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THE LEGAL SUBJECT IN EXILE

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INTRODUCTION

This Essay examines the contemporary reemergence of the "Constitution in Exile"[1] by focusing on a particular aspect of doctrine, the legal subject. By "legal subject," I mean courts' paradigmatic accounts of who human beings are and how they are connected to the social world around them. These are the accounts that courts use to characterize and address the claims of the actual human beings who come before them in litigation. Accounts of the subject have been scrutinized only rarely in constitutional or other doctrinal analysis.[2] This may be because they reveal a philosophical or ideological dimension of judicial decisionmaking—or underscore the mutability of this dimension across time—that sits uneasily with traditional claims of legal autonomy or judicial objectivity.[3] Yet accounts of the subject of-

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1. By "Constitution in Exile," I refer to a constellation of features that characterized pre–New Deal constitutional interpretation. Those elements of the pre–New Deal judicial approach which are particularly implicated by my analysis of the Supreme Court's view of the legal subject include a circumscribed view of the power of Congress, a disinclination to defer to legislative factfinding and decisionmaking, and a restricted view of the role of either federal or state government in addressing or ameliorating group-based inequalities.

2. Interestingly, discussions of the legal subject (or the legal subjects characteristic of certain doctrinal areas) occur more frequently in forms of legal scholarship that are less focused on doctrine and more focused on the role of legal decisions or legal imagery in shaping popular conceptions of particular claimants or groups. This focus emerges, for example, in feminist scholarship that analyzes the ways that women as legal subjects appear to be conceptualized by courts and the effect that these conceptualizations have on popular perceptions of women. *See, e.g.*, Mary Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 277 (1993) (describing the sociocultural costs of exposing the victims of sexual assault to a highly confrontational legal setting where their credibility and character are attacked); Martha Mahoney, *Legal Images of Battered Women*, 90 MICH. L. REV. 1, 2 (1990) (emphasizing the ways in which law distorts the image and experiences of abused women).

3. The few sustained accounts of the legal subject that appear in legal scholarship with any sort of doctrinal focus explicitly note the failure of mainstream (and often critical) doctrinal

ten reveal important elements of a legal theory or doctrinal approach. Accounts of the subject may reflect *descriptive* elements of a legal theory, such as whether essential attributes of the subject are shaped by social interactions or whether governmental regulation establishes a backdrop for the interactions one subject has with another. The descriptive accounts emanating from law may influence or interact with other social images of human subjectivity. In addition, accounts of the subject may be strongly linked with *normative* elements of a judicial approach, such as an account of the proper scope of judicial power, or of government more generally. Thus, accounts of the legal subject can tell us crucial things about the legal world in which we live. They may even function as a bellwether: abrupt or thoroughgoing changes in the characterization of the legal subject may signal a judicial reconsideration of salient elements of the existing interpretive approach.

In this Essay, I trace the characterizations of the legal subject in a particular set of contexts—where the question, broadly put, is the extent to which the government may intervene to ameliorate inequalities between participants in particular social or economic transactions. I focus primarily on substantive due process cases from the pre–New Deal period with substantive due process and equal protection cases from the second half of the twentieth century. I argue that when we examine these characterizations, we see that the contemporary subject of equality bears an uncanny resemblance to its early-twentieth-century counterpart: the subject of the Constitution in Exile. Both subjects are relatively undifferentiated, and those attributes described by the Supreme Court appear to be more a matter of natural endowment than of social formation or governmental influence. Between these periods there is a lengthy interregnum, extending roughly from 1937 to the late 1970s or early 1980s, when the account

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analysis to attend to the features of the legal subject or what they suggest about the legal thought of a particular period. *See, e.g.*, James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 489 (1991) (presenting an analysis of doctrine and theory arguing that debate between critical and mainstream legal thinkers focuses primarily on legal "objectivity," neglecting questions of legal subjectivity); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628 (1991):

> [T]here is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never part of the story.

