

SITUATING “GROUPS” IN CONSTITUTIONAL ARGUMENT: INTERROGATING JUDICIAL ARGUMENTS ON ECONOMIC RIGHTS, GENDER EQUALITY, AND GAY EQUALITY

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The New Deal transformation in Commerce Clause and Due Process jurisprudence marked, among other things, a shift in judicial attention from groups defined by economic relationships to groups defined by social status. Hence, one might plausibly see judicial activism in defense of freedom of contract during the Lochner-era subsequently giving way, in part, to the judicial protection of racial minorities, women, and gay persons in the decades after Brown v. Board of Education.

In this Article, I attempt to illuminate this shift in judicial attention by examining the Supreme Court’s rhetoric surrounding groups in the context of the Lochner-era cases on wages and hours regulations and the post-Brown v. Board of Education-era cases on gender and gay equality. I situate my inquiry in the context of broader themes in American political thought, with particular attention to the core concepts and principles of American liberalism. In examining the recurrent modes of argument surrounding groups in these Supreme Court cases, I discuss how the Court’s concept of groups—and how its views of American society more broadly—has varied in different constitutional doctrinal contexts.

My examination of these cases yields two key findings. The first finding speaks to a similarity across these contexts of Supreme Court jurisprudence: when confronted by reforms calling for special or different legal treatment of specific groups, both pro-reform and anti-reform Supreme Court Justices in these three doctrinal contexts put forth arguments about group-sameness and group-difference. That is, group-sameness and group-difference arguments were deployed by Justices on both sides of the various legal controversies in these doctrinal areas. The second finding speaks to a difference between these doctrinal contexts: while arguments in defense of special legal treatment for groups in the Lochner-era cases on wages and hours regulations were linked to larger, broader, more systemic goals, no such sensibility informs the judicial protection of groups in the post-Brown cases on gender and gay equality. Rather, in more recent years, the judicial defense of groups largely proceeds from a judicial concern for only the groups in question. Thus, we see in the more contemporary cases examples of judicial arguments about “societal segmentation”—a significant mode of legal and political argument that, I assert, has appeared episodically throughout American history. In the final Part, I set forth a more general definition of societal segmentation arguments, and I discuss how notions of segmentation may be situated in relation to the principles of American liberalism.

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TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION..... | 97 |
| I. INDIVIDUALS/GROUPS, EQUALITY/DIFFERENTIATION IN AMERICA'S POLITICAL TRADITIONS | 102 |
| A. <i>Liberalism</i> | 103 |
| B. <i>Civic Republicanism</i> | 105 |
| C. <i>Ascriptive Hierarchies and Multiple Traditions</i> | 107 |
| D. <i>Innovation and Flexibility in Liberalism</i> | 108 |
| II. THE IMPARTIAL STATE..... | 113 |
| A. <i>Anti-Reform Arguments on Economic Rights</i> | 115 |
| B. <i>Pro-Reform Arguments on Economic Rights</i> | 117 |
| C. <i>Groups and the Impartial State</i> | 121 |
| III. THE PARTIAL STATE | 123 |
| A. <i>Pro-Reform Arguments on Gender and Gay Equality</i> | 125 |
| B. <i>Anti-Reform Arguments on Gender and Gay Equality</i> | 131 |
| IV. SEGMENTATION ARGUMENTS AND THE POST-BROWN-ERA CASES ON GENDER AND GAY EQUALITY..... | 134 |
| CONCLUSION..... | 143 |

INTRODUCTION

The New Deal era is commonly recognized as a crucial breakpoint in American constitutional development for, among other things, marking a transformative shift in the Supreme Court's Commerce Clause and Due Process jurisprudence.¹ As many have noted, the Supreme Court's lessening concern with protecting economic rights in cases such as *West Coast Hotel v. Parrish*,² *United States v. Carolene Products Co.*,³ and *United States v. Darby*⁴ ultimately gave way, in part, to judicial protection of the individual rights of racial minorities, women, and more recently gay persons. This marked shift in focus by the judiciary from focusing on individuals and groups defined by economic relationships to focusing on individuals and groups defined by social status was encouraged in the notable Footnote Four of the *Carolene Products* ruling.⁵ In an opinion otherwise devoted to the theme of judicial deference toward legislation on economic matters, Justice Harlan Stone hinted in Footnote Four's memorable third paragraph that heightened judicial scrutiny may be appropriate for laws that targeted "religious," "national," or "racial" minorities, or for laws that encompassed "prejudice against discrete and insular minorities."⁶

My primary goal in this Article is to further examine the substance of this doctrinal shift suggested in the third paragraph of Footnote

1 See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 256–57 (1998); PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* 516, 549–50 (5th ed. 2006); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 640–41 (4th ed. 2011); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 117–20 (*revised by* Sanford Levinson, 2d ed. 1994); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 811–17, 1352 (3d ed. 2000); 12 WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT 1941–1953*, at 32–38 (Stanley N. Katz ed., 2006).

2 300 U.S. 379 (1937).

3 304 U.S. 144 (1938).

4 312 U.S. 100 (1941).

5 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980); see also BREST, *supra* note 1, at 517–18 (suggesting that Footnote Four's protection of the rights of "discrete and insular" minorities offered "a new justification for judicial review of legislation"); CHEMERINSKY, *supra* note 1, at 712–13 (explaining the relationship between Footnote Four and "heightened scrutiny for government actions discriminating against racial and national origin minorities"); WIECEK, *supra* note 1, at 141–42 (citing concern over the civil rights of minority populations as one reason for the Court's rejection of "classical legal thought" during this time period). On the rise of a new judicial concern with protecting groups defined by racial, religious, and ethnic identity in the post-New Deal era, see David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 *YALE L.J.* 741, 743, 761–79 (1981).

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

Four. In discussing this shift in judicial attention from groups defined by economic relationships to groups defined by social status, I intend to offer a preliminary exploration of a significant element in American political and legal thought that is present in one context but absent in the other. I argue that the Court's discussion of groups and societal differentiation in its *Lochner*-era cases on economic rights and its more recent cases on gender and gay equality reflect recognizably distinct judicial perspectives. In the former body of doctrine, the Court linked the differential treatment of certain groups to larger public or society-wide interests. In the more recent cases on gender and gay equality, however, such arguments are much more subdued. Indeed, in the gender and gay equality cases, the differential treatment of certain groups is mainly justified with reference to the unique hardships and interests of those specific groups. This contrast between more universalistic, public-regarding justifications versus more group-specific justifications speaks, I believe, to a notion of *societal segmentation* that is present in the more recent cases. Segmentation arguments are a significant mode of argument that, I will suggest, have appeared episodically in different policy arenas and different times in American political and legal thought.

In Part I, I set the context for my inquiry in discussing the scholarly literature surrounding American political "traditions." This literature begins with the subject of liberalism, the political philosophy that nearly all scholars consider dominant in American politics. But alongside liberalism, I discuss its various competitor traditions, in addition to some of the more recent scholarship on liberalism that emphasizes its malleability and interconnectedness with other, sometimes conflicting, political ideological themes.

In discussing this scholarly literature, I also introduce two key conceptual dichotomies that are implicated in the notion of societal segmentation. These concepts are generally used in both descriptive and normative ways, and have constituted elements of every major tradition in American politics. The first dichotomy is the notion of individualism versus the notion of emphasizing groups in thinking about the constitutive units of American society. The second dichotomy speaks to competing notions of how American society is, or should be, organized: an emphasis on sameness and relative equality among members of the political community in terms of legal, political, and social status versus an emphasis on entrenched differentiation and differential treatment for various individuals and groups in the political community.

In Part I, I very briefly discuss how each of the major American political traditions has intersected with these conceptual dichotomies.

I also set the stage for the discussion in Parts II and III, where I begin to interrogate the relative importance of individuals/groups and sameness/differentiation in two constitutional doctrinal areas: the Supreme Court's *Lochner*-era cases on economic rights (discussed in Part II) and its more recent cases on gender and gay equality (discussed in Part III). The judicial rhetoric in these various cases will not directly clarify the relative importance of the individuals/groups and sameness/differentiation conceptual dichotomies at these different moments in constitutional history. Still, by examining patterns in how the Court has discussed groups across these cases—and by seeing how the Court has deployed arguments about group difference and group sameness in the contexts of economic rights, gender rights, and gay rights—hints of the greater influence of the segmentation ideal in the more contemporary cases will become clear.

Thus, beginning in Parts II and III, but continuing in a more extended discussion in Part IV, I flesh out the two primary claims of this Article: first, the Court's more recent cases on gender and gay equality reflect a greater judicial acceptance—relative to the *Lochner*-era Court—of approaching certain legal issues with a presumption of greater segmentation in American society.⁷ In fleshing out this claim, I tentatively offer a more general theory of segmentation as a mode of political and legal argument, and discuss its broader applicability to other contexts.

My second primary claim concerns the status of liberalism. As discussed in Part I, an acceptance of fixed, unchanging groups sits in tension with the emphasis on individualism at the heart of liberal political philosophy. To the extent judicial rhetoric can be taken as fairly representative of broader trends in American political thought, at least among political elites, the greater judicial willingness to recognize segmented groups in its opinions reflects the greater comfort within contemporary American political thought of moving to the outer edges of liberalism. Thus, I conclude the Article by discussing, in Part IV, an oddity about contemporary rights jurisprudence: the Court is deeply committed to deploying a non-liberal concept, such as the social group, to achieve liberal ends including achieving great-

⁷ My examination of groups in judicial rhetoric in this paper is limited to two kinds of groups: groups constituted by professional identity or employment in the *Lochner* era, and groups constituted by social identity and social status in the post-*Brown* era. While the doctrine surrounding these groups has played an out-sized role in American constitutional development, this does not exhaust the entire range of important groups in American politics and society, of course. Corporations, for example, are also commonly recognized as a kind of social group as well. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 2 (1987).

er freedom and emancipation for certain disadvantaged individuals. This intertwining of illiberal and liberal concepts in turn suggests, I believe, a continuing development that will ultimately lead to a greater acceptance of social groups and group difference within American liberalism, and a continued adaptation of liberal ideology.

Finally, let me offer a quick comment on case selection: since the context for my inquiry is limited to only three significant doctrinal areas, I should mention some reasons for my choice to focus on these particular areas. The *Lochner*⁸-era cases on economic rights and the post-*Brown*⁹ cases on gender and gay equality are appropriate for analysis, and for comparison to each other, for two simple reasons. First, each context saw legal reforms at stake that aimed to improve the rights and entitlements of groups perceived by many to be relatively disadvantaged under the status quo. To invoke some terminology that will be introduced in Part I, one might plausibly say that both doctrinal areas involved beneficial or benign class legislation. Second, each context stands out as a conspicuous and significant period of judicial assertiveness regarding group or class interests. The first period saw the Court responding negatively, and conspicuously, to legislative enactments aiming to regulate economic relationships for certain kinds of employees and their employers. The latter period saw the Court elaborating in a similarly conspicuous manner upon the rights of women and gay persons that went beyond prior doctrine and established federal and state statutes.

There are a number of other avenues—whether judicial or non-judicial—where these themes might be explored. Indeed, I might note one prominent omission in the case discussion below: I have little discussion of the Court’s jurisprudence on race in the years prior to and during the Jim Crow era.¹⁰ These cases constitute some of the strongest historical support for the existence of an “ascriptive-hierarchical”¹¹ political tradition, or a commitment to social group

⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁰ For instances of judicial antipathy, sometimes explicit and sometimes more implicit, to African-American rights, see, for example, *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Virginia v. Rives*, 100 U.S. 313 (1879); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872). For a general discussion of a heightened conservatism from the Court in the post-Reconstruction era, see STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE*, 65–108, 193–236 (2014).

¹¹ See *infra* 37 and accompanying text.

inequality. As such, these cases exhibit a judicial assumption of entrenched, social group differentiation in American society. Furthermore, beyond the omission of certain cases, the judiciary itself certainly holds no monopoly on discussions of the concepts and ideals I am investigating; an examination of legislative and executive actions would also be relevant to an inquiry regarding how groups are discussed and treated in American law and politics.

Notwithstanding the above, however, I limit my discussion in Parts II and III to the *Lochner*-era economic rights cases and the gender and gay equality cases. My focus on Supreme Court doctrine stems from the fact that the Court has a particular institutional orientation toward justifying and elaborating upon its actions in its opinions that is sometimes absent in the actions of the elected branches. Because the concepts surrounding group rights and social segmentation speak to foundational and abstract themes in American political thought, they seem particularly likely to intersect with constitutional doctrine in significant ways.

