

Symposium

The Constitution of Status

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I. INTRODUCTION: THE IDEA OF A DEMOCRATIC CULTURE

A. *Democracy's Sociological Predicament*

Democracies are societies. Behind the formal features of democratic self-governance—whether regular elections or majority rule—lie social organization and social structure. Like other societies, democracies have varying degrees of social stratification and social hierarchy, group competition and group subordination. But democracies are special in this respect: Their political ideals seem partly in tension with their social structures. Democracy is more than a commitment to a set of procedures for resolving disputes. It is more than a culture of respect for those procedures. Democratic ideals seem to require a further commitment to democratic forms of social structure and social organization, a commitment to social as well as political equality.

Imagine a democracy organized according to strict lines of racial caste, in which all citizens have equal rights to express their views, vote and hold office, but in which job opportunities and life chances are practically and definitively limited by membership in one's social group. Government discrimination based on caste membership is strictly forbidden, but the social hierarchy remains rigidly in place even without the overt support of law. The citizens of this society take their commitment to voting and freedom of speech very seriously, yet as a society they seem equally committed to their traditional social structure. In one sense this society is a democracy, and yet in another it is very antidemocratic. Indeed, it is hard to imagine this society precisely because we think that accepting the democratic ideal of equal citizenship is inconsistent with social caste; this principle will either ultimately corrode a

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society's social organization or be co-opted and disfigured by it.¹ Of course, that is precisely my point: Democratic ideals do tend to corrode hierarchies; they tend to push social organization in particular directions, unless and until they are deflected and blunted by even stronger social forces.

Ideally, one might think, in a truly democratic society all unjust forms of social stratification—caste being only the most extreme example—would cease to exist. The democratic ideal must include the idea of a *democratic culture*: one that opposes all unjust hierarchies of status, and that promotes equal status and equal standing for all its members. Thus the democratic ideal calls for a social revolution: not only a transformation in legal form but in social structure. Indeed, this revolution cannot be achieved through legal regulation alone, for law is usually complicit in the preservation of existing social structure, even when its asserted purpose is to reform that structure. Democratic culture requires changes in all the devices of social stratification, even those that persist in the face of legal reform.

In this sense, no democracy is fully realized until it becomes a democratic society with a democratic culture. Yet we also know that democratic institutions have always existed in societies with various forms of social stratification and unjust social hierarchy. The America of 1800, for example, thought itself a democracy, and yet it was also a society in which aristocratic privilege still reigned, in which women were subordinate to men and blacks were chattel. It was a democracy in a profoundly undemocratic society.

Nor is this example exceptional. Indeed, it is the standard case. Democracy always exists in a sociological predicament: Democracy is not merely a procedure, but a form of social organization never fully realized. The deepest ideals of democracy are in tension with the social world in which all democracies exist and have always existed; democracies are always begun and carried out in the shadow of older regimes, existing social structures, past misdeeds, and continuing injustices. If social hierarchy is a sin to democratic ideals, then democracy always exists in a fallen condition, a penitent perpetually in hope of redemption. Democracies are always unfinished projects; they are always, in some sense, antidemocratic.

Because democracies are societies, they have social structures; they contain different social groups with different places in those social structures. These social groups have contrasting social identities. They compete with each other for social esteem and material resource, for privilege and prestige. They have conflicting views about society; they have conflicting views about morality. And all of their conflicts are played out against the backdrop of those social hierarchies—just and unjust—that exist in any actual democracy.

1. India is perhaps the most obvious example of the eventual compromises that must be forged between democratic equality and the maintenance of social caste, but the United States is an equally compelling instance of compromise between democratic ideals and social structure.

Constitutional lawyers know that group conflicts are inevitable features of democratic life. What is more difficult to determine is the Constitution's proper role in dealing with these conflicts. Does the Constitution merely lay down rules of fair competition in the endless struggles of social groups? Or does it take sides in some of these struggles because the Constitution is a charter of democracy, because democratic ideals commit us to break down older forms of social hierarchy and to democratize social structure? What role, in short, should the Constitution play in what I have called democracy's sociological predicament?

In this Essay, I argue that the Constitution is committed to the realization of a democratic culture, even though constitutional law—and indeed, law generally—cannot realize this goal by its own efforts. Large-scale changes in social structure require social transformation over long periods of time, and law forms only a part of that phenomenon. But to understand the Constitution's proper role in forging a democratic culture, we must understand something about the nature of social hierarchies and how social groups struggle for power and status within those hierarchies.²

2. Thus, this Essay is in a tradition of legal academic writing that looks to sociological realities to understand the Constitution's commitments to social equality

In my view, this approach originates with Charles Black's cultural defense of *Brown v Board of Education*, 347 U.S. 483 (1954). See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). In the 1970s, the two most important exponents of this sociological approach were Owen Fiss and Kenneth Karst. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV L. REV. 1 (1977). Fiss's insistence that "[t]here are . . . social groups," Fiss, *supra*, at 148, has unfortunately gone unheeded by the current Supreme Court. Fiss emphasized the sociological question of subordination in contrast to the legal question of equal treatment. See *id.* at 108, 154–58, 170–75. Karst emphasized the processes of social meaning by which individuals understand themselves as members of groups and through which groups are declared subordinate and superordinate. See Karst, *supra*, at 5–11. Each view complements the other. While acknowledging the dignitary elements of subordination, Fiss's theory of group disadvantage has tended to emphasize conditions of material deprivation; while acknowledging the importance of material deprivation, Karst's equal citizenship principle has tended to focus on social messages of inferiority.

Both the ideas of social subordination and cultural meaning have continued to be central to feminist and critical race theory scholarship in the 1980s and 1990s. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (emphasizing reality of group subordination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (emphasizing systems of cultural meaning).

The theory of status groups helps tie both strands of this tradition together. First, focusing on status groups gives us a much stronger account of what social groups are. The theory of status groups comes already equipped with an account of social stratification on the one hand, and group conflict on the other. Second, this theory argues that the identity of social groups in a social hierarchy is dependent on the identities of other social groups. Hence group identity is connected both to social meanings—the positive and negative associations of groups vis-à-vis each other—and to the group's place in the social structure. Groups fight about status because they are fighting about their relative social identities.

Most writers in this tradition (including Black, Fiss, Karst, Lawrence, and many others) have tried to explain the proper interpretation of a single clause of the Constitution—the Equal Protection Clause. I believe that our proper focus should be on understanding the ongoing social revolutions in American society that are later understood through many different clauses of the Constitution. It is also important to take some critical distance from the project of doctrinal exegesis. Constitutional doctrine is both a reflection of the demand for social equality and a means of blunting or avoiding the dismantling of status hierarchies. Precisely because the Equal Protection Clause seems on its face to concern what equality means at any

America's commitment to a democratic culture began with the social revolution against aristocratic privilege that formed the basis of the American Revolution. The political act of revolution accompanied a deeper and longer-lasting social transformation. The egalitarian urge of the American Revolution is enshrined in the Declaration of Independence and forms the underlying spirit of our constitutional tradition. The social revolution let loose in the 1770s hardly ended with the Founding; it has gained strength over time and has propelled itself through American history, undermining different elements of then-existing social hierarchies, and continuing to this day through many social movements and social transformations that have left their mark both on American society and the Constitution itself.

To see the Constitution's relation to this revolution, we must think of the Constitution not in terms of its individual clauses, but as a document whose interpretation has responded to social movements demanding changes in social structure. To appreciate the meaning of democratic culture, we must think less in terms of familiar legal categories of unequal treatment and more in terms of underlying sociological realities: the existence and the perpetuation of unjust status hierarchies. To confront the problem of social equality, we must confront the problem of social structure. To understand the Constitution, we must understand the constitution of status.

B. *Kulturkampf*s and the Constitution

Whether they recognize it or not, courts constantly face the problem of social hierarchy in cases involving group conflict. The U.S. Supreme Court was faced with the problem once again when it considered the constitutionality of Colorado's Amendment 2 in *Romer v. Evans*.³ Amendment 2 repealed existing local ordinances that protected homosexuals from discrimination, and effectively required a state constitutional amendment to reinstate any of them.⁴ From one perspective, *Romer v. Evans* concerned only a dry issue of local government law: whether state referenda could require that regulatory decisions be made at the state level rather than at the level of local municipalities. Yet the parties and the Justices of the Supreme Court alike understood that the

point in time, doctrines of equal protection will often serve as the means through which status hierarchies will attempt to preserve themselves.

3. 116 S. Ct. 1620 (1996).

4. The Amendment read as follows:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

campaign for the Amendment, and the battle over its constitutionality, signified something much more. They were symptomatic of an important cultural struggle in the United States: the struggle over gay rights and the status of homosexuals in American society.

The Court intervened in this cultural dispute, but only in the most tentative way. Justice Kennedy's majority opinion claimed that Amendment 2 was unconstitutional in part because it rested upon "'a bare . . . desire to harm a politically unpopular group.'"⁵ The Constitution, Justice Kennedy seemed to say, allows social groups to struggle and majorities to have their way. But majorities cannot express overt hatred for groups by declaring them legally unprotected, or strangers to the law.⁶

Justice Scalia's dissent strongly took issue with this characterization. To his credit, Justice Scalia did not attempt to hide the political background of the case behind a veneer of neutral principles. Indeed, he made the political context central to his opinion. In his view, the Constitution had nothing to say about this particular social struggle; he rejected the majority's contention that Amendment 2 reflected irrational hatred or invidious animus. "The Court," argued Justice Scalia, "has mistaken a Kulturkampf for a fit of spite."⁷

Justice Scalia insisted that hatred of homosexuals and homosexuality did not necessarily motivate the Amendment. Rather, it might have been designed merely to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."⁸ To be sure, Colorado had repealed its criminalization of homosexual sodomy. Nevertheless, Justice Scalia argued, its citizens might well have wanted to decriminalize sodomy while still expressing moral disapproval of it.⁹ They may have wanted to preserve the idea that homosexuality is not simply a lifestyle choice as worthy as heterosexuality. And they may have wanted to resist a drive by gay activists toward "achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."¹⁰

The miasma that is contemporary equal protection doctrine created genuine problems for the majority, problems that bolstered Justice Scalia's argument. The majority seemed to accept that only a showing of severe and invidious animus toward homosexuals—what it called "'a bare . . . desire to harm a politically unpopular group'"¹¹—could justify striking down Amendment 2

5. *Romer*, 116 S. Ct. at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The actual holding of *Romer* is and likely will continue to be disputed for some time, but concerns about antihomosexual animus and the desire to stigmatize homosexuals seemed to be a central part of Justice Kennedy's opinion, and it was this feature that Justice Scalia particularly focused upon.

6. See *Romer*, 116 S. Ct. at 1629.

7. *Id.* (Scalia, J., dissenting).

8. *Id.* (Scalia, J., dissenting).

9. See *id.* at 1633 (Scalia, J., dissenting).

10. *Id.* at 1634 (Scalia, J., dissenting).

11. *Id.* at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

where neither a suspect classification nor a fundamental right was involved. Hence it argued that Amendment 2 was motivated by just such hatred, a hatred it inferred from the breadth and scope of the Amendment's prohibitions.¹² Yet, as Justice Scalia suggested, Amendment 2 actually involved nothing more than one of the many recurrent struggles over the terms of American society's culture and morality. Although such struggles may cause tempers to flare and even lead to occasional violence, they do not necessarily involve widespread and invidious hatred or the bare desire to harm opponents. At bottom, these struggles concern whose moral and cultural vision shall prevail.

The waging of these cultural struggles, Justice Scalia reasoned, is best left to the democratic process. Democracies often operate without a moral consensus on many significant issues, and their citizens may have widely divergent views about what is moral and immoral; but the Constitution permits majorities to impose their vision of morality as long as no fundamental right or suspect classification is affected. The best example of this principle is *Bowers v. Hardwick*,¹³ in which the Court argued that Georgia's criminalization of homosexual sodomy could be justified by moral disapproval by a majority of its citizens. It was no accident, Justice Scalia thought, that the majority avoided citing this opinion in *Romer*.¹⁴

Justice Scalia's argument, in short, is that cultural struggles over moral vision are best left to the political process and to the judgments of ordinary people, not to the judgment of unelected elites in the federal judiciary.¹⁵ Elites who disagree with the moral views of majorities may well regard them as nothing more than unthinking prejudice, and it is a short slide from this smug conclusion to branding majority opinion as irrational hatred. But this accusation is both unfair and deeply confused; it misunderstands the social reality of cultural conflict and the pervasiveness of social struggle. It is itself an example of the prejudice it attributes to others.

Justice Scalia tried to invoke this idea of democratic struggle over moral values by using the term "Kulturkampf." Ironically, Justice Scalia, who is so fond of dictionaries, failed to consult one in this case. The word "Kulturkampf" is defined as a "conflict between civil government and religious authorities esp. over control of education and church appointments."¹⁶ The original Kulturkampf was an attempt by German nationalists to destroy the political power of the Catholic Church by, among other things, seizing control of church appointments and arresting Catholic priests.¹⁷ Presumably even the

12. *See id.* at 1627-29.

13. 478 U.S. 186 (1986).

14. *See Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting).

15. *See id.* at 1637 (Scalia, J., dissenting).

16. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 648 (10th ed. 1993).

17. The original Kulturkampf was part of Otto von Bismarck's campaign for a unified sense of German nationhood. The expression "Kulturkampf" was coined in a March 1873 election appeal by Rudolf Virchow, who referred to the struggle against the Catholic Church as a struggle for culture. *See E.J.*

author of *Employment Division v. Smith*¹⁸ would agree that the Constitution is implicated in such an action.

Today the term “Kulturkampf” is sometimes applied more broadly to denote any struggle between groups over a common national culture. It presupposes both the existence of social groups with distinct identities and conflicts between them over values, status, power, and authority. That was the rough sense in which Justice Scalia used the term. He meant it innocently, of course, but in hindsight his unintentional reference to a sustained government attempt to destroy the political power of Catholics is both ironic and eerily appropriate.

Scalia was right to see *Romer* as part of a larger struggle over morality and culture. But he was wrong to think that the Constitution is necessarily silent in such a struggle. Just as the original Kulturkampf in Germany implicated human rights questions, so too group conflict over social status and moral authority is one of the deep concerns of the Constitution. The question is not whether the Constitution is implicated in cultural struggles, but how it is implicated.

Both Amendment 2 and the gay rights movement to which it responds are symptoms of a larger social phenomenon: a gradual but accelerating breakdown of a powerful hierarchy of social status buttressed by a system of social meanings. This hierarchy understood heterosexuality as normal, moral, and honorable, and homosexuality as abnormal, immoral, and stigmatizing by comparison. As this hierarchy has begun to break down, the certainty of these social meanings has begun to dissolve, and with it the hierarchies of status, authority, and moral prestige that go with them. Groups whose worldviews are most undermined by such changes, as well as people who have the most to lose from a change in status relationships, will understandably seek to halt what they see as an accelerating slide toward moral degeneration. In such moments a certain kind of cultural struggle is born: a rearguard action in which an older order of social meaning tries to prevent the emergence of a newer one. The outcome of such a struggle cannot always be foreseen, but its

PASSANT, A SHORT HISTORY OF GERMANY 1815–1945, at 88–90 (1960). At Bismarck’s instigation, the German government attempted to undermine the strength of the Catholic political party, the Zentrum, by asserting control over Church functions and appointments. The government arrested clergymen who resisted its initiatives, and left many parishes without priests. Ultimately, the heavy-handed persecution of political Catholicism backfired. The Zentrum was actually strengthened and remained an important force in German politics well into the twentieth century. See GORDON A. CRAIG, GERMANY 1866–1945, at 70–78, 280–81 (1978); ELLEN LOVELL EVANS, THE GERMAN CENTER PARTY 1870–1933, A STUDY IN POLITICAL CATHOLICISM 36–95 (1981); 2 OTTO PFLANZE, BISMARCK AND THE DEVELOPMENT OF GERMANY, THE PERIOD OF CONSOLIDATION 1871–1880, at 179–206 (1990); HELMUT WALSER SMITH, GERMAN NATIONALISM AND RELIGIOUS CONFLICT: CULTURE, IDEOLOGY, POLITICS, 1870–1914, at 19–20, 37–50 (1995); HANS-ÜLRICH WEHLER, THE GERMAN EMPIRE 1871–1918, at 76–78 (1985).

18. 494 U.S. 872 (1990) (holding that rules of general application that adversely affect religious practice do not violate Free Exercise Clause)

urgency and deep symbolic meaning are apparent to all. It is a tribute to the inanity of current doctrinal categories that this complex social phenomenon had to be redescribed as the unreasoning animus of particular individuals and groups before the law could provide any remedy.

In short, many of the struggles that define America's "culture wars"—of which *Romer* is only one example—are really battles over social status and social structure. The combatants are fighting over whether an existing form of social stratification will prevail or be transformed, whether an older social hierarchy will be problematized or perpetuated. These Kulturkämpfs are a special kind of group conflict—a group conflict whose prize is social status.

Justice Scalia thought that Amendment 2 was insulated from constitutional scrutiny if it reflected a majority's desire to assert (or reassert) its moral values. But Scalia was wrong to think that phrasing the matter in this way is determinative. The real question is whether state power has been harnessed to maintain or perpetuate an unjust hierarchy of social status. The fact that moral values are invoked does not dispose of the question. Status hierarchies are often preserved by appeals to morality. Assertions about what is moral and immoral, normal and deviant, honorable and dishonorable are not smokescreens for illicit motivation, but the very fabric of a system of social domination.

For these reasons, the Constitution cannot always be neutral in cultural struggles. It places itself on the side of the values of some groups and in opposition to the values of others, even (and especially) if the grounds of dispute include disagreements about religion, custom, tradition, or morality. The Constitution is driven by a vision of democracy, but this democratic vision is more than a formal commitment to majority rule. It is a commitment to a democratic culture: one devoted to the dismantling of unjust hierarchies of social status and the gradual realization of social equality for all citizens.

Part II of this Essay explains the theory of status groups and status hierarchies. It shows how these phenomena produce group conflicts and cultural struggles over moral vision. Part III argues that many clauses of the Constitution—including many predating the Bill of Rights and the Reconstruction Amendments—are concerned with dismantling unjust social hierarchies of status and realizing a democratic culture. This is true even though these same clauses also serve many other independent functions, and even though the original Constitution was itself partly an attempt to stem the tides of America's egalitarian social revolution. Part IV is a brief conclusion that describes how the essays in this Symposium connect to the problem of status conflict.

II. GROUP CONFLICT AND THE ECONOMY OF STATUS

A. *Status Groups and Status Hierarchy*

To understand the relationship between the Constitution and group conflict, one must understand how and why cultural struggles arise. Democracies always involve struggles between groups. Interest groups contend over wealth and political power. Yet what is distinctive about what I am calling *cultural* struggles—like those over homosexual rights, school prayer, gun control, and educational policy—is that they prominently feature conflicts over social status. Put another way, cultural struggles are group conflicts where social status and associated symbolic benefits are an indispensable and central bone of contention and a crucial part of the prize sought.¹⁹ In describing how these cultural struggles arise, I want to introduce five key ideas: status group, status hierarchy, status competition, status anxiety, and status nostalgia.