It is worth noting, however, that in some of these analyses—particularly that of Schlag—the subjectivity that is insufficiently addressed is more the subjectivity of the legal decisionmakers than the subjectivity of the claimants, although the latter, too, is often neglected, because of its potential for raising the question of the former.

of the subject is more highly differentiated and historicized, and the role of governmental action in shaping the condition or attributes of the subject is emphasized more strongly. However, at the end of this time, the subject of the early period returns so forcefully as to suggest that a major conceptual shift is afoot. These developments seem to mark a new—or newly restrictive—notion of the governmental role in ameliorating inequality, and a new—or newly classicist—approach to legal reasoning in the area of constitutional interpretation.

In Part I, I describe those features of the legal subject that are my focus in this exploration, and the questions that I pose regarding judicial decisions in each of these three periods. In Part II, I explore the characterization of the legal subject in three periods: the period from *Lochner v. New York*[4] through its repudiation at the height of the New Deal; the period from the New Deal through the civil and reproductive rights activism of the 1950s–70s; and the period that begins with *Regents of the University of California v. Bakke*[5] and the abortion funding cases and continues to the present.[6] As I look at these cases, I ask what the Court was prepared to acknowledge about the distinctive features of human subjects, and how this account related to the Court's conclusions about the proper scope of governmental intervention in the area in question. In the context of this inquiry, I discuss the influences, both theoretical and institutional, that shaped the Court's inclination to acknowledge social or economic difference.[7] My goal is not to reach any firm conclusions about the comparative influence of different factors, but rather to highlight influences that emanated from the political thought of the time or were more specific to legal theory or to contemporaneous understandings of the judicial role. I also consider the doctrine in which these accounts were embedded,

4. 198 U.S. 45 (1905).

5. 438 U.S. 265 (1978).

6. The analysis may seem atypical for a doctrinal discussion in that it does not focus predictably on the judgments or holdings in the cases, although it notes broad patterns in the resolution of recurring issues. The analysis also may seem atypical in that not all cases that are juxtaposed are doctrinally analogous to each other: the early-twentieth-century cases concern economic substantive due process while the later-twentieth-century cases focus on equal protection, particularly in the areas of race and substantive due process as it applies to reproductive choice. My premise—in fact, part of my thesis—in this Essay is that all of these cases concern the extent to which social or economic inequalities among subjects justify government intervention. This quality, to my mind, makes these two groups of cases appropriate for comparison.

7. My analysis treats as paradigmatic positions espoused by consistent Court majorities in each of these periods. Although I refer to dissenting positions and discuss periods of transition, I do not dwell on divisions among the Justices, nor do I speculate at any length on how changes in court personnel affected or might affect the broad approaches described.

and the extent to which the doctrine permitted the Court to learn from claimants, theorists, and others who sought to alter the Court's recognition of difference. Through this inquiry I highlight important similarities between the account of the human subject emerging today in the Fourteenth Amendment area and that which prevailed during the pre–New Deal encounter with substantive due process.

In Part III, I undertake a closer comparison of the pre–New Deal and the contemporary legal subjects, which highlights both their similarities and their differences. I argue that the Court's recent rejection of group-based particularity in characterizing the legal subject is more extreme and less theoretically well grounded than that of the earlier period. It is also less easily moderated by incorporating competing views into the litigation process. Finally, I attempt to assess, in a preliminary way, the meaning or implications of this development. The intensified resurgence of what I call a "minimalist" legal subject may simply signal an effort on the part of the Court to disentangle itself from the particularistic vision of the subject that has been ascendant since the time of the New Deal. But it also may be part of an effort by the Court to introduce a new normative vision of the government's role in responding to inequality.

