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CONSTITUTIONAL EQUALITY AND THE ROLE OF THE GOVERNMENT*

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I'm going to talk about constitutional equality and the role of the government in achieving equality. And I think there are some general theoretical points to make about those issues—that's my ultimate goal—but I want to try to approach them and bring them out by talking about three case studies in constitutional history and doctrine—three areas where we have questions about equality and the role of government in promoting it. Those three areas are the jurisprudence of the *Lochner* era, the First Amendment and campaign finance reform, and the Equal Protection Doctrine, more specifically, but not exclusively, affirmative action. How are these three areas similar? What lessons do they have to teach us about equality, the constitution, and the government? Well, let's see.

I'll start with the *Lochner* era. This makes sense chronologically, and that's the way I'm proceeding. What happened during the *Lochner* era? Well, the Supreme Court invalidated a bunch of laws regulating economic activity—everyone agrees on that. Different people will tell you different things about precisely what got invalidated and why, and I don't want to spend too much time trying to sort the separate views out. I have a particular view of what was going on, and that's what I'll focus on. But let me take a second to give you a thumbnail sketch of the views I don't find persuasive and then a longer explanation of the one I do.

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One thing people say—and they said this at the time, and for a while it was the conventional wisdom—is that the Supreme Court was siding with business, with capital against labor. So here there's a role for considerations about equality, because this account tells us the Supreme Court is playing favorites, manipulating or making up constitutional doctrine to help certain parties that it likes. And basically, on this account, it's deregulating because that's what business wants. Scrap those minimum wage and maximum hour laws, maximize the profits that go to the owners of the businesses.

Pretty much everyone can agree that what's described there is bad. That's not how we want the Supreme Court to behave. Part of the reason it's bad is that on this account, the Supreme Court is just making stuff up—it's striking down laws not because they really violate the Constitution, but because the Court wants to help parties it likes or, slightly different, because the Court thinks the outcomes it's producing are desirable from a policy perspective—deregulation is better in some sense. Better for the nation, maybe, or more efficient. This is kind of the perspective that Holmes takes in his dissent, where he says that the Constitution does not enact Herbert Spencer's *Social Statics*. Herbert Spencer, in case you're wondering, is a libertarian philosopher who coined the phrase "survival of the fittest." So he's considered by some the father of Social Darwinism. The Supreme Court, Holmes is saying, has taken a free-market ideology that isn't in the Constitution and started pretending it is.

Which is bad, as I said, but is that what the Court was doing? Probably not, and the evidence against this theory is that while yes, they did strike down some economic regulations that now seem unproblematic—so they were doing *something* different from what we do now—they didn't actually strike down all that many. There were lots of economic regulations as the nation industrialized and moved into the Progressive Era, and lots of challenges to them, and the vast majority survived. So if this was simple hostility to regulation, or simple preference for business, the Court was pursuing those goals in a strange way. Not very consistently, not very effectively. Probably there's a better explanation for what was going on.

The second theory says that the Court was enforcing a fundamental right to contract. So you know nowadays the Supreme Court has found various fundamental rights to be part of the liberty protected by the due process clause, what's called substantive due process. But those rights tend to be rights about intimate personal decisions—things like abortion, contraception, marriage, child rearing. They don't tend to be economic rights. So what was happening in the *Lochner* era, according to this theory, was that the Supreme Court was engaged in the project of finding fundamental rights in the Due Process Clause—as it still does today—but it just happened to find

an economic one, the liberty of contract, instead of a personal one like abortion. And this theory lends itself to a comparison between liberty of contract and abortion, which can point in different directions depending on what your premise is. If you like *Roe*, you must also like *Lochner*, said Robert Bork. And since at the point he was saying this, liberals thought they weren't supposed to like *Lochner*, it seemed a pretty good argument against *Roe*. More recently, libertarians have started spinning it the other way: if you like *Roe*, you should also like *Lochner*—and since liberals nowadays think they're supposed to like *Roe*, it seems like an argument in favor of *Lochner*. In a slightly more neutral vein, David Strauss wrote an article about it from this perspective, called “Why Was *Lochner* Wrong” and ultimately concluded that liberty of contract was just as plausible a fundamental right as some of the other ones the Court was discovering. It simply enforced it a little too aggressively.

So what would we say about this from an equality perspective? Here the Court is being evenhanded, you might say: it's protecting the liberty of contract of all—employers and employees alike; everyone is free to contract for low wages and long hours. The majority opinion in *Lochner* actually does nod in this direction: it describes the New York law as an infringement on the liberty of both the employer and the employee. But you might wonder whether aggressive enforcement of liberty of contract is actually equal in its effects: does this benefit everyone equally? Or do the benefits you get from liberty of contract depend somewhat on your situation in life—whether, for instance, you own a bakeshop rather than working in one?