Social status is the degree of prestige and honor that individuals or groups enjoy.²⁰ This prestige involves the approval, respect, admiration, or positive qualities imputed to a person or group. Lower social status confers and imputes corresponding disapproval and negative qualities. Although individuals may have different degrees of status within a single group, they also have status because they are members of a group.²¹ One can have higher or lower status, for example, because one is an immigrant, a woman, or a member of “the upper crust.” Critical race scholars have repeatedly noted that white Americans have certain status privileges conferred on them merely by being white.²²

19. Because social conflict is often overdetermined, there is no reason to believe in a strict opposition between cultural struggles and other interest group conflicts. To take only one example, opposition to gun control may be financed by the arms industry in addition to being an issue of symbolic politics. Yet it also seems clear that gun manufacturers do not exhaust the sources of opposition to gun control, indeed, gun manufacturers may find it much more in their interests to play up the cultural associations of gun ownership.

20. See, e.g., RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH*, at III-24 (forthcoming 1997); JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 14–15 (2d ed. 1986); BRYAN S. TURNER, *STATUS* 6–7 (1988). The original definition of status comes from Weber: a conception of “what is correct and proper and, above all, of what affects the individual’s sense of honor and dignity.” 1 MAX WEBER, *ECONOMY AND SOCIETY* 391 (Guenther Roth & Claus Wittich eds., U. of Cal. Press 1978) (4th ed. 1956) (describing notion of ethnic honor); see also 2 *id.* at 932 (defining status situation as “every typical component of the life of men that is determined by a specific, positive or negative, social estimation of *honor*”).

21. In recent years, economists have produced models of status competition both within groups, see, e.g., ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985), and between groups, see, e.g., Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* 1003, 1029 (1995) (arguing that intergroup conflicts arise from mechanisms designed to resolve intragroup conflicts for status).

22. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 124 (1991), Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 *GEO. WASH. L. REV.* 1595, 1602, 1608 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1714 (1993), see also Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 *U. PA. L. REV.* 1595, 1636–48 (1995).

Accordingly, a tradition of sociology beginning with Max Weber analyzes social structure in terms of *status groups*, which demand and command different degrees of respect and esteem in society.²³ Weber's idea of status groups is usually distinguished from Marx's idea of economic class.²⁴ Members of an economic class share a common economic interest because of their common position in the structure of economic relations. They are people who are subject to market forces in essentially the same way. Status groups, on the other hand, do not have to contain members of the same economic class. They are organized around common styles of life and common senses of honor, prestige, or moral rectitude. Their members' common interest is in defending and increasing the prestige of their group, their common ideals, or their common styles of life.²⁵ There can be and often are significant overlaps between status identity and economic class.²⁶ Yet status groups can also be organized around religious and ethnic identities that cut across lines of economic class, and both class and status can serve as distinctive methods of social stratification.²⁷

23. See, e.g., 1 WEBER, *supra* note 20, at 305–06; 2 *id.* at 932–39; TURNER, *supra* note 20, at 6. Later sociologists have developed the idea of status groups in different ways. Pierre Bourdieu has emphasized the role of patterns of cultural consumption in social stratification. See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (Richard Nice trans., Routledge & Kegan Paul Ltd. 1984) (1979). And there are many affinities between Weber's definition of status as lifestyle and Thorstein Veblen's earlier theory of consumption as a cultural marker. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (London, MacMillan 1899).

Sociologists sometimes make a further distinction between status communities and status blocs. Status communities are groups of individuals defined by a relatively long-lasting set of common characteristics like language, religion, ethnicity, culture, locality, and occupation. Status blocs are associations, defined by their members' common characteristics, that come together to organize politically or socially for a limited time. Members of status communities can form status blocs (for example, blacks can form advocacy organizations like the NAACP), but they do not have to. An example of a status bloc not based on a status community would be a consumer protection group or an organization to promote the interests of single mothers. See TURNER, *supra* note 20, at 13 (“[S]tatus [blocs] come together for rather limited and possibly short-term political or social objectives, while status communities tend to be long-enduring, multidimensional, complex, primary groups.”); cf. GUSFIELD, *supra* note 20, at 21 (noting related distinction between status communities such as religions and status collectivities such as generations). My major concern in this Essay is with status communities. I am interested in status blocs only to the extent that status communities participate in social movements and form status blocs for this purpose.

24. See GUSFIELD, *supra* note 20, at 14–15; TURNER, *supra* note 20, at 8, 45–46.

25. See GUSFIELD, *supra* note 20, at 16, 18. Note that one's “style of life” can range from one's religion to one's speech patterns; from one's family arrangements to one's favorite foods; from one's clothing preferences to one's sexual preferences; from one's musical choices to one's choice of heroes and villains. There is an almost limitless array of behaviors that can become associated with a group and symbolic of its status. That is one reason why racial distinctions, for example, can be coded around so many different aspects of cultural life—for example, whether one watches *Friends* or *Mo'etisha*. Cf. 1 WEBER, *supra* note 20, at 391 (“[T]he belief in ethnic affinity has at all times been affected by outward differences in clothes, in the style of housing, food and eating habits . . .”).

26. As Frank Parkin has suggested, over time the defenders of the Marxist and the Weberian approaches to social stratification have begun to sound more and more alike. See FRANK PARKIN, *MARXISM AND CLASS THEORY: A BOURGEOIS CRITIQUE* 25 (1979).

27. See GUSFIELD, *supra* note 20, at 14–15; TURNER, *supra* note 20, at 13–14, 26–28; 1 WEBER, *supra* note 20, at 302–06; 2 *id.* at 926–27.

The debate between Marx and Weber concerns whether, in the long term, status hierarchies will survive as a major form of social inequality in modern societies. See TURNER, *supra* note 20, at 1–2, 45–50. Marx believed that capitalism and markets would ultimately be the primary mechanism of social

In many societies, *status hierarchies* emerge between groups with distinctive identities or styles of life. The most obvious example of a status hierarchy is a system of social caste; but status hierarchies can be much less rigid and even quite fluid. Status hierarchies differ from mere separation of groups, where the members of each group hold the other in mutual disdain. As Weber noted, “the caste structure transforms the horizontal and unconnected coexistences of ethnically segregated groups into a vertical social system of super- and subordination.”²⁸ In other words, a status hierarchy is sustained by a system of social meanings in which one group receives relatively positive associations and another correspondingly negative associations. As a result, their identities are not freestanding: The identity of one is defined in part by its relationship to the identity of the other, and a change in the meanings attributed to one will affect not only its own social identity, but the identity of the other group. In a hierarchy with many status groups, there can be many different ways of differentiating the various groups and their respective lifestyles, and hence the system of social meanings (and the results of changes in social meanings) can be quite complex.

There is no necessary limitation on what characteristics can serve to distinguish status groups in a status hierarchy. They can be mutable or immutable, physical or ideological, matters of behavior or matters of appearance. The most familiar ones in the United States are organized along lines of race, sex, religion, immigrant status, and ethnicity.²⁹ Conversely, not every distinguishing trait or characteristic corresponds to a status group in a status hierarchy. The number of traits that might be used to distinguish human beings is limitless, but the organization of a status hierarchy is a result of a particular history of social stratification and subordination. The question is not whether identifying traits exist that might distinguish people, but whether society has organized itself into a system of super- and subordination based on those traits. The issue is social stratification based on traits, not the nature of the traits themselves.

Thus, what constitutional lawyers call “immutability” is neither a necessary nor a sufficient criterion for a status group. The question is whether the trait

stratification. He was not alone in this view. Tönnies and Maunc had both suggested that free exchange in markets undermines community norms and status relationships. See ABEL, *supra* note 20, at III-35–36; SIR HENRY SUMNER MAINE, *ANCIENT LAW* 100 (1917) (movement from status to contract); FERDINAND TÖNNIES, *COMMUNITY AND ASSOCIATION* (Charles P. Loomis trans., Routledge & Kegan Paul Ltd 1957) (1887) (movement from community to society). Weber, by contrast, insisted that status distinctions and status conflicts would remain in capitalist and socialist societies. See TURNER, *supra* note 20, at 2. The twentieth century has seen, if anything, ever-increasing varieties of religious conflict, nationalist assertion, ethnic tension, and other struggles over status, both in the Third World and in the West. See ABEL, *supra* note 20, at III-36–37.

28. 2 WEBER, *supra* note 20, at 934.

29. There are also “less explicit groupings, such as ‘the old aristocracy,’ ‘the *nouveau riche*,’ and ‘the *lumpenproletariat*,’” which invoke “the subtle interrelation” of status and economic class. GUSHFIELD, *supra* note 20, at 14.

can be endowed with sufficient cultural meaning to support a system of social stratification. Religious identity can serve this function even though religions proselytize and gain new converts. The point is not what the trait is, but what it can be made to mean in opposition to other traits.

Obviously, a system of subordination cannot be stable if it is too easy to exit from the criteria of subordinate status. That is why biological traits can be such useful markers of cultural differentiation. The advantage of immutability lies in its guarantee of stability—it helps ensure that social hierarchy can be reproduced effectively. Yet a trait does not have to be biologically based for group membership to be relatively stable over time.

Conversely, even biological traits like skin color can allow for the exit of one's children (through miscegenation), and hence so-called immutable criteria like race may have to be buttressed or even constituted by legal or cultural rules. Thus the Jim Crow regime featured cultural and legal prohibitions on interracial marriage (if not interracial sex) and elaborate rules of hypodescent to define who was white and black given the inevitability of racial mixing.³⁰

Groups lower in a status hierarchy may respond to their lower status by developing a compensatory sense of esteem in their own ways of living, condemning the lifestyles of higher status groups as immoral or inauthentic, or attempting to turn their lower status into a point of pride through irony. Weber believed that Jewish pride in being a "chosen people" was in part a compensation for the experience of being social pariahs.³¹ Working-class culture has found innumerable ways to express resentment and disapproval of upper-class manners; blacks, homosexuals, and other lower status groups have often used derogatory epithets and stereotypes ironically and subversively.

B. *Legal and Sociological Status Contrasted*

The idea of "status groups" may be confusing at first because lawyers have their own concept of "status" which is used in a number of legal contexts and forms the basis for many important doctrines. For example, the famous case of *Robinson v. California*³² held that mere status could not be the basis of criminal punishment. However, the legal and sociological concepts are importantly different. In law, status is generally a characteristic of an individual that has some legal consequences. Examples are being a servant, a woman, or a minor. Sometimes legal status refers to a characteristic wholly created by law, such as being a Social Security recipient. Sometimes it refers

30. See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION 4-5, 8-11, 54-66, 77-79, 113-17, 139 (1991); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 23-24 (1991); Harris, *supra* note 22, at 1738.

31. See 2 WEBER, *supra* note 20, at 933-34.

32. 370 U.S. 660 (1962).

to the legal results of previous action that has legal consequences, such as being someone's spouse, an immigrant, or a felon.

Sociological status differs in three important ways. First, lawyers usually understand legal status as a feature of individuals and their relationships to the law (including their legal relationships to other individuals). By contrast, the theory of status groups is concerned about social structure: It is concerned with competition and hierarchy among social collectivities.

Second, sociological status is usually tied to a system of social hierarchy or a system of comparative social evaluation. By contrast, legal status—at least in modern times—is primarily concerned with legal meanings and legal consequences. To be sure, in different times and places, legal status categories like master and slave or husband and wife have helped support and even constitute systems of social hierarchy. That is only one of the ways in which legal form plays an important role in the structure of social relations. But with modernization, legal status has increasingly been divorced from the task of directly mapping or constituting social status categories.³³ Nineteenth-century concepts like “pauper” or “servant,” for example, have increasingly been replaced by twentieth-century concepts like “AFDC recipient” or “part-time employee” as defined by particular statutory schemes.

Third, the legal concept of status is often distinguished from conduct. Thus, in *Robinson* the Court argued that one could not punish a person for being a heroin addict because being an addict was a preexisting status, not current conduct.³⁴ However, sociological status groups are differentiated by many different cultural markers, including speech, patterns of behavior, tastes, and styles of life.³⁵ It includes both what the law would call “status” and “conduct.” The esteem that one holds in society (including both positive and negative associations) is tied to how one dresses, how one prays, the kinds of goods one purchases and consumes, and so on. Discrimination against African Americans is usually based on negative judgments not about skin color, but about dress, speech, bodily movements, consumption patterns, etc. When whites make racist jokes about blacks' speech, dress, or mannerisms, for example, they engage in demeaning stereotypes about behavior. Status-based discrimination in the sociological sense is discrimination with respect to all of the cultural markers—including “conduct”—that distinguish groups or are otherwise associated with them.

Although the legal status of individuals and the sociological status of groups are distinct concepts, law often directly reflects social status or helps preserve status markers. Sometimes law helps constitute hierarchies of social status directly. Examples are nineteenth-century doctrines regarding slaves, Jim

33. Indeed, laws invoking categories that directly refer to status groups like women or African Americans are now more likely to be understood as de jure discrimination.

34. See 370 U.S. at 667.

35. See 1 WEBER, *supra* note 20, at 391.

Crow laws, laws against miscegenation, and rules about the comparative political and property rights of men and women. In the nineteenth century in particular, the criteria of citizenship and the distribution of civil and political rights often directly mapped or even helped define and constitute differences in social status.

Legal reforms (like the abolition of slavery) may withdraw direct legal support for categories of social status, often in the hope of dismantling status hierarchies. Even so, the law usually continues to support social stratification in other ways. Examples are the use of privacy doctrine in family law, or the use of colorblindness in equal protection law.³⁶ Thus, status hierarchies can gain the support of legal norms either directly or indirectly. Legal categories can map status distinctions and even help constitute them (as in the case of slavery). On the other hand, status hierarchies can manipulate or work around other kinds of legal distinctions to reproduce themselves in ever new forms.³⁷

C. Status Groups and Symbolic Capital

Status groups compete not only for material resources, but for prestige and honor. Members of status groups often fight about things that seem merely symbolic, including flags, the placement and design of monuments, and the presence and content of prayers at civic ceremonies.³⁸ Whites and blacks fight over whether to install a statue of Arthur Ashe among a group of Confederate heroes, or whether to remove a Confederate flag from the state capitol.³⁹ Groups often fight over relatively minor changes in statutory provisions that often will have little effect on the actual practices of law enforcement.⁴⁰

36. See, e.g., Reva Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *YALE L.J.* 2117 (1996). Siegel argues that law's relationship to status hierarchies changes over time as status hierarchies become "modernized." Modernization usually involves a movement from direct legal constitution of status hierarchy—as in the case of slavery or the definition of women's rights—to legal categories that seem irrelevant or even hostile to status distinctions but which actively perpetuate them in other ways. See *id.* at 2174–78. Thus, although legal and social status are analytically distinct categories, they have often been intertwined in historical practice. Legal categories like "slave" or "master and servant" were not only legal distinctions, but helped support a system of social hierarchy. We only see the relation between legal and social status differently now because of modernization. See *id.* at 2178–88.

37. On this phenomenon, see *id.* at 2178–87; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* (forthcoming 1997).

38. Richard Abel's recent work on freedom of speech is based on the theory of status conflict and is filled with many helpful examples of the phenomenon. See ABEL, *supra* note 20; RICHARD ABEL, SPEECH & RESPECT (1994). Sanford Levinson's recent writings on public monuments and government-sponsored speech also contain many useful examples of symbolic conflicts over status. See, e.g., Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 *CARDOZO L. REV.* 1969 (1996); Sanford Levinson, *The Tutelary State, "Censorship," "Silencing," and the "Practices of Cultural Regulation"*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* (Robert Post ed., forthcoming 1998); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 *CHI.-KENT L. REV.* 1079 (1995) [hereinafter Levinson, *They Whisper*].

39. See ABEL, *supra* note 20, at IV-44–45; Levinson, *They Whisper*, *supra* note 38.

40. See, e.g., MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 36–43 (1964) (discussing symbolic use of antitrust laws and other forms of economic regulation).

These symbolic struggles are forms of *status competition*.⁴¹ Status competition occurs in many different forms because one's status can be diminished or augmented in many different ways. For example, people may experience a loss of status because of the way others treat them in day-to-day encounters.⁴² However, because status is defined and measured in symbolic terms, direct interaction is not always necessary. People can experience threats to their status simply by watching or even hearing about conduct that is not specifically directed at them individually but that reflects on their status group. For example, even if an African American has never walked past the South Carolina capitol, she might be very upset to know that the Confederate battle flag flies there. Even if a religious parent never watches television sitcoms with gay characters, she might be very concerned about their symbolic approval of a gay lifestyle. Many Muslims were deeply hurt by the publication of *The Satanic Verses* even though they had no intention of ever reading the book. The mere existence of an offending monument, television program, or book, can produce a felt loss in status and esteem for groups and for their idealized styles of life.⁴³ Groups who fear a loss of status, either due to competition from other groups or general social and economic changes, experience *status anxiety*; often this leads them to try to reassert their status through new forms of status competition.⁴⁴

One should not assume that symbolic struggles between status groups are "merely" symbolic. Much politics is fought over the control of symbols because these symbols are markers of social status, and social status is itself a valuable good. Status includes social approval, respect, and admiration for one's self and one's style of life; these attitudes are largely demonstrated and received through symbolic activity. Hence the visible signs of increased status are hotly contested by competing groups, and the contestants often look closely for any signs of slights or disrespect, whether intended or unintended.⁴⁵ Symbolic conflict is not "just" symbolic; it is the very currency of having and

41. See ABEL, *supra* note 20, at III-23-24; ABEL, *supra* note 38, at 22-24 (describing controversies over freedom of speech as examples of status competition).

42. The analogous phenomenon is Erving Goffman's conception of stigma, in which the individual conveys information about himself through personal interaction. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 51-62 (1963).

43. See ABEL, *supra* note 38, at 4-22. Because symbolism is the currency of status hierarchy, the mass media play an important role in the economy of status. First, the mass media widely disseminate social meanings that reinforce status hierarchies. That is one reason why people are concerned about stereotypes in television and movies. Second, mass media can spread alternative social meanings that might subvert existing hierarchies. An example would be sympathetic portrayals of homosexual characters. Third, mass media can amplify and expand the scope of symbolic conflicts by calling attention to local disputes and putting them "in the face" of people widely dispersed geographically. Recent controversies over graduation prayers, the Confederate battle flag, and the teaching of "ebonics" (Black English) are all examples.

44. See GUSFIELD, *supra* note 20, at 22-23 (describing examples of how loss of prestige leads to attempts to "cut down to size" newly rising classes). Gusfield attributes the rise of support for Prohibition largely to "the sense of cultural change and prestige loss which accompanied both the defeat of the Populist movement and the increased urbanization and immigration of the early twentieth century." *Id.* at 102.

45. See ABEL, *supra* note 20, at IV-1-8.

maintaining higher or lower status. The ability to gain a symbolic victory is itself evidence of the achievement or preservation of higher status, which is proved by the symbolic trophy carried away.⁴⁶

Groups often pursue status competition with amazing vehemence. They do so for two reasons. First, dignity, honor, and moral approval are important to most people both intrinsically and for the further advantages that they bring. Status is not identical to wealth, political power, or other social goods, but it is often correlated with them.⁴⁷ It can help people attain other social goods, and in any case it provides its own compensations. Higher status can confer increased political power; it often reflects wealth and may help create it.⁴⁸ Status capital can be converted, though often imperfectly and unpredictably, into other forms of capital and economic and social power. Not surprisingly, conflicts for increased social status often overlap with struggles for other social goods. Thus, status competition is a method of upward social mobility. It is a means for groups that have previously held lower status to raise their social esteem, and gain other potential advantages that higher status normally confers. Conversely, it is a method for groups who enjoy higher status to preserve their prerogatives.