I. Characterizing the Legal Subject

Few legal opinions—as opposed, say, to more theoretical writings—explicitly describe their conception of the legal subject. Accounts of the subject generally must be drawn from the interstices of judicial argument: from apparent dicta about human actors, or about categories of actors before the court in a given case, or, by inference, from arguments made in the course of reaching a legal conclusion. So it is useful, before moving to particular conceptions of the subject, to clarify both the interstitial character of these accounts and the *kinds* of interstitial assumptions or conclusions that contribute to judicial views of the human subject.

An account of the subject in legal doctrine is, as I note above, an account of who human beings are. It defines their distinguishing attributes, the origin or sources of these attributes, and how they are affected by governmental action. When judges address these questions in the context of particular opinions, they may be influenced by the ways that these questions are dealt with by political or theoretical accounts external to the field of law. But the legal context is distinctive in that courts' knowledge of human subjectivity is shaped not simply

by the theoretical materials they may consume, but by their understanding of the confines of their judicial role. There are things that they may know about human subjectivity as fellow members of the human race, or as students of social thought, that they feel they cannot know, or cannot give formal doctrinal recognition to, as judges.

A good example of this institutional constraint on knowledge of the human subject is Justice John Harlan's famous dissent in *Plessy v. Ferguson*.[8] I refer in particular to the passage in which he noted,

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, it if remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . .[9]

In this passage, Justice Harlan did something unusual: he juxtaposed the account of the human subject that one might hold as a private citizen with the account of the human subject that he felt constrained to have as an officer of the law. The first portion of this passage reflects an account of human beings that Justice Harlan developed as a thinker, shaped by many of the social influences of his time—from scientific theories describing race as a biological attribute rather than a social construct, and identifying differences between blacks and whites as to skull volume and other ostensibly determinative physiological features;[10] to political theories meticulously dividing the public domain into subrealms identified as the political, civil, and social;[11] to popular assumptions connecting racial pride and manhood. The second portion, however, reflects an account of human beings that was centrally shaped by Justice Harlan's role as a judge and by what he believed the law permitted and enjoined lawmakers from noticing about those human subjects that came before them. It was not, in Harlan's view, that there were no differences between blacks and whites—the differences in history and trajectory that he was prepared

8. 163 U.S. 537 (1896).

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

10. For an interesting discussion of the pre-*Brown* empirical science of the equal protection clause, see generally Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624.

11. The majority opinion appears to embrace such a view. *See Plessy*, 163 U.S. at 544 (asserting that the Fourteenth Amendment "could not have been intended . . . to enforce social, as distinguished from political, equality").

to recognize seem clear enough to make many contemporary readers uncomfortable.[12] It was that the law should recognize no differences when it regulated matters such as access to public accommodations.

As I explore these cases, I ask how the legal subject is characterized with respect to three interrelated questions. First, is the subject described as an unmarked member of the human race, with characteristics that are thought to inhere more or less universally in human beings, or as a member of a particular group or groups, marked by differentiated attributes and shaped by specific histories? Second, is the subject described in terms of its abstract potential for, or its concrete performance in, achieving certain goals? Third, is the subject described as operating largely autonomously in a naturalized domain or as negotiating a conventional domain shaped by governmental action and other historically specific social forces? The answers to this last set of questions may help to determine whether there is a predictable relation between particular accounts of the subject and particular views of the proper scope of governmental authority. Such a relation might suggest that a particular descriptive view of the subject travels with, and helps to perpetuate, a particular normative view of the government's role.

With these questions in mind, I turn to the first period in which the Court announced most explicitly its understanding of legal subjectivity: the period between *Lochner v. New York*[13] and its renunciation in the heyday of the New Deal.

II. THREE MOMENTS IN LEGAL SUBJECTIVITY

A. *The Pre–New Deal, Classical Legal Subject*

1. *The Minimalist Economic Subject*. My first account of the legal subject covers the period spanning roughly from the *Lochner* decision in 1905 to *West Coast Hotel Co. v. Parrish*[14] more than thirty years later. The cases in which this account appears involved chal-

12. *See* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 172 (1996) ("It is not so clear that Harlan thought African Americans were the moral equals of the majority race."); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 39 n.153 (1991) (noting that, while Harlan believed that color-blind constitutionalism would result in continuing white superiority, modern supporters of color-blind constitutionalism hope that it will eliminate racial divisions).