Further, in focusing on judicial cases dealing with class legislation benefitting disadvantaged groups, we might also observe some distinctive arguments justifying or critiquing the targeted treatment of certain groups that are distinct from arguments in those contexts where racial and gender hierarchies are being *promoted*—the latter of which have been ably explored by others.¹² Finally, my targeted focus on only the aforementioned doctrinal areas stems from the presumption that instances of judicial assertiveness will tend to force underlying ideological commitments and presumptions more to the surface. When the judiciary orients itself in opposition to existing statutory law or case law in highly visible political controversies, this political context will tend to make the Court more inclined to offer elaborate and substantive justifications for its decisions. That is, contexts of judicial assertiveness seem particularly likely to encourage the Court to be more self-conscious and explicit about its ideological presumptions, and about its role in relation to the elected branches.¹³ In con-

¹² See, e.g., ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); see also *infra* Part I.

¹³ Thus, even among the Court's *Lochner*-era cases on economic rights and its post-*Brown* cases on noneconomic rights, I have focused on those cases where the Court explicitly spoke to the individual/group and equality/differentiation concepts under discussion. Other cases from these eras touch upon these themes in less explicit ways, of course, but my choice of cases proceeds from the assumption that greater value—at least at this stage of the inquiry—lies in tracing the interaction between certain ideological concepts and the judiciary's understanding of its institutional role in those opinions that deal with these issues more explicitly.

trast, I suspect that instances of the judiciary affirming or reconciling itself to prior legislative action—as was the case with some of the key Jim Crow-era cases¹⁴—will tend to provide judicial actors with a broader range of politically plausible judicial responses. Majority opinions in such cases may be narrow or broad in scope, deeply reasoned or shallowly reasoned.¹⁵ Thus, focusing on cases where the Court’s political capital might be at greatest risk seems an appropriate starting point for examining key aspects of American political thought, and how certain ideas intersect with the judiciary’s understanding of its role in American democracy.

I. INDIVIDUALS/GROUPS AND EQUALITY/DIFFERENTIATION IN AMERICA’S POLITICAL TRADITIONS

In discussing the Footnote Four shift, others have examined the Court’s change in focus from economic to noneconomic rights in doctrinal or normative-legal theoretical terms.¹⁶ As noted above, we might gain a different sense of the Footnote’s significance by focusing on some of the more abstract concepts implicated in the constitutional treatment of groups. But necessarily prior to that exercise, some clarification and discussion is warranted regarding the concepts themselves that will structure the subsequent case analysis. The particular focus below will be on two key conceptual dichotomies. The first is the ideal of individualism set against an emphasis on groups. The second dichotomy is the ideal and legal promotion of relative equality and sameness among members of the polity, set against the opposing ideal and legal promotion of entrenched differentiations within the polity. I will flesh out both conceptual dichotomies in the

¹⁴ The Court did strike down the Civil Rights Act of 1875 in the *Civil Rights Cases*, though that was a statute that had enjoyed very little political support. CHINN, *supra* note 10, at 77.

¹⁵ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–14 (1999) (explaining these different modes of adjudication).

¹⁶ ELY, *supra* note 5, at 75–77, 151–53; see also BREST, *supra* note 1, at 517–18 (explaining that after the Court moved away from judicial review of economic legislation, “protecting democracy” and “protecting civil rights” were new justifications for reviewing other types of legislation); WIECEK, *supra* note 1, at 136–42 (noting that Footnote Four “set the agenda for the Court” during this period and highlighted the concern of some Justices that legislatures could not “be counted on to protect discrete and insular minorities”); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977) (“More recently, concern has been directed toward threats to . . . noneconomic rights.”); David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1253–1254 (2010) (describing the Court’s shift away from the *Lochner*-era decisions, which focused on economic rights).

context of the major “traditions” in American political thought.¹⁷ That exercise, in turn, will help provide content to the notion of societal segmentation, the latter of which I will emphasize in the subsequent parts of this Article as a key element of the Footnote Four shift.

A. *Liberalism*

Liberal political philosophy is generally understood to be at the center of American political thought; hence, most scholarly discussions of American political ideologies or traditions begin with an examination of it. By “liberalism,” most commentators on American politics have a John Locke-inspired version of liberalism¹⁸ in mind, emphasizing some mix of the following key commitments and ideals: individualism, individual rights, a limited state, “atomistic” social freedom (i.e., negative liberty), and commitments to property rights and market capitalism.¹⁹ Furthermore, most also emphasize a notion of equality or universalism lying at the core of liberalism, with respect to individual rights and entitlements.²⁰ This also leads to an accompanying emphasis on government by consent and representative government; so long as individual rights are respected, the basic equality among members of a liberal political community leads to some form of majority rule.²¹ At the same time, of course, conceptions of liberal-

¹⁷ I use the term political “tradition” in the manner defined by Rogers Smith: “(1) a world view or ideology that defines basic political and economic institutions, the persons eligible to participate in them, and the roles or rights to which they are entitled, and (2) institutions and practices embodying and reproducing such precepts.” SMITH, *supra* note 12, at 507 n.5.

¹⁸ For a brief summary discussion of John Locke’s *The Second Treatise of Government* within the context of a broader discussion of American liberalism, see JAMES P. YOUNG, RECONSIDERING AMERICAN LIBERALISM: THE TROUBLED ODYSSEY OF THE LIBERAL IDEA 23–39 (1996).

¹⁹ The key text in this literature is LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 12–18, 55–60, 62–64, 128–34 (1955). Other key works include: J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 48 (1993); CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 5 (2005); SMITH, *supra* note 12, at 8, 18, 35–39, 507 n.4; ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 14 (2d ed., 1985); YOUNG, *supra* note 18, at 6–7, 327–29. The Lockean liberalism discussed here should be distinguished from “legal liberalism,” the latter of which Laura Kalman describes as a faith in the potential of the judiciary—the Supreme Court in particular—to bring about progressive change on behalf of more disempowered social groups. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2, 247 n.1 (1996).

²⁰ HARTZ, *supra* note 19, at 56, 205–06; DESMOND KING, IN THE NAME OF LIBERALISM: ILLIBERAL SOCIAL POLICY IN THE USA AND BRITAIN 7–8 (1999); SMITH, LIBERALISM, *supra* note 19, at 18, 35–37; YOUNG, *supra* note 18, at 6, 328.

²¹ GREENSTONE, *supra* note 19, at 48; HARTZ, *supra* note 19, at 56–62; HORTON, *supra* note 19, at 5; SMITH, CIVIC IDEALS, *supra* note 12, at 507 n.5.

ism also emphasize a sense of cautiousness and wariness about majority rule—hence the aforementioned focus on individual rights (especially property rights) and commitments to constitutionalism and the rule of law.²²

Undoubtedly different scholars would emphasize some concepts and deemphasize others among those I mention. Still, there are clear convergences in the scholarly literature, and much of that convergence reflects a point of intellectual history: the preceding discussion, and the authors cited within it, rely upon, critique, or are otherwise in conversation with the work of Louis Hartz. Hartz's key claim was that a pervasive liberal political tradition exists in America due to the absence of feudalism in our history and historical consciousness.²³ The Hartzian thesis, as noted in more detail below, has been subject to sustained scholarly critique. Yet, despite its potential shortcomings, the Hartzian thesis retains enough significance to remain a starting point for many discussions of American political thought.

For our purposes, we might extract from the preceding discussion two key concepts implicated in most conceptions of American liberalism that bear directly on the constitutional doctrinal shifts that are our focus. The first, which is emphasized by all scholars of American liberalism, is relatively uncontroversial: liberalism's emphasis on individuals as opposed to groups or classes. It is the individual that remains the unit of analysis within liberalism—the entity entitled to rights, and the key constitutive unit of civil society and the legal-political system. Indeed, liberalism's emphasis on individualism was, in Hartz's estimation, crucial in explaining the absence of more economic class-based politics in American history; the myth of Horatio Alger-like upward economic mobility, so his argument went, proved too attractive an aspiration for American's working class. That is, less wealthy individuals preferred to channel their energies in pursuit of the individualistic, Alger myth over class-based political mobilization and collective action.²⁴

²² See YOUNG, *supra* note 18, at 6, 328.

²³ HARTZ, *supra* note 18, at 3–14, 20. On this point, Hartz drew on a Tocquevillian insight: “The Americans have this great advantage, that they attained democracy without the sufferings of a democratic revolution and that they were born equal instead of becoming so.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 480 (J.P. Mayer ed., George Lawrence trans., 1966); see also YOUNG, *supra* note 18, at 100 (noting that Hartz drew upon the influence of de Tocqueville as the “starting point for his theory of liberal consensus”).

²⁴ HARTZ, *supra* note 19, at 6, 111–13, 199–200, 203–11. The theme of individualism has also been at the core of non-American versions of liberalism as well. See, e.g., MICHAEL FREEDEN, *IDEOLOGIES AND POLITICAL THEORY: A CONCEPTUAL APPROACH* 144–45, 153,

A second and perhaps more contestable liberal concept worth emphasizing is the notion of equality. As previously noted, precisely what makes American society liberal, according to Hartz, is the absence of permanent feudal classes. Thus, while individuals in a liberal society would want and expect differences to emerge among themselves with respect to wealth and property, there would also be an expectation of equal rights and equal legal entitlements for all *full* members of the political community. There may also be an emphasis on the relative equality of social status for all members of the political community as well; notwithstanding substantial economic differences that may exist among them, citizens in a liberal polity would not view those differences as fundamental or permanently entrenched.²⁵ This pervasive equality across individuals marked a point of concern for Hartz, and at an earlier time, Alexis de Tocqueville as well. Both warned of the specter of a tyranny of the majority, where such equality might lead to a problem of conformity and the stifling of dissent.²⁶ One might say then that both theorists noted ambivalence, or even a hostility in American political thought—at least at a conceptual level—toward entrenched, permanent differentiation in society.

B. Civic Republicanism

While liberalism remains central to discussions of American political traditions, civic republicanism has often been invoked as a competitor of sorts to it. Trying to define the contours of civic republicanism would be nearly as difficult as the analogous chore for liberalism, but at least with respect to the two items emphasized above—individualism and equality—one might roughly sketch out an alternative perspective.

In contrast to liberalism's focus on the individual and individual social freedom, many have emphasized the civic republican focus on the normative ideal of an active citizenry, oriented toward serving a larger common good or the general welfare of the polity. Thus, the civic republican vision places relatively greater emphasis on the duties

185–86 (1996). Notably, Freedman has also discussed an emphasis on community within non-American versions of liberalism that soften the latter's focus on the individual; he thus argues that considerations of societal or the common good can be incorporated within liberal ideology. *Id.* at 203–06, 249–50, 254–58. That said, even these less individualistic forms of liberalism seem to remain some distance from whole-hearted acceptance of social group differentiation and societal segmentation—the latter of which clearly seems to reside at the outer edges of or outside American liberalism.

²⁵ See *supra* note 20.

²⁶ HARTZ, *supra* note 19, at 11, 57, 254–56; TOCQUEVILLE, *supra* note 23, at 254–56.

of citizenship and on the polity as an entity worthy of consideration in its own right. This is a theme that J.G.A. Pocock traced from Renaissance political thought to the American context;²⁷ that Gordon Wood emphasized as an enduring theme in the American Revolutionary era;²⁸ and that contemporary political theorists like Michael Sandel invoked as a normative prescription for the ills of current politics.²⁹

Second, with respect to liberalism's commitment to equality and social undifferentiation, some scholars have emphasized a civic republican view that diverges in key respects. A sense of equality among citizens also underlies many discussions of civic republicanism;³⁰ but, equality in the latter is sometimes accompanied by the theme of a persistent divide, and the potential for conflict between "the people" and "elites."³¹ Hence there is a basic and fundamental

27 See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 506–07, 550–52 (1975).

28 See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 58 (3d prt. 1987) (describing the common good in the American colonial context as follows: "This common interest was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals . . . [P]olitics was conceived to be not the reconciling but the transcending of the different interests of the society in the search for the single common good . . ."); see also *id.* at 53–65 (discussing republicanism's focus on the public good, and the ways in which this informed Americans' conception of how their society should operate during the Revolution).