Second, status competition is intense because status is a relative good. One has more of it because others have correspondingly less. Status competition tends to be zero-sum, at least in the short run.⁴⁹ More generally, it is non-Paretian: One cannot increase the status of one group without decreasing the status of another.⁵⁰ High prestige is prestige over others and in distinction to others. Increased respect for lower status groups means a corresponding loss of respect for higher status groups because their identity has been constructed around their greater prestige and the greater propriety of their ways of living.⁵¹

46. See *id.* at III-26; GUSFIELD, *supra* note 20, at 4, 21.

47. See ABEL, *supra* note 20, at III-27; BOURDIEU, *supra* note 23, at 125-43; Kevin Sack, *Symbols of Old South Feed a New Bitterness*, N.Y. TIMES, Feb. 8, 1997, at A1 (quoting view of historian Charles Reagan Wilson that disputes over southern flags are fights "about who has the power, really").

48. See ABEL, *supra* note 20, at III-27.

49. See *id.* at III-28-29; McAdams, *supra* note 21, at 1030-31 (arguing that status competition is zero-sum "when members of different [social] groups seek incompatible positions for their groups along some common, observable, and reasonably objective dimension"); *id.* at 1076 (noting that where one social group seeks superiority and the other seeks equality, "the struggle for social status is zero sum"); cf. Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 351 (1994) ("Status domination is a zero-sum game, and one group's achievement of dominance is matched by a 'status harm' to another group."). See generally KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION* (1993) (offering various examples of zero-sum games of status domination involving race, religion, and gender).

50. A change in the economy of status might be non-Paretian without being zero-sum if members of a superordinate group lose less in status than members of a subordinate group gain.

51. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 371-72 (1954). Giving different groups equal status requires that high status groups lose status. Because status is valuable, the latter groups will not easily surrender it. In other words, in the economy of status one cannot reproduce the mythical Minnesota town of Lake Wobegone, where all the children are above average.

Put another way, status competition tends to be zero-sum—or at least non-Paretian—because the identities of the antagonistic groups are not independent of each other. Social identities depend on social meanings—sets of positive and negative associations—that compare and contrast social groups. An increase of positive associations for one group changes its social identity, and hence affects the social identity of groups superordinate to it. For example, in a system of white supremacy, whites gain positive associations of honesty, reliability, industry, intelligence, and morality in comparison to blacks. To increase the status of blacks in society means that these positive associations must be weakened or eliminated. Whites can no longer expect a certain set of positive assumptions to be made about them simply because they are white. The social meanings of whiteness and blackness are subtly altered, and the social identities of individuals are thereby changed.

Indeed, one way of tracing the history of the successes and failures of American civil rights law is to ask how much social superiority whites have felt comfortable surrendering at any time while still retaining their superior status. Justice Harlan makes this point inadvertently in his famous dissent in *Plessy v. Ferguson*.⁵² Immediately before his famous declaration of colorblindness and his announcement that “[t]here is no caste”⁵³ in the United States, he notes that “[t]he white race deems itself to be the dominant race in this country.”⁵⁴ Whites, Harlan argues, are dominant “in prestige, in achievements, in education, in wealth and in power,”⁵⁵ and so they “will continue to be for all time.”⁵⁶ Harlan sees no contradiction between these claims and the anti-caste principle he is about to announce, for he does not think that granting legal equality to blacks will destroy the social superiority of whites. Harlan thinks that one can and must make a distinction between legal equality and social equality, and that the granting of legal equality will not eventually lead to social equality: Even if blacks can sit in railway carriages with whites, the white race will continue to be the dominant race for all time. Of course, the whole debate in *Plessy* is how much the white race can afford to give up in terms of legal protection and still remain “the dominant

In the long run, a society can attempt to increase the size of the “status pie” by increasing the number of awards, prizes, and other markers of high status available in society. If people care about different metrics of esteem, their status competition may not be zero-sum and it may not even be non-Paretian. See McAdams, *supra* note 21, at 1031; Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 49–55 (1992). On the other hand, if awards and status are distributed too liberally, this tends to cheapen their value.

A related strategy is to create many new and different kinds of status that are incommensurable or difficult to compare. In this way each group can have its share of status markers, but the very fact that new forms of status are incommensurable with each other undermines the sense that one is better than others, and therefore may be insufficient compensation.

52. 163 U.S. 537 (1896).

53. *Id.* at 559 (Harlan, J., dissenting).

54. *Id.* (Harlan, J., dissenting).

55. *Id.* (Harlan, J., dissenting).

56. *Id.* (Harlan, J., dissenting).

race." Justices Brown and Harlan disagree on precisely this point.⁵⁷ Yet neither Justice is willing to surrender the social dominance of whites. They simply represent two different takes on the management of that dominance. As soon as whites fear that legal reforms have left them no longer "the dominant race in the country," their backlash has been as ferocious as it has been predictable.

Just as status is partly convertible into other social goods, these goods can partly compensate individuals for changes in their status. One can increase an individual's level of social comfort by giving that person political power, a higher income, or greater social esteem. Increases in one dimension can sometimes compensate, albeit imperfectly, for losses in another.⁵⁸ Conversely, losses to social esteem are probably felt most keenly by those who have less compensation in other dimensions of social goods.

It is not surprising that the middle of the 1950s and most of the 1960s witnessed both a significant breakdown in status hierarchies as well as abundant prosperity in the United States, not simply for the rich, but more importantly for the middle and working classes. Middle- and working-class whites and males had the most to lose from a loss in their social status, but increasing affluence partly compensated them for a change in their social identities.

Yet such balm can spread only so far. For all of their affluence, the 1960s hardly witnessed a complacent acceptance of changes in the social meanings of race and gender. Moreover, status politics and status competition usually intensify when economic growth slows, as it inevitably must. When the size of the economic pie is no longer growing or is even shrinking, social groups may return avidly to the zero-sum game of status politics. Tolerance is replaced by suspicion, and cooperation is replaced by increased demands for respect and esteem.⁵⁹ This fact has not gone unnoticed by politicians. The so-

57. Although nowhere directly stated, one senses that Justice Brown's majority opinion is deeply concerned that granting blacks additional legal equality will inevitably lead to social equality through racial mixing. That is why it is necessary for Brown to prevaricate and insist that feelings of inferiority produced by segregation do not reflect social reality but are simply blacks' idiosyncratic construction of the matter. *See id.* at 551. Justice Harlan can afford to be more honest in his racism because he is quite sure that civil equality for blacks will not lead to their social equality—that granting blacks additional rights will not significantly change the superior status of "the white race."

58. Consider, for example, the tradeoff that many federal judges make when they surrender a much higher expected income for what is presumably greater political power and higher social prestige.

59. *See ABEL, supra* note 20, at III-38; 2 *WEBER, supra* note 20, at 938. By contrast, Gusfield, following Lipset, argued that class politics was heightened in times of economic downturns, while status politics was heightened in times of economic prosperity. *See GUSFIELD, supra* note 20, at 16-17 (citing Seymour Lipset, *The Sources of the Radical Right*, in *THE NEW AMERICAN RIGHT* 166 (Daniel Bell ed., 1955)). A more plausible account distinguishes two different causes of status politics. The first is the scapegoating that accompanies economic downturns, as noted above. A second kind of status politics can occur during times of economic prosperity but the mechanism is more complicated: It occurs not because of scapegoating by superordinate groups but because of self-assertion by subordinate groups. During times of economic expansion, status hierarchies may loosen for two reasons. First, subordinate groups are energized because they have more resources and can spend less of their time eking out a living. Second, superordinate groups, enjoying the fruits of the same expansion, are partially compensated for changes in

called wedge issues perfected by the Republican Party in the 1970s and 1980s have often been based on appeals to status politics, whether organized around race, religion, ethnicity, or gender.⁶⁰

Moreover, a booming economy does not always distribute its benefits equally. Even when the rich are doing well, working- and middle-class Americans may not be. Restructuring may cost jobs and produce lower wages, and thereby create economic insecurities leading to a renewed hunger for status and respect. This hunger can lead to new rounds of status competition, and the scapegoating of blacks, Hispanics, and immigrant groups.⁶¹

D. *Status Competition and the Clash of Moral Values*

Because status groups are organized around contrasting styles of life, status competition is often phrased in terms of moral approval or disapproval. The preservation of the status of one's group is seen as the preservation of morality itself or at the very least of a particularly upright way of life. As Joseph Gusfield argued in his study of the Temperance movement, "[e]ach status group operates with an image of correct behavior which it prizes and with a contrast conception in the behavior of despised groups whose status is beneath theirs."⁶² The fight over temperance was expressed in distinctively moral terms, with abstemious Protestants berating Catholics and immigrants for their immoral ways.

Men who sought to defend traditional gender roles (in which women hold lower status) have often done so on the grounds of preserving the family and traditional moral values. Women who abandoned traditional female roles were either themselves immoral or were unwittingly contributing to moral lassitude and the destruction of the family. Symbolic politics often concerns issues of moral reform through which status groups attempt to defend or enhance their

the status regime. This relaxation of status hierarchies in turn emboldens subordinate groups, who step up their demands and attempt to accelerate the process of transformation. This self-assertion leads eventually to status anxiety and backlash. Status conflict will be exacerbated still further if this backlash occurs as the economy is slowing.

60. See THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION* (1991) (describing history of Republican Party's successful use of social, racial and other "wedge" issues)

61. See, e.g., Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 *LA RAZA L.J.* 42, 60 & n.89 (1995). The situation is exacerbated because these groups are, in turn, attempting to better their status at the same time. Hence middle-class and working-class whites may feel squeezed between two different social trends. Economic insecurity may also lead to a resurgence of anti-Semitism—and not only among whites—because anti-Jewish stereotypes feed into a sense of economic frustration. See ALLPORT, *supra* note 51, at 370–71

62. GUSFIELD, *supra* note 20, at 27. Gusfield borrows the term "contrast conception" from the literature on racial and cultural relations. "It describes the ways in which groups impute significance to differences between their behavior and that of other social groups." *Id.*

social prestige and the prestige of their style of life.⁶³ Usually groups do so at the expense of the prestige and esteem of the losers in the cultural struggle.⁶⁴ Stereotypes often play an important role in these moral conflicts. White beliefs about black immorality and the bankruptcy of black culture have surely affected struggles ranging from welfare policy to censorship of rap music.⁶⁵

Because status competition is tied to competing conceptions of morality, it is tempting to assume that moral discourse and moral condemnation in cultural struggles are merely a cover for status competition. But this view is mistaken. The word “morality” itself comes from the Latin *mores*, or modes of life, and the two concepts remain deeply connected. Debates about morality are not smokescreens for debates about status; rather, struggles over status are struggles over what forms of life should be honored and receive general moral approval. Debates about morality and moral approval are the medium through which status competition is carried out, but the moral debates are no less authentic for that reason.⁶⁶

Similarly, status competition does not always involve animus or hatred toward competing groups. Animus may be present, but only in extreme situations. Members of status groups are equally likely to feel disgust, fear, condescension, or pity for their opponents. Often one finds only a sincere desire to preserve the moral approval of a way of life that a status group has adopted or that it holds up as an unfulfilled ideal. Just as moral disapproval is not simply a cover for status competition, a status group’s attempt to maintain a preferred status or a status hierarchy is no less real simply because hatred or animus is absent.

63. *See id.* at 3.

64. *See id.*

65. The sources of racism are many and varied; racism is not simple moral disapproval of other races or their ways of life. But an important part of racial attitudes treats race as a proxy for culture. It is important to emphasize that even after whites accepted that blacks were not naturally inferior to them it was possible for them to believe that blacks were culturally inferior. White disapproval of black culture as ignorant and immoral is an important part of this belief.

66. Many debates over the relationship between law and morals—raising in one form or another the question whether the law should “legislate morality”—are debates about ideals and idealized styles of life connected with groups actively engaged in status competition. Prohibition is an obvious example, and homosexual rights are another. Religious groups in particular have often sought to bolster their esteem and reassert their importance to society through moral crusades about gambling, drinking, alcohol and drug use, and sexuality. Conversely, the rebuttal that law should “stay out of morality” is often made by secularists or opposing religious groups. Once again, the language of morality is not a smokescreen for invidious motivation, but the way in which cultural struggle is carried out. Although not all debates over “legislating morality” are linked to status competition, many important ones have had these links. Jurisprudential debates about the proper relationship between law and morals are both interesting and important philosophically, but often they are beside the point sociologically. Competing groups are after more than jurisprudential correctness; they are after a vindication of their worldview and hence their felt esteem in a larger polity that they believe gives them and their idealized styles of life less respect than they rightfully deserve.

E. *The Paradox of Status Hierarchy*

Status competition can occur between groups with comparatively equal status in society, for example blacks and Hispanics, both of whom currently enjoy less social status than non-Hispanic whites.⁶⁷ However, the examples I am most concerned with in this Essay are cultural struggles between higher and lower status groups in a status hierarchy. Status hierarchies are kept in place by a system of social meanings and the attribution of positive and negative qualities. When this set of social meanings starts to weaken, so too does the status hierarchy, and new forms of status competition become possible between superordinate and subordinate groups. This movement from relatively taken-for-granted status hierarchies to relatively contestable ones is an important source of cultural struggles.

When status hierarchies are relatively rigid, higher status groups may treat lower status groups with condescension and even affection. Gordon Wood tells of upper-crust American colonial aristocrats who joked and ate with their social inferiors and treated them affectionately like children.⁶⁸ These aristocrats could afford to intermingle because they were confident that their social status was unaffected by such encounters. Indeed, the very idea of “condescension” toward one’s social inferiors was viewed as a positive quality, whereas in our more egalitarian times it is viewed as an insulting form of snobbery.⁶⁹

Yet the aristocracy’s comparatively easy attitude toward poor and working-class Americans changed significantly in the years after the Revolution, when the boundaries between classes had begun to break down and republican zeal had started to dismantle native aristocracies.⁷⁰ As the ideology of the American Revolution succeeded in weakening social distinctions, condescension gave way to fear and distrust.

This point can be generalized. As social hierarchies break down, they are increasingly replaced by new forms of status competition. This leads to what I shall call the *paradox of status hierarchy*: Societies with relatively rigid

67. Moreover, although status competition usually occurs between groups in a single society, it can also occur across national boundaries. Abel gives as an example the controversy surrounding Salman Rushdie’s publication of *The Satanic Verses*. See ABEL, *supra* note 38, at 11–22. Many Muslims—both in Great Britain and around the world—felt that the book was blasphemous and an insult to the honor and dignity of Islam. The most extreme form of disapproval, however, was the Iranian Ayatollah Khomeini’s *fatwa* against Rushdie, calling upon the faithful to execute the author. See *id.* at 15. The *fatwa* helped precipitate an equally indignant reaction in Western Europe and the United States over the intolerance of Islamic fundamentalism, coupled with a demand that Rushdie’s opponents recognize and respect his artistic freedom. See *id.* at 15–18. The controversy over *The Satanic Verses* concerned both the comparative status of Muslims and Christians in Great Britain (where Rushdie lived), and the comparative honor of Islam and the non-Islamic West.

68. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 41–42 (1991).

69. See 3 OXFORD ENGLISH DICTIONARY 682 (2d ed. 1989) (listing earlier, more positive definition as “affability to one’s inferiors, with courteous disregard of difference of rank or position”).

70. See WOOD, *supra* note 68, at 271–86.

social roles and hierarchical orderings tend to appear relatively stable and peaceful on the surface. Consensus seems to rule. The system of social meanings that convey higher and lower status is reproduced effectively, and without great effort. Higher status groups may treat lower status groups with condescension and paternalism.

Yet as status hierarchies weaken, it takes considerably greater effort to keep subordinate groups subordinate and inferior meanings inferior. Lower status groups feel able to assert themselves and demand greater respect. Higher status groups experience increasing fears that they will suffer a corresponding loss of prestige in the non-Paretian world of social status. People certain of their superior social status may treat their social inferiors with indulgence and even paternal affection, but when the status barriers begin to break down, their rhetoric turns to fear, anger, and hate. They can no longer afford the luxury of condescension.

As Richard Abel has noted, dominant groups faced with upstart competitors are likely to feel extremely threatened; they cling ever more fiercely to their symbols of pride and prestige. Hence, “[e]ven if a subordinate group asks only a minimum of respect, the dominant group rightly perceives this as challenging its superiority.”⁷¹ The result can be not only ill will and intemperate language, but mindless, recurring cycles of violence and mutual recrimination. Both subordinate and superordinate groups may lash out at each other, wielding the weapons of rhetoric, law, or brute force: the former to demand new social prestige, the latter to reinforce and reproduce old hierarchies of respect and social meaning.

The paradox of status is that intense social conflict between status groups emerges not at the height of a system of social stratification but during its decline. The more clear-cut and well-defined that status hierarchies are, the less overt are the kinds of discontent and strife one may see. A regime in which “everyone knows their place”—and does not even imagine it possible to alter that place—can create the illusion, if not the reality, of a harmonious, well-ordered society. Conversely, when the clarity of status hierarchies is breaking down, when social meanings become contested, and when previously lower groups begin to demand higher status and a greater share of respect, there is likely to be great confusion, discord, strife, even violence. Yet this may not be because a perfect harmony has been shattered, but because the chains of a particularly egregious hierarchy have begun to be loosened. The halcyon “good old days,” by contrast, may have reflected the robustness of then-existing social hierarchies and the rigidity of social stratification.

The most conflicted moments in American history may be the times when old social meanings about status are dissolving and new ones are taking their place. These are moments of heightened cultural struggle or *Kulturkampf*. To

71. ABEL, *supra* note 38, at 24.

be sure, they are not necessarily Kulturkamps in Bismarck's original sense. These cultural struggles are the effect of social forces that have already begun to change. They feature not only the new assertions of groups rising in status, but the rearguard actions of an older order that is starting to pass away. Higher status groups employ whatever muscle they can offer—whether cultural, legal, or physical—to replenish their diminishing status capital and to put things back the way they were.⁷² But often, perhaps usually, it is already too late. The system of social meanings has changed, and all of us are carried along by its powerful tides. Faced with dissensus, open conflict, and even violence, people often harken back to the “good old days” when people were moral, social expectations were preserved, social deviance was invisible, overt enforcement of status norms was unnecessary, and everybody knew their place. I call this phenomenon *status nostalgia*.⁷³

F. *Romer v. Evans as an Example of Status Competition*

It is not difficult to see how *Romer v. Evans* fits into this analysis. Amendment 2 was a shoring-up exercise, designed to reassert what had lately come into question. The proponents of Amendment 2 attempted to reestablish traditional values through legal declaration. They wanted to ensure that discrimination on the basis of sexual orientation was not put on the same level of immorality as discrimination on the basis of gender or race. They wanted a clear statement by the state of Colorado that it was not so reprehensible an act to discriminate on the basis of sexual orientation. What was at stake in Amendment 2 was a symbolic affirmation of the comparative value, prestige, and morality of different styles of living, and of the different groups who practiced those different styles of life.

The hierarchy of social meanings that granted superior prestige to heterosexuality was not primarily based on animus toward homosexuals. It was

72. As discussed *supra* text accompanying notes 58–61, the loss of status may be most keenly felt by members of high status groups who in other respects have low social status. Such people have the most to lose from a decline in prestige in the one aspect of their identity that bestows higher status. Therefore their opposition may be the keenest.