And this actually leads into the third perspective, which I'm going to suggest is the most persuasive one—that *Lochner* is in fact a case about equality. Equality is the central value it's concerned with. But before I set out that perspective, I want to say why it's not about a fundamental right to contract. The answer is that the results of the *Lochner* era jurisprudence simply aren't what you would get from a fundamental right to contract. Nowadays, when we say there's a fundamental right—like abortion, or contraception—we mean generally that if the government wants to restrict that right, it's going to face strict scrutiny. You can't do it for just any reason: the government's going to have to show that what it's doing is necessary to serve a compelling interest. And this isn't what happened in the *Lochner* era. The Court did not use anything that looks like modern heightened scrutiny. It did not say, as we might now, that it's enforcing a right that trumps an otherwise-valid law. *Lochner*-era liberty of contract didn't behave like a fundamental right. Instead, it turned out that the government could restrain this liberty for any valid reason—any legitimate interest was enough. And for the sake of completeness, let me mention a couple of cases here: in *Holden v. Hardy*, the

Court upheld a maximum hours law for working in mines because it was based on the state's power to protect health. Same thing for *Muller v. Oregon*, where it upholds a maximum hour law for women. And one case where it strikes down a regulation—*Allgeyer v. Louisiana*—it does this not because there's a fundamental right that trumps Louisiana's regulatory authority, but because it decides that the contract is constitutionally subject to the regulatory power of New York—because it's made in New York—and not Louisiana. That's not a modern fundamental right, because everyone concedes New York could have imposed the restriction that Louisiana was trying to. So it's not that this liberty of contract is immune from state regulation, it's that the wrong state is trying to regulate it. That's actually a sort of constitutional choice of law case.

Anyway, what is it that's going on with the *Lochner* cases? If you look at the whole set of cases, what you'll see is that the Supreme Court allows interference with the right to contract if it can be justified under any of the traditional bases of the state police power: the power to legislate to protect the public health, safety, or morals, or to promote the public interest. The problems for legislatures arose in this last category: when the legislature justified its law by saying it was promoting the public interest, and, in particular, when it changed the common law and relied on a public interest justification.

So what's going on there, and how does it relate to equality? The conception of the public interest is something that changes over time, but in the *Lochner* era it had a very strong egalitarian component—Jacksonian egalitarianism, in particular. Andrew Jackson, famously, in his veto message about the Bank of the United States complained about what we would now call special interest legislation. "It is to be regretted," he wrote, "that the rich and powerful too often bend the acts of government to their selfish purposes." Government would be great if "it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing." Note that the rains affect people differently depending on whether one can afford an umbrella, or a roof over her head. The *Lochner* Court believes that government actions that benefit everyone—that fall like the rain on rich and poor alike—promote the public interest. But laws that single out one group for special, preferential treatment do not. Those are what the *Lochner* court sometimes called "partial legislation"—partial because it favors part of society, and also partial in that it's biased. It's the opposite of "impartial." And that, the *Lochner* Court said, is not a permissible aim of government. Redistribution for its own sake—unequal treatment, taking from A and giving to B—this concept has a long history, and there's a slightly complicated story about how it becomes part of

federal constitutional law, but what's important for our purposes is that this egalitarian ideal is what's underlying the *Lochner*-era jurisprudence. The Supreme Court is going to defend equality by preventing special interests from capturing government and rewarding themselves.

Now, that actually doesn't sound so bad, does it? When I describe it that way, you might wonder why progressives were so troubled by *Lochner*. After all, no one likes it when special interests take over government and use it to enrich themselves. No one likes it when, as Jackson put it, laws "undertake ... to make the rich richer and the potent more powerful."

And indeed, they don't. But is that what was going on in the *Lochner* era? Not really, no. *Lochner*, as you probably know, is about a New York law that sets maximum hours for bakers. It was enacted not to make the rich richer or the potent more powerful, but rather, the reverse. The primary debate between the majority and the dissent is about whether the law can be justified as a measure to protect health, because the protection of health was a recognized element of the state police power, a legitimate state interest. But both the majority and the dissent advert to what they think is the real interest behind it: the majority speaks darkly of "other motives": "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives." And Harlan, dissenting, concedes the point: "It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength."

So the *Lochner* Court is right, it seems, that this is partial legislation. It's trying to benefit one group—the workers—at the expense of another—the owners. This is unequal treatment. But it's doing this in response to a perceived inequality of bargaining power. Is that okay?

Absolutely not, says the *Lochner* Court. It's still redistribution, and redistribution is unfair—no matter whom it benefits. Note this principle, because we're going to see it again. You could call it the symmetry principle, because the point is to treat all redistribution the same. It can't be a matter of whose ox is gored, the Court is suggesting—if it's wrong to redistribute one way, it's wrong to redistribute the other way. It's the government playing favorites. It's something people would never give the government the power to do. This sort of social contract political philosophy, which you can trace back to Justice Chase's opinion in *Calder v. Bull*, is a main source for *Lochner*-era thinking. And since people wouldn't give the government the power to do it, when the government pretends to have that power, its purported laws are not

real laws. (They are, said Justice Chase, mere “acts” of the legislature, not worthy of being called laws.) And hence when they government uses those acts to deprive you of liberty or property—to imprison or fine Joseph Lochner—it is doing so without due process of law.

So that’s *Lochner*-era substantive due process. The government should treat people equally—and this principle applies even when the government is responding to inequality, when the government is trying to promote equality. In fact, the *Lochner* Court thinks, the legislature has no business trying to remedy inequality. It may not, the Court said in *Coppage*, “declare in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result” of the exercise of rights to contract and property. The “supposed desirability of leveling inequalities of fortune” is simply not a legitimate purpose of government, any more than increasing those inequalities would be.

Now, what do you think about that? From one perspective, it maybe sounds sort of nice—it’s a requirement of equal treatment. It’s in line with Jacksonian egalitarianism, and maybe egalitarianism sounds good. But the thing is, that’s a bit of a misnomer, because egalitarianism is actually concerned with equality, and this is concerned more with impartiality, neutrality. The government must be neutral in class struggles, would be a way of putting it. It must not try to lift up the downtrodden, it must not try to strengthen the weak. So normatively, it’s somewhat less clear that this is desirable. And if you wanted to say what was objectionable about it from an equality perspective, you would probably focus on this symmetry principle.