29 See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 3–7 (2d prt. 1996) (contrasting contemporary liberalism, which the author argues is ill-equipped to address the sense of disempowerment afflicting public life, with republican political theory, which "may offer a corrective to our impoverished civic life," in light of its emphasis on civic considerations). On republicanism in general, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 18–20 (1992); see also SMITH, *supra* note 12, at 15, 507 n.5 (treating republican traditions as "grounded on popular sovereignty exercised via institutions not just of formal consent but of mass self-governance").

30 See SMITH, *supra* note 12, at 37 (explaining that democratic republicanism can have strongly egalitarian implications); WOOD, *supra* note 28, at 70–75 (discussing how the Americans' adoption of republicanism led to a fundamental change in their social structure, as the principle of equality became central to the governing of society).

31 Wood discusses this theme among key anti-federalist figures during the Founding Era, who he views as legitimate spokesmen for the republican tradition. See WOOD, *supra* note 28, at 513–24, 562–64 (discussing the anti-federalists' pervasive distrust in what they considered to be an essentially aristocratic government established under the Constitution, and the ways in which their rejection of this new system compelled Federalists to articulate how and why it was "strictly republican"); see also POCOCK, *supra* note 27, at 507; WOOD, *supra* note 28, at 57–58 (discussing how republicanism ushered a new era of cooperation between rulers and citizens); John P. McCormick, *Machiavellian Democracy: Controlling Elites with Ferocious Populism*, 95 AM. POL. SCI. REV. 297, 297 (2001) (arguing that Niccolò Machiavelli theorized for extensive institutional and cultural means of popular

societal division that accompanies some strains of civic republican thought that is in tension with core components of liberal ideology.

Among those interested in exploring the historical role of civic republican thought in American history, few claim that its influence has been nearly as significant as liberalism. Daniel Rodgers notes that among scholars of the revolutionary and early national eras, few “doubted that liberalism ultimately swept up the nation’s economic, political, and cultural life. The project [of these scholars] was to stay the hand of the Hartzian moment, not to deny it.”³² Still, certain elements of civic republican thought undoubtedly live on in our political vocabulary, and one might find connections between its themes and other bodies of American thought such as populism.³³

C. *Ascriptive Hierarchies and Multiple Traditions*

While much of American politics can be explained with reference to either a liberal or civic republican political tradition, much else remains that seems to fall outside these two bodies of thought. Hence one of the strongest critiques pressed against the Hartzian thesis stems from an emphasis on the politics of exclusion in American history. A long and very extensive history of law and politics centered on discriminatory and exclusionary state actions against racial minorities, women, and gay persons in particular raises serious questions about Hartz’s claims. How pervasive could the liberal commitment to individuals, individual rights, and universal equality be if such stark social segmentation and group-based oppression has played a major role in our history? Focusing on doctrinal developments in citizenship law, Rogers Smith asserts that such group-based

control over political elites). This basic idea was a notable component of Jacksonian political thought. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815–1848*, at 380–81, 501, 582 (2007) (describing the Jacksonian emphasis on popular rule set in opposition to the pernicious influence of special interests and elites); WHITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS 138–39* (2003); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 513–14* (1st ed. 2005) (explaining that the Jacksonian democratic emphasis on popular rule opposed the pernicious influence of special interests and elites). This idea also appeared within Populism as well. See MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY I* (1995) (“That is the most basic and telling definition of populism: a language whose speakers conceive of ordinary people as a noble assemblage not bounded narrowly by class, view their elite opponents as self-serving and undemocratic, and seek to mobilize the former against the latter.”).

³² Rodgers, *supra* note 29, at 24. Rodgers does note, however, that scholars who studied republicanism in labor history tended to see its influence extending further across American history. *Id.* at 30.

³³ On the rhetoric of populism, see generally KAZIN, *supra* note 31.

exclusion and inequalities are so pervasive that they encompass nothing less than a tradition in American political thought separate from liberalism and civic republicanism.³⁴ He labels it a tradition of “ascriptive hierarchies.”³⁵ Indeed, it is the presence of “multiple traditions” in the American political imagination and vocabulary that, according to Smith, allows for change and innovation in American political thought.³⁶ As politicians cobble together various strands of thought from each of these traditions into coherent narratives of citizenship—in order to bring together majority voting coalitions—new combinations of ideals and commitments can be created.³⁷ Thus, the multiple traditions approach explains the presence of more exclusionary modes of thought in our history, and allows for interpretations of American political thought encompassing change and innovation, which might seemingly be precluded by the implication of persistent continuity within the Hartzian thesis of a rather hegemonic American liberal tradition.

D. Innovation and Flexibility in Liberalism

Thus, a crucial fault line might be drawn between a liberal perspective and the ascriptive-hierarchical perspective with respect to the two core concepts I have emphasized. While the liberal perspective emphasizes individuals and the ideals of relative equality and sameness, the ascriptive-hierarchical perspective emphasizes clearly-defined groups or classes of persons, and allows for differential (and subordinating) treatment of those groups or classes.

Subsequent to Hartz, however, other theorists of American liberalism have set forth more nuanced conceptions of liberalism that challenge such a clear distinction between it and the more exclusionary aspects of American politics. These post-Hartzians have emphasized the flexibility of liberal ideals and liberal language, with at least two significant addendums to the Hartzian perspective.

The first addendum is a challenge to Hartz’s view of liberalism as a static, relatively unchanging philosophy. To the contrary, scholars such as J. David Greenstone and Stephen Skowronek have emphasized how the complexity of concepts within American liberalism allows creative political entrepreneurs to reshape those concepts. The consequence of such conceptual reshaping and transformation, they

³⁴ SMITH, *supra* note 10, at 6, 8–9, 30–39.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

argue, allows for the possibility of real conflict and real development within liberal political thought. Greenstone, for example, discussed a “bipolarity” in American liberalism between a “reform” variant of liberalism “concerned primarily with the development of the faculties of individuals,” and a “humanist” variant of liberalism “concerned primarily with the satisfaction of the preferences of individuals.”³⁸ These two variants allowed for points of disagreements to occur even among individuals all committed to liberalism, and for innovation to occur within liberalism as well—the latter of which Greenstone explores in the case of Lincoln.³⁹

In a similar vein, Skowronek has focused on the example of President Woodrow Wilson and traced how President Wilson took conventionally understood liberal concepts such as “nationalism” and “democracy” and innovatively used them to promote racist political goals.⁴⁰ Skowronek refers to such acts as the reassociation of ideas with different programmatic purposes, and he views this as more than just instrumental, strategic action by clever political entrepreneurs.⁴¹ The case of President Wilson demonstrates, he argues, that such acts of conceptual innovation are capable of helping to constitute new elements of the American political tradition.⁴²

The second addendum to Hartz, oriented more directly as a response to the multiple traditions thesis, is to challenge the characterization of liberalism and ascriptive-hierarchical ideology as encompassing separate traditions. Contrary to Smith’s multiple traditions approach, some post-Hartzian theorists acknowledge the possibility of inegalitarian and ascriptive-hierarchical ideals existing *within* liberal ideology.⁴³ How then might illiberal political outcomes—such as exclusionary laws aimed at racial minorities and women—coexist or even be facilitated by liberal ideals and commitments? These post-Hartzians emphasize at least two possible mechanisms. First, scholars have emphasized that liberal ideals and language have often been deployed in ways consistent with, or supportive of, inegalitarian

38 GREENSTONE, *supra* note 19, at 6.

39 *Id.* at 6–7, 33, 48–50, 236–43.

40 Stephen Skowronek, *The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition*, 100 AM. POL. SCI. REV. 395 (2006).

41 *Id.* at 392.

42 *Id.* at 385, 385–86, 388–89, 393–95, 398–400.

43 See, e.g., KING, *supra* note 20; Ira Katznelson, *Books in Review*, 27 POL. THEORY 565, 568–70 (1999) (reviewing ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

goals.⁴⁴ For example, a liberal polity might generate illiberal outcomes through exclusionary standards regulating membership into the political community. Those who are deemed “full” members might enjoy a full array of liberal rights protections and enjoy the expectation of full equality. Those who fall short of full membership for whatever reason, however, might be deemed less “fit” for such a status, and excluded from these benefits in a manner consistent with liberal ideals.⁴⁵

Second, a liberal polity might generate illiberal outcomes through one of the core institutions of liberal ideology: representative-democratic government. One then might lay at least partial responsibility for the appearance of illiberal, exclusionary statutes in American history upon liberalism, since such statutes were created via liberal institutions.⁴⁶ Hence the consequences of liberal ideals can sometimes be seen as consistent with illiberal political outcomes.

The flexibility and complexity of liberalism emphasized above has led some post-Hartzians to offer a view of the liberal political tradition that is more amorphous than what Hartz imagined. Rather than viewing it as a discrete set of ideals and commitments, some scholars view it as more akin to a grammar.⁴⁷ Stears summarizes this view as follows:

[T]he American liberal tradition is in essence a prolonged *argument* about a series of shared but indeterminate ideals. The bare outline of

44 See, e.g., HORTON, *supra* note 19, at 4–5, 37, 96 (explaining that the liberal position “blended easily with a newly expansive and more severely hierarchical conception of race”); KING, *supra* note 20, at 10–23 (describing possible justifications for illiberal social policies within a liberal framework); Katznelson, *supra* note 43, at 568 (“Even when conceptualized as neutral rules of the game, liberalism’s ordinary functioning can, under some circumstances, advance and thus bond with nonliberal and illiberal impulses of various kinds.”).

45 See KING, *supra* note 20, at 11–13 (discussing the emphasis that liberal democracy and its theorists place on assessing who should be excluded from or included in the polity); Katznelson, *supra* note 43, at 568 (“Doctrinally, key liberal thinkers elaborated standards for inclusion in a liberal polity based either on levels of rationality . . . or on compounds of rationality and ascription . . .”).

46 See Katznelson, *supra* note 43, at 568 (asserting that key liberal institutional inventions such as political representation and political consent by the governed have led to the expression of majority’s exclusivist and racist preferences).

47 See, e.g., HORTON, *supra* note 19, at 5 (arguing that treating liberalism as a flexible discourse is consistent with long accepted theories of cultural practice); Gary Gerstle, *The Protean Character of American Liberalism*, 99 AM. HIST. REV. 1043, 1045–46 (1994) (noting the “malleability” of the liberal tradition); Marc Stears, *The Liberal Tradition and the Politics of Exclusion*, 10 ANN. REV. POL. SCI. 85, 97 (2007) (noting that “liberalism is essentially a loose set of interrelated general ideas” and that “[t]he American liberal tradition . . . is essentially a shared argument rather than a set of clear, coherent, and consistent beliefs”).

these ideals—including liberty, equality, and a worry about excessive power—is consistent over time, and it plays a vital role in shaping the political identity of the nation and ensuring a remarkable continuity of popular aspiration over time. But the precise meaning and concrete political implications of such concepts as liberty, equality, and power have been the subject of continuous contestation.⁴⁸

Yet, as powerful as these post-Hartzian arguments may be, a point worth emphasizing—and one that all of them seemingly concede explicitly or implicitly⁴⁹—is that even a flexible liberalism cannot be all-encompassing. To see all events in American politics as inescapably leading back to liberalism risks either ignoring or minimizing certain events (the critique that prompted the multiple traditions thesis itself) or expanding the meaning of liberalism to the point where it fails to hold much analytical value.

My own inquiry begins with a slightly different point of departure relative to some of the post-Hartzians; my emphasis is less on the inherent suppleness and complexity of liberalism and more on those issues that probe at the outer boundaries of liberalism. That is, my interest is on those political commitments that—even if they may not lie wholly outside liberalism—may lie further from core liberal concepts, or may be genuine innovations upon core liberal concepts, or may even be in tension with core liberal concepts.

Thus in Parts II and III, I investigate two bodies of constitutional doctrine that lie on either side of a break-point in American constitutional development. Ultimately, this analysis in Parts II and III will aid in illuminating the Court's varied approach to dealing with groups and societal differentiation in different doctrinal and historical contexts.

That said, let me note two obstacles that may complicate this task from the outset. First, the judicial rhetoric within the cases will not directly address the individualism versus group dichotomy. I have deliberately focused on judicial opinions that explicitly address the interests of groups or classes, thereby perhaps stacking the deck toward examining cases that cut against the individualistic focus of liberalism. Further, even with this potential stacking of the deck, one might still easily take the contrarian position and see the judicial concern for groups in these cases as merely a proxy for its more basic concern for individual rights. Indeed the “contrarian” view is perhaps the

⁴⁸ Stears, *supra* note 47, at 93–94 (emphasis in original).