13. 198 U.S. 45 (1905).

14. 300 U.S. 379 (1937).

lenges to state legislation under the Due Process Clause of the Fourteenth Amendment. The human and legal subject in this period is a pared-down version of *Homo economicus*, the rational, self-interested actor of what is often referred to as laissez-faire economics. This subject employed a form of means-ends rationality to chart a path through the economic world, entering into agreements that served the range of his needs and interests. This form of unencumbered economic activity expressed a kind of human essence or raison d'etre—a feature that was recognized in the constitutional doctrine of the period by its enshrinement of economic activity as a fundamental, if not a natural, right. Economic activity was also a critical means of vindicating the common good, as the Court observed in *Adkins v. Children's Hospital*:[15]

> To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.[16]

In assuming and articulating this view of the subject, the Court recognized some distinctive features of a human subject, all of a more or less universal character. The subject had a will and an abstract capacity to function as an economic actor: to search out productive work, to enter into agreements for the purchase and sale of his labor, and to enter into other agreements as may have been necessary for the satisfaction of his material needs.[17] But beyond its productive or economic orientation, the distinctive feature of this subject is its conceptualization as generalized human potential: the Court was not willing to recognize the extent to which subjects fare differently, as a result of different starting points and other characteristics which may be group-based as well as individual.

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15. 261 U.S. 525 (1923).

16. *Id.* at 561.

17. *See, e.g.*, *id.* at 545–46 (describing the importance and constitutionalization of rights to "contract about one's affairs," "sell his labor upon such terms as he deems proper," and "obtain from each other the best terms [men] can as the result of private bargaining"); Coppage v. Kansas, 236 U.S. 1, 7–9 (1915) (noting that, with respect to a worker compelled to sign a "yellow dog" contract, "aside from this matter of pecuniary interest, there is nothing to show that Hedges . . . was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests"); *Lochner*, 198 U.S. at 61 (describing statutes "limiting the hours during which grown and intelligent men may labor to earn their living" as "meddlesome interferences with the rights of the individual").

When the pre–New Deal Court reviewed legislation challenged as a violation of economic due process, the generalized capacity to bargain—that is, to engage in means-ends calculations of rationality—was the only characteristic as to which the Court was willing to acknowledge differentiation, or to probe in the individual case.[18] If the parties were adult men of sound mind and body, the symmetry of formal opportunities—to purchase labor under the conditions one sees fit to impose, and to sell labor or not as one prefers[19]—was sufficient to satisfy the Court that an enforceable bargain, reflecting liberty of contract rather than disparate economic influence, had been struck. Moreover, this formal capacity to bargain tended to be found in all but the most exceptional cases: the Court explicitly distinguished the mental capacity to engage in means-ends rationality from the more contextualized ability to secure an advantageous contract, given differences in the position or material resources of the bargaining parties.[20] Bakers, as the Court said in *Lochner*, "are in no

18. *See, e.g.*, *Coppage*, 236 U.S. at 8–9 ("[T]here is nothing to show that Hedges . . . was not . . . in all respects competent, and at liberty to choose what was best from the standpoint of his own interests."); *Lochner*, 198 U.S. at 57 ("There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades . . . or that they are not able to assert their rights and care for themselves . . . . They are in no sense wards of the State.").

19. *Coppage*, 236 U.S. at 10 (citing Adair v. United States, 208 U.S. 161, 174 (1908)).