As presumably you know, the *Lochner* era jurisprudence was overthrown. Now the government can enact minimum wage and maximum hour laws; now it can try to redress imbalances in bargaining power. But it’s not because the Supreme Court decided to abandon the symmetry principle. What it abandoned, what it gave up on, was the whole idea of neutrality or impartiality.

It did this for basically two reasons. First, it turned out that redistribution might actually be in the public interest. It might be in the public interest for basically two reasons—so these are subparts A and B of the first reason *Lochner* fell. So, A, the alternative to redistribution might be total disaster. The government leaves the economic system alone and it collapses. This might not have seemed like a serious fear in 1905 when *Lochner* was decided—although of course there had been regular panics and crashes—but in the 1930s, when the Supreme Court came up against the New Deal and backed down, it did. People might very well give the government the power to redistribute if that’s the only way to save, as Justice Hughes put it in *Blaisdell*, “the economic structure upon which the good of all depends.” “The question is no longer merely that of one party to a contract as against another.”

And B, it might be the case that the legislature could be expected to favor one group today and another group tomorrow, and different groups might form coalitions that shift over time, so that if you just let interest group politics work, in the end everyone is better off. That's a view that was emerging in political science around this time, and it's also a view that we find in famous Supreme Court decisions, maybe most notably *Carolene Products*, where the Court also identifies groups who won't fare well in the give-and-take of interest group politics: discrete and insular minorities subject to prejudice. The concern here is that these groups will have difficulty forming coalitions.

So these are two reasons why redistribution might actually be in the public interest and you can't say that the people would never have given government that power. These are reasons to reject the symmetry principle, reasons why not all redistribution is the same. But like I said, that's not what the Court did—it didn't really start distinguishing between good and bad redistribution. *Carolene Products* is actually an attempt to do that—to say, generally, we will accept a legislature's assertion that redistribution serves the public interest, but when it harms a vulnerable minority, we're going to look more closely at it. But that's not really what *Carolene Products* turned into—not a way of understanding Due Process, which is of course is the constitutional provision at issue in *Carolene Products*. Instead, the Court basically gave up on the concept of redistribution as constitutionally significant. And here's why: here's the reason why the concept of redistribution isn't as easy to apply as the *Lochner* Court thought. There's a rejoinder that you might make to the *Lochner* Court: yes, you might say, a legal regime with a maximum hour law favors the employees, in comparison to a legal regime without one. But by the same token, the absence of the maximum hour law favors the employers, in comparison to a legal regime that does have one. So why is it that the absence is neutral and the presence is impermissible favoritism?

In 1905, the *Lochner* Court would have had an answer to this. Adding the maximum hour law in is government intervention. Leaving it out is not. Leaving it out is noninterference. The government isn't acting at all.

That should sound implausible to modern ears. If you don't have a maximum hour statute, what you have is the common law of contract, and the common law of contract is state law and government action just as much as a statute. "The common law, so far as it is enforced in a State ... is not the common law generally but the law of that State existing by the authority of that State." So we all know nowadays, but the passage I quoted is from *Erie Railroad v. Tompkins*, and *Erie* was decided in 1935. So *Erie*, by recognizing that common law is state law, is in fact one of the things that pulls the rug out from under *Lochner*. To identify impermissible redistribution, you have to

have a neutral baseline. If the common law isn't state law—if it's a brooding omnipresence, or the product of reason—then it can be your baseline. And that's why what the *Lochner* Court invalidated were statutes that departed from the common law. But once we realize that common law is state law, there's no neutral baseline. Having the maximum hour law subsidizes employees at the expense of employers. Not having it subsidizes employers at the expense of employees. (And this, of course, is what the Court said in *West Coast Hotel v. Parrish*.) Neutrality has turned out to be impossible, because the state is responsible for the whole thing—you can't have contracts without laws, and different laws will favor different parties.

So the whole *Lochner* edifice comes crashing down and now the government can act to redress inequality—at least with respect to contracts and bargaining power. What about other areas?

Well, now I'm going to turn to the First Amendment. Because something similar goes on here. So the First Amendment, we all know, protects the freedom of speech. What exactly that means, and why the First Amendment protects it, have been areas of more dispute, but over the years the Supreme Court has more or less settled on a pretty reasonable understanding of free speech. According to the Court, the point of the First Amendment is to protect the free flow of information that's essential to democratic self-governance. People must be free to debate political issues, in order to make good policy decisions, and they must be free to discuss the performance of their government in order to decide when a change is necessary.

This understanding of the First Amendment as centrally connected to the political process might suggest a relatively narrow scope for protection—namely, political speech—but the Court has been reluctant to limit the amendment's protections based either on the fact that some activity is not speech per se or on the fact that the content of the expression is not political. Instead, the amendment's protection is quite broad, extending to almost all sorts of activity connected to expression, and to almost all sorts of expression. (Some kinds of expression, such as commercial speech, get slightly lesser protection, and some narrowly defined categories of speech, such as obscenity, are unprotected. But generally, protection is broad and it extends to some things—like giving money to politicians, for instance—that don't on their face look like speech.) The general idea here is not so much that all speech is of equivalent value—the gradations of protection and exclusions of certain speech show that this is not true—but rather that the government should not be allowed to decide which speech is better and which speech is worse.

So we have here another kind of equality-protecting constitutional provision. The government must generally treat all speech equally: it can't single out preferred or disfavored viewpoints, or content, or speakers. That

restriction makes sense, at least at first cut, if we think about the First Amendment from the perspective of protecting speech as an adjunct to democratic self-governance. Allowing the government to favor or disfavor certain speech raises the obvious risk that officeholders would try to preserve their positions by suppressing speech that criticized them. Ideas are supposed to rise or fall on their own merit in the intellectual marketplace, not to be advanced by government subsidies or suppressed by penalties.