⁴⁹ See, e.g., Gerstle, *supra* note 47, at 1046 (acknowledging the limitations of liberalism's flexibility); Katznelson, *supra* note 43, at 568 (explaining the complications that an all-encompassing conception of liberalism encounters when racism becomes a part of the discussion).

more conventional view of the gender equality and gay equality cases; arguably, the Court's protection of women and gay persons as classes in these cases should be seen, first and foremost, as merely a means toward the judicial protection of the rights of individual women and individual gay persons.⁵⁰ At the very least then, the opinions themselves will not, on their surface, directly settle questions about whether the Court has cared more about groups or individuals at different moments in time.

Second and relatedly, the question of whether the Court is more inclined to emphasize sameness and equality or entrenched differentiation in these opinions is also made difficult by the Justices' divergence on baseline assessments. As discussed in more detail below, oftentimes a given Justice's openness to "differential" legal treatment for a given group hinged greatly on that Justice's evaluation of the initial status quo baseline. Depending upon whether a Justice felt that a given group enjoyed a rough parity with comparable groups, that Justice would or would not ultimately endorse differential treatment for the group in question. Thus, given that a Justice's intuitive analysis of status quo conditions weighed so heavily in their analysis of group rights, a superficial reading of these cases is unlikely to tell us whether liberal ideology (more equality-focused) or a non-liberal ideology (more open to differentiation) is really structuring the Court's analysis in these cases.

Nevertheless, in Parts II and III below, I proceed by examining cases where groups articulated certain rights, and I interrogate the Court's rhetoric and analysis surrounding the "sameness" or "difference" between those groups and other relevant groups. I catalogue the array of sameness-arguments and difference-arguments made in the context of the *Lochner*-era cases on wages and hours legislation,

50 In *J.E.B. v. Alabama*, Justice Anthony Kennedy makes this comment in his concurrence: The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government. The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'

511 U.S. 127, 152–53 (1994) (Kennedy, J., concurring) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)); see also 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, 1385 (1990) (arguing that equal protection is for individuals—with group membership being an incidental concern—and in fact "[t]he equal protection clause makes no mention of groups").

and the post-*Brown*-era cases on gender and gay equality. This analysis will provide a foundation for subsequent discussion in Part IV on the relative importance of individual versus group and sameness versus differentiation ideals in the Court's jurisprudence from these two eras. I argue that we can indeed detect a significant, but subtle difference in the Court's understanding of group rights across these cases, and that this difference stems from the judiciary's changed receptivity to segmentation concerns. Finally, in Part IV, I will elaborate on this distinction and flesh out the concept of segmentation as a distinctive mode of political and legal argument.

II. THE IMPARTIAL STATE

From the late nineteenth century to the New Deal, the Court positioned itself in opposition to federal and state laws seeking to regulate, among other things, maximum hours and minimum wages for employees in various occupations. The Court was largely hostile to such laws, striking many of them down for violating rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

A conventional interpretation of these cases treats them as evidence of the Court promoting laissez-faire values and the interests of business.⁵¹ However, a more convincing line of scholarship identifies a different analytical thread running through them. To these "revisionist" scholars, the Court's *Lochner*-era cases reflected, above all else, a strain of Jacksonian political thought focused on the maintenance of an "impartial state."⁵² An impartial state was desirable and necessary to prevent the proliferation of "class legislation" where through its laws, the state would grant special privileges and favors to specific classes of citizens, to the detriment of other citizens. A desire for equality in how the state treated its citizens was the normative goal of the Jacksonian-impartial state ideal. The Court did allow for exceptions, however. If a law sought to single out a particular class or group for a benefit or burden, the law could be justified as within the state's legitimate police powers if it served the public interest in pro-

51 For a discussion of this view, see HOWARD GILLMAN, *THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1–4 (1993).

52 My use of the term "impartial state" in this Part, and my use of "partial state" in Part III, is descriptive; these terms are not meant to be taken as normative evaluations of the judiciary's actions in these two periods. That is, as a historical matter, the "impartial state" ideal structured a world-view many *Lochner*-era judges shared. In contrast, for a more normatively driven use and discussion of these terms in doctrinal contexts that overlap with some of the cases that I discuss, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 3–7, 24–25, 75–81, 347, 350–53 (1993).

moting the health, safety, or general well-being of either the broader public or the group in question (if, say, the group in question were employed in a particularly dangerous occupation).⁵³ As discussed below, we do find the ideals and concerns of the impartial state perspective within the rhetoric of anti-reform judicial opinions during this period.

The endorsement of an impartial state ideal in some of the judicial opinions from the *Lochner* era might be seen as clear support for the Hartzian claim of a liberal consensus in America, at least among judicial actors. A significant judicial fear did exist of state and federal legislation recognizing and entrenching class differentiation and segmentation in society; hence Court majorities at this time felt that the peculiar duty of the Court was to enforce equality with respect to how the state treated individuals. Indeed, Hartzian-liberal ideals and commitments seem to have held sway among a majority of the Supreme Court at this time, with regard to these cases. And yet, as evidenced in part by the fact that the Court allowed for differential legal treatment for certain groups during this period, other strains of American political thought can be glimpsed in the rhetoric of both the anti- and pro-reform voices on the Court as well.

In the following parts, I draw from the economic rights cases of this era where either the majority or the dissenting opinions engaged in some explicit discussion of class or group interests. What emerges from the opinions is that *both* anti- and pro-reform Justices deployed arguments about group sameness and difference. That is, when con-

⁵³ See GILLMAN, *supra* note 51, at 1–4; see also *id.* at 10–14, 54–55 (arguing that “the *Lochner* era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid ‘class’ legislation, on the other”); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298, 305–14 (1985) (explaining that under laissez-faire economics, only certain kinds of government interference were permissible); Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 J. AM. HIST. 751, 752–56, 758–60, 763–66, 771 (1967) (describing Cooley’s conception of a “constitutional government” and noting that Cooley’s writings “applied the term constitutional only to those governments [who] . . . defined ‘the limits of its exercise so as to protect individual rights and shield them against the exercise of arbitrary power’”); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 971–74, 979–81, 994–95, 1004–05 (1975) (describing post-Civil War constitutional controversies and noting that the Court had “both the power and the opportunity to forge new doctrine and fix new boundaries between the public and private sectors”); Yudof, *supra* note 50, at 1368–71 (analyzing the Equal Protection Clause to illustrate an instance when the government was permitted to “employ protective measures” to benefit a specific group, even as it “aspire[d] to a more global concept of constitutional equality”).

fronted by reforms promoting certain group interests, Justices both favorable and opposed to the reform discussed the groups in question by emphasizing its similarity *and* its difference from other groups in society. But the payoff from the discussion below is not merely to demonstrate a diversity of arguments in the Court's opinions. More than this, the analysis provides a baseline from which to contrast the post-*Brown* jurisprudence on noneconomic rights that would appear decades later. Even though both the *Locher*-era and post-*Brown*-era cases dealt with group interests, I will argue that the latter dealt with group interests in a markedly different way. After discussing both the anti- and pro-reform perspectives on economic rights below, I conclude this Part with a brief discussion of the "universalistic" approach to group rights in these cases to help set up a more extended, subsequent discussion of how they diverge from the gender and gay equality cases that are the focus of Part III.

A. *Anti-Reform Arguments on Economic Rights*

When confronted by federal and state statutes seeking to regulate the wages and hours of certain employees, those Supreme Court Justices predisposed toward an anti-reform perspective predictably emphasized the inherent sameness of the groups in question, relative to other groups. Because the groups in question were no different from anyone else, these Justices argued, they should not get the benefit (or burden, depending upon one's perspective) of specific legislative regulations governing their relationship with their employer. This was an argument directly in line with the impartial state ideal.

Thus in the *Lochner* case itself, the Supreme Court struck down a New York law providing for maximum hours for bakers as a violation of the freedom of the contract.⁵⁴ Justice Rufus Peckham's opinion for the majority emphasized that bakers as a class were in no obvious way disadvantaged in their ability to bargain with their employers over the terms of their labor. As he stated:

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the state.⁵⁵

There was nothing particularly dangerous about the profession of a baker, and the public interest was not otherwise implicated in the

⁵⁴ *Lochner*, 198 U.S. at 64.

⁵⁵ *Id.* at 57.

context of baker employment.⁵⁶ Hence bakers as a class should not be treated differently from other classes of workers.

A similar sensibility appears among anti-reform Justices in the context of wages and hours legislation for female workers. In *Adkins v. Children's Hospital*, a majority of the Court struck down a minimum wage law for women and minors in the District of Columbia for infringing upon the freedom of contract, as protected in the Fifth Amendment's Due Process Clause.⁵⁷ Justice George Sutherland, writing for the Court, asserted that with respect to wages, women were the equal of men and should not enjoy the special protection afforded them in this legislation—especially with the Nineteenth Amendment having been ratified only three years earlier. Differences in physical stature were not relevant here. As he stated:

In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.⁵⁸

Likewise, similar anti-reform arguments regarding gender appear in *Morehead v. New York*, when the Court struck down a New York minimum wage law for women and minors for violating the freedom of contract.⁵⁹

But if it is not surprising to see anti-reform arguments emphasizing sameness between the groups in question and other groups, anti-reform Justices also deployed arguments emphasizing group difference too. In *Lochner*, the topic of the relative unhealthiness of the baking profession came up for considerable discussion in both the majority opinion and in Justice John Harlan's dissenting opinion.⁶⁰ Justice Peckham's opinion for the Court both minimized any particular danger associated with the baking profession—as noted above—

⁵⁶ *Id.* at 57, 59.

⁵⁷ 261 U.S. 525, 559–62 (1923).

⁵⁸ *Id.* at 553.

⁵⁹ 298 U.S. 587, 611 (1936); accord *West Coast Hotel*, 300 U.S. at 411–13 (Sutherland, J., dissenting) (making similar arguments that “[d]ifference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all women from which like contracts of all working men are left free”).

⁶⁰ 198 U.S. at 70–71.

and went on to make the following argument: even if baking may not be the most healthy of all professions, it was no worse than many other professions that were not presently the focus of New York state employment regulations. Justice Peckham made this argument in the context of raising a slippery slope concern of endless legislative regulation of occupations, if all that were needed to justify regulation was some sort of risk to an employee's health.⁶¹ In other words, Justice Peckham acknowledged that the baking profession may not be exactly the same as all other professions when it came to health risks. But even if there may be some differences between it and others, the risks of being a baker lay well within an acceptable range of varying employment health risks: i.e., baking lay within an "acceptable" set of diverse occupations that did not require special legislative attention.

B. Pro-Reform Arguments on Economic Rights

In contrast to the prior arguments, a different set of arguments were deployed by those Justices pressing a more pro-reform position. But even if they were different in their specifics, these pro-reform arguments also emphasized group sameness and difference.

Arguments emphasizing group difference were, not surprisingly, deployed by pro-reform Justices in these cases. When a Justice sought to defend legislation setting minimum wages or maximum hours for a certain class of employees, a common move was to emphasize the distinctiveness of the occupation—either for its heightened potential health risk to workers or because workers in that occupation were hobbled by significantly unequal bargaining power with their employers. One of the most important precedents establishing these principles was *Holden v. Hardy*, where the Court upheld a Utah statute establishing maximum hours for miners and those engaged "in the smelting, reduction, or refining of ores and metals."⁶² The Court concluded that the law was within the police powers of the state of Utah, and did not violate liberty of contract, due process, or equal protection.⁶³

In reaching this conclusion, the Court relied upon a number of prior, legitimate incursions on the right of contract in the form of health and safety laws.⁶⁴ With respect to the statute at issue in *Holden* specifically, Justice Henry Brown stated for the Court that

⁶¹ *Id.* at 59–61.

⁶² 169 U.S. 366, 395 (1898).

⁶³ *Id.*

⁶⁴ *See id.* at 391–93 (describing the Court's recent decisions in this area).