73. A wonderful example of status nostalgia is captured in the lyrics to the theme song for Norman Lear's *All in the Family*, sung by Archie Bunker and his wife Edith at the beginning of each episode

Boy the way Glenn Miller played,
Songs that made the hit parade,
Guys like us we had it made,
Those were the days.
And you knew where you were then,
Girls were girls and men were men,
Mister we could use a man like Herbert Hoover again
Didn't need no welfare state,
Everybody pulled his weight,
Gee our old LaSalle ran great,
Those were the days!

All in the Family (CBS television broadcast, 1971–79)

based on moral disapproval. It involved discrimination to be sure, but between those morally more and less worthy. It was discrimination in the same way that people discriminate between the honest and the dishonest. Morality and social propriety are surely at stake in the debates over the legalization of homosexuality and the social equality of homosexuals. Unfortunately, moral discourse is often the most important way in which existing social hierarchies are defended and maintained. The lower status of women, and of blacks, has repeatedly been defended in terms of religious and moral values.⁷⁴

Understanding the struggle in *Romer* as the result of status competition also helps to explain two claims that may at first seem mystifying from the perspective of advocates of gay rights. The first is the claim that protecting homosexuals from discrimination offers them "special" rights. The second is the claim that antidiscrimination ordinances place an official stamp of approval on homosexuality and will destroy the traditional family. A related claim is that the recognition of gay marriage will endorse homosexuality and make a mockery of heterosexual marriage. These assertions should be understood in their cultural context. They are reactions to the gradual change in the social status of homosexuals, and in the social meanings of homosexuality and heterosexuality.

An ongoing status regime relies on the continual reproduction of a set of social meanings about what is normal and abnormal, moral and immoral, prestigious and base, that provide a baseline of expectations about what is happening in society and what things mean. In a cultural struggle or *Kulturkampf* like that over gay rights, superordinate status groups are trying to preserve this older baseline of social meanings and expectations from gradually occurring changes.

Protecting homosexuals from discrimination is understood as a sign of increased social status mirrored in new legal protections. Because status competition is zero-sum, this increase in status necessarily occurs at the expense of heterosexuals. From the perspective of the older baseline of social meanings, it appears that homosexuals are being given something new that is being taken away from heterosexuals. They are being given increased honor, respect, and esteem, hence "special treatment." At the risk of trivializing the phenomenon, it is somewhat like an older brother who resents the new toy purchased for his younger sibling. Or more accurately, it is as if the toy were taken from the older brother and given to the younger. Every change in the semiotic status quo, no matter how unfair the previous baseline of social meanings, may be seen as sending the message of favoritism and special treatment. Any departure from a baseline that views homosexuality as deviant

74. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (justifying subordinate status of women as "law of the Creator"). These hierarchies have also been defended by appeals to scientific rationality. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 30-145 (1981).

and immoral will be viewed by some members of the dominant status group eager to retain their status as a movement toward treating homosexuality as normal and morally appropriate.

In this zero-sum world, tolerance for homosexuals can be reconciled with their lower social status only so long as this tolerance is given grudgingly and without any social or moral approval of homosexuality. Tolerance that demands moral acceptance of homosexuality, however, is in tension with the existing baseline of social meanings and hence will be viewed as deliberate approval or advocacy of gay lifestyles. This baseline of expectations explains the politics of the closet: Homosexuals who remain in the closet and act like heterosexuals will be treated equally as long as they do not make an issue of their homosexuality. To declare their homosexuality openly and then to demand equal rights appears to assert that it is wrong to discriminate against homosexuals because of their lifestyle, which in turn implies that perhaps homosexuality is not so immoral after all. Because such overt demands disturb the hierarchy of social meanings and the implicit moral superiority of heterosexuality, they are viewed as “flaunting,” and thus as presenting demands for “special” treatment.

Similarly, gay marriages “threaten” or “make a mockery of” traditional marriage because from the standpoint of the older baseline of social meanings they send the message that gay marriage is “just as good as” heterosexual marriage. Legal recognition of gay marriages, like antidiscrimination legislation, is symbolic of a change in the status relationship between heterosexuality and homosexuality, and thus appears to equate the morality of one with the morality of the other. Because homosexuality is presumed immoral under the older set of assumptions, gay marriages degrade heterosexual marriage by comparison. From the standpoint of gay rights opponents, it is as if one equated property with theft. Nothing could be more damaging to the hierarchy of heterosexuality over homosexuality, and produce a greater loss of status, than the symbolic statement that homosexual unions are just as moral, just as normal, and deserve just as much social approval as heterosexual marriages. Because legal recognition of gay marriage departs from the symbolic status quo, it can be interpreted in precisely this way—as “advocacy” of the gay lifestyle rather than a demand for equal treatment.

It is not accidental that the most vocal opponents of gay marriage and gay rights have repeatedly raised the specter of children being taught in the public schools that homosexuality is just as normal and morally appropriate as heterosexuality.⁷⁵ This is understood as a powerful argument against reform precisely because it poses the question of a change in status relations in its

75. See, e.g., David Foster, *In Gay Rights Debate, Concern About Children Is Never Far Away*, L A TIMES, June 6, 1993, at B3 (noting concerns among parents that teaching that homosexuality is normal will lead more children to become homosexual).

starkest form: It asks straights if they are really willing to accept fully equal moral status with homosexuals. Opponents of gay rights assume that most heterosexuals, no matter how tolerant, will not be willing to take that step; once they understand what full social equality for homosexuals means they will recoil in horror. The instincts of these gay rights opponents are entirely correct: Few groups ever surrender the whole of their higher social status willingly.

G. *The Role of Social Movements*

Indeed, because status competition is zero-sum, higher status groups are loath to surrender any of their status unless it conflicts with practical political necessities or with other deeply held beliefs. Hence social movements like abolitionism, the civil rights movement, the gay rights movement, and the many incarnations of American feminism are vitally important in explaining why superordinate groups eventually accept a redistribution of status.

Social movements are more than movements for legal reform. They are movements for status disestablishment. Hence they are movements for changes in social structure and changes in social meaning. The feminist movement in America, for example, has not been simply about gaining legal rights for women; it has also tried to change the day to day behavior and beliefs of both men and women. Law plays an important role in this process, but it is only one element.

Social movements attempt to create practical problems in maintaining social order and social control. Social movements also attempt to change the social meaning of subordination so that it eventually comes to conflict with other deeply held beliefs about justice, equality, and fair play.⁷⁶ A dual attack on both practical interests and ideological commitments is often the best strategy. A good example is the gradual change of heart that elites experienced concerning southern segregation as a result of America's foreign policy initiatives in the Cold War.⁷⁷ Distinguishing the American way of life from Communism caused many elites to become increasingly uncomfortable with America's system of apartheid. This change in attitude by elites, and particularly northern elites, probably helped buttress the fledgling civil rights movement in the South in the 1950s.

Furthermore, social movements can often gain advantages by forming alliances with more powerful groups. The early civil rights movement took place against the backdrop of a more general assault on southern culture and

76. See, e.g., Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1359, 1368 (1988) (discussing role of civil rights movement in remaking image of blacks in eyes of whites and undermining white views about justice of status quo).

77. See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988).

southern institutions by northern elites. Even before the Supreme Court finally put its weight behind school desegregation in *Green v. County School Board*⁷⁸ it demanded an end to Bible readings and school prayer.⁷⁹

The present struggle over gay rights is also much more complicated than a simple status conflict between the forces of social hierarchy and the righteous armies of egalitarianism. Many different groups are usually involved in cultural struggles, forming complicated sets of alliances. Struggles for equality are often bound up with other struggles that are not so egalitarian. The civil rights movement, for all of its moral authority, was allied with the drive by northern managerial and technical elites to dominate and reshape the culture of southern working-class whites. Moreover, different groups, each of whom is attempting to rise in status, may be on different sides of a cultural struggle.

In like fashion, the current struggle over gay rights is more than a battle between the Goliath of heterosexual America against the David of the gay rights movement. Among the most vocal opponents of gay rights initiatives are Christian conservatives, who are themselves struggling to increase their status and respect vis-à-vis secular America.⁸⁰ Conversely, the struggle for gay rights may well be facilitated by the emergence of a new status regime that features a rising economic class of professionals and information producers.

This new information or knowledge class earns its living through the manipulation of symbols, the production and interpretation of information, and the creation of objects of informational consumption through computers and mass media. The new knowledge class is largely secular, and tends to be liberal on so-called social issues. The rise of this class signals the increasing economic and social downfall of non-symbol-manipulating, nonprofessional, lesser-educated Americans. It was no accident, then, that Justice Scalia angrily identified the result in *Romer* with the prejudices of "elites,"⁸¹ or that Republicans ranging from Bob Dole to Pat Buchanan have made anti-elitist appeals both to working-class Americans and religious conservatives.⁸² Gay

78. 391 U.S. 430 (1968).

79. On the strategy of northern elites in remaking the South, see L A Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENTARY 197, 212-14 (1994)

80. Christian conservatives are not a monolithic entity, and it is unclear whether the label constitutes an independent status group, but it surely contains many status groups, including fundamentalist Christians, evangelical Protestants, and conservative Catholics. The latter groups have often been stereotyped and made the butt of jokes. Nevertheless, they are by no means held in the same degree of contempt as homosexuals. It is not illegal for Christian conservatives to practice their religion, and they are protected from discrimination by federal and state law. Few people in the United States regard being an evangelical Christian as an immoral lifestyle choice. By contrast, homosexuals are still often condemned morally by many segments of society and they are still subject to de jure discrimination in many areas of life

81. See *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting)

82. See, e.g., Michael Barone, *Hell No, They Shouldn't Go: For Republican Pat Buchanan, Bosnia Is a Target of Opportunity*, U.S. NEWS & WORLD REP., Dec. 11, 1995, at 50-51 (reporting Buchanan calls for "building a national coalition that will defy the corporate and political elites and put our own people and our own country first for a change"); Rita Beamish, *Buchanan Accuses Republican Rivals of Stealing His Agenda's Thunder*, STAR-LEDGER (Newark), Sept. 18, 1995 (noting Republican presidential candidates' appropriation of Buchanan's anti-elitist message); Robert J. Dole, *Text of the Republican Response*, WASH

rights advocates will probably find this rising knowledge class among its most hospitable allies, but it is unclear whether this new class is producing a more just and egalitarian order of status.

The centrality of social movements to contemporary attacks on status hierarchy shows the irony and the perversity of the categories courts have traditionally used to describe groups deserving of special constitutional protection. Courts often look to the “political powerlessness” of a group when deciding whether to treat it as disadvantaged and classifications affecting it as suspect.⁸³ Yet legal elites—whether judicial or legislative—usually respond to “disadvantaged” groups only after a social movement has demanded a response. Ironically then, a status group must display some degree of political power—whether at the ballot box or in the streets—before it can be considered “politically powerless” and hence deserving of legal protection.⁸⁴

The centrality of social movements in promoting social change reflects the fact that law generally works most effectively in assisting the breakdown of a system of social meanings that has already begun. Rarely can it dismantle a status system on its own. The fact that members of status groups have organized into social movements like feminism, civil rights, or gay rights is a sign that social changes have already begun, that the social hierarchy has started to become controversial and hence can no longer hide itself under the camouflage of naturalness. Under these conditions, law can play an important, albeit supporting, role. After all, it is unlikely that members of higher status groups (who tend to dominate the legislatures and the judiciary) will even recognize the possibility of a problem until a social movement appears on the scene to demand increased status.

Thus, the ability of status groups to find supporters in the political process tells us only that a status hierarchy has begun to break down and therefore that its injustice has begun to become visible to increasing numbers of legal and governmental elites; it does not tell us whether the group is deserving or undeserving of legal protection. After all, African Americans have been the beneficiaries of remedial legislation since the passage of the 1866 Civil Rights

POST, Jan. 24, 1996, at A15 (responding to President Clinton’s State of the Union Address by accusing Clinton of “shar[ing] a view of America held by our country’s elites”). Attacks on elites are important parts of the current culture wars, not only in the cases of gay rights, abortion, and school prayer, but also federal funding for the arts. Ironically, members of political elites—for example, Pat Buchanan, Jesse Helms, and George Wallace—usually represent lower status groups in public discourse. Even if they retain relatively high individual status as a result of their privileged positions, they gain political power by representing the status concerns and status resentment of others.

83. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973).

84. This phenomenon is related to the paradox of status hierarchy noted earlier. Robust status hierarchies are less likely to be challenged and therefore have a greater appearance of stability. Only when hierarchies begin to weaken are mass social movements able to form and gain strength. Indeed, social movements are both cause and symptom, for as they grow they may accelerate the process of social transformation.

Act. Over the years, many legal elites (including African-American members of those elites) have enlisted in the cause of racial equality. Yet this does not mean that unjust racial hierarchy has been eliminated from the United States. Indeed, groups that are truly politically powerless usually do not even appear on the radar screen of legal decisionmakers—including courts—because the status hierarchy is so robust that few in power even notice that there is a problem.

Nevertheless, once a social movement has gained widespread recognition, the law often expands its protection to other groups who may never have organized into a social movement but whose situation is understood as formally similar. Thus, the beneficiaries of Reconstruction were not only blacks, but also Hispanics, Asian Americans, and other ethnic minorities. Even though the Reconstruction Amendments were specifically designed to protect blacks, courts soon applied them to prohibit all discrimination based on race or national origin.⁸⁵ Today Polish Americans are protected every bit as much as African Americans even though the 1960s did not witness a Polish American civil rights movement. The internal logic of legal regulation grants rights to groups even without the creation of social movements, as long as some other group judged sufficiently “similar” has trod before them.

In fact, a focus on “political powerlessness” may be not only irrelevant but perverse: It plays into the hands of people who want to preserve status hierarchies. The very existence of a nascent social movement to break down unjust status hierarchies is evidence that the group is *not* politically powerless. It is evidence that the group is, in contemporary language, a powerful special interest group, or in public choice terms, a rent-seeking minority seeking to impose costs on the rest of society. It is no accident, therefore, that opponents of homosexual rights complain loudly about the power of the “homosexual lobby,” or that Justice Scalia thinks it important to note that homosexuals are a highly organized and politically influential group.⁸⁶

Scalia’s impression of the massive political might of homosexuals may be due to their relatively recent self-assertion in the face of a declining, albeit still powerful, status hierarchy. Our sense of political clout depends, like so much else, on background assumptions of what is normal and appropriate. All groups tend to look more powerful once a boot has been lifted off their neck. If one never noticed the boot (or its impropriety) in the first place, the group may now look positively arrogant.

The more general lesson that we should draw is one about the sociology of legal knowledge—about lawyers’ use of doctrinal categories to judge the nature of the political and social system and to measure and remedy group

85. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (applying Fourteenth Amendment to Chinese resident alien); *Slaughter-House Cases*, 83 U.S. 36, 71–72 (1872) (recognizing Reconstruction Amendments not limited to blacks).

86. See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting)

disadvantage. Legal elites must be self-critical because their judgments are conditioned by their participation in the system they are trying to judge. The lawyer's conception of "suspect classification," for example, does not refer so much to a fact about social hierarchy as to the consciousness of legal elites in recognizing the existence and the unjustness of social hierarchy as the result of successful social movements. Few legal elites thought sexual orientation could be a suspect classification until social movements began to change their political imaginations.⁸⁷ Law always comes upon social inequities *in medias res*; lawyers only see the problem because some group has already imagined and acted upon the promise of a better world.

III. THE CONSTITUTION AND STATUS HIERARCHIES

A. *The Soul of the Constitution*

If status hierarchy and status competition are pervasive and ubiquitous features of even democratic societies, does the Constitution have anything to say about them? Justice Scalia's dissent in *Romer* suggests one view: Because cultural struggles are cultural, they are the subject of everyday political struggle. The evolution of status relations should be left to the vicissitudes of cultural change and democratic struggle. Indeed, precisely because democracies

87. In some ways, the relation of *Romer* to *Bowers* is a perfect example of this phenomenon. Several years ago, Cass Sunstein tried to deal with *Bowers* by suggesting that while the Due Process Clause properly looks to history and tradition, the Equal Protection Clause need not. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHL. L. REV. 1161, 1163 (1988). This is a wonderful example of lawyers' continual belief in the ability of legal categories to understand the social world: Like the test of "political powerlessness," it is an attempt—through doctrine—to articulate a social phenomenon that shapes the lawyer's very understanding of what doctrine means!

The result in *Bowers* is best explained not by the differing legal functions of the two Clauses, but at what point in the history of a declining status hierarchy each Clause is most likely to get invoked. When a status hierarchy is still relatively unproblematic, when it appears natural and normal, defenders of the hierarchy can make more or less unproblematic appeals to the moral values that support the hierarchy. As a result, the conflict is more likely to be understood as one between morality and claims of individual liberty. One looks to "tradition" to settle the issue because tradition is the crystallization of those moral views that reflect and support those status hierarchies that are still relatively unproblematized. Any liberty claim must somehow be made consistent with an interpretation of this tradition. One way to do this is to argue that law should not attempt to enforce "morality"; a second is to claim that the tradition is flexible, or indeterminate; a third is to claim that there are differing views about morality and the law should not impose a particular version.

Hence, at the beginnings of the contemporary (post-1960s) women's movement, abortion rights were more likely to be understood and accepted (by most men if not by most women) as questions of individual liberty than as questions of the equality of status groups. This conceptualization is reflected in the structure of *Roe v. Wade*, 410 U.S. 113 (1973). It also helps that the Court that wrote this opinion consisted of middle- to older-aged men. An equality-based interpretation of abortion rights surely existed in 1972 when *Roe* was argued, but it was not sufficiently mainstream to appeal to the members of the Supreme Court.

However, when a status hierarchy increasingly begins to decline, the struggle between social groups emerges more clearly, and all sides see the conflict more clearly as one of equality. Tradition can no longer play the same role as it did before. It has become problematized in the minds of increasing numbers of legal elites, and hence it must be selectively invoked if it is invoked at all.

allow majorities to rule, and because majorities tend to be of lower status than elite groups, democracy will, over time, be the greatest foe of status hierarchies and status inequalities. Gradually, the democratic process and the levelling features of democratic culture will destroy systems of social meaning that unjustly privilege some groups over others. Democracy will eventually extirpate privilege and level caste. Obviously, the Constitution must intervene where there is a “bare . . . desire to harm a politically unpopular group.”⁸⁸ Absent a clear showing of such animus, however, the Constitution’s role is merely to ensure that the political system does not take sides in the ongoing struggle between status groups in the zero-sum game of status competition.