But just like the command enforced by the *Lochner* Court, this turns out to be a demand more for impartiality than for equality. The government must be neutral between speakers and ideas, but this requirement may serve just as well to lock in inequality as to promote equality. Just as the *Lochner* Court did, the modern Supreme Court has confronted attempts by government to promote equality—to limit the distorting effects of wealth, in particular—in the marketplace of ideas. And just like the *Lochner* Court, the modern court has treated such interventions skeptically. There are many cases about campaign finance reform, but the central principle the Court seems to be enforcing was stated most clearly in the *Buckley per curiam* opinion: “[T]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others” is entirely foreign to the First Amendment.

So in the context of the First Amendment, we have something very similar to the state of affairs under *Lochner*. A requirement of impartiality, which looks superficially egalitarian, is preventing the government from promoting real equality. Is the First Amendment regime vulnerable to the same attacks that brought down *Lochner*?

The answer is probably yes, although it is not an answer to which the Supreme Court appears very receptive. So the two things that doomed *Lochner*, remember, are the discrediting of the idea that redistribution was never in the public interest and the realization that the common law is not a neutral baseline.

How do these work with the First Amendment? The analogous arguments are pretty strong—though, as I said, the Supreme Court hasn’t accepted them. As to the first, the argument would be that the First Amendment is designed to facilitate the free flow of information necessary to allow the American people to govern themselves (by discussing political issues) and monitor the performance of their agents—the government (by discussing what the government is doing). With that as the goal—with that idea of democratic deliberation serving sort of the same role as the public interest served for the *Lochner* jurisprudence—the Supreme Court came up with the idea that of course you shouldn’t let the government limit political speech, and of course you shouldn’t let it distinguish between speakers. Because if you let the government do those things, it can interfere with the marketplace of ideas.

Which is true, of course, just like it's true that some kinds of redistribution are things we would probably never give the government the power to do. (If you think about people negotiating from behind a veil of ignorance, they would probably agree that they didn't want to give the government the power to take from those who have little and give to those who have much.) But it turns out that there are other kinds of redistribution, and some of those might in fact be desirable. Just so, it turns out that there are other kinds of speech restrictions, and some of those might in fact advance the goals of democratic deliberation. Some kinds of speech regulations might improve the marketplace of ideas. They might, for instance, stop rich people from drowning out the voices of other speakers, or from buying influence with politicians through campaign contributions, which isn't about speech precisely, but is about the way in which money/speech affects governance.

But the Supreme Court hasn't accepted this. As the quote from *Buckley* shows, it has been very hostile to the idea of speech-friendly regulation. Will it change its mind? Well, it depends on appointments, and things have gone south in that department if you're hoping for a change.

On to the second argument against *Lochner*: that the common law isn't a neutral baseline but rather the product of government action. What's the First Amendment analogy?

It's that the existing distribution of speech resources isn't a pre-legal, neutral given, but rather—like the common law regime—the product of government action. Some people have more money than others, so they can make larger contributions to politicians. Some people have newspapers and television stations where they can reach a lot of people; others don't. And, the argument goes, the government actually bears responsibility for that.

Now, this is true in a certain sense. Like the market for goods and services, the marketplace of ideas isn't free in the sense that it's entirely unregulated. It's a creation of government regulation, just like the economic market is created by government laws of property and contract. The absence of government regulation, it bears repeating, isn't the free market. It's anarchy; it's the war of all against all. So certain government laws give us what we call the free market. And actually those same laws structure the context in which speech takes place. It's because of our laws of property and contract that I can't commandeer the *New York Times* editorial page or the Fox News TV studio. If I try to use someone else's property to speak, the government will stop me. The marketplace of ideas isn't free in the sense of being totally unregulated—it can't be. It needs regulation to exist.

So the argument is true in some sense. And it's also true that the government bears some responsibility for the existing distribution of speech rights. Rich people can speak loudly—they can buy lots of advertising. And

the government created the laws under which fortunes were amassed, and then it decided to allow them to be transmitted to descendants and so on. Still, I think most people find this argument a little stretched. I do. If you follow this line of reasoning, the government is responsible for everything, because everything takes place in a world where there are laws, and those laws shape outcomes, directly or indirectly. So it maybe reaches a little too far.

But there's one context in which it strikes me as pretty plausible, and that's corporations. Because corporations are clearly created by the government. They're artificial people who exist by virtue of state law. And they're given various rights and powers under that law that make them good at accumulating money. Indefinite life, for one thing—my corporations professor used to like to ask, “If the government can make corporations live forever, why can't they do it for the rest of us?” Well, corporate law jokes aren't that funny. But, indefinite life, limited liability for shareholders, the power to sue and be sued, to enter contracts, and so on—here the government has come in and created these entities. And then guess what happens: they start speaking. And they speak powerfully. And some people are worried about that and say, “Hey, maybe the government should try to restrain the influence of corporations on politics.” And here I would say it's a very plausible argument that the government bears responsibility for the influence that corporations do have over politics—the government bears responsibility for the fact that corporations are so good at accumulating money and that their corporate law then allows them to speak in the way it does. Corporate law could say something different, probably—it could say, for instance, “You must identify yourself as a media corporation or a non-media corporation. Media corporations—newspapers, TV channels, book publishers, etc.— get to speak. Non-media corporations, which are just in the business of accumulating wealth, don't have the same powers under our corporate law.” That would create a different speech environment, more favorable to some people and less favorable to others.