[w]e think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.⁶⁵

Similar arguments regarding group difference were made by Justice Harlan in dissent in *Lochner* as well, where he cited to *Holden*.⁶⁶

The Court in *Holden* further noted that the law at issue there might be justified by a legislative belief in an inequality of bargaining power between employers and employees in this specific context:

The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these [mining] establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.⁶⁷

Beyond the context of dangerous occupations, the Court also expressed some openness to allowing exceptions to the impartial state ideal with regulations governing the hours and wages of female and minor employees. These arguments followed a different structure because the point of emphasis was less the particular kind of occupation in question, and more the peculiar obstacles faced by women and minors in the workplace. Hence Justices sympathetic to wages and hours regulation for women emphasized the weaker physical stature of women in treating these regulations as health and safety measures; they emphasized the absence of equal bargaining power for female employees as a class; and they deployed civic republican-

65 *Id.* at 395; *see also id.* at 396–97 (continuing to distinguish this group of laborers based on the hazards of their profession and arguing further that although “reasonable doubts may exist as to the power of the legislature to pass a law . . . to promote the health, safety or comfort of the people . . . we must resolve them in favor of the right of that department of government”).

66 198 U.S. at 66, 69–71.

67 *Holden*, 169 U.S. at 397; *see also Lochner*, 198 U.S. at 69 (“It may be that the statute had its origin, in part, in the belief that employers and employés in such establishments were not upon an equal footing . . .”).

inspired arguments regarding the unique maternal role of women in ensuring the vitality of the nation and its populace.

In *Muller v. Oregon*, a unanimous Court upheld an Oregon maximum hours law for female employees “in any mechanical establishment, or factory, or laundry.”⁶⁸ References to the greater relative physical weakness of women were combined with an appeal to the maternal obligations placed upon women in this comment by Justice David Brewer, for the Court:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.⁶⁹

These characteristics thus made women fundamentally different from men, and justified governmental favoritism through labor regulations: “[d]ifferentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.”⁷⁰ As noted above in the discussion of the *Adkins* case, Justice Sutherland had emphasized a basic sameness or similarity across gender with respect to the employment context, especially after the enactment of the Nineteenth Amendment in 1920. In response, both Justices William Howard Taft and Oliver Holmes Jr. dissented in *Adkins* and converged on a key point: because the differences in physical stature between men and women were so basic and consequential, they felt the Nineteenth Amendment should not be used to reduce labor protections afforded to women.⁷¹

Likewise, in *Morehead*, a point of emphasis for Justice Charles Hughes in his dissent was the particular dangers faced by female and underage workers in seeking to bargain for their wages with employers:

⁶⁸ 208 U.S. 412, 416, 423 (1908).

⁶⁹ *Id.* at 421; *see also West Coast Hotel*, 300 U.S. at 394–95, 398–99 (containing similar arguments emphasizing the relatively greater physical weakness of women and their maternal function).

⁷⁰ *Muller*, 208 at 422.

⁷¹ *Adkins*, 261 U.S. at 567 (Taft, J., dissenting); *id.* at 569 (Holmes, J., dissenting).

The Legislature finds that the employment of women and minors in trade and industry in the State of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of vital public concern; that many women and minors are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and that 'freedom of contract' as applied to their relations with employers is illusory; that, by reason of the necessity of seeking support for themselves and their dependents, they are forced to accept whatever wages are offered; and that judged by any reasonable standard, wages in many instances are fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service.⁷²

No surprise then that given the impartial state ideal, judicial defenses of reforms seeking to carve out exceptions to that ideal would emphasize the distinctiveness of the groups that might enjoy special legal protections. But even if a theme of group difference runs most prominently in these pro-reform arguments, an appeal to sameness can be found in these arguments as well, and it is implicit in the judicial discussions of unequal bargaining power. If the pro-reform Justices were claiming that certain occupations, or certain kinds of workers, faced substantial obstacles in attaining "equal" bargaining power with their employers toward earning "fair" wages or working "fair" hours, there was also an implicit assumption that something like equal bargaining power and fair hours/wages did in fact exist as the aspired normative goal. That is, arguments regarding unequal bargaining power were implicitly positing a goal of sameness: that workers in dangerous professions and female or underage employees needed the benefit of legislation to attain the same benefits for their labor that their adult, male counterparts in non-dangerous occupations enjoyed. In short, a basic sameness in employee goals provided a significant portion of the normative appeal of these laws singling out certain groups for legal protections.

Hence, pro-reform Justices employed arguments in these cases that referenced a "fair" or "living" wage. This idea is referenced above at the end of the extended quotation by Justice Hughes in his *Morehead* dissent. He followed up that quotation with this additional comment on the absence of fair wages for women:

Inquiries by the New York State Department of Labor in cooperation with the Emergency Relief Bureau of New York City disclosed the large number of women employed in industry whose wages *were insufficient* for the support of themselves and those dependent upon them. For that

⁷² *Morehead*, 298 U.S. at 626–27 (Hughes, J., dissenting); *see also West Coast Hotel*, 300 U.S. at 398–99 (contending that female workers need additional legal protections because of their limited bargaining power).

reason, they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau.⁷³

Note this comment by Justice Hughes again in *West Coast Hotel v. Parrish*, where his opinion for the Court upheld a Washington state law setting minimum wages for women (and also overruled *Adkins*):

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. *The bare cost of living must be met.*⁷⁴

C. Groups and the Impartial State

Notwithstanding the variety of arguments used on both sides of the debate on wages and hours legislation, let me conclude this Part by discussing one basic similarity that runs through both the pro- and anti-reform arguments: neither side proved hospitable to viewing group interests as separate from broader, more systematic interests. This perspective is most obvious in the context of group sameness arguments which, from anti-reform Justices, essentially denied that certain groups had distinct, legitimate interests that should be legally-recognized and promoted. But this perspective, more notably, also arose within pro-reform arguments, particularly those arguments emphasizing group difference. Even in group difference arguments favoring reform, group interests were closely linked to broader concerns or goals that were systemic, and that transcended the interests of the group in question.

One example of this includes pro-reform arguments linking the protection of certain groups to more universalistic goals such as the broader public's health and safety; indeed, sometimes pro-reform judicial arguments treated the health and safety of certain employees as essentially equivalent to the health and safety of the broader public.⁷⁵ Another example is pro-reform judicial arguments linking wages and hours legislation for specific groups to the economy and broader goals such as promoting fair economic competition and industrial stability. Indeed the goals of competition and industrial stability were mentioned approvingly by the Court in *United States v. Darby*, where the Court upheld the Fair Labor Standards Act ("FLSA")—which set

⁷³ *Morehead*, 298 U.S. at 627 (Hughes, J., dissenting) (emphasis added).

⁷⁴ *West Coast Hotel*, 300 U.S. at 399 (emphasis added).

⁷⁵ See *Holden*, 169 U.S. at 395; *West Coast Hotel*, 300 U.S. at 393–94.

maximum hours and a minimum wage for employees in the production of goods for interstate commerce.⁷⁶

In one sense, this is hardly surprising. The judicial emphasis on a broader public interest in these discussions speaks in part to the broader theory of the impartial state. As noted above, the Court had consistently allowed for exceptions to that ideal in its rulings; it allowed for laws—usually categorized as “health and safety” laws⁷⁷—to specifically benefit or burden particular groups if such laws could be justified as serving the public interest and falling within general police powers. Thus referencing benefits that might flow to other groups or society at large with class-specific legislation was a principle explicitly built into the doctrine itself.

Still, the judicial focus on explicating how certain group interests served broader goals also appears to encompass an ideal that goes beyond this doctrinal principle. Consider a second example: the references to the state’s interest in the maternal function of women, in support of labor protections for female employees.⁷⁸ This argument certainly implicated health and safety considerations too.⁷⁹ But it also invoked civic republican notions of the common good, and spoke to, or implied, broader notions of societal equity in relation to the welfare of female workers. That is, some of these arguments emphasized the burden imposed upon the broader taxpaying public when female workers were not paid a living wage.⁸⁰ The state’s interest in protecting female workers was thus motivated by more than just the benefits that would accrue to those particular workers. Justice Hughes stated the following in his opinion for the Court in *West Coast Hotel* in upholding the minimum wage law for women at issue there: “*The community is not bound to provide what is in effect a subsidy for unconscionable employers.*”⁸¹

Finally, judicial efforts to link group-interests to broader communal and systemic goals appear in a third way: a strategic instrumentalism intersects with the appeals to group interests in these cases. In examining the arc of wages and hours legislation in the early twentieth century, we can plausibly link the focus on particular groups in

76 312 U.S. 100, 109 n.1, 109–10, 122 (1941); *see also Morehead*, 298 U.S. at 626–27 (Hughes, J., dissenting) (discussing the larger social problem and burden placed on taxpayers arising out of female workers’ lower wages and weakened bargaining power).

77 *See, e.g., Lochner*, 198 U.S. at 57–58; *see also* GILLMAN, *supra* note 51, at 127–30.

78 *See Muller*, 208 U.S. at 421–22; *Morehead*, 298 U.S. at 629–30 (Hughes, J., dissenting); *id.* at 633 (Stone, J., dissenting); *West Coast Hotel*, 300 U.S. at 394–95, 398.

79 *See, e.g., West Coast Hotel*, 300 U.S. at 394–95, 398.

80 *See Morehead*, 298 U.S. at 635 (Stone, J., dissenting).

81 300 U.S. at 399 (emphasis added).

these cases to a broader trend toward more universal hours and wages legislation that culminated in the FLSA. For example, the National Consumers' League, one of the crucial advocacy groups in the development of labor standards legislation in the early twentieth century, purposefully focused on women-specific reforms as an "entering wedge" strategy toward later securing wages and hours legislation for workers in general.⁸² Likewise, the decision to remain focused on female workers in future-Justice Louis Brandeis's famous brief in *Muller v. Oregon*—a case he was shepherded to by the National Consumers' League—was also a choice calculated toward securing judicial success and certainly not a reflection of Justice Brandeis's belief that labor protections should stop with female workers.⁸³ Not surprisingly, by the time the Court confronted the FLSA in *Darby*, it explicitly referenced one of that statute's concerns with establishing a "minimum standard of living necessary for health, efficiency, and general wellbeing of workers" *in general*.⁸⁴ The focus on particular groups in these earlier cases might be seen as driven then, at least in part, by pragmatic political and judicial judgment toward securing a more universal reform, and less by the inherent distinctiveness of the groups themselves.

I would tentatively assert here that judicial tendencies to think of group interests as tied to broader, more systemic or universalistic goals is a distinctive feature of these arguments in the wages and hours cases, during these years. In contrast, as I will discuss in the remainder of this Article, group-focused arguments from the late twentieth to the early twenty-first century on gender and gay equality have been characterized by some key, distinct rhetorical elements. I turn now to examine some more recent constitutional cases.

III. THE PARTIAL STATE

If the notion of an impartial state held sway in the *Lochner* era with respect to wages and hours legislation, much of the Court's post-

⁸² LONDON R.Y. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 2–4, 6, 42, 46, 58 (2000). The National Consumers' League was also involved in the effort to pass the Fair Labor Standards Act. *Id.* at 177, 183, 185.

⁸³ *Id.* at 44–45; PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 60 (1993); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 128 (1984). Strum notes that "[b]y far the largest share of the work on the brief was done by [Josephine] Goldmark," who was Justice Brandeis's sister-in-law and who also worked as the research director of the National Consumers' League. STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra*, at 60; STORRS, *supra* note 82, at 44.

⁸⁴ *Darby*, 312 U.S. at 109.

Brown v. Board of Education jurisprudence on noneconomic rights might be characterized as subscribing to the notion of a partial state. That is, during this period the Court expressed greater explicit openness to the idea of the state, and the judiciary especially, engaging in targeted actions to benefit specific social groups.

As noted above, the partial state ideal was indeed suggested in Footnote Four of *Carolene Products*; Justice Stone's majority opinion contained a strong statement of judicial deference to elected bodies on economic rights, while also demarcating certain areas where the Court might remain assertive and scrutinize legislative actions to a greater degree. Among these areas were those noted in Footnote Four's third paragraph: laws that targeted "religious," "national," or "racial" minorities, or laws that encompassed "prejudice against discrete and insular minorities."⁸⁵ The Footnote's third paragraph thus spoke to the notion of the Court engaging in class politics benefitting a minority social group, and due in no small part to this, John Hart Ely focused on Footnote Four as a justification for much of the Warren Court's subsequent rights jurisprudence.⁸⁶

Let me then briefly articulate key elements of the partial state perspective that emerge in some of the Court's opinions during the post-*Brown* era. First, if the dominant judicial fear of the *Lochner*-era Court was a legislative process descending into pork barrel legislation and rampant favoritism to certain classes, the dominant fear within the partial state perspective is a legislature inclined to ignore or harm the interests and rights of certain groups. When the interests of these unfortunate groups are ignored or harmed, key problems emerge: members of these groups are denied "equal concern and respect" and the functioning of democratic processes is fundamentally impaired.⁸⁷ Second, in response to these problems, the partial state ideal would have the state—and the Court especially—engage in class politics to correct for these flaws. This is more or less the opposite of the prescriptions of the impartial state.