20. An interesting question regarding this distinction is raised by the Court's decision in *Muller v. Oregon*, 208 U.S. 412 (1908), a decision that upheld state regulation of the hours of women workers, notwithstanding the constitutional injunction against such legislation, as applied to men, in *Lochner*. It is difficult to determine, from the majority opinion in *Muller*, whether the Court is arguing that women lack the capacity to bargain or that they suffer from categorical inequalities in bargaining power that justify governmental intervention. Consider the following language from the Court's opinion:

> 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 on 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.
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> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affaires it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where

sense wards of the State . . . . Statutes . . . limiting the hours in which *grown and intelligent men* may labor to earn their living[] are mere meddlesome interferences with the rights of the individual."[21] The economic disparities or differentials in power that might unmask such formal parallels as frankly asymmetrical simply were not admitted into the Court's sphere of apprehension.

This account of the subject reflected a then-prominent political worldview that regarded social and economic progress as emanating from a Darwinian engagement among unencumbered economic actors.[22] In this view, the subject was regarded as a largely autonomous denizen of a naturalized economic domain. Market exchange frequently was characterized as a natural phenomenon that runs ac-

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> some legislation to protect her seems necessary to secure a real equality of right. . . . Differentiated 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.

Id. at 421–22. In the Court's invocation of women's comparability to minors, there was a suggestion that there may be a categorical inability to engage in means-ends rationality, although the Court equivocated both with the explicit qualifier "though not to the same extent," and through the analysis in the remainder of the second paragraph, which seemed to indicate more of an inequality of bargaining power, fueled in part by restricted opportunities, but due more importantly to women's "disposition and habits of life"—presumably the biological (and social) orientation toward motherhood referred to in the preceding paragraph. It appears that the Court was willing to take legal (constitutional) cognizance of women's inequalities in bargaining power specifically because they were not contingent—they did not relate to power imbalances in a particular context, but rather were connected to women's distinct biological capacities and socially ordained roles—and recognizing them would not invite similar claims by relatively disempowered male workers. This understanding seems to me to be conveyed by the Court's conclusion that "[d]ifferentiated by these matters [foremost among them "disposition and habits of life"] from the other sex, she is properly placed in a class by herself." *Id.* at 422.

21. *Lochner*, 198 U.S. at 57–61 (emphasis added).

22. *See, e.g.*, RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 6 (1st ed. 1944) (stating that social Darwinists believe that competition among men will lead to continuing improvement); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 417–20 (1988) (discussing social Darwinism as a means of reinforcing Protestants' faith in laissez-faire); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 26 (stating that judicial protection of labor contracts "was the product of a 'free labor' ideology"). Historians have, however, debated vigorously the question of what judicial motivations animated the Court's apparent endorsement of this view through "laissez faire constitutionalism." Some historians have described this approach as a kind of doctrinal figleaf for the Court's enthusiastic sponsorship of the interests of big business, while others have argued that the Court had a genuine commitment to the protection of individual liberty, which it conceived primarily in economic terms, from government interference. *Compare, e.g.*, Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 L. & HIST. REV. 249 (1987) (describing the Court as a patriarchal force that aggressively protected interests of big business), *with, e.g.*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 2 (1995) (arguing that the Fuller Court strengthened private property by deeming it a central personal right that provided a bulwark against government interference).

cording to the free will of the parties and its own set of internal imperatives. One finds this view even in judicial opinions—a context in which one might expect decisionmakers to recognize the implication of the conventional, or the legal, in this ostensibly natural domain. The Court in *Adkins* noted, for example, that employment contracts function according to a "moral requirement . . . that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence."[23] A fair price, in other words, was determined not by reference to any external standard, but by reference to the agreement of the two parties. The economic subject was described as moving freely in this domain, despite the palpable existence of economic inequalities. For example, in upholding the employer's imposition of an anti-union contract, the Court in *Coppage v. Kansas* holds that, "aside from this matter of pecuniary interest, there is nothing to show that [the laborer] was not a free agent . . . at liberty to choose what was best from the standpoint of his own interests."[24]