So in the First Amendment context, we see much the same thing that we saw with *Lochner*. The government wants to act in the name of equality. It wants to give people a more equal opportunity to be heard in the marketplace of ideas, just as it wanted to give them more equal bargaining power in the market for labor. And a constitutional rule that seems on its face to be about equality is blocking that attempt. Because in fact the rule isn't about equality, but about neutrality. Because the rule has a symmetry component that tells us all government interventions are bad.

But this situation is even a little worse than *Lochner*, I would say, because it's not clear to me with *Lochner* that there is any underlying constitutional provision that favors equality. The New York legislature did

favor equality—economic equality, or equality of bargaining power, or something like that—but it didn't have to. It could have chosen different policies. With the First Amendment, though, I think we do have a vision of a good speech environment, a good environment for democratic deliberation—that's an environment in which people are generally presented with truthful, non-misleading information and are exposed to a wide variety of viewpoints and ideas fight it out on more or less equal terms, and they win because they actually appeal to more people after some sort of reasoned deliberation. And we have a vision of a bad speech environment, where people are exposed to mostly misleading information or fake news, and lies are repeated so often they start to seem true, and people end up making decisions based on false beliefs and never get exposed to information that might reveal the truth.

And if we can imagine good speech environments and bad speech environments, it follows that we can imagine good government interventions—which take us closer to the good environment—and bad government interventions—which take us farther away. Now, we have a hearty and well-founded skepticism about the government's motives here, because we know that incumbents might try to entrench themselves or stifle criticism. But if you think that we can detect that sort of bad government intervention—and I think we can—then it does suggest we should be more open to the possibility of distinguishing between good and bad. Which is to say, we should reject the symmetry principle in the First Amendment context, even more than we should reject it in the *Lochner* context. The fact that it's bad for the government to limit speech to exclude a view does not mean it's bad for the government to limit speech to include the view. (If you think about how we run meetings, including government meetings and legislatures, this should be obvious. When one person speaks indefinitely, it's the filibuster and it brings things to a halt.)

We could even say a little bit more about good and bad speech, and I'm going to do that now because the issue is going to recur in our next context. The most fundamental idea under the First Amendment—the deepest principle—is, in my view, the principle that the government doesn't get to decide what's a good idea and what's a bad one, what speech is worth hearing and what speech should be silenced. The deepest principle is a sort of skepticism or distrust of the government exercising paternalism and telling us it knows what we should read or hear or see. So we don't let the government intervene in the marketplace of ideas because we think all interventions are bad. (That's the symmetry principle.) And I said I'm not sure that's always true—I'm not sure all government interventions should be viewed as equivalent because some might take us closer to a good environment for deliberative democracy and others might take us farther away. And if we can distinguish

between the good interventions and the bad interventions, then maybe we should abandon symmetry and say not, “The government can’t intervene,” but rather, “The government can’t make things worse.” (And I set aside for the moment the baseline argument, which is that the government can’t *not* intervene and all we can choose is what form the intervention takes).

But there’s even a slightly stronger way of making this point, which is that the Constitution—maybe not the First Amendment, but the Constitution—does actually have a vision of good and bad speech. And we can see this in the following way. Generally, the government isn’t allowed to silence private speakers, but it is allowed to speak. The government can have its views, and it can try to promote them. It can urge people to love America, to be kind to their neighbors. It can urge them not to have abortions—so it can indicate a preference that they not exercise certain constitutional rights. But there are some things it can’t say, because the Constitution prohibits it.

One thing it can’t do is endorse religion. It can’t say that some god is the one true god, or some faith is better than others. Now, interestingly, the reason for that isn’t that the Constitution sets itself against those claims. The Constitution is fine with them; the Constitution protects them ... if they’re made by private speakers. With religion, the point isn’t that this is a bad idea, which the government shouldn’t say, the point is that it’s a bad idea *if* it’s the government saying it. The religion clauses tell us that people are protected in their religious beliefs and to some extent in their free exercise, but the government is forbidden from taking a position. Neutrality is required. And that makes sense—I’m talking about three areas of constitutional law where I think the command of neutrality is misguided, but this is not one of them.

Now think instead about racist speech. The government is also not allowed to engage in racist speech. It can’t proclaim a racial hierarchy or assert that members of one race are superior or inferior to others. Why not? Well, here I think the point actually is that those are bad ideas. Not merely bad if it’s the government holding them, but substantively bad. And you can see that in two ways. One is that we have a constitutional provision, the Equal Protection Clause, which is designed to fight against racial caste systems. Another is that here—unlike in the religion context, where it has to be neutral—the government is allowed to take sides. The government cannot engage in racist speech, but it can engage in pro-equality speech. And so if you wanted to argue against symmetry in the First Amendment context, you could also do it this way: The Constitution itself identifies some speech, some ideas, as bad. Not necessarily so bad that they’re outside the protection of the First Amendment, but bad enough that the government cannot endorse them but can oppose them.

So the point here is that in the First Amendment context, we perhaps have more faith in the symmetry principle than we should, both because the government can sometimes intervene in ways that improve the speech environment, and because it doesn't quite seem to be the case that the constitution doesn't distinguish between good and bad speech. Symmetry, I'm going to tell you, is the real villain here. And we see that most clearly when we shift to the third setting, which is equal protection and race equality.

So here again—and here most vividly—we have the same general pattern. The government perceives inequality. It acts to remedy that inequality. And courts tell it that it can't, because it's violating a requirement that on its face seems to be about equality.

And I said you see the pattern here most vividly, because while you can tell a pretty good story about why due process or the First Amendment might be concerned with equality, the Equal Protection Clause, of course, actually uses the word. This is our guarantee of equality.