Too strong a version of this call for neutrality can surely be reduced to an absurdity. Hierarchies of social status are often intertwined with and supported by distinctions of legal status. Status hierarchies have been used to define who can be a citizen, and who among the citizenry can enjoy the privileges of self-governance. The vast majority of African Americans were once held in slavery with no political rights, and even after emancipation they were effectively denied suffrage and political equality. Women were recognized as citizens from the beginnings of the republic but were for many years denied the right to vote as well as many other political rights. All of these restrictions occurred with the blessing of democratic majorities, at least as defined by existing law. The self-reinforcing character of social status distinctions mapped onto law undermines the assumption that democracies can be expected to dismantle unjust status hierarchies. Yet these examples do not refute a general policy of constitutional neutrality in cultural struggles. Rather, they might simply suggest that the Constitution demands that status hierarchies must be dismantled only to the extent that they deny citizens equal rights to vote and participate in the democratic process.⁸⁹

But the Constitution does more than simply provide fair ground rules for cultural struggle. It also actively intervenes in some status hierarchies and requires that they be dismantled, or at the very least, that the support of law be withdrawn from them. The Constitution has an egalitarian demand, a demand which is more than a demand for equality of civil rights, and more than a demand for equality of political rights. It is a demand for equality of social status, a demand that exists even though it cannot be achieved by legal

88. *Romer*, 116 S. Ct. at 1628 (quoting *Department of Agric v Moreno*, 413 U S 528, 534 (1973))

89. In fact, our largely libertarian doctrines of free speech seem to embrace the idea of rough neutrality in cultural struggles. Status inequality is reproduced through systems of cultural meaning, but much cultural meaning is created, reproduced, and transmitted through expression. The First Amendment guarantees the existence of a sphere of public discourse in which different status groups can attempt to shape and control their own cultural associations and the cultural associations of groups with which they compete. No group is given the right to a monopoly over the cultural meanings associated with it, it must win the battle over cultural meaning through its own effective use of speech. For an argument about government regulation of racist speech along these lines, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

means alone. This egalitarian demand is what connects the Constitution to our founding document, the Declaration of Independence. It is the deep meaning of the American political experience. It is the soul of our Constitution.

Our constitutional tradition has understood itself as responding to this demand, albeit haltingly and defectively. In his Gettysburg Address, Abraham Lincoln noted that although our Constitution was “conceived in liberty,” it was dedicated to a proposition—the proposition that all human beings are created equal.⁹⁰ The actual words of the Declaration, of course, are that all “men” are created equal. That grammatical embarrassment, that sour note in the clarion call for equality, is also part of the meaning of the egalitarian demand. For whenever we attempt to articulate this demand, we always articulate it imperfectly.

At the time the Declaration was written, few in the Continental Congress understood the exclusion of women as an embarrassment, although more perhaps understood and felt the embarrassment of slavery. Yet this phenomenon of a document making a demand for equality, a demand that undermines itself and embarrasses the document that states it—this self-contradictory expression of an underlying ideal—is one of the central features of our political predicament. It is an apt and ironic expression of the ongoing and indeterminate demand for equality. The Constitution makes a distinction between just and unjust status hierarchies. It places itself on the side of dismantling the unjust ones. But it does not always tell us which ones are which; and our first thoughts on the matter are often transformed through further experience and reflection.

Individuals who enjoy high status do not want to surrender that status easily. They may either fail to see their privileged position in a social hierarchy, or, when called to their attention, think it entirely just. Precisely because status capital is so precious a commodity, there is no end of ways in which people can justify their social privileges to themselves. Yet the egalitarian project of our Constitution requires us to engage in an ongoing reflection on what forms of status hierarchy are just and unjust, and how best to dismantle them given the always limited and imperfect tools at our disposal. The oracle of the Declaration speaks in a hazy and unclear voice. Each of us carries away something different from her words. Each generation must come to understand what forms of social hierarchy still exist and the extent to which they are unjust. Through this experience, we eventually come to understand

90. Abraham Lincoln, *Address at Gettysburg, Pennsylvania*, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989). For an excellent discussion of Lincoln's theory of the Declaration as expounding the deep meaning of the Constitution, see GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 88–89, 101–08, 118–20, 130–33 (1992). Lincoln, in turn, drew on an entire tradition of antebellum thought that accorded a special place to the Declaration as representing a transcendent ideal that continually tests the Constitution and to which the American polity aspires. See *id.* at 103–20.

what we were always committed to. We will become what we in hindsight always meant to become. This is an ongoing project of self-understanding and self-governance. We Americans are not agreed on its contours today, and it is certain that we will not be agreed on it a century from now. But the project itself, the oracle, the demand, is the deepest meaning of the American political experiment.⁹¹

Many features of the Constitution, both in its 1787 version and as later amended, are concerned with dismantling unjust status hierarchies. I use the term “concerned” advisedly, for the Framers and Ratifiers of the Constitution lived long before Max Weber and they did not think in these particular sociological terms. (Indeed, the discipline of sociology would not be invented until the next century.) Yet one does not have to be a sociologist to understand that society is full of cultural meanings of superiority and inferiority, that groups exist in social hierarchies of relative status and prestige, and that some of these hierarchies are unfair and unjust. Indeed, the generation that fought the Revolutionary War understood all of these things. They had themselves lived through and participated in a social transformation that dismantled an older status regime: the American Revolution and its aftermath.

The American Revolution was not simply a political revolution; it was also a social revolution. As Gordon Wood has described in a book aptly titled *The Radicalism of the American Revolution*, the generation of 1776 consciously attempted to break free from the aristocratic social structure they had inherited from Great Britain.⁹² They hoped to create in its stead not only a republican form of government but a new republican society, freed from the caste-like system of nobility and royal honors. They hoped to substitute a natural aristocracy of merit for the aristocracy of birth and social privilege. They hoped, in short, to breed a new sort of person, a republican citizen, equal to all and subordinate to none.

Although the revolutionary generation spoke in these broad phrases, their actual commitment to equality was more limited. They wanted to rid themselves of the bowing and the scraping, the snobbery and the undeserved prestige of noble birth and royal prerogative. Yet they did not extend their egalitarian social revolution to slaves, to women, to the poor, or to many other social groups. They saw only certain features of the status hierarchies of their day as worth fighting and dismantling. This is hardly surprising, for the leaders of the Revolution were for the most part themselves privileged men. They believed in a form of deference politics, in which the masses would and should

91. For a discussion of the political meaning of the Constitution in terms of the “project” of the Declaration, see Mark Tushnet, *The Constitution Outside the Courts* (Oct. 26, 1996) (unpublished manuscript, on file with author).

92. See WOOD, *supra* note 68, at 240–43, 276

defer to the “best” men.⁹³ Yet within a few generations, this halfway house between an older order and the new had largely broken down; deference politics was itself viewed as a relic of aristocratic pretension.⁹⁴

The revolutionary generation, and the Framers and Ratifiers of the American Constitution, let loose an egalitarian revolution that went much further than they imagined or with which they themselves would have been comfortable. In the process of destroying the old order of nobility and aristocracy, and creating a new republican man, they set free forces of democratization that still carry us along today. But this is the fate of all great revolutions and all great revolutionary ideas; they are always more powerful than their progenitors. Often their original advocates seem in hindsight much closer to the ideas they themselves tried to leave behind. The American hunger for social equality has proved more lasting than any single generation’s interpretation of it.

B. *The Constitution’s Status-Disestablishing Clauses*

When we look at the Constitution, we can see that many of its elements—especially those in the 1787 Constitution—are designed to temper mass participation and hinder full social equality. They preserve and reinforce social inequalities even as they partially disassemble them; and the specter of the slave system haunts many of the clauses of the original Constitution. Yet what is more wonderful is that many other features of the Constitution seem specifically concerned with dismantling hierarchies of social status, and offering fair ground rules for the status competition that results. To be sure, these different clauses of the Constitution deal with only some of the features of status hierarchy, and often only fitfully at best; but that is because they are designed for many other purposes as well.

The most obvious examples of status-dismantling clauses occur in the Reconstruction Amendments, and particularly in the Thirteenth Amendment. The Thirteenth Amendment at one stroke abolished an entire system of chattel slavery, and called for the extirpation of its “badges and incidents.”⁹⁵ Because status inequality is more than legal distinction, the elimination of slavery should have also included the elimination of the system of cultural meanings

93. See *id.* at 253–55 (explaining that Framers thought that officers of new federal government would be “disinterested gentlemen” or “wise and virtuous elite”). On the phenomenon of “deference politics,” both in England and America, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 169–79, 248–49, 285–87, 305–06 (1988).

94. See, e.g., WOOD, *supra* note 68, at 298 (describing Federalists’ view of themselves as “natural gentry rulers of the society”); *id.* at 299–300 (noting that family connections and high birth gave way to party loyalty as test of who should receive nominations and appointments). The republican vision was quasi-aristocratic as well in its vision of the statesman who served the public without pay. This soon gave way to the salaried officeholder. See *id.* at 293–94.

95. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

that made slavery possible. Hence dismantling the badges and incidents of slavery should also have included the full elimination of the system of white supremacy that allowed generations of blacks to be subordinated to whites. Here too, the generation that began a revolution was unwilling to fully carry out its promises, and it has been left to us even today to redeem them.

The Fourteenth Amendment is another obvious example of a status disestablishing amendment. The *Dred Scott*⁹⁶ case had closely linked the status hierarchy of white supremacy to legal status by holding that blacks could not be citizens.⁹⁷ Section One of the Fourteenth Amendment extended citizenship to all persons born in the United States, thus demolishing the linkage between citizenship and race. It states that: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."⁹⁸ The citizenship clause is a second Declaration of Independence, announcing that equal citizenship would henceforth be available to all regardless of race or prior condition of servitude.

The Fourteenth Amendment was status-disestablishing in another important way. Its framers believed that the Fourteenth Amendment abolished all forms of so-called class legislation.⁹⁹ The very idea of a prohibition on class legislation seems puzzling to us today. In the modern world view, *all* legislation divides individuals and groups into classes and hence could be understood as a form of class legislation.¹⁰⁰ Yet the framers of the Fourteenth Amendment had something more specific in mind. The concept of class legislation had its sources in the Jacksonian era's distrust of governments granting monopoly charters and other special privileges to the rich and powerful.¹⁰¹ Class legislation in the Jacksonian sense was a government's attempt to grant special favors to a specified class of citizens and hence elevate them above others both symbolically and legally.¹⁰² The Jacksonians'

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

97. *See id.* at 404.

98. U.S. CONST. amend. XIV, § 1.

99. This expression is used in Senator Howard's famous speech on behalf of the Fourteenth Amendment. *See* CONG. GLOBE, 39th Cong. (1st Sess.) 2766 (1866) The framers of the Fourteenth Amendment actually used many different phrases to describe the concept, including the ideas of "equality before the law," a prohibition of "special privileges," and "equal justice for rich and poor alike" *See* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 71-80 (1988). Whatever the language used, "[t]he idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted." Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1376 (1990)

100. *See* NELSON, *supra* note 99, at 138; Yudof, *supra* note 99, at 1378-82

101. *See* NELSON, *supra* note 99, at 14-17; Michael Les Benedict, *Laissez-Faire and Liberty A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST REV 293, 318-21 (1985).

102. As Jackson himself said in his famous veto message on the Second Bank of the United States, the law should not add "artificial distinctions" or seek to "grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful." Andrew Jackson, Veto Message, July 10, 1832, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (Richardson ed., 1897), *quoted in* PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 52 (3d ed 1992). *see also* J R

resentment of class legislation was tied to their suspicion of status distinctions among free white men; it went hand in hand with the crusade for universal manhood suffrage.¹⁰³ This egalitarian urge of Jacksonian democrats was connected to their resentment of Eastern financiers and monopolists, whom they saw as the great barriers to equality of opportunity for all free white male citizens.

In the terms of this Essay, the Jacksonian era was the time of another cultural struggle, in which white working men attacked the superior status of Eastern elites, accusing the latter of creating a new class of nobility based on corporate power and financial privilege.¹⁰⁴ The Jacksonian concept of "class legislation" was originally designed to oppose corporate charters and business monopolies, because of the fear that these would create a new class of economic "nobility" elevated above the ordinary white working man. By the end of the Civil War, however, the framers of the Fourteenth Amendment understood the concept as encompassing the converse phenomenon: legislation that denigrated or demeaned a group of persons and held them as less equal than others.¹⁰⁵ In his proposed joint resolution for drafting the Fourteenth Amendment, for example, Charles Sumner invoked the Jacksonian heritage when he claimed that the proposed Fourteenth Amendment should abolish "oligarchy, aristocracy, caste, or monopoly with particular privileges and powers."¹⁰⁶ He spoke of monopoly and caste in the same breath, equating legislation that singles out groups for special treatment with legislation that demeans and stigmatizes groups as social inferiors. Likewise Senator Howard, the floor manager of the Fourteenth Amendment, offered an expanded interpretation of the Jacksonian principle. He argued that the amendment's goal was to "abolis[h] all class legislation . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."¹⁰⁷ Howard also seemed to equate the dangers of creating a new nobility with the dangers of maintaining a class of social inferiors.

The problem of unjust status hierarchy is implicated in several other clauses of the Constitution. For example, the Establishment Clause (especially

POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 145 (1978).

103. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 35-38 (1993); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 70-78 (1948).

104. See HOFSTADTER, *supra* note 103, at 70-79; ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 132-33, 306-07 (1950).

105. On the transformation of the Jacksonian idea of class legislation, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* 90-91 (1970); Yudof, *supra* note 99, at 1379; cf. NELSON, *supra* note 99, at 18 (noting use of class legislation idea in antislavery rhetoric). Needless to say, Andrew Jackson himself would have been taken aback by this reinterpretation. See POLE, *supra* note 102, at 146.

106. CONG. GLOBE, 39th Cong. (1st Sess.) 674 (1866). The joint resolution failed, but the debate affected the final language of the amendment. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 74-75 (1992); see also *Adamson v. California*, 332 U.S. 46, 51 n.8 (1947) (quoting Sumner's resolution as evidence of meaning of Fourteenth Amendment).

107. CONG. GLOBE, 39th Cong. (1st Sess.) 2766 (1866).

after its application to the states through the Fourteenth Amendment) denies the state the right to establish a single church and thus label one particular status group as preferred over all others. As Michael McConnell has astutely pointed out, resolving the potential conflicts between different religious sects was the new nation's first experiment with multiculturalism.¹⁰⁸ The First Amendment guaranteed that religious groups would and could compete with each other for converts, but the federal government (and later the states) would not be permitted to show favoritism toward any of them. Thus the Religion Clauses are both a means of status disestablishment and a means for providing rules of political fairness for the ensuing status competition.¹⁰⁹

Two of the most important status-disestablishing provisions appear in the original 1787 Constitution. They are the Bill of Attainder and Titles of Nobility Clauses.¹¹⁰ As Akhil Amar has recently argued, the Bill of Attainder Clauses are designed to prevent governments from singling out and punishing

108. See Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U CHI LEGAL F 123, 131-34.

109. Justice O'Connor's "endorsement" test makes considerable sense in terms of status categories. O'Connor argues that the government violates the Establishment Clause when its actions have the purpose or effect of endorsing religion or non-religion to a reasonable observer. Endorsement violates the Establishment Clause because the government may not make people's religious beliefs or their membership in a particular religious group determinative of their political standing in the community. See *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring). In other words, government may not proclaim that people have higher or lower status based on their religious affiliation. When government action has the purpose or effect of endorsing religion, it sends a message to some members of the community that they are favored insiders; and it sends a message to others who adhere to different beliefs that they are disfavored outsiders, "not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Justice O'Connor's endorsement test has much in common with Charles Lawrence's "cultural meaning" theory of equal protection. See Lawrence, *supra* note 2. Indeed, both tests have much in common with Karst's original "equal citizenship" principle. See Karst, *supra* note 2. Lawrence argues that the government violates the Equal Protection Clause when it sends a message of cultural inferiority to racial minorities. See Lawrence, *supra* note 2, at 350-51, 355-56, 363-64. Like Lawrence, O'Connor focuses on the cultural meaning of contested governmental action. Like Lawrence, she does not require any deliberate government intent to degrade or harm; the mere effect of endorsement as judged by a reasonable observer is sufficient.

Justice O'Connor's and Lawrence's tests are similar because both are concerned with managing status competition: Both tests prohibit certain government actions that attempt to raise the status of some social groups at the expense of others. This project has two consequences. First, both tests require judges to investigate the cultural meaning of government action to determine if an injury to status has occurred. Second, both tests require a criterion of reasonableness to adjudicate inevitable disagreements about the meaning of what the government has done.

110. Because the two principles apply to both the states and the federal government, there are actually four clauses in all. See U.S. CONST. art. I, § 9, cl. 3 (prohibiting federal bills of attainder); *id.* § 10, cl. 1 (prohibiting state bills of attainder); *id.* § 9, cl. 8 (prohibiting federal grant of titles of nobility); *id.* § 10, cl. 1 (prohibiting state grant of titles of nobility). The Republican Government Clause, *id.* art. IV, § 4, might also be read as status disestablishing to the extent that one believes that equal citizenship is a requirement of republican government. Cf. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 COLO L REV 749, 750, 773, 782-86 (1994) (arguing that central guarantee of republican government is popular sovereignty, which implies constitutional guarantees of equal citizenship); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV J L & PUB POL'Y 37 (1990) (arguing that republican political theory creates obligation to redistribute property to create independent citizenry and give each citizen stake in society).

identifiable groups because of who they are.¹¹¹ In recent years Bill of Attainder cases have often concerned the government's attempts to brand and punish specific individuals.¹¹² Yet Amar reminds us that the Clauses were also originally designed to protect social groups, including groups bound together through ties of descent and kinship.¹¹³

The Titles of Nobility Clauses are perhaps even more important examples. These Clauses have little meaning for us today precisely because of the success of the American Revolution in dismantling a profound and pervasive form of status hierarchy. Although the Constitution speaks of "titles" of nobility, the concern was with much more than mere bestowal of titles. Nobility was far more than the right to use a particular name. It was an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank and political, cultural and economic privilege.¹¹⁴ Gordon Wood points out that the hierarchy of aristocracy was defended on grounds of seemingly natural differences between the nobility and common folk: "So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring."¹¹⁵ Conversely, "[i]n our egalitarian-minded age it is difficult for us to appreciate the degree of contempt with which the aristocracy and the gentry of the traditional monarchical society had regarded the lower orders."¹¹⁶ The latter, "when they were noticed at all, were often regarded as little better than animals."¹¹⁷

When the Framers and Ratifiers of the Constitution denied both the states and the federal government the right to grant titles of nobility, they tried to stamp out this pernicious system of social hierarchy. They feared monarchy not only because of the tyranny of kings but because the monarch was the social and symbolic head of an entire system of social prestige based on nobility.

111. See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 218 (1996).

112. See, e.g., *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (noting requirement of legislatively specified persons); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468–69 (1977) (same); *United States v. Lovett*, 328 U.S. 303, 315–16 (1946) (same); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 643 (2d ed. 1988) ("The essence of the bill of attainder ban is that it proscribes legislative punishment of specified persons . . .").

113. See Amar, *supra* note 111, at 214–18. Similarly, Frederick Douglass argued that slavery violated the Bill of Attainder Clauses because they prohibit hereditary status disabilities:

The Constitution forbids the passing of a bill of attainder: that is, a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave.

Frederick Douglass, *The Constitution of the United States: Is It Pro or Anti-Slavery?*, in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850–1860*, at 478 (Philip S. Foner ed., 1950).

114. See WOOD, *supra* note 68, at 11–24.

115. *Id.* at 27.

116. *Id.* at 235.