In the cases that follow, I draw attention to one similarity and one point of divergence between the post-*Brown* cases on gender and gay equality and the *Lochner*-era cases on economic rights. The similarity

⁸⁵ *Carolene Prods.*, 304 U.S. at 152 n.4.

⁸⁶ ELY, *supra* note 5, at 75–77. To be sure, to say that the Court has "favored" certain minority groups carries some crucial presumptions, and is complicated by the question of what the proper analytical baseline is for determining "favoritism." I will explore this point in greater detail below.

⁸⁷ *Id.* at 74–77, 82, 84–85, 103–04. In discussing the notion of equal concern and respect, Ely relied on the work of Ronald Dworkin. See, e.g., RONALD DWORIN, TAKING RIGHTS SERIOUSLY 180 (1977).

is this: in the gender and gay equality cases, we again see that both the pro- and anti-reform arguments put forth by Justices appeal to themes of group sameness *and* group difference.

At the same time, there is a crucial difference between these cases and the *Lochner*-era cases: if pro-reform arguments in the *Lochner* era appealed to group interests in a broader, more systemic or more instrumental manner, such concerns seem to be more subdued in the post-*Brown* cases. Larger, more systemic goals encompassing other social groups or the broader polity do not seem to color the Court's discussion of group rights to the same degree here. Rather, the Court appears more engaged in class politics, largely to the benefit of only the group in question. Thus, the partial state perspective aligns well with notions of *societal segmentation*, a concept that I will begin to flesh out in this Part.

A final note on case selection: in the discussion below, my focus is only on the Court's gender and sexual orientation cases where the majority, concurring, or dissenting opinions devoted some explicit attention to group interests. I focus on these two bodies of doctrine because they constitute two of the most visible and important examples of judicial assertiveness against conflicting prior doctrine, and conflicting federal and state statutes. I have, however, bypassed a discussion of *Brown* itself and the post-*Brown* cases on race and equal protection. This is partly because the gender and sexual orientation cases arguably present better case studies of judicial assertiveness; while the Court's post-civil rights era jurisprudence on race was built upon a foundation of earlier judicial precedents and pivotal congressional statutes, there had been no such legislative basis for the doctrinal shifts in gender and gay equality. As a result, the judicial articulation of rights in the latter contexts was relatively more dependent upon the judiciary's own reasoning.

A. *Pro-Reform Arguments on Gender and Gay Equality*

Within pro-reform arguments in the context of gender and gay rights, appeals to similarity and difference are tightly intertwined and often deployed in the same sentences. With respect to sameness, pro-reform arguments tend to begin with the assumption of a normative baseline that is assumed to be universal and equal for all relevant social groups. But from this assumption of equality, pro-reform legal conclusions follow in those cases where certain social groups—which *should* be treated on an equal footing with their legitimate analogues (“like cases”)—are found to be facing severe legal and social inequalities under status quo conditions. That is, it is the status quo condi-

tion of “difference” for certain unfortunate social groups that justifies a corresponding judicial action to treat these groups differently—and more favorably—to counteract an unfair set of baseline conditions and return them to “equality.” The justification for differential and beneficial treatment for certain groups, by the Court, stems from a perceived, initial departure from equality.

The basic shape of this argument is familiar enough for anyone who has read these cases or the Court’s cases on race-based affirmative action, and it mirrors President Lyndon Johnson’s notable comments analogizing the problems of racial inequality to the rules of a foot race:

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.⁸⁸

Still, while this same argument reappears in the context of gender and gay equality, it does carry some additional subtleties in the latter two contexts. With respect to gender, pro-reform arguments were influenced by the Court’s earlier rulings in race and equal protection, and emphasized a long history of discrimination against women to justify the application of heightened scrutiny to gender classifications. For example, in *Frontiero v. Richardson*, a plurality of the Court overturned a system of military benefits for dependents that imposed greater burdens on female military members.⁸⁹ The Court justified the application of heightened scrutiny by discussing the presence of gender discrimination, paternalism, and archaic stereotypes against women in law and society, leading to the imposition of legal disabilities upon women at different historical periods, including the inability to hold office, serve on juries, or vote.⁹⁰

Similarly, in *Mississippi University for Women v. Hogan*, the Court ruled that a Mississippi public university that maintained an all-female nursing program (and that denied admission to a male appli-

⁸⁸ Lyndon B. Johnson, President of the United States, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

⁸⁹ 411 U.S. 677, 684–87, 688 (1973).

⁹⁰ *Id.*; see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–27 (1982) (noting that “[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic” notions of gender); *J.E.B.*, 511 U.S. at 135–36 (arguing that “this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations” may reflect archaic generalizations about gender).

cant on those grounds) violated the Equal Protection Clause of the Fourteenth Amendment.⁹¹ In doing so, the Court majority found that the university perpetuated the archaic stereotype of nursing as a profession only for women.⁹² And in *United States v. Virginia*, the Court ruled that the Virginia Military Institute (“VMI”), a public military university, violated the Equal Protection Clause by excluding women from admission.⁹³ Justice Ruth Bader Ginsburg’s opinion for the Court emphasized an extended history of discrimination against women,⁹⁴ and she noted that while gender differences may exist and could be celebrated, they could not be deployed to subordinate or otherwise harm the interests of women.⁹⁵

Recall the comments of Justices Taft and Holmes’ dissent in *Adkins*, when they stated their skepticism about the Nineteenth Amendment eliminating the need for protective legislation for female employees. In a similar vein, Justice William Brennan voiced skepticism in his opinion for the Court in *Frontiero* that advances for women over the latter half of the twentieth century were sufficient to eliminate the need for judicial action protective of women. In commenting on the unique pervasiveness of gender stereotypes, Justice Brennan stated that:

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.⁹⁶

The race-gender analogy was often made explicit in these cases, since both kinds of social identities arguably had a similar nature: they were individual characteristics imposed arbitrarily at birth, and they had the effect of diminishing the opportunities and benefits of those individuals assigned a more “inferior” status by society. As Justice Brennan stated in *Frontiero*:

And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of

91 *Hogan*, 458 U.S. at 729–30.

92 *Id.*

93 518 U.S. 515, 565 (1996).

94 *Id.* at 531–32.

95 *Id.* at 533–34.

96 *Frontiero*, 411 U.S. at 685–86 (footnotes omitted).

females to inferior legal status without regard to the actual capabilities of its individual members.⁹⁷

Judicial arguments defending the special, favored treatment of groups because of the distinctive disabilities faced by those groups is a familiar point. But embedded within these comments on the peculiar disabilities faced by women are also implicit assumptions of sameness—namely, the assumption of a universal, fair baseline from which the Court might make judgments about the welfare and treatment of individuals. Indeed, the Court’s belief that women had been treated by the law and civil society in ways that diverged from this baseline—to the detriment of women as a class—was what justified the differential treatment of women (and the application of heightened scrutiny for gender classifications) by the judiciary.⁹⁸ Hence the Court’s discussion of pernicious stereotypes against women is intertwined with concerns about how such stereotypes pervert judgments that should be based upon merit or performance—a fairer baseline, as the Court often implied. In *J.E.B. v. Alabama*, the Court ruled that the Equal Protection Clause prohibited gender-based jury selection, and disallowed the state’s use of gender-based peremptory challenges.⁹⁹ In Justice Harry Blackmun’s opinion for the Court in this case, he stated:

Striking individual jurors on the assumption that they hold particular views simply because of their gender is ‘practically a brand upon them, affixed by law, an assertion of their inferiority.’ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.¹⁰⁰

Similar kinds of arguments appear in the pro-reform judicial opinions on gay rights. In the three opinions discussed below, all authored by Justice Anthony Kennedy, there is a baseline presumption of sameness between gay persons and other social groups—to be free

97 *Id.* at 686–87 (footnotes omitted); *see also J.E.B.*, 511 U.S. at 135–36. For an extremely detailed historical analysis of the race-gender analogy, as deployed by feminist legal advocates, *see generally* SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011).

98 *See Frontiero*, 411 U.S. at 686–87.

99 511 U.S. at 138–42.

100 *Id.* at 142 (footnotes omitted); *accord. Virginia*, 518 U.S. at 543–45 (arguing that the justifications for excluding all women from citizen-soldier training are not “exceedingly persuasive”).

of animus, prejudice, and certain legal disabilities—and judicial action is subsequently necessary when laws exist that treat gay persons in a different, less favorable way. That is, targeted judicial action in defense of gay rights is justified by the prior presence of targeted discrimination against gay persons in past precedents or legislation. Thus in *Romer v. Evans*, the Court struck down Amendment 2 to Colorado’s state constitution.¹⁰¹ Amendment 2 prohibited antidiscrimination laws at the state and local level for persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”¹⁰² One of the crucial components of Justice Kennedy’s opinion for the Court was his emphasis on the targeted discriminatory nature of Amendment 2. He emphasized that only gay persons were targeted with the particular legal disability contained within it:

Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.¹⁰³

Furthermore, Justice Kennedy asserted that animus against the entire class of gay persons was the real motivation behind Amendment 2.¹⁰⁴

Likewise, in *Lawrence v. Texas* the Court struck down Texas’s anti-sodomy statute, targeted only at gay persons, as a violation of the Due Process Clause of the Fourteenth Amendment.¹⁰⁵ Justice Kennedy, again writing for the Court, argued that the anti-sodomy statute took something away from gay persons that all others were able to enjoy, and that went beyond the mere act of sex:

The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and

¹⁰¹ 517 U.S. 620, 624 (1996).

¹⁰² *Id.*

¹⁰³ *Id.* at 627; *see also id.* at 627–31 (describing other ways in which Amendment 2 restricted homosexuals). Notably, Justice Kennedy also invoked the precedent of the *Civil Rights Cases*:

[Amendment 2] is a status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. ‘[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . .’ *Civil Rights Cases*, 109 U. S., at 24.

Id. at 635; *see also Lawrence v. Texas*, 539 U.S. 558, 583–85 (2003) (O’Connor, J., concurring) (making similar comments about the Texas anti-sodomy statute at issue).

¹⁰⁴ *Romer*, 517 U.S. at 634–35; *see also Lawrence*, 539 U.S. at 582–83 (O’Connor, J., concurring) (commenting on the insufficiency of “moral disapproval” of gay persons as a legitimate state purpose under the Equal Protection Clause in the context of the anti-sodomy statute at issue).

¹⁰⁵ 539 U.S. at 567.

purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.¹⁰⁶

Furthermore, the criminalization of this conduct by the state carried with it certain stigma harms that would attach only to gay persons, and that would remain even if the Court were to use the Equal Protection Clause to strike the law down, rather than the Due Process Clause:

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.¹⁰⁷

Finally, all of the preceding themes of animus, stigma harms, and the imposition of a significant and targeted legal disability reappear in Justice Kennedy's opinion for the Court in *United States v. Windsor*.¹⁰⁸ There, the Court struck down the Defense of Marriage Act's ("DOMA") definition of marriage as "a legal union between one man and one woman" for federal purposes as a violation of Fifth Amendment Due Process.¹⁰⁹ In doing so, Justice Kennedy viewed this definition in DOMA as singling out gay persons for a legal disability with real consequences—both financial and in the form of a stigma harm.¹¹⁰ Furthermore, he viewed DOMA as being motivated by a goal of animus against gay persons, which justified the Court's subsequent actions in defense of their rights:

DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws,

¹⁰⁶ *Id.*; *accord. id.* at 574 (noting that "our laws and traditions afford constitutional protection" to intimate and private decisions that are "central to personal dignity and autonomy").

¹⁰⁷ *Id.* at 575; *see also id.* at 575–76, 578 (describing in further detail the "collateral consequences" of the anti-sodomy statute).

¹⁰⁸ 133 S. Ct. 2675 (2013).

¹⁰⁹ *Id.* at 2695.