Or is it? If we look at equal protection cases—and in particular if we look at recent ones—is the net effect to increase equality or not?

Well, one thing to say at the outset is that it depends a bit on the kind of discrimination we're talking about. So you'll get different answers if you think about race, or sex, or sexual orientation. (Those are the three major equality movements of our constitutional history.) And I'm going to focus on race—I'm going to say some things about sex and sexual orientation, mostly by way of comparison. So what does our equal protection jurisprudence look like if you focus on race? Has the Equal Protection Clause, or the version incorporated into the Fifth Amendment, promoted equality?

The answer is, it's a mixed bag, and it changes over time. There was a period when the Equal Protection Clause was doing something to promote equality—it was invalidating racial classifications that oppressed blacks. That would be a case like *Strauder v. West Virginia*, from 1880, where the Court said that states couldn't exclude blacks from jury pools. But it didn't invalidate all oppressive racial classifications: in *Plessy v. Ferguson*, decided sixteen years later, the Supreme Court upheld a Louisiana law segregating railroad cars, on the grounds that it was not stigmatizing or oppressive, but rather a good-faith attempt to promote the public interest. Then the Clause goes dormant for a while, until it comes back with the Warren Court and the civil rights movement. And now we've got the best historical moment in terms of its record in promoting equality: decisions like *Brown v. Board of Education*, *Loving v. Virginia*, and so on. But of course the Warren Court doesn't last forever, and within a relatively short period of time—twenty-four years from *Brown* to *Bakke*—the Court is using the Equal Protection Clause to invalidate race-based affirmative action programs. This tendency increases

over the years, so that for the past few decades, attacks on affirmative action have dominated the race-based equal protection portion of the Supreme Court's docket.

If we're interested in substantive racial equality—and whether we are is a separate question, which I'll address later—but if we're interested in whether cases involving the Equal Protection Clause have tended to increase or decrease the racial stratification of our society—that's a mixed record. And we have to compare it to what would have happened in the absence of the Court's intervention, where the story is (probably) that without judicial intervention, segregation and similar explicit discrimination would likely have been eliminated, if somewhat later, and affirmative action would have survived. If we look at actions of the federal government, rather than the states, the picture is even starker. The equal protection component of the Fifth Amendment, which for over twenty years since *Adarand* and indefinitely into the future prohibits the federal government from using race-based affirmative action, has struck down precisely one federal classification that burdened blacks: the segregation of D.C. public schools. *Bolling* alone, as Richard Primus put it, shows us Fifth Amendment equal protection as a force for racial equality.

Why is this happening? The answer, again, is a symmetry principle. The Supreme Court has called it consistency, the principle that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” Scholars tend to call it anticlassification, in contrast to antidisubordination, which is the nomenclature I will generally follow. But whatever we call it, it is the equivalent of the symmetry principles in *Lochner* and the First Amendment, which tell us that all government intervention is equally bad. The Court's current approach embodies the view that identical treatment of members of different races is neutral, that departures from identical treatment, at least by means of racial classifications, are not neutral, and that all classifications are equivalently objectionable.

In that sense—being currently governed by a symmetry principle—race-based equal protection jurisprudence is similar to the jurisprudence of *Lochner* and the First Amendment discussed earlier. The consequences are also the same: government attempts to promote equality are being invalidated by a constitutional provision that on its face—indeed, explicitly in its words—seems intended to promote equality. There is, however, an interesting difference in these three areas in that equal protection jurisprudence wasn't always like that. Antidisubordination—the view that equal protection was concerned not with classification but with oppression—was a viable and at times dominant alternative to anticlassification. *Plessy*, notably, used an antidisubordination approach, and Warren Court cases including *Brown* and *Loving* repeatedly

found constitutional defects not in the mere existence of a racial classification but in stigma, oppression, or attempts to promote white supremacy. Anti-classification emerged with the Burger Court—perhaps most notably in *Bakke*—and didn't really prevail until *Crosby*, in 1989, and *Adarand*, in 1995. And—another very interesting point—it has not prevailed to an equivalent degree in the contexts of discrimination based on sex or sexual orientation.

There are thus three topics worth exploring with respect to race-based equal protection. First, how do the anti-*Lochner* arguments fare here—the arguments that there is no neutral baseline, and that not all government interventions are the same? Second, what is the consequence of the anticlassification approach in terms of constitutional values—are there reasons to question the Court's embrace of symmetry? And third, do the differences among the Court's approaches to race, sex, and sexual orientation discrimination shed any light on the problem?

Turning to the first question and the first anti-*Lochner* argument, there are actually three different ways to object to the idea that the absence of racial classifications is government neutrality. First, there is an obvious argument to be made that the government bears some responsibility for the current degree of racial stratification. According to Demos, white households in 2013 had thirteen times as much wealth as black households. It is hard to deny that this has something to do with the fact that for hundreds of years whites enslaved blacks, generating wealth from their labor and their bodies; that the Supreme Court pronounced slaves and their descendants categorically and perpetually excluded from U.S. citizenship; that for decades after the abolition of slavery blacks were systematically excluded from opportunity. Like race, poverty is heritable. (Under our constitution, wrote Scalia, there can be no such thing as a creditor race and a debtor race. Well, okay. Under our constitution for about a hundred years there was an owner race and a property race; there was a slave race and a master race.)