117. *Id.*

Thus, in many different ways the Framers and Ratifiers tried to ensure that nothing like a hereditary monarchy or a hereditary nobility would ever rise up in the United States.¹¹⁸

The Framers' and Ratifiers' opposition to monarchy was part of a larger social revolution against the social hierarchy that monarchy symbolized. Their crusade against nobility was the true radicalism of the American Revolution: the dismantling of monarchical order and aristocratic privilege in the name of liberty and equality.¹¹⁹ From this perspective we can see how the Titles of Nobility and Bill of Attainder Clauses serve complementary functions. The first prevents state maintenance of a status hierarchy by prohibiting the creation of a group of social superiors; the second prevents the state from singling out particular individuals, or more importantly, particular groups, as social pariahs.¹²⁰

Moreover, each of these status-dismantling clauses implicitly relies on the asymmetry of status hierarchies. Status hierarchies are asymmetrical because higher and lower status individuals are not social equals. Hence the cultural meanings of their actions as well as actions directed against them may differ significantly. For example, when a higher status person teases a lower status one, the act may be interpreted as bullying or lording over a social inferior; but a lower status person's teasing a higher status person may be understood as a permissible tweaking of the sensibilities of those higher up in the status hierarchy.¹²¹ The cultural meaning of government benefits also differs for high and low status groups. If the government directly benefited high status

118. The Federalist Papers took great care to distinguish the President from "a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever," and to emphasize the President's limited powers and subjection to ordinary law THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961). While a President "can confer no privileges whatever," Hamilton argued, a monarch "can make denizens of aliens" and "noblemen of commoners." *Id.* at 422. As Jack Rakove notes, supporters of the Constitution argued that the President would have no private fortune large enough to purchase a court of adherents or raise a private army on his own, and that the 35-year-old requirement (fairly old in eighteenth-century terms) would prevent most sons from immediately succeeding their fathers, because "in the course of nature very few fathers leave a son who has arrived at that age." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 276 & 408 n.98 (1996) (quoting A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Petersburg, Va., 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 679 (Merrill Jensen et al. eds., 1976)). Ironically, the nation's second President, John Adams, did have a son who later became President, but almost a quarter of a century after he left office.

119. Both concerns are equally important to this revolution. The Titles of Nobility Clauses, like other status-dismantling clauses of the Constitution, are not simply demands for equality. They are also demands for liberty. The Framers and Ratifiers well understood that inequality of social circumstances limits the liberty of those less well off by denying them equal opportunity. Even today social hierarchies inhibit opportunity and prevent individuals from self-realization and the ability to control their own lives. In dismantling unjust systems of status hierarchy, we must keep the connections between equality and equal liberty always in mind.

120. See Amar, *supra* note 111; Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST COMMENTARY 257 (1996).

121. Conversely, demands for deference and recognition shown by high status individuals may be understood as appropriate when similar demands by low status persons might be interpreted as "uppity," "bitchy," or "making a federal case."

groups—for example, if it created an affirmative action program for whites—it would appear to be reinforcing or approving of existing status hierarchies; but when it benefits lower status groups, it is more likely to be seen as dismantling or at least counteracting them.¹²²

The prohibitions of the Bill of Attainder and Titles of Nobility Clauses depend on this asymmetry of status relations. As a result, both are asymmetric in their concerns. As Amar notes, Bills of Attainder are concerned with social exclusion rather than social inclusion. Laws that single some persons out for disfavored treatment because of their identity “are in tension with our constitutional tradition, and should be strongly disfavored.”¹²³ Yet, Amar explains, laws that single out individuals or groups for inclusion rather than exclusion do not violate this principle.¹²⁴ For example, a bill that singles out a particular individual for deportation is constitutionally different from a private immigration bill that allows a single person to remain in the United States.¹²⁵

Favored treatment of individuals or groups on the basis of their social identity can violate the 1787 Constitution, but only if this treatment rises to the level of creating or perpetuating a title of nobility. However, the Titles of Nobility Clauses are also asymmetric: They concern only the maintenance or creation of social hierarchy through law, not the destruction of such a hierarchy. Moreover, not all government benefits violate the Clauses; to do so they must help create a set of meanings of social superiority. Merely singling out an individual for a special benefit is a far cry from creating or attempting to create a new Brahmin-style caste or a new social elite. Just as the Bill of Attainder Clauses are not violated by the attempt to raise the status of lower level groups, neither are the Titles of Nobility Clauses violated by attempts to dismantle status inequalities.

The debate over affirmative action looks quite different from the standpoint of these “sociologically informed” clauses of the Constitution. Consider education as an example. Admission preferences that attempt to

122. Precisely because direct government favoritism toward high status groups is increasingly viewed with suspicion, contemporary status hierarchies are usually supported by legal doctrines that make no direct reference to status categories like race or gender; nevertheless these doctrines may have highly disproportionate and predictable effects on different status groups. At the same time, status hierarchies adapt themselves so that they can be preserved and reproduced without overt legal support. Reva Siegel calls this adaptive transformation of status hierarchies the “modernization” of status regimes. See Siegel, *supra* note 36, at 2174–78. After modernization, preservation of the social status quo looks like a matter of formal neutrality or formal equality before the law, while status legislation that directly attempts to improve the lot of low status groups looks like “special treatment,” and indeed may be attacked precisely because it makes explicit reference to status categories. See Siegel, *supra* note 37, manuscript at 23, 29–33, 35–37; cf. MACKINNON, *supra* note 2, at 32–40 (critiquing equal treatment and difference approaches to gender equality).

123. Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 517 (forthcoming Apr. 1997) (manuscript at 23, on file with author).

124. See *id.*

125. See *id.*; see also Amar, *supra* note 111, at 212–14.

increase the number of historically disadvantaged minorities are not a bill of attainder against white applicants, for they do not single whites out as social inferiors. They do not turn blacks and Hispanics into a new class of aristocrats.¹²⁶

Admission preferences clearly do not send the message that racial minorities are superior human beings by virtue of their identity. Whites may grumble that blacks and other minorities are getting "special treatment," but they would hardly view these preferences as a governmental assertion that blacks have higher social status or have a greater share of positive qualities and social esteem. To the contrary, so powerful are the social meanings of race and ethnicity in this country that affirmative action preferences often create the opposite social meaning among whites. They see these preferences as further evidence of the inferiority and unworthiness of racial and ethnic minorities.¹²⁷ Even if they do not believe themselves prejudiced, many whites still regard themselves as social superiors to blacks, and blacks still retain many cultural associations of inferiority. As long as "[t]he white race deems itself to be the dominant race in this country,"¹²⁸ as Justice Harlan put it, racial preferences cannot be construed as Titles of Nobility.

In fact, admissions preferences have a very different symbolic effect: They are a sign of increased political clout. The ability of racial minorities to demand and receive affirmative action shows that they have gained increasing status in American society. This combination of symbolic and material benefit creates real status anxiety among white Americans, and has led to predictable forms of backlash.

C. *Status Hierarchy and Caste*

Following Kenneth Karst's seminal work, many scholars have used caste as a central organizing concept in antidiscrimination law. They have pointed to stigma and the perpetuation of caste-like relationships as the touchstone of constitutional concern.¹²⁹ There is ample historical precedent for this. As we

126. See Amar, *supra* note 123, at 24. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stewart tried to compare affirmative action policies to titles of nobility, arguing that they were "preference[s] based on lineage." *Id.* at 531 (Stewart, J., dissenting). But Justice Stewart did not claim (nor could he) that, like titles of nobility, such preferences were a sign of the social superiority of racial and ethnic minorities. His comparison failed to acknowledge the most crucial aspect of a title of nobility: that it proclaims superior social as well as legal status.

127. Indeed, even though they facially benefit from racial preferences, minorities are hardly unconcerned that preferences might confirm or enhance rather than remedy social stigma. See, e.g., STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 11-17, 47-69 (1991).

128. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

129. Karst's theory of equality, for example, "centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community." KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989). Hence his "equal citizenship" principle holds that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized

have seen, several framers of the Fourteenth Amendment specifically made analogies to caste. Justice Harlan's famous dissent in *Plessy v. Ferguson* insisted that "[t]here is no caste here" in the United States.¹³⁰ As Dan Farber and Suzanna Sherry have noted, many Supreme Court opinions have stated that various provisions of the Constitution forbid legislation that creates or maintains social caste.¹³¹

Generally speaking, American constitutional lawyers have tended to use the word "caste" as a general term of disapproval, but with virtually no attention to whether their usage matches the nature of existing caste systems.¹³² Rather, what they have meant by "caste" has usually been some form of status hierarchy.

In the early 1980s Paul Dimond articulated what he called the anti-caste principle: "[E]ach person has the right to be free from the continuing effects of caste discrimination in the laws, programs, official decisions, government, and community affairs of these United States."¹³³ Dimond's version of the anti-caste principle requires government to take affirmative steps to eliminate the past effects of caste discrimination.¹³⁴ Like Karst's equal citizenship principle, it also prohibits government action that "perpetuate[s] longstanding stereotypes that stigmatize a racial minority as inherently inferior or undeserving compared to the white majority."¹³⁵

Just as Dimond's original anti-caste principle was specifically concerned with race discrimination, Cass Sunstein's later version also focuses on the

society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant." *Id.*

130. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

131. See Farber & Sherry, *supra* note 120, at 266–70.

132. Generally speaking, in a caste system "society is divided up into a large number of permanent groups which are at once specialized, hierarchized, and separated (in matter of marriage, food, physical contact) in relation to each other." LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* 259 (Mark Sainsbury et al. trans., Univ. of Chicago Press 1980) (1970). These differentiations have in common the opposition of purity and impurity. "[T]his basic opposition can segment itself without limit," creating multiple orders of caste. *Id.* The idea of mutual opposition is central to the idea of caste, so that society as a whole is the unity of the castes in their mutual relations to each other. See *id.* Although a hierarchy of castes seems to divide society, it actually unifies it by "connecting it to what appears to it to be universal, namely a conception of the cosmic order." *Id.* at 260. Note that within this definition, women do not form a separate caste. Rather, the exchange of women through marriage is a means through which caste is reproduced over generations. Society is organized and reproduced through rules of marriage and descent. See *id.* at 123–24. Nor does this definition reflect religious discrimination, because members of different castes often share common religious beliefs. Indeed, the hierarchy is often based on religious cosmology and justified by reference to shared religious belief. See *id.* at 260.

Modernized Western societies lack "caste" in this strict sense, because they no longer conceive group distinctions—between the races, for example—to be based on a natural order that unifies and gives meaning to society as a whole. Western thought has abandoned ideas of a natural social order in order to pursue a "rational" social order. Western societies still feature social stratification, to be sure, but this stratification is based on status and class distinctions, which bear important resemblances to traditional caste structures but are also importantly different.

133. Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 3 (1983).

134. See *id.* at 5–7.

135. *Id.* at 6–7.

social subordination of a limited set of groups.¹³⁶ It “forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.”¹³⁷ This anti-caste principle deals with “a special problem of inequality”¹³⁸ that “arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view.”¹³⁹ Sunstein emphasizes that the group affected has to be systematically disadvantaged “in multiple and important spheres of life”¹⁴⁰ in ways that affect “basic participation as a citizen in a democracy.”¹⁴¹ These realms of life may include, among others, “education, freedom from private and public violence, income and wealth, political representation, longevity, health, and political influence.”¹⁴²

Sunstein’s principle is designed to focus only on limited forms of status hierarchy: in particular, those based on race, sex, and disability.¹⁴³ The poor are not protected: first, because they “represent a broad, amorphous, not easily identified, and to some degree shifting group”;¹⁴⁴ and second, because Sunstein’s principle is specifically designed not to upset existing market forces significantly.¹⁴⁵ Jews, homosexuals, and Asian Americans are not protected because although they suffer discrimination, they do not suffer systematic disadvantage in many spheres of life.¹⁴⁶ Moreover, in the case of homosexuals (and in the case of some Jews, though not male Orthodox Jews and *haredim*), group membership is not necessarily visible.¹⁴⁷

136. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994)

137. *Id.* at 2411.

138. *Id.*

139. *Id.* at 2411–12.

140. *Id.* at 2429.

141. *Id.*

142. *Id.* In this sense, Sunstein’s version of the anti-caste principle strongly resembles Owen Fiss’s group disadvantage principle. See Fiss, *supra* note 2, at 147–56.

143. See Sunstein, *supra* note 136, at 2438.

144. *Id.*

145. As Sunstein points out, he is most interested in “discrete contexts” in which it is hard to argue that current practices benefit the least well off, and

in which second-class citizenship is systemic and occurs in multiple spheres and along easily identifiable and sharply defined lines; in which the morally irrelevant characteristic is highly visible; in which there will be no major threat to a market economy; and in which the costs of implementation are most unlikely to be terribly high.

Id.

These concessions tend to beg the question whether the market might have any significant role to play in the perpetuation of “caste-like” relationships. Conversely, Sunstein’s hedging seems to suggest that if a system of social subordination *would* require disruptions in the economy to be corrected—for example, a massive redistribution from whites to blacks—the system of subordination is not caste-based. It is a sort of cost-benefit approach to defining caste rather than a sociological one.

146. See *id.* at 2443. Thus not all racial discrimination falls under Sunstein’s anti-caste principle. Sunstein does not address whether the principle would have applied to the treatment of Chinese immigrants in the nineteenth century or Japanese Americans during World War II.

147. See *id.* at 2433 n.74.

Sunstein's anti-caste principle does not insist on any single criterion of social stratification. As he himself emphasizes, his criteria for inclusion are pragmatic rather than sociological.¹⁴⁸ As a result, his restriction of the anti-caste principle to race, sex, and disability is somewhat arbitrary. First, the patterns of reproduction of status hierarchy are different in each of the cases he is concerned with.¹⁴⁹ Second, the social stereotypes and cultural meanings employed to maintain the hierarchy also differ for each group. Third, as Farber and Sherry have noted, restricting the "definition of caste to visible characteristics"¹⁵⁰ is false to actual caste systems; for example, it "might paradoxically exclude the Indian untouchable caste."¹⁵¹ Fourth, exclusion of the poor from the anti-caste principle seems particularly odd given that Sunstein's originalist justification for the anti-caste principle is the founding generation's social revolution against the monarchy and the prerogatives of nobility, reflected in the Titles of Nobility Clauses.¹⁵² But this revolution was

148. See *id.* at 2429, 2432 (noting pragmatic considerations behind his definition).

149. To give only one example, traditional caste systems like those in the Indian subcontinent are perpetuated through lines of descent enforced by marriage rules and taboos. Generally speaking, untouchables are expected to marry untouchables, and their children inherit their caste ranking. See DUMONT, *supra* note 132, at 109 (describing general rule of endogamy). Generally speaking, illegitimate sexual unions result in loss of status to the child. Illegitimate children are usually identified with the mother's social group if she is of inferior caste. See *id.* at 115. Discrimination against African Americans is closest to this system, especially given its long connections to the system of slavery. Generally speaking, the children of slaves were born into slavery, even if their real fathers were their white masters. See DAVIS, *supra* note 30, at 48–49; Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 225–27 (1995); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 943 (1996). Enormous legal and cultural efforts went into preserving the social identity of race both during the period of slavery and the later Jim Crow era. Examples are rules against miscegenation (often opportunistically and hypocritically enforced), rules against racial intermarriage (often rigorously enforced), and the legal rule of hypodescent, in which "one drop of black blood" made a person black. See DAVIS, *supra* note 30, at 47–58. Denial of familial relations between whites and blacks, even when they clearly existed, coupled with social segregation, tended to reproduce a system much closer to Indian-style caste.

By contrast, disabled individuals do not always pass on their disabilities to their children, and approximately half of the children born to women are not themselves women. Nor, as far as I am aware, has any legal rule of hypodescent been applied in the United States to children of women or the disabled. Women are the wives, daughters, and mothers of the men who are elevated above them, and disabled persons are usually family members of the nondisabled.

150. Farber & Sherry, *supra* note 120, at 273.

151. *Id.* The restriction lacks historical sense as well. The terms and devices of social stratification change over time. Religious affiliation is not always visible, but it has often served as a marker of social status. Jews are comparatively well off in the United States today, but even as late as the early 1950s they were subject to rampant discrimination in education and employment. See, e.g., Harold Braverman, *Medical School Quotas*, in BARRIERS: PATTERNS OF DISCRIMINATION AGAINST JEWS 74, 74–77 (N.C. Belth ed., 1958); Albert Weiss, "Jews Need Not Apply", in *id.* at 43, 43–47. According to Sunstein's criteria, Jews would never have been the beneficiaries of the anti-caste principle if being Jewish is not a visible trait.

In any case, the "visibility" of "Jewish traits" is itself a historical construction. It depends on many factors, including the cultural practices of Jews themselves—for example, whether they are largely secular or largely orthodox. As society changes, the saliency of cultural markers varies over time. When anti-Semitism was more socially acceptable, Jewish identity may have been more visible to some people, precisely because more people looked to it as a means of discrimination. See Sunstein, *supra* note 136, at 2432. Conversely, because Jews are largely integrated into American society (and because the intermarriage rate is astronomical), Jewish identity may seem less salient.

152. See Sunstein, *supra* note 136, at 2428–29.

itself about social class (an amorphous category even then) and decidedly not about race, gender, or disability.

The more basic problem with Sunstein's version of the anti-caste principle, however, is that it makes no attempt to connect its criteria to any sociological account of how stratification occurs in actual caste systems. In this sense, it is truly an "anti"-caste principle, for it has little to do with the actual sociological phenomenon of caste.

Daniel Farber and Suzanna Sherry have suggested that the Fourteenth Amendment includes a much narrower "pariah principle": The government cannot create or sanction pariah or outcast groups.¹⁵³ Treating "a group of citizens as pariahs . . . imposes two unacceptable harms. It simultaneously brands them as inferior and encourages others to ostracize them."¹⁵⁴ Farber and Sherry argue that this principle operates not only in equal protection cases, but in Bill of Attainder and Eighth Amendment cases.¹⁵⁵ However, their principle is a very limited claim about equality. It is not really an attempt to map features of social practice onto legal doctrine. It is not a general demand for equality in the face of unjust social stratification, nor is it concerned with systematic disadvantage. The "pariah principle" is limited only to the most extreme forms of exclusion like that faced by untouchables in a caste system, rather than an attack on general systems of social stratification.¹⁵⁶ The principle outlaws the tip of a much larger iceberg without asking how the tip arose or what supports it.

First, the principle focuses not on the general status of social groups or existing social hierarchies, but on whether the government has in any particular case treated a group like pariahs.¹⁵⁷ According to Farber and Sherry's theory, a group like left-handed persons could be made pariahs by a single piece of legislation even if there were no previous history of discrimination against them and they were not a discrete and insular minority invoking heightened scrutiny.¹⁵⁸

Second, mere creation of a stigma or a message of inferiority is apparently insufficient to invoke the principle. The message sent by caste legislation must be "even stronger: all right-thinking people should avoid any contact with those the legislation makes pariahs."¹⁵⁹ "[P]ariahs," Farber and Sherry explain, "are not simply the group at the bottom of the social or economic

153. See Farber & Sherry, *supra* note 120, at 265-67

154. *Id.* at 267.

155. See *id.* at 268-69.

156. See *id.* at 272.

157. See *id.* at 274.

158. See *id.*

159. *Id.* at 271. Despite this requirement, the psychological consequences of the message of inferiority are apparently irrelevant to Farber and Sherry. The pariah principle is not concerned with the self-esteem of the outcast group, but "is primarily focused on the victims' right to participate in civil society" *Id.* at 272.

ladder.”¹⁶⁰ They are “shunned and isolated, . . . treated as if [they] had a loathsome and contagious disease.”¹⁶¹ To violate the pariah principle, the government must send “[t]he message . . . that outcasts are not merely inferior [but that] they are not fully human, and contact with them is dangerous and degrading.”¹⁶² The demand of such extreme isolation tends to mesh poorly with Farber and Sherry’s first claim that a group’s general social status is irrelevant. It is difficult to imagine a society that would want to send so extreme a message about a group that had not already suffered a history of discrimination. Generally speaking, pariah status does not usually come from nowhere; it is usually the result of a gradual accumulation of negative associations and social meanings of inferiority.¹⁶³ Thus, Farber and Sherry offer an extremely limited equality principle isolated from other forms of unjust discrimination. As a result, their “pariah principle” is abstracted from the actual social processes that produce the kinds of extreme legislation to which their principle would apply.