¹¹⁰ *Id.* at 2692–95.

sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.¹¹¹

B. *Anti-Reform Arguments on Gender and Gay Equality*

If Justice Kennedy's opinions dominate the discussion of gay rights on the pro-reform side, Justice Antonin Scalia's arguments dominate the discussion on the anti-reform side. Very similar to the anti-reform arguments put forth during the *Lochner* era, one argument repeated by Justice Scalia was to deemphasize differences between women or gay persons, relative to those groups not receiving special judicial protection. Thus in his dissent in *United States v. Virginia*, Justice Scalia questioned whether it made sense to treat women as a disempowered minority at all. They were not a numerical minority—making them not analogous to racial minorities—and federal legislative victories for women's rights suggested that they were not lacking in political influence either. Justice Scalia further noted that the apparent assumption of pro-reform Justices that women as a group lacked the ability to properly exert their potential political power suggested a kind of paternalism in its own right that was similar to what the pro-reform Court majority found troubling in VMI's actions.¹¹²

Similarly, in the context of gay rights, Justice Scalia was unsympathetic to the notion of gay persons constituting a weaker political class. To the contrary, in his *Romer* dissent he emphasized that gay rights advocates had demonstrated their ability to successfully navigate the political process with victories at the local and state level prior to Amendment 2.¹¹³ More pointedly, in both his *Romer* and *Lawrence* dissents, he suggested that gay rights advocates were actually placed in a more *favored* position relative to other social groups because of the close alignment in ideology between them and members of the legal elite. As he stated in his *Lawrence* dissent:

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . [M]any Americans do not want persons who openly engage in homosexual conduct as partners in their

111 *Id.* at 2696; see also *id.* at 2693–95.

112 *Virginia*, 518 U.S. at 575–76 (Scalia, J., dissenting).

113 *Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination' which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream'¹¹⁴

Stated more precisely, in the *Romer* case, Justice Scalia viewed the initial anti-discrimination legislative protecting gay persons at the state and local level as a legitimate kind of class politics favoring that group. In response, the passage of Amendment 2 was, in his estimation, *also* a legitimate, political response to remove that prior, favorable legislation, and to place gay persons back on the same equal footing as everyone else. As he stated of Amendment 2, "[t]he people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment."¹¹⁵

By contesting the presumption of constitutionally significant inequalities for women or gay persons in the status quo, Justice Scalia thus viewed the Court's subsequent actions in defense of their rights not as corrective or as remedial, but as a kind of pure favoritism—i.e., the kind of class legislation that inspired the ideal of an impartial state as a corrective. In his *Romer* dissent, he stated:

Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil.¹¹⁶

Similar arguments appear in his *Lawrence* dissent as well.¹¹⁷

Alongside these appeals to the inherent sameness between women, gay persons, and other less judicially favored social groups, Justice Scalia does make an argument regarding group difference as well. It is clear that in each of these controversies, there is no purely neutral

¹¹⁴ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

¹¹⁵ *Romer*, 517 U.S. at 653 (Scalia, J., dissenting); *see also id.* at 637, 638–39 (arguing further that the only "equal treatment" denied to homosexuals as a result of Amendment 2 was the ability to obtain "preferential treatment"). This was also the state of Colorado's position on Amendment 2, which the Court majority rejected. *Id.* at 626 (majority opinion).

¹¹⁶ 517 U.S. at 636 (Scalia, J., dissenting) (citations omitted); *see also id.* at 646, 652–53 (stating a concern with a particular class of individuals becoming the impetus for such a shift from traditional values).

¹¹⁷ 539 U.S. at 602–03 (Scalia, J., dissenting).

outcome. Under the status quo prior to judicial intervention, women—but not men—are denied admission into VMI, and gay persons—but not straight persons—are placed at a legal disadvantage in being subject to Colorado’s Amendment 2, Texas’s anti-sodomy statute, and the definition of marriage within DOMA. With the Court’s actions, women and gay persons are freed of these legal disabilities. Justice Scalia recognizes, of course, that women and gay persons would be subject to a different, and smaller set of legal entitlements—relative to other social groups—if the Court were to forego action in these cases. But he critiqued the Court’s actions, and stated his preference for a default to the status quo and its differential treatment for women and gay persons, with the claim that status quo conditions were well within the bounds of acceptable, pluralistic, democratic politics.

That is, the prospect of different social groups enjoying different legal entitlements was acceptable so long as this did not run afoul of constitutional guarantees. In a sense then, Justice Scalia made it clear that he was fine with class politics, and he was fine with some differential treatment of different groups under the law, so long as it was legitimate class politics done by legislatures. Judicially led class politics, however, was a different matter, and that was how he would describe the Court’s intervention in these cases. As he stated in his *Lawrence* dissent:

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.¹¹⁸

That is, gay rights advocates should not be allowed to have the Court bail them out when they lose in the democratic arena.

118 539 U.S. at 603 (Scalia, J., dissenting); *see also id.* at 602–05 (arguing further that the democratic process, not the Courts, should resolve these matters). For a similar comment in his *Romer* dissent, *see* 517 U.S. at 646 (Scalia, J., dissenting).

IV. SEGMENTATION ARGUMENTS AND THE POST-BROWN-ERA CASES ON GENDER AND GAY EQUALITY

As noted before, one basic similarity runs across the *Lochner*-era cases and the more recent cases on gender and sexual orientation: pro-reform and anti-reform judges in both eras employed arguments about group sameness *and* group difference when discussing group interests. Yet notwithstanding this similarity, arguments in defense of group interests in the context of gender and gay equality diverge in one key regard from such arguments in the *Lochner*-era cases.

By way of beginning to flesh out this claim, let us first consider the most obvious difference between these two sets of cases: the nature of the groups involved in each era. In the *Lochner* era, there was an emphasis on specific types of employees (and by implication specific types of employers): for example, miners, bakers, and those who employed them. Hence the judicial focus in these cases was on the nature of certain kinds of economic relationships, and this was true even when the subjects of litigation were female or underage workers. Professional identity, gender identity, or age identity were relevant in these cases only to the extent that it held implications for both evaluating the nature of an employment relationship, and helping judges determine whether wages or hours legislation was appropriate for certain workers or not.

In contrast, no such consistent focus exists within the more recent gender and gay equality cases—at least with respect to the immediate focus of litigation in these cases. Again, these cases dealt with diverse topics such as admission to a public university, an anti-sodomy statute, and gay marriage. What joins them and makes them appropriate for comparison are the subjects of litigation in these cases, and the shared identities of these subjects. That is, these cases are commonly grouped together and treated as gender equality or gay equality cases precisely because they implicate issues dealing with two groups that are commonly defined by social status—i.e., these cases concern social groups.¹¹⁹

Carolene Products' Footnote Four discussed groups that are “discrete and insular,” which has had great effect in how scholars have theorized about the judiciary’s relationship with social groups.¹²⁰ But

119 On the topic of group status in American constitutional law, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321–42 (1997). On the theory of social groups, see IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 42–48 (1990).

120 See *supra* note 121 and accompanying text; see also *infra* notes 122–23 and accompanying text. For a critique of judicial and scholarly focus on group discreteness and insularity,

perhaps a more precise—and, I believe, relatively non-controversial—description of these social groups that have earned special judicial solicitude since the New Deal era would include the following elements. First, the group possesses a significant degree of “permanence” such that one’s membership in the group is, or the social characteristics that help define the group are, relatively non-fluid as a matter of social relations. Footnote Four’s reference to “discrete” groups offers a narrower formulation of this idea. Second, the social characteristics that help define the group and its members are largely perceived by the broader society to be central to a group member’s identity. That is, these social characteristics are not easily shed for most individuals, in the same way that one’s age or professional identity might change. Finally, especially when the judiciary takes the initiative to defend these groups, such actions are usually supported by a prevailing sense—at least among the judiciary and often among a majority of the electorate as well—of an unfair social disadvantage accompanying group membership.¹²¹

Beyond this rather obvious point that the kinds of groups implicated in the later cases were distinct from the kinds of groups implicated in the *Lochner*-era cases, the contemporary Court’s focus on social groups points to a second and more important difference between these two eras. Recall that in the context of the *Lochner*-era

see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–31, 745–46 (1985).

¹²¹ This description draws on prior discussions of this topic in the following works: YOUNG, *supra* note 119, at 42–48; Balkin, *supra* note 120, at 2359–60; Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1294–95 (1982); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148–50 (1976); Vernon Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607, 610 (1975) (reviewing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)). Groups defined by social status are distinct from alternative conceptions of groups modeled on notions of “association” or “aggregates”—the latter two being more prevalent in pluralist theories of political science. As Young notes, aggregates are defined as collections of individuals sharing certain attributes, and associations are groups constituted by individuals sharing practices and norms. YOUNG, *supra* note 119, at 43–44. In contrast to the possibly impersonal, abstract nature of aggregate groups, social groups are instead constituted by the nature of how group members are situated and positioned in relation to one another and in relation to non-group members. Similarly, this characteristic of social groups also speaks to how they are distinct from associations. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 89–90 (2000). In earlier work, Young went further in differentiating social groups from aggregates and associations. She argued that while social groups may not “exist” apart from their individual members, they are not mere collections of fully formed individuals either. Unlike aggregates and associations, she claimed that social groups partially constitute the social identities of their members. YOUNG, *supra* note 119, at 42–44. For her subsequent comments on the relationship between identity and social groups, see YOUNG, *INCLUSION AND DEMOCRACY*, *supra* at 99–102.

cases, pro-reform arguments emphasizing the distinctiveness of protected groups—relative to all other economic groups that would not be protected by legislation—often had some link to broader, more systemic reform goals. For example, pro-reform arguments for specific groups linked the protective legislation at issue to the public interest (which was an explicit doctrinal principle within the case law), the broader economy, or the vitality of the nation and the American populace through the maternal role of female workers. Furthermore, when examined in whole, the broader legislative effort—and subsequent judicial acquiescence—toward wages and hours regulations for workers in general suggested that the earlier, more targeted reforms seeking protection of certain economic groups might plausibly be seen as instrumental to the larger, more universal goal.

In contrast, such broader goals are less apparent with the more recent judicial emphasis on group difference in the gender and gay equality cases. The judicial solicitude for these groups appears to extend only to the protected groups, with no larger goals driving the Court's actions—and certainly no explicit doctrinal requirement akin to the *Lochner*-era demand that class-specific reform legislation serve the public interest. Indeed, in the Court's discussion of group rights and interests in the more recent cases, its focus is on the very specific and targeted legal disabilities these groups have suffered. Documenting these disabilities was a crucial early step in the Court's analysis in these cases, and it generally provided the basis for very specific and targeted judicial remedies. As we have seen, group-specific past harms and group-specific legal remedies were crucial elements of the arguments in pro-reform gender and gay equality opinions.

One might say that perhaps the Court's actions in these cases are plausibly tied to broader goals like perfecting democratic procedures or ensuring some universal, equal level of status and respect for all.¹²² But even if such concerns have motivated these cases, they are seemingly more subdued here compared to the broader, systemic concerns at work in the wages and hours cases from the *Lochner* era. In

¹²² Ely focused on these themes in discussing the jurisprudence of the Warren Court and in elaborating on his normative theory of judicial review. ELY, *supra* note 5, at 74–77, 82, 84–85, 103–04. I should note, perhaps one exception to my argument among the cases I discuss is *J.E.B. v. Alabama*, where the Court's pro-reform ruling was linked to broader communal interests. See 511 U.S. at 140, 142 (noting that “[d]iscrimination in jury selection, whether based on race or gender,” harms not only those who are excluded but also the community at large). However, communal interests were likely relevant there less because of the gender equality issue, and more because of that ruling's focus on the peremptory challenge, and accompanying questions concerning the integrity of the legal system.

the more recent cases, the rights and interests of certain groups merit judicial solicitude simply because those groups (or the individual members of those groups) were determined by the Court to merit its solicitude.

To be sure, and as noted above, the judicial protection of group interests can be seen as either a defense of group rights (at least partly) for its own sake, or merely as a means toward protecting the rights of individual group members. But regardless of whether the Court may ultimately be more concerned with groups or with individual group members, what nevertheless emerges from the contemporary cases is a judicial outlook more accepting of societal segmentation. Given the Court's focus on groups defined by more permanent, central, and disadvantaging social characteristics, and given the absence of more visible universal goals driving legal reform, the key units of analysis for the Court in these cases are fixed, relatively unchanging groups. Thus, while majorities of the Court have remained committed to liberal notions of individualism and equality across individuals in these cases on gender and gay equality, they have also pressed forth a group-centered perspective—and an openness to differentiation across groups—in a way not shown by Court majorities in the *Lochner*-era cases.