The second, and perhaps more important point is that if we take away racial preferences, we aren't left with a neutral situation where the government isn't playing favorites. The idea that the government shouldn't play favorites, remember, died with *Lochner*. We now accept special interest legislation, and it's pervasive. Look, for instance, at university admissions, which has been the context for most of our recent affirmative action cases. Do certain applicants get a leg up in the admissions process for reasons unrelated to merit? Of course. Schools favor people from geographical regions from which there are few applicants—they look for geographical diversity. They favor the children of alumni. They also, with varying degrees of candor, favor the children of the wealthy—so-called development admits. None of these criteria has anything to do with the applicant's merit. And all of them, on a statistical basis, favor

whites over blacks. Broaden the field a bit to the general legislative process and what we see is that taking away laws that benefit racial minorities likewise doesn't give us the completely even playing field, the completely neutral government that Jackson and the *Lochner* Court aspired to. It gives us a situation in which basically every interest group *except* racial minorities can get preferences. That's a little strange, and it's also a complete inversion of *Carolene Products*, where the point was that racial minorities needed special protection in the context of interest group politics—not that they should be uniquely excluded from its benefits.

The third point about baselines is a little more abstract, and a convincing development probably requires more time than we have here, but I think it's interesting enough that I'm going to mention it. This point is that there isn't a reason to think that identical treatment—treating the members of all races identically—is equal in the sense that we care about. It might seem intuitively obvious—of course treating people the same is treating them equally—but it's certainly not true in all contexts. Two thought experiments can demonstrate this. First, suppose we're considering men and women as the relevant populations. Is it fair to treat them identically? Sometimes yes and sometimes no—men and women differ, on a population basis in qualities such as height, and more starkly in terms of reproductive biology. Identical treatment might be fair, or it might tend to favor men over women (using height as a criterion), or it might categorically favor one sex over the other.

Categorical preferences are less likely to occur with race, because race does not present the same stark biological differences. But there may well be—there frequently are—disparate impacts from facially neutral rules. Our constitutional jurisprudence treats disparate impact as benign and unproblematic unless it is intentional—but that is just a way of saying that identical treatment is generally considered fair. When you have groups that differ on a population basis in terms of characteristics for which they bear no responsibility, it shouldn't be obvious that this is true. Consider the characteristic of wealth, for instance: a rule that taxes everyone \$1000 will bear on the rich and poor quite differently—as will one that taxes everyone ten percent of their income, or ten percent of their income over \$100,000, and so on. These latter rules will actually take different dollar amounts from different people, which shows that the same rule can be described as both identical and non-identical treatment. So the concept of equality probably requires a little more investigation. Some rules—progressive taxation—will push against existing inequalities, while others will reinforce them. Blacks and whites differ, on a population basis, in lots of characteristics: wealth, geographic distribution, even the likelihood of suffering from lead poisoning. So equality is a little more complicated than the Court seems to suppose.

The symmetry principle, on the other hand, is not complicated. It's just loony. The symmetry principle, which the Supreme Court has embraced with tremendous fervor in the context of race-based equal protection, tells us that all government interventions—all racial classifications, all intentional disparate impacts, all attempts to achieve particular racial outcomes, all, to put it most generally, consideration of race—is equally bad. Laws that use race to integrate are just as bad as those that use race to segregate.

There's a lot to be said about the many ways in which this makes no sense, but the basic point is very simple. As we see in the context of government speech, where pro-equality speech is permitted but racial supremacy speech prohibited, the Equal Protection Clause takes sides on the question of race: it takes the pro-equality side. It is easy to explain why segregation is bad in terms that link it to the purpose and historical context of the Fourteenth Amendment. Segregation, as Charles Black said, descends in apostolic succession from slavery and the Black Codes. It is a device for perpetuating a racial caste system.

Affirmative action, of course, is not. It is instead a device for breaking down a racial caste system. And if, as seems most plausible, the point of the Fourteenth Amendment was to prohibit state support for such systems, it seems very odd that the same amendment would likewise prohibit state attempts to break them down. One might, as in the First Amendment context, seek justification in skepticism about the government's good faith. (We recognize that there can be good and bad speech interventions, the First Amendment argument goes, but we don't trust the government to do the good rather than the bad, so we prohibit all interventions.) But this isn't very plausible in the First Amendment context, and it's even less plausible with race. Affirmative action is not a disguised attempt to subordinate minorities. It just isn't, and that's obvious.

Given the implausibility of the argument that good interventions cannot be distinguished from bad, proponents of the anticlassification approach have strongly embraced the idea that all interventions are bad. But explaining why this is so has led them to some very strange positions. Race-based affirmative action, Supreme Court justices have told us, is bad because it inspires resentment and increases racial tensions, because it may mismatch students with schools and end up hurting its intended beneficiaries. These may or may not be plausible policy concerns, but to suppose that they are plausible as values with which the equal protection clause is concerned is crazy. The resentment the Court speaks of is white resentment, resentment that blacks are getting what rightfully belongs to whites. The mismatch injury to black recipients of affirmative action is that they go to schools that are too good for them. It is simply ridiculous to suggest that the point of the Equal Protection Clause is to

prevent blacks from hurting themselves by reaching too high, or to prevent whites from getting upset that blacks are getting things they don't deserve. Those concerns cannot be attributed either to the Reconstruction Congress or to anyone who care about substantive racial equality.

So the symmetry principle is probably the weakest in the context of race-based equal protection. And in fact, I've said, it's a relative newcomer. It starts emerging in earnest with the Burger Court, around the time of *Bakke*, and it hasn't achieved similar dominance in the context of either sex equality or sexual orientation. And now I want to spend a little while thinking about why that might be so.