American constitutional theorists’ romance with “caste” as an explanatory category needs serious reappraisal. Although Justice Harlan’s famous words have probably made it too late to jettison the expression “caste,” social stratification in the United States does not really match the technical definition of caste. “Caste” is really a metonym used by constitutional scholars to describe a set of different forms of unjust social hierarchy, of which true caste relations would be only a very extreme example not currently found in this country. Hence “caste” is at best an effective hyperbole; it is used to describe a number of different methods of unjust social stratification and a number of different forms of unfair status competition. But these forms of hierarchy are no less unjust simply because they do not conform to a rigorous definition of caste.

D. *Which Groups? Which Hierarchies?*

I have been urging a shift from a model that focuses on discrimination and equal treatment to a model that focuses on the existence and dismantling of unjust status hierarchy. This inquiry does not remove normative questions. It simply asks them in different ways. Instead of asking whether certain classifications should be regarded as suspect, I am asking whether certain status hierarchies exist that are so unjust that the Constitution demands their disestablishment.

160. *Id.* at 266.

161. *Id.*

162. *Id.*

163. An example of a pariah status that could develop in a very short time would be a group that had contracted a previously unknown disease like AIDS. Even in that case, pariah status would rest in part on a long history of social dread and irrational behavior toward people with disease.

Nevertheless, this inquiry into status hierarchy should not be confused with a general constitutional principle of equal protection. The Equal Protection Clause is concerned with many other things besides unjust status hierarchy. It serves many different functions—including assessing the rationality of tax legislation¹⁶⁴ or interferences with the right to travel.¹⁶⁵ Because all of these different functions are in some sense about equality, they tend to be confused with each other. We would be better served if we understood the problem of unjust status hierarchy as a distinct problem, to which other questions of constitutional equality may bear only a family resemblance.

Conversely, the constitutional principle of opposition to unjust status hierarchies is partially vindicated by the Equal Protection Clause, but it is also the concern of many other clauses as well. As I have argued above, the Constitution's hostility to status hierarchy is not located in a single clause—one can find it in the Reconstruction Amendments, the Titles of Nobility Clauses, the Bill of Attainder Clauses, the Establishment Clause, and the Republican Government Clause. Thus, the principle I am elaborating overlaps with several clauses and is not the exclusive concern of any one of them.¹⁶⁶

The problem of status hierarchy is not a purely descriptive problem. It is a question of unjust subordination. Yet if the Constitution does not oppose all status hierarchies, which ones does it oppose? What distinguishes the low status of homosexuals, for example, from social disapproval of gamblers, sluggards, gossips, opticians, and MTV watchers? Why is one an unjust status hierarchy while the others are not, or at least not so unjust that the Constitution should be concerned with them?

Gamblers, sluggards, gossips, opticians, and MTV watchers may be groups in the ordinary sense of that word, and some of them may even be interest groups in the political scientist's sense. However, they are not currently status groups in an ongoing status hierarchy; and they are not groups who suffer overlapping and reinforcing forms of subordination and social disadvantage due to their place in that social hierarchy. This is not due to any physical property of these groups but a contingent fact of social history. There is no reason why a social hierarchy could not have been organized on any number of different

164. See *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

165. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

166. Constitutional clauses often exist for a number of different reasons and embody a number of different principles. The Equal Protection Clause, for example, is concerned with many forms of inequality other than unjust hierarchies of status. It is concerned with unfair political procedures and unfair allocations of material advantage regardless of whether these are part of status hierarchies. Moreover, courts use the Equal Protection Clause to address the constitutionality of many forms of economic and social legislation, ranging from tax abatements to restrictions on ice-skating rinks. Indeed, part of the difficulty in constitutional law's recognition of the problem of status hierarchy is that the tools it offers to analyze the problem serve many different functions. The fact that the status disestablishment principle can be found in the Equal Protection Clause, for example, can lead us to imagine (incorrectly) that the problems of equality are the same across different areas of social life.

lines, using any number of different traits. It happens to be the case, however, that mankind has tended to use skin color, gender, and religious belief as its most familiar technologies of social stratification and oppression. The Equal Protection Clause—and other clauses of the Constitution—may protect sluggards, opticians, and MTV watchers against various forms of government overreaching. Even so, this is not the sort of evil I am concerned with here.

My central concern is with those status hierarchies where status identity is a central feature of one's social existence, and affects many different spheres of one's life. There may be a status hierarchy between skiers and snowboarders. Being a skier rather than a snowboarder, however, is not a central feature of one's social identity. It is not something that affects many overlapping aspects of one's everyday interactions with others, or that has ripple effects in various parts of one's life, including wealth, social connections, political power, employment prospects, the ability to have intimate relationships and form families, and so on. By contrast, being a black person as opposed to a white person, or being female as opposed to being male, is a central feature of one's identity, at least in contemporary America. It does affect a large percentage of one's personal interactions with others, and it has many mutually supporting and overlapping effects.

Homosexuals are in a somewhat different situation because their social identity depends on how far out of the closet they are and to whom. For fully out homosexuals, their identity does have significant overlapping effects, for they cannot have homosexual marriages, their relationships are not sanctioned by law, and they are subject to discrimination, harassment, and moral denunciation. Homosexuals can hide their identity by staying in the closet, but this merely means that they purchase some degree of higher status by their inability to announce what they are to the world. Thus their homosexuality affects their interactions with others by virtue of its absence, somewhat like interactions between whites and those blacks who are sufficiently light-skinned to "pass" as white while retaining an internal sense of being black.

In short, unlike snowboarders or skiers, homosexuals are a social group whose status is central to their general social identity. Moreover, unlike these other groups, homosexuals exist in a fairly overt hierarchy of status, in which they and their lifestyle are routinely condemned as immoral, abnormal, deviant, and against the laws of God and Nature. The status hierarchy that places homosexuals beneath heterosexuals is different in many important respects from the system of social meanings used to keep blacks in an inferior position, but it is no less real. Not only is homosexuality subjected to intense social disapproval, but homosexuals are still subject to de jure discrimination in many areas, including marriage and sexual relationships. Homosexuals can avoid legal and social disabilities only by remaining in the closet; the stresses and strains in their lives resulting from this masquerade are simply the flip side of the disabilities they suffer from making their sexual orientation public.

But that is hardly the end of the matter. It is not enough that homosexuals exist in a status hierarchy sustained both by law and by social custom. They must also exist in an *unjust* status hierarchy. Why is the hierarchy of heterosexuality over homosexuality unjust? Even if this hierarchy is gradually breaking down in social custom and convention, why should the Constitution use its authority to accelerate the trend?

The answer to this question does not depend on the existence or absence of so-called immutable characteristics. It depends rather on the nature of the status hierarchy; it depends on the social meaning of being homosexual. To decide whether a status hierarchy is just or unjust, we have to examine the justice of the system of social meanings that create and perpetuate that status hierarchy.

The comparatively low status of homosexuals in a society dominated by heterosexuals derives from a more general status hierarchy organized around gender. This hierarchy defines masculinity and femininity in heterosexual terms and bestows higher status on the former.¹⁶⁷ This status hierarchy is unjust because it organizes social structure, distributes dignitary and material benefits, and shapes and justifies people's life chances through systematic privileging of things associated with being male over those associated with being female. Due in part to the success of previous social movements, our society has formally repudiated gender discrimination as unjust; nevertheless, the set of social meanings that privilege masculinity over femininity continue to permeate our social existence in multiple and overlapping areas of life. Homosexuals occupy low status because they transgress this set of meanings. If this status hierarchy is unjust, then discrimination against homosexuals, which forms an important part of this system, is also unjust, and the Constitution should assist in dismantling it.

The social bias against homosexuality is part of the preservation of traditional gender roles and stereotypes, which are both heterosexual and patriarchal. Society discriminates against homosexuals because homosexuals violate heterosexual understandings about what it means to be male and female. Homosexuals transgress social meanings about gender that help constitute gender identity. This system of meanings defines masculinity and femininity in terms of complementary traits and attraction to the opposite sex. Men are defined as people who are attracted to women; women are defined as people who are the object of sexual attraction by men. More importantly, this system of social meanings about gender is itself part of an unjust status hierarchy that privileges males and things associated with maleness over females and things associated with femaleness. Males and masculinity are

167. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 146-76 (1996); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187

defined not only in terms of their opposition to females and femininity, but in terms of their superiority.

Homosexuality, and especially male homosexuality, threatens this conceptual order because it undermines the clarity of traditional heterosexual male and female gender identities, and hence undermines what are judged to be appropriate male and female social roles, authority, and power. By failing to conform to the heterosexual definition of masculinity, gay men appear both to surrender their masculine privileges and to threaten the masculine privileges of other males. First, by being attracted to other men—a sign of femininity—they cheapen or ambiguate the masculinity and manliness of heterosexuals. Second, the mere presence of homosexual men causes heterosexual men to imagine that they could be objects of sexual desire by other men, which leads them to fear that they will be “feminized” and hence emasculated.¹⁶⁸ This fear is particularly threatening precisely because the system of social meanings does not treat men and women equally: To play the role of “woman” is to be dominated and subordinate. In like fashion, lesbians threaten the conceptual order of male and female because they are attracted to women. They undermine the subordinate role of femininity because they refuse their roles as wives and mothers within a traditional heterosexual family.¹⁶⁹

Homosexuals have low status because they transgress a set of social meanings about gender that define heterosexuality. This is a causal explanation of a social phenomenon of discrimination and not a claim about the inherent nature of either gender or homosexuality. This subordination is unjust on its own terms and not derivative from the subordination of women. Andrew Koppelman has recently argued that the taboo against homosexuality is wrong because of sexism. In other words, he is arguing that “compulsory heterosexuality keeps women in relationships in which men exert power over their lives.”¹⁷⁰ By contrast, I am not claiming that discrimination against homosexuals is merely a “side effect” of discrimination against women, and therefore somehow less important. Therefore it is important to avoid several possible confusions about the argument.

First, I am not claiming that discrimination against homosexuals is unjust *because* it worsens the situation of straight women. I am claiming that gender categories are general forms of social subordination that subordinate the feminine and all things associated with the feminine. Thus, this system subordinates not only women, but homosexuals, bisexuals, and effeminate men.¹⁷¹

168. See KOPPELMAN, *supra* note 167, at 159 (describing system of social meanings in terms of taboo against homosexuality).

169. *See id.*

170. *Id.* at 170.

171. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995).

Second, the argument does not require clear-cut distinctions between homosexual and bisexual identity. Nor does it assume that sexual orientations and gender identities cannot exist along a continuum. A continuum also transgresses the dominant set of social meanings, which is essentially bivalent.¹⁷²

Finally, I am not claiming that “gender” and gender identities are simply what heterosexuality defines them to be. Homosexuals and bisexuals may have their own views about gender and gender identity which may conflict with dominant views.

What I am claiming is: (1) that there are a dominant set of social meanings about gender that benefit heterosexuals and view heterosexuality as normal; (2) that these social meanings are also patriarchal in that they privilege masculinity over femininity and view things associated with the feminine as inferior or subordinate; and (3) that they are the source of heterosexual disapproval of homosexuality and bisexuality, which are judged as deviant from the point of view of this system of social meanings.

What threatens gender hierarchy is not so much what homosexuals do as the meaning of what they do. Because meaning matters, heterosexuals can deal with the threat of homosexuality in two different ways: They can pretend that it does not exist, or, if this is not possible, they can openly castigate it and declare it abnormal, immoral, and deviant. Each strategy helps preserve the traditional system of gender relations as normal, natural, and justified. Homosexuals who stay in the closet do not threaten the system of social meanings, because they do not appear as transgressors. However, if they do make an issue of their identity, it is important to demarcate them as outliers whose behavior is abnormal and immoral.

Just as whites have a stake in the preservation of their racial identity, so too heterosexuals (and particularly heterosexual men) have a stake in the preservation of their gender identity. Homosexuals undermine social meanings about gender that perpetuate male supremacy; homosexuality also threatens notions of family organized around patriarchal privilege. Demands by homosexuals for increased status—which include challenging the idea that they are immoral and deviant—undermine the superordinate identity of heterosexuals as surely as demands by blacks or women undermine the superordinate identities of whites and males.

Thinking about homosexuality in terms of social hierarchies helps explain why not all sexual taboos are equally suspect. For example, a standard objection to the protection of homosexuals is that they cannot be distinguished

172. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994)

from other sexual deviants, in particular pedophiles. However, a status-based analysis helps show why this argument is unpersuasive.¹⁷³

Pedophiles tend to prey on both girls and boys. There is no reason to think, therefore, that discrimination against pedophiles stems from a desire to preserve unjust traditional gender roles or an unjust set of social meanings about gender. Pedophiles do not transgress gender roles. Indeed, the common stereotypes that pedophiles are disproportionately homosexual—or that homosexuals are disproportionately pedophiles—are false and offensive reflections of antihomosexual bias. They attempt to degrade homosexuals by associating them with particularly reprehensible forms of sexual deviance.

Furthermore, sexual relationships with children are inherently exploitative, or so likely to be exploitative that society has good reasons for forbidding them as a class. By contrast, there is no reason to think that sexual relationships between adult homosexual men or adult homosexual women are inherently or predominantly exploitative. In particular, there is no reason to believe that relationships between adult homosexuals are likely to be more exploitative than heterosexual adult sexual relationships, whether in or outside of marriage. Even though sexual exploitation between adults goes on all the time, it makes more sense to try to prohibit this sexual exploitation directly than for society to outlaw all adult sexual relationships for fear that some of them might be exploitative. A similar logic, however, does not apply to sexual relationships between adults and children.

The argument that sexual relationships between adults and children are exploitative is surely a moral (and political) judgment. How is this moral judgment different from the moral disapproval of homosexuality? The point of a status-based analysis is not to disregard moral objections simply because they are moral; if that were so we could make no moral judgments at all, including those about the need to dismantle unjust status hierarchies. Rather, the point is that because people use moral arguments to justify existing status hierarchies, we must try to be morally critical about claims of morality. The question is whether moral condemnations are linked to the preservation of an unjust form of status hierarchy. If they are, the Constitution cannot defer to majoritarian moral judgments simply because they are moral judgments. Conversely, absent a persuasive argument that moral disapproval of pedophilia

173. As a threshold matter, it is by no means clear that pedophiles form a distinct status group. Although being a pedophile is certainly low status, it is not clear that pedophiles currently understand themselves as a social group with distinctive claims to honor and esteem. By itself, this strikes me as an insufficient reason for distinguishing discrimination against homosexuals from discrimination against pedophiles. Political groups like the North American Man-Boy Love Association already exist. Pedophiles might have their own equivalent of Stonewall, and attain some measure of group consciousness. The real question is how we know that discrimination against pedophiles and the criminalization of pedophilia are not reflections of an unjust status hierarchy, in the same way that discrimination against homosexuals and criminalization of homosexual sodomy are.

is deeply connected to the preservation of an oppressive social structure, we should leave the legality of pedophilia to judgments of democratic politics.

The reason to be suspicious of moral condemnation of homosexuality is the existence of a pervasive social hierarchy organized around social meanings of masculinity and femininity, a hierarchy which homosexuality transgresses. To be similarly suspicious about our moral condemnation of pedophilia as exploitative, we would need more than hypothetical moral disagreement about the proprieties of sex with children. We would need *an account of social structure* that justifies our suspicions. We would have to show that the present taboo against adult-child sex in our current society is systematically connected to the oppression of an identifiable social group due to its refusal to assign children an unjustified and inappropriate role of relative sexual innocence. We would have to show that no psychological, physical, or emotional harm comes to children from early sexual relations with adults and that adult-child liaisons do not reflect unfair relationships of power, but are healthy for adults and children alike. Finally, we would have to show that the reason for the taboo lies elsewhere: that it is part and parcel of a system that attempts to preserve a monopoly on sexual activity for adults alone, wrongfully oppresses children who stray from this prohibition, and wrongfully subjugates the adults who attempt to facilitate their sexual liberation, particularly fathers who attempt to “liberate” their daughters.

Perhaps I am wrong about this, but I doubt very much whether a convincing argument of this sort could be made. It simply rings false as a claim about how social structure is currently organized in this country.¹⁷⁴ The phenomenon of pedophilia appears to be, if anything, less a transgression of oppressive sexual taboos by courageous eight-year-olds than a problem of adults (and particularly male adults) asserting sexual privileges and sexual power over children. It seems to have much more in common with patriarchal dominance than with antihierarchical revolution.

In short, the status-based analysis advocated here is not simply an open invitation to disregard moral values we dislike. It requires us to ground our critique in a convincing account of social structure; it demands that we describe how society is stratified and explain what produces this stratification.

Analyzing discrimination in terms of status groups also helps us understand our objections to discrimination more clearly in situations where courts hold that the Constitution already proscribes it. Discrimination against

174. To be sure, childhood and childhood sexuality are deeply problematized in contemporary American society. Parents may be increasingly protective and fearful about their children's sexuality. Their concern over childhood sexuality and their continual need for reassurance about the sexual innocence of children may lead to hysterical and unjustified allegations of child abuse. But these phenomena hardly demonstrate that most children are being sexually oppressed by their inability to form consensual sexual relationships with adults, or that adults who seek to have sex with children are victims of an oppressive social structure.

blacks, for example, is not unjust simply because race is an immutable characteristic. Focusing on immutability per se confuses biological with sociological considerations. It confuses the physical existence of the trait with what the trait means in a social system. Racial discrimination is wrong because of the historical creation of a status hierarchy organized around the meaning of skin color. The question to ask is not whether a trait is immutable, but whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people. Any conclusions about the importance of immutability already presuppose a view about background social structure.

Indeed, a focus on immutability makes sense only as long as we recognize its relationship to social structure. Social hierarchies often assign differential social meanings to immutable traits because they make exit from low status more difficult.¹⁷⁵ But not all immutable characteristics are or have been the basis for unjust social hierarchies, and not all unjust social hierarchies are founded on immutable characteristics.

Religion is not an immutable trait—many religions are always looking for new converts—but status-based discrimination against religious groups is surely also unjust. Defenders of the immutability criterion can point to the Religion Clauses as an independent justification for protection of religious minorities; but this puts the cart before the horse. The Religion Clauses exist in part because the Framers recognized that religious intolerance was an evil long before they recognized that racial intolerance was.