This greater emphasis on groups and group differentiation carries two sets of implications for themes in American political thought. The first is that the post-*Brown* cases hint at a distinct mode of political or legal argument reflecting a theme of societal segmentation. To be clear, I make no claim that this mode of argument is unique to the race, gender, or gay equality cases, nor that it is distinct to post-New Deal-era jurisprudence. To the contrary, I believe segmentation themes appear episodically throughout American history, in a variety of different institutional and policy contexts. The Court rulings on gender and gay equality discussed here are merely one recent example of this form of argument.¹²³

¹²³ Though I will have to defer a more extended discussion of the race cases and segmentation to future work, a few observations are worth mentioning at this point. First, notions of segmentation are, without question, prominent within some of the Court's opinions that promoted and aided the interests of racial minorities. Consider this comment by Justice William Strong for the Court in *Strauder v. West Virginia*, where the Court struck down a state law excluding African Americans from jury service:

At the time when they [the Reconstruction Amendments] were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that

Segmentation arguments, as I define them, invoke a description of society that might be gleaned in legal and political arguments.¹²⁴

had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted.

100 U.S. 303, 306 (1880); *see also id.* at 306–09 (describing further the backdrop against which the Fourteenth Amendment was ratified).

Present within this comment, alongside racist-paternalist sentiments, are the familiar themes of judicial solicitude for a particular social group based upon the targeted harms suffered by that group. A more recent example may be found in Justices Brennan, White, Marshall, and Blackmun's separate opinion in *Regents of the University of California v. Bakke*, where in voting to uphold the U.C. Davis affirmative action program, they stated that "[t]he lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities." 438 U.S. 265, 373 (1978); *see also id.* at 359, 362, 373–74 (arguing further that the purpose of the program, to "overcome the effects of segregation by bringing the races together," was justifiable).

Second, however, the race cases may diverge from the gender and gay equality cases in that broader, systemic interests have been articulated by the Court to justify rulings that plausibly benefit racial minorities. For example, in *Brown v. Board of Education* itself, the Court supported its ruling striking down segregated public schooling by emphasizing the importance of public education both for African-American children and for the broader society as well. 347 U.S. at 493–94. On the latter point, Chief Justice Earl Warren stated that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." *Id.* at 493. Consider also the Court's more recent rulings in defense of race-based affirmative action, where such policies are defended in the name of diversity interests that serve a broad array of interests: the interests of minority student beneficiaries of these programs, the interests of non-minority classmates whose learning is enhanced by this diversity, and society-wide interests in cultivating active and knowledgeable citizenship and leadership among all racial groups. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 315–16, 330–32 (2003); *Bakke*, 438 U.S. at 311–15.

Thus, in the Court's rulings benefitting racial minorities, we find themes and arguments that both overlap and seemingly diverge from the segmentation themes that appear in the context of the gender and gay equality cases. My tentative belief is that these points of divergence in the race cases reflect the peculiar political, institutional, and intellectual context in which the rise of strict scrutiny, and the judicial antipathy to racial classifications, first solidified in the doctrine in the middle to the latter part of the twentieth century. Further, the Court's conceptualization of racial minority groups in its more recent cases reflects a mix of the ideas and arguments from both this earlier, formative period, and from its more recent cases in the post-Civil Rights era.

¹²⁴ The precise relationship between segmentation arguments—as I define them—and the wide array of other arguments in American politics stressing "pluralism" is a large topic that I will have to leave for future work. However, for a short, excellent intellectual histo-

We might say that a legal or political actor makes an argument referencing segmentation in the following circumstances. First, the person proceeds from the assumption, or seeks to assert, that certain cleavages exist in American society that are persistent and significant within the polity. We might expect the referenced cleavages to be tied to distinct and separate social identities. Further, these arguments may assert the permanence of these cleavages. Or, they may assert a belief in the possibility of key cleavages eventually being erased—though the latter argument would likely be joined with an accompanying demand for a change of posture by the state and/or a hope that the passage of time would have significant effect in erasing differences.¹²⁵ Second, implied within the preceding point, but worth spelling out explicitly, segmentation arguments invoke or perceive situations where the benefits or burdens tied to a particular issue or policy are relatively more targeted and specific to groups. That is, these arguments emphasize at least a minimal overlapping of benefits or burdens across groups, and may contemplate direct conflicts of group interests. To be sure, arguments reflecting segmentation may also accompany appeals to the public interest, though the more that broader, public interest themes recede, the more we may consider the argument an appeal to segmentation.

Third, building upon the preceding point, segmentation arguments need not be uniformly so. The appeal to segmentation may, in a given instance, be relatively more or less pronounced; it may travel alone or it may be mixed with other kinds of arguments. Fourth, and finally, themes of segmentation may be specific to certain issues or policy contexts, such that at a given moment in time, segmentation themes in one policy area may coexist with arguments and appeals to consensual pluralism or quasi-consensus in other policy areas. That said, stronger forms of segmentation arguments would emphasize how certain societal cleavages encompass or implicate or simply overshadow multiple policy areas, with perhaps some pre-Civil War sectional arguments serving as prominent, more dramatic examples of segmentation arguments.¹²⁶

ry of notions of pluralism tied to race and ethnicity, see JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 198–232 (rev. ed. 1984).

125 See, for example, Justice Sandra Day O'Connor's measured endorsement of race-based affirmative action in *Grutter v. Bollinger*, where she concluded her opinion for the Court by stating that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

126 See, e.g., John C. Calhoun, *A Disquisition on Government*, in *AMERICAN POLITICAL THOUGHT: A NORTON ANTHOLOGY* 607, 617–18 (Isaac Kramnick & Theodore J. Lowi eds., 2009).

Beyond tentatively illuminating a distinctive mode of argument, these cases carry a second implication for American political thought: they point to the increasing acceptance of groups and group-based analyses within legal and political argument. Consider first the critique that conservatives have sometimes made in accusing the Court's liberal majority of referring back to *Plessy v. Ferguson*¹²⁷ and other ascriptive hierarchical precedents when the latter defends race-based affirmative action.¹²⁸ While the critique is problematic,¹²⁹ such arguments are correct, of course, that pro-affirmative action arguments are invoking a form of group-based analysis rooted in social status.

The fact that non-liberal (or even arguably illiberal), group-based concepts have such currency within the Court's contemporary jurisprudence on race, gender, and sexual orientation is not indicative of the contemporary Court departing from liberalism, or situating itself wholly outside the liberal tradition. Rather, the tentative conclusion I draw from the gender and gay equality cases is that group-based concepts constitute an interesting synthesis of liberal and non-liberal concepts. This conceptual synthesis is constituted by a reaffirmation of the liberal commitment to equality across individuals. But this commitment is applied to individuals *and* groups. And this individual-and-group-focused commitment to equality is accompanied by at least the implicit judicial acceptance of quasi-permanent societal segmentation. The fact that there has been political and social acceptance of such judicial actions accordingly indicates a broader ac-

127 163 U.S. 537 (1896).

128 See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2428–29 (2013) (Thomas, J., concurring).

129 Where such arguments fall short is in assuming that references to social group status by liberal Court members in defense of affirmative action are legally and ethically equivalent to such references in defense of racial subordination and ascriptive hierarchy. To the contrary, we see the contemporary Court deploying group identity toward ends that can plausibly be defended as egalitarian rather than oppressive to racial minorities. On this point, Justice John Paul Stevens stated that

[t]he Court's concept of 'consistency' assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to 'govern impartially,' should ignore this distinction.

Adarand Constrs., Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (citations omitted).

ceptance within the polity of these conceptual innovations related to liberal ideology.

To conclude on two speculative points, we might first ask whether this mixture of non-liberal and liberal concepts, as reflected in the Court's contemporary doctrine on gender and gay equality, is a positive thing from the standpoint of liberal goals. On the one hand, more obviously, the answer to this query might be a very emphatic endorsement. The cases here, after all, show liberal goals being advanced by illiberal concepts. Judicial recognition of ascriptive differences—and making these differences the basis for legal and political reform beneficial to disfavored groups—are ultimately furthering emancipation and the freedom of individuals across social barriers that may have remained legally invisible in the absence of social group recognition. Indeed, once a given social characteristic is viewed by the judiciary as a significant and substantive departure from a liberal baseline of universal equality, liberalism's demand for universalism can obviously be a powerful tool for change and reform.

Yet, on the other hand, there is also a sense in which harnessing group difference to liberalism's demand for universal equality may carry costs as well. Liberalism's emancipatory power is most prominent and attractive when confronted with a disfavored group seeking to enjoy the same set of rights and entitlements enjoyed by all non-subordinated groups—for example, admission to a public school, or the right to marry. Liberalism's demand for universal equality might even plausibly encompass situations like affirmative action, where differential treatment is used toward achieving goals recognized as broadly desirable and important such as admission to elite universities or programs, or obtaining competitive employment positions. But if we take the notion of group difference seriously, it must also imply that different groups may ultimately value different kinds of goals or purposes at different moments in time. In situations where emancipation, freedom, and anti-subordination may demand recognition of a varied and different set of aims for different groups, liberalism's commitment to universal equality may limit the legal recognition of important group differences.¹³⁰ For example, although race-based affirmative action can plausibly be defended in liberal terms, the continuing concern felt by some concerning the differential treatment afforded to distinct racial groups directly speaks to the ten-

¹³⁰ On the costs that liberal principles may impose upon disadvantaged social groups, see YOUNG, *supra* note 119, at 112–16, 164–65.

sion that exists between these programs and the liberal commitment to equality.

Still, regardless of how we might normatively evaluate this conceptual synthesis, it seems hard to imagine social group differences disappearing anytime soon, no matter how enthusiastic one might remain about assimilation as a goal in American society.¹³¹ This leads to my second speculative point: to the extent that liberalism will remain the dominant political philosophy in America, it will continue to maintain, and will likely expand upon, its conceptual accommodation of social groups. One point of likely conceptual accommodation is already well-illustrated in the gender and gay equality cases discussed above. Liberal defenses of the judicial reforms in these cases can claim that these rulings are first and foremost about removing legal disabilities arbitrarily imposed on individuals. To the extent that social groups continue to be viewed as reliable proxies for individual rights, we may see an expansion of judicial and political rhetorical emphasis on social groups as key, constitutive units of American society.¹³²

Another possible point of conceptual accommodation between liberalism and social group-difference can also be gleaned in the assumptions of equality within the gender and gay rights cases. A more robust recognition of group-difference may ultimately lie in fleshing out the liberal notion of equality and emphasizing the multi-faceted demands of equality. Once equality and emancipation are understood in more context-specific, structural, and historically based ways, it may ultimately lead the judiciary and the polity to greater recognition and acceptance of differential treatment of social groups as an implication of liberal equality.

A form of liberalism more accommodating of social group differences may be another episode in liberalism's evolution and a sign of its near-endless flexibility. Conversely, a liberalism that is more accommodating of social groups could signal the loosening of liberal-

¹³¹ See *id.* at 47, 163–64.

¹³² Will Kymlicka has notably emphasized how a state's provision of group-specific rights may be justified within liberal theory. As he states, "For meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture. Group-differentiated measures that secure and promote this access may, therefore, have a legitimate role to play in a liberal theory of justice." WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 84 (1995); see also *id.* at 52, 82–93 (describing the impact of national and cultural identity on self-identification); WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 39–42 (2001) (discussing liberal culturalism).

ism's grip upon American politics and American political thought. However we might classify such a development in political theoretical terms, however, it would be in keeping with trends in the Court's jurisprudence since the mid-twentieth century, and it would certainly speak to normative principles worthy of broader judicial and political acceptance.

CONCLUSION

In situating key constitutional developments within core themes drawn from American political thought, I have illuminated some fundamental judicial presumptions about American society and how it is constituted that underlay the various opinions. In doing so and in emphasizing how the judicial rhetoric on groups differs between the *Lochner*-era cases on wages and hours legislation and the post-*Brown* cases on gender and gay equality, I have sought to illuminate the ideal of societal segmentation in judicial arguments. Segmentation arguments are significant, I have argued, as a crucial component of some of the Court's more recent, significant rulings on social groups and equality. Segmentation arguments are also worthy of attention as a historically important and recurrent mode of argument in American political and legal thought. As discussed in the preceding Part, it remains ambiguous as to what segmentation ideals ultimately imply for American liberalism more broadly. Since both will remain firmly entrenched within American political and legal thought for the foreseeable future, the points of conceptual convergence, mutual accommodation, and conceptual divergence between liberalism and segmentation will undoubtedly continue to shift and evolve.