What is the effect of the symmetry principle? Basically it works to lock in the status quo—to prevent the government from changing the racial distribution of welfare. What effect that has on equality depends of course on what the government would be doing if it had a freer hand. And from that perspective, it's particularly alarming that anticlassification rises at about the same time as—or perhaps more precisely in response to—the rise of affirmative action. Generally speaking, successful equality movements pass through three stages. First, a certain form of discrimination is seen as natural and justified. Some people oppose it, but they're a minority and their views are considered extreme. Second, as the social movement starts to gain ground, the discrimination becomes contested—no longer natural but ideologically freighted. And last, if the movement succeeds, the discrimination is seen as illegitimate. The ordinary political process no longer permits it, and attempts to remedy its effects may be adopted.

The movement for race equality is in the third stage, and it was during this third stage that anticlassification took hold. What that means is that anticlassification, historically, has done very little to protect racial minorities from hostile discrimination—that is why, for instance, segregation survived in *Plessy*—but a good deal to prevent them from receiving the benefits of friendly discrimination. It comes to the fore at the moment when it does the least to advance and the most to thwart substantive racial equality.

Interestingly, the Court's treatment of sex and sexual orientation is different. With sex, the Court is much less forceful in its embrace of anticlassification; with sexual orientation, in recent cases, it has framed arguments in terms of liberty rather than equality. This is particularly surprising with respect to sexual orientation, where an anticlassification approach would work to bring substantive equality quite quickly. Treating blacks and whites identically doesn't take us immediately to substantive equality because the effects of racial discrimination are heritable: racial minorities who suffered from discrimination have less to pass on to their children. The effects of sex discrimination are not heritable in the same way (because people have equal

numbers of male and female ancestors), but identical treatment of men and women will still not lead to immediate substantive equality because there are real biological differences and entrenched gender norms. (Perhaps the best example is the clash between work and parenthood: neutral rules denying parental leave will clearly hit women harder, because of pregnancy and child-birth, and neutral rules allowing parental leave still tend to hit women harder because when leave is voluntary, mothers take it and fall behind the fathers who don't.) But treating gays and straights identically does give us substantive equality, because the effects of sexual orientation discrimination are much less heritable and there are no biological differences or gender norms that will undermine equality as they do in the sex context. The Court, in short, is not only using anticlassification *when* it is most harmful to substantive equality, it is doing so *where* it is most harmful, too.

So one effect of the turn to anticlassification is that it slows the progress toward substantive equality. It puts the brakes on the success that the social movement can achieve through the political process: having gained the strength to fight off unfriendly legislation and secure benevolent laws, it is now told that the Court will give it protection it no longer needs in exchange for taking away its newfound ability to win benefits.

And there's a way of putting this that is maybe slightly more provocative but perhaps helpful to analysis. Anticlassification tells us that all consideration of race is equally bad, that the bad thing, really, is thinking about race at all. If you take it seriously, and some Supreme Court justices do, it tells you that all racial goals are equally impermissible. The government cannot seek segregation, and it cannot seek integration either. It must simply be blind to race.

This idea is often associated with the dissent of Justice Harlan in *Plessy v. Ferguson*, where he wrote that the Constitution is colorblind. I tend to doubt that Harlan was really endorsing the modern understanding of anticlassification, since he also wrote that there is no caste here; that the Constitution neither knows nor tolerates classes among citizens. But he also wrote something else, which is very relevant to anticlassification. The white race, he wrote "deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." White supremacy, Harlan was saying, does not require racial classifications that subordinate blacks. And of course, if you start from a position of white supremacy, with a newly emancipated black population, it doesn't. All it requires is locking in the status quo, preventing people from undoing the existing racial hierarchy. Racial classifications are not necessary to white supremacy; in fact, in the form of affirmative action, they're the greatest threat to it. What will reliably protect white supremacy is anticlassification.

So in practical terms, anticlassification locks in existing inequalities. It is what you would expect foes of equality to turn to once an equality movement has gained sufficient power to start winning at ordinary politics. And from that perspective, it seems hostile to equality, even more than the symmetry principle usually is: it can be, perhaps it has been, strategically invoked against social movements as they gain steam. But there's also an effect on the discourse of equality that's worth mentioning.

What's good, according to anticlassification, is being blind to race. What's bad is being aware of it, thinking about it. So anticlassification lends itself very easily to the argument—it almost implies it—that people who care about racial equality are the real racists. What we need to do, anticlassification tells us, is simply ignore race. And anyone who doesn't is doing something wrong, something contrary to the values of the Equal Protection Clause. This argument can be made subtly, as Justice Roberts did in *Parents Involved*: the way to stop racial discrimination is to stop discriminating on the basis of race. Or it can be made more loudly, as Justice Thomas did when he equated Justice Breyer's approach—that it is constitutional for schools to use race-based criteria to achieve racial integration—to “that advocated by the segregationists in *Brown*.” In either case, though, we see one more of the pernicious effects of anticlassification. Racism—the bad thing the Equal Protection Clause is designed to thwart—gets defined as thinking about race. And people who raise questions about, for instance, systemic racism, or people who actively try to promote racial equality, are cast as the real racists.

In each context we see a constitutional principle that looks like it's promoting equality. Surprisingly, that principle then frustrates government attempts to promote equality. This happens because the Court's use of a symmetry principle means it's actually promoting neutrality, not equality, and neutrality is very different. And then there's a tendency to backslide—to think that the Court really is promoting equality and that therefore the government actions it opposes are opposed to equality. That's wrong. And that's the natural consequence of the slippage between equality and neutrality. A constitutional demand for neutrality thwarts government attempts to promote equality. But because that demand is conflated with an ideal of equality, the people who are working for equality are then cast as its opponents.