The importance of immutability as a criterion of judgment is also sometimes defended on the grounds that immutable characteristics—for example, race—are morally irrelevant. But this argument, too, really depends on a view about the justness of a particular status hierarchy. When status distinctions are internalized in a culture, status hierarchies *make* traits morally relevant. They become signs of positive and negative associations. They become permissible proxies for inferences about character, honesty, ability, and judgment. Such traits are morally irrelevant only to persons not in the grip of that particular hierarchy. In the aristocracy of pre-Revolutionary America, for example, high birth was viewed as correlating with many other positive attributes—honesty, sagacity, learning, and good manners—and society was organized to make these positive associations a self-fulfilling prophecy. Generations of whites thought blacks naturally inferior; succeeding generations who learned not to make biological arguments have nevertheless continued to regard blacks as culturally inferior—as displaying negative qualities of sloth, violence, and licentiousness. A characteristic becomes “morally irrelevant”

175. Although often so-called immutable traits need considerable support from law and culture to remain stable markers of superiority and inferiority. Legal and cultural rules defining who is black and white are good examples. See sources cited *supra* notes 30, 149; *infra* note 187.

precisely when we understand the status hierarchy it is based on to be unjust. Only then do we become embarrassed to use the trait as a signifier of, or a proxy for, positive or negative associations. Our objection to the moral relevance of the characteristic is really our objection to the system of social meanings and the hierarchy of social status that uses this trait as a criterion for judgment.¹⁷⁶ The real issue is whether society has created an unjust status hierarchy organized around a particular trait or set of traits, whether those traits are immutable, or—like religion—voluntarily chosen or instilled through socialization.

E. *Status Hierarchy and Democratic Culture*

When we interpret civil rights in terms of status groups, we replace the inquiry into discrimination based on immutable traits with an inquiry into systems of social meaning and status hierarchy. In this way we make group conflict and group hierarchy central to the study of constitutional liberty. This way of thinking about group conflict sheds light on one of the Supreme Court's oldest models for judicial protection of minorities: the famous *Carolene Products* footnote, written by Justice Harlan F. Stone.¹⁷⁷ In large part because of John Hart Ely's work,¹⁷⁸ we associate this footnote today with a process-based theory of the Constitution and judicial review. I would like to suggest now that footnote four is also concerned with the problem of unjust status hierarchies in a democracy. In hindsight, the language of the famous footnote points, however awkwardly and haltingly, toward sociological as well as procedural concerns. Reinterpreted in this way, it offers an effective rejoinder to Justice Scalia's thesis in *Romer v. Evans*. The Constitution cannot be neutral in cultural struggles because democracies will not always dismantle unjust status hierarchies on their own.

Implicit in the theory of *Carolene Products* is the insight that the merely formal features of democracy are insufficient. The Constitution demands more than democratic procedures; it also demands that we create a democratic *culture*. If American democracy is to survive, democratic processes must be nourished by democratic forms of social organization. Without the fertile soil of democratic culture, democracy will die; like an opportunistic weed, tyranny will spring up in its stead. The third paragraph of footnote four suggests that

176. Again, it is sometimes thought that the problem is that immutable traits are linked to stereotyping. Yet stereotyping is simply a pejorative expression for the types of social generalizations we use in everyday social judgement: for example, that fast food is unhealthy, or that Republican politicians are beholden to big business. Surely not all fast food is unhealthy, and some Democrats are probably more in the pocket of malefactors of great wealth than some Republicans. What makes stereotypes constitutionally objectionable is that they are part of a system of social meanings used to oppress some groups and benefit others.

177. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n 4 (1938)

178. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)

prejudice against “discrete and insular minorities” is a “special condition” that might undermine democratic processes, processes that would ordinarily be expected to protect minorities.¹⁷⁹ Implicit in this suggestion is a perceived conflict between democracy and prejudicial treatment of certain kinds of social groups. One reason for this conflict—most clearly implied by Justice Stone—is that when this “special condition” occurs, social groups are unable to form coalitions with other groups to protect their interests.¹⁸⁰ Beyond this, however, is a deeper and more important reason: Democracy and democratic culture are themselves incompatible with certain kinds of prejudices against social groups. This “special condition”—this prejudicial treatment of particular social groups—is ultimately corrosive of and threatening to democratic institutions and democratic culture.

Although not stated by Justice Stone, this second reason is essential to understanding and justifying the first. If democracy is simply the rule of the majority, then the preferences of the majority should ordinarily be sacrosanct.¹⁸¹ If majorities want to preserve a system of social hierarchy—because it reflects their vision of morality and propriety—they should be permitted to have their way. This is, in yet another form, Justice Scalia’s theory about the proper role of constitutions in times of cultural struggle or *Kulturkampf*.

But democracy is not merely a formal theory about majority rule. Democracy is more than just a matter of letting majorities have their way, or, more correctly, it is more than a matter of letting elites elected by majorities have their way. It is also a theory about the proper organization of society and the proper mode of social relations. Democracy is premised on the establishment and preservation of a certain type of culture, a democratic culture. This deeper, substantive, and cultural vision of democracy is and must be opposed to unjust social hierarchy and caste, even when supported by a majority of citizens, and even when justified by appeals to morality and tradition.

This substantive vision of democratic processes supported by a larger culture of democracy is necessary to explain why we care about the inability of minority groups to form coalitions. After all, we do not worry about the inability of many interest groups to form successful alliances. If opticians are defeated by optometrists and ophthalmologists,¹⁸² or if debt adjusters or

179. *Carolene Prods.*, 304 U.S. at 152 n.4.

180. See ELY, *supra* note 178, at 151; Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 720 (1985).

181. That is, unless they violate the Bill of Rights, which is the concern of paragraph one of the footnote. Even here a court might defer to the majority’s reading of what constitutes a violation of the Bill of Rights.

182. See *Williamson v. Lee Optical Inc.*, 348 U.S. 483 (1955).

skating rink owners fail to form winning coalitions,¹⁸³ we do not fear that democracy or democratic culture is undermined. If we are worried about the political prospects of some groups, it is because they exist in the interstices of a cultural system of subordination that we find profoundly and pervasively undemocratic. We care about them because we think that status hierarchies are hostile to democratic culture.

Justice Stone's emphasis on "minorities" is connected to his view that democracy can ordinarily be expected to remedy unjust legislation. In some societies, the hierarchy of status is organized like a pyramid; comparatively few people are at the top, and the lower one's status, the greater the population of one's status group. As long as fair procedures are required (paragraph two of footnote four), democracy can be expected to undermine status hierarchy in the long run. Lower status people will simply have more votes. Recognizing that gains in status for some will mean corresponding losses for others, low status majorities will use the power of the state to increase their status at the expense of those higher up, resulting in a gradual movement toward status equality. Because status is a relative good, low status majorities can be expected to dismantle status hierarchies in procedurally fair democracies. That at least is the assumption, although the case of women tends to show that it is seriously incomplete.

However, in many societies—including our own—social stratification is shaped more like a vase than a pyramid. As before, there are comparatively few people with very high status; but members of very low status groups may also tend to be comparatively few in number. The largest group of people in the middle will have the most votes. It will tend to be fairly well-protected, but low status groups will not be. Here ordinary democratic processes work against the eventual dismantling of status hierarchy. The middle ranks of the status "vase" may well be tempted to keep some groups on the bottom because this reinforces their own comparatively high status. For example, white middle-class and working-class Americans might hope to retain the comparatively higher status of being white. In short, even in an otherwise well-functioning democracy, majorities may have an interest in perpetuating status hierarchies over low status minorities to preserve their status capital. This result is due less to failures of coalition building than to the fact that status is a relative good.¹⁸⁴

183. See *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (skating rink owners); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (debt adjusters).

184. Nevertheless, because populations are not uniformly distributed, minorities may hold a much higher percentage of the vote in specific areas: Blacks and Hispanics in large urban areas or homosexuals in specific cities like San Francisco and Aspen, Colorado. This may allow them to form winning coalitions with other groups despite their lower status. In larger areas however, their minority status reemerges. To some extent this explains the politics of *Romer*: Boulder and Aspen had gay rights ordinances that were nullified by statewide referendum. This phenomenon is the flip side of the Madisonian notion that small communities tend to produce oppressive factions that are avoided in a national political process. See THE

This account shows us that Justice Stone's language is entirely apt: Prejudice against "discrete and insular minorities" is a "special condition" that prevents democratic procedures from moving us toward a more democratic culture. However, the condition is not "special" because it is "exceptional"—because democracies normally do not feature status hierarchies. Indeed, democratic governments almost always exist against the backdrop of some forms of unjust status hierarchy. The problem has always been how to vindicate democracy in a society whose social organization is in important respects opposed to democratic culture. The condition Stone speaks of is "special" because it is a case where democratic procedures cannot be expected eventually to lead to a more democratic form of social organization. Here the zero-sum game of status politics works democracy into a rut, using the power of majorities to preserve unjust status hierarchies that they rightly see are in their interest to retain.

"Discreteness" and "insularity" are problematic terms. Neither term is synonymous with immutability. One might think the point is to protect "unpopular" groups. Yet political unpopularity is not the same thing as low social status in a status hierarchy. Rich people, for example, are often politically unpopular, but they do not have low social status. Quite the contrary: They are unpopular because they have high social status. Most people want to be rich even though they know that the rich are envied and resented; but most nonblacks do not want to be black. That is the difference between merely unpopular groups and groups on the bottom of a social hierarchy.

The language of "discrete and insular minorities" points, however awkwardly, toward the reality of status hierarchy and status competition in democratic societies. The metaphors of "discreteness" and "insularity" describe features of particularly egregious kinds of status hierarchies. They are inadequate metaphors because they describe special cases of more general phenomena. Both terms really refer to different forms of *division* and *distinction* through which status hierarchies are maintained and reproduced.¹⁸⁵

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185. I do not claim that the Justices who joined Stone's opinion were covert social theorists. They were lawyers trying to understand the political and social problems of their times. They knew of America's racial problems, and the dangers of religious intolerance. They saw Fascism brewing in Europe. During the years immediately before and after the 1937 constitutional revolution they had decided several cases protecting religious and ethnic minorities, but it was not clear to them how judicial review that protected minorities could be reconciled with the new thesis of judicial deference. See J.M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 275, 297 (1989).

Their preliminary ideas on the problem of minority rights were unclear and unformed. They were dropped into a footnote, a mere placeholder for a discussion to be offered later. See *id.* They combined sociological insight with a rather primitive pluralist model of interest group politics. They offered a suggestion expressed in metaphors, not a well-worked-out theory. Yet what these Justices said makes as much sense in the language of status as it does in the language of procedural perfection. If the metaphors are imperfectly suited to describe the reality of status hierarchy, they are even less well-suited to describe procedural obstacles of interest group pluralism. See Ackerman, *supra* note 180, at 724–28.

Behind the *Carolene Products* footnote, I claim, is something more than an intuition about pluralist bargaining, or the special capacities of legally trained jurists to devise and enforce fair procedures. It is the

Why emphasize this interpretation? The paradigmatic case of a “discrete and insular minority” in Stone’s footnote surely must have been African Americans. Yet neither metaphor really applies to the paradigmatic case. Take discreteness: African Americans do not have one set of skin colors, or one set of facial features. Their color varies from dark to light; some can hardly be distinguished from whites, Hispanics, or Asian Americans. Nor are African Americans always “insular” in a geographical sense. There are now many racially segregated communities in the United States. But they were not always thus, particularly in the Jim Crow South.¹⁸⁶ Indeed, during the height of slavery, blacks were clearly not geographically isolated; they lived alongside whites. They were simply subordinate to them in all respects. A similar point can be made about women. Women are not geographically isolated from men but live with them as wives, daughters, and sisters.

We can make better sense of these metaphors if we reimagine them in terms of status hierarchies. Discreteness and insularity are metaphors of division that describe, albeit from a limited perspective, certain features of particularly egregious status hierarchies. “Discreteness,” for example, really concerns the cultural categories that distinguish groups. In a status hierarchy, cultural markers—including dress, language, appearance, behavior, systems of belief, styles of life, or even so-called immutable characteristics—demarcate members of status groups and organize them into hierarchies. “Discreteness” refers to what distinguishes people into groups so that stratification can proceed. Yet the metaphor is also partly misleading because this semiotic organization can exist either in binary categories or along a continuum. For example, it is possible both for whites to have higher social status than blacks, and for lighter-skinned blacks to have higher social status than darker-skinned blacks. Discrimination against darker-skinned blacks by lighter-skinned blacks should not be constitutionally unprotected simply because there is no bright line that separates them.¹⁸⁷

“Insularity” is also a metaphor of division. The lower status of subordinated status groups can make them “insular,” but not necessarily because they live by themselves. The metaphor is misleading to the extent that it suggests geographical separation. Insularity really concerns the multiple and

recognition that social hierarchies are the enemy of a well-functioning democracy because they undermine the possibility of a democratic culture necessary to support democratic processes. Both democracy and democratic culture are, in the long run, in tension with any sustained and ossified system of social superiority and inferiority.

186. For example, busing was sometimes used as a tool of segregation because blacks and whites lived sufficiently close together that neighborhood school policies would not effectively segregate the races. *See, e.g., Green v. County Sch. Bd.*, 391 U.S. 430, 432 (1968) (finding that although New Kent County was not residentially segregated, white and black students were bussed to schools on opposite sides of county).

187. *See* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale* (Mar 1996) (unpublished manuscript, on file with author). Precisely because it was not always easy to tell who was white and who was black, racial categories were defined and reinforced through legal rules of hypodescent. *See* DAVIS, *supra* note 30, at 54–55, 62–63, 78–79, 113–14.

mutually reinforcing terms of a group's subordination. As I have argued previously, the Constitution is and should be concerned with status groups whose identity pervasively affects their interactions with others. Members of "insular" low status groups suffer from any number of forms of exclusion and separation that mark off social superiors from social inferiors—ranging from housing patterns and membership in social organizations and family alliances, to business contacts and the ability to form political coalitions. What these examples all have in common is not geographical isolation, but forms of separation and exclusion—in whatever sphere of life—that connote social inferiority. Insularity in this sense refers to the various and mutually supporting forms of social division that simultaneously symbolize, enact, and reinforce social superiority and inferiority.¹⁸⁸

Today we tend to read Justice Stone's words in light of the doctrinal glosses on equal protection that came afterwards: a relatively rigid system consisting of three tiers of scrutiny, with their accompanying verbal formulae. But at the time Stone wrote, he was making a simple point. The Supreme Court had just decided to overthrow the practice of judicial review of legislation of the *Lochner* era, and substitute a new practice of judicial deference based on respect for democratic processes. Hence all legislation was to be granted a strong presumption of constitutionality. *Carolene Products* is written in precisely these terms. The problem facing Stone and his colleagues was why a court would ever strike down anything at all. Why not always defer? To justify judicial intervention, Stone had to have a theory of what special situations would not justify the presumption of constitutionality. This theory required, among other things, a theory of what democracy was. This is the predicament of the 1937 revolution: To truly respect democracy one has to have an understanding of what it is one is respecting. Otherwise, one may

188. To see the advantage of this interpretation, consider once again the case of homosexuality. Under the traditional understanding of *Carolene Products*, the fact that many homosexuals are closeted (or out to some people but not to others) creates a significant problem. Homosexuals could be understood either as discrete and insular (to the extent that they are out) or as anonymous and diffuse (to the extent that they remain partly or completely closeted). See Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 548 (1992); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1809–10 (1996).

This problem does not occur under my interpretation of insularity. Because insularity refers to the social meaning of homosexuality, homosexuals are insular whether or not they are closeted. To identify themselves as homosexual is to invite distancing, separation, and stigmatization. To fail to identify as homosexual requires them to pass as heterosexual, or, at the least, not to call attention to their homosexuality.

Homosexuals can live and work alongside heterosexuals, but often only by hiding their homosexuality. For example, in the *Hurley* case, the Irish-American organizers of the St. Patrick's Day parade were willing to allow homosexuals to march in the parade as long as they did not identify themselves as such. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338, 2347 (1995). If they insisted on identifying themselves, they would have to be excluded. Similarly, under the military's "don't-ask-don't-tell" policy, homosexuals may serve in the military as long their sexual orientation is not revealed. Once it is revealed, they must be excluded from military service. This is social separation achieved through other means. The same argument applies to all groups who have the possibility of passing as members of superordinate groups, including light-skinned blacks.

end up, in the name of democracy, deferring to political actions that corrode and destroy it. One can “respect” democracy so much that one is left with something very different in its place.

That is why Justice Stone’s theory of process representation really rests on a deeper meaning of democracy, democracy as premised on democratic culture. This theory of democracy has its roots in the social transformation that accompanied the American Revolution. The revolt against monarchy and aristocratic privilege is the heritage that informs and should inform our vision of democratic culture. It is an ideal toward which society strives, but which it never fully achieves—a world in which citizens are equal not only civilly and politically, but also socially, in which all unjust distinctions of rank and prestige have melted away. True democracy rests on democratic culture, and democratic culture remains an unfinished project.

IV. CONCLUSION

Each of the essays in this Symposium touches on different examples of group conflict and different aspects of status competition and status hierarchy. Their concerns range from gay rights to school choice to race-based voting districts.

Robin Barnes’s piece describes the problems of African-American parents who want to improve the quality of their children’s education.¹⁸⁹ Her story of the fight over Mark Twain’s *The Adventures of Huckleberry Finn* is a classic example of a status conflict, in which each side feels the other lacks proper understanding and respect.

Rick Pildes argues that the Supreme Court’s voting rights cases beginning with *Shaw v. Reno*¹⁹⁰ are best understood as remedying dignitary harm to groups—in effect, harm to group status.¹⁹¹ The Supreme Court has held constitutionally suspect majority-minority districts with bizarre shapes, but has suggested that districts with relatively regular and compact shapes pose no such problem. Pildes explains this distinction in terms of the message sent to constituents. Bizarrely shaped districts suggest that some groups have received special treatment on the basis of race, while compact districts do not send so blatant a message of racial favoritism. In Pildes’s analysis, appearances do matter, because symbolism matters. Thus the harm the Court seems to be concerned about in *Shaw* and its progeny is actually an injury to group status, in this case the racial status of white voters.

189. See Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997).

190. 509 U.S. 630 (1993).

191. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

Finally, both Bill Eskridge and Robert George attempt to find ways out of the zero-sum game of status competition.¹⁹² For George, the answer lies in a proper understanding of political theory. Liberal theory cannot offer a remedy to group conflict until it takes account of continuing and deep divisions in worldviews. Eskridge believes that courts can help bring parties together through expressing respect for both sides. By showing empathy for both positions, a court can fashion accommodations that give each side some measure of dignity and respect.

The status-based approach I have offered in this Essay argues that we cannot understand how constitutional doctrine should be organized until we understand how society is organized. It requires us to look carefully at the structure of the society in which we live, to identify social stratification where it exists, and to recognize the possible connections between the moral justifications that majorities offer and the preservation of their superior status. This approach is flexible and open-ended. Social hierarchies appear in many forms and degrees: We should not imagine that there is a single test or a single clause of the Constitution that can deal with all of them fully and adequately.

The social transformations begun by the American Revolution are by no means completed; nor has this country achieved a fully democratic culture. Like the words of the Declaration itself, the legal doctrines developed at any period of time will always be imperfect articulations of the democratic ideal. Indeed, because law is part of social structure, legal doctrines will usually be complicit in preserving status hierarchies even when they claim to be dismantling them.

We cannot avoid having constitutional doctrines simply because they may turn out to be inadequate or imperfect. But we can avoid believing that the truth about society is described within them. Thinking about social equality in terms of status gives us some distance from the project of doctrinal exegesis. It gives that task a deeper meaning; and it helps preserve the open-ended character of our inquiry. This open-endedness is necessary to the fulfillment of the ideal of democratic equality expressed in our Declaration. Perhaps if we pay attention to the constitution of status, we can bring that ideal a few steps closer to reality.

192. See William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1997).