This view of economic and social life was linked to a vision of limited government, which gained appeal in some intellectual circles, in the face of the impinging legislation characteristic of the Progressive Era and, later, the burgeoning regulatory apparatus of the New Deal.[25] In this view, government—increasingly via the courts—should operate primarily as the protector of this salutary process of economic engagement. Through the recognition of property rights, or of liberty of contract, government enabled parties in the marketplace to negotiate and contract with each other substantially without encumbrance. Despite the functioning of these wealth-protective legal regimes, the courts and other governmental actors rarely viewed themselves (and were not regarded by proponents of this worldview) as implicated in the creation or maintenance of the economic realm, or as responsible for the inequalities that arose there. For example, the fact that a given wage did not permit subsistence for an employee seldom was taken to be the responsibility either of the employer or of the state. Where the courts ascribed responsibility at all, they were more likely to refer to

23. Adkins v. Children's Hosp., 261 U.S. 525, 558 (1923).

24. *Coppage*, 236 U.S. at 8–9.

25. This emphasis on limited government is characteristic of the views of James W. Ely, Jr., *see supra* note 22, and other "moderate revisionists." For an interesting discussion typologizing historical accounts of laissez-faire constitutionalism, see James A. Thomson, *Review Essay: Swimming in the Air: Melville W. Fuller and the Supreme Court 1888–1910*, 27 CUMB. L. REV. 139, 139–56 (1996–1997) (reviewing JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (1995)).

the lack of frugality or discipline in the subject than to mention either exploitative behavior by the employer or governmental choices or policies that may have contributed to the subject's indigency.[26]

Thus when judicial actors spoke explicitly about their disinclination to predicate governmental action (either their own or that of the legislature) on inequalities in bargaining power between the parties, they tended to invoke one of two arguments. The first was the kind of natural rights understanding of economic transactions, such as that advanced in *Adkins*,[27] that provided justification for the legal regimes of property and contract that were being elaborated at that time. Legal actors, like other social actors, served the broader social good when they respected this natural domain of economic engagement. A second argument invoked a narrower institutional logic. According to this reasoning, inequalities were the inevitable result of regimes of property and liberty of contract, and the courts, as the institutions charged with enforcement of those regimes, should be the last to interfere with their predictable consequences. As the Court noted in *Coppage*,

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by

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26. An illuminating opinion on this count is *Adkins*. In the course of rejecting the notion of a subsistence (minimum) wage for women workers, the Court offered reasoning that seemed to hold workers responsible for their own inability to make ends meet at a particular wage level. The Court noted that

> [whether a given wage will meet subsistence needs] depend[s] upon a variety of circumstances: the individual temperament, habits of thirst, care, ability to buy necessaries intelligently, and whether the woman live [sic] alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate.

Adkins, 261 U.S. at 555. The Court also made clear that subsistence wages tax the employer with the support of indigents, which was not his responsibility:

> To the extent that the sum fixed exceeds the fair value of the services rendered [an amount that is determined, according to the Court, by the particular bargain struck between the parties], it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility . . . .

Id. at 557–58. The Court concluded that such exactions "arbitrarily shift[] to [the employer's] shoulders a burden which, if it belongs to anybody, belongs to society as a whole." *Id.* at 558. While this last statement might be taken to gesture toward some notion of governmental responsibility, I see that interpretation as weakened by the penultimate clause ("if it belongs to anybody") as well as by the reference to "society as a whole," which seemed to invoke more of a cost-spreading device than a notion that government should support indigents because it is in some way implicated in their economic condition.

27. *See supra* note 23 and accompanying text.

> circumstances. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[28]

Under either of these views, a minimalist economic subject—one that highlighted equal formal potential, and downplayed differentiated achievement—was a descriptive device that helped keep inevitable economic disparities in perspective, and pro-regulatory impulses at bay. If the Court's decisionmaking reflected only minimal acknowledgment of the economic inequalities that often underlay formal bargains, it could more readily limit the government's role to those exceptional cases where some documented effect of an economic relation on public health or morals justified (state) legislative resort to the "police power."

This stripped-down version of the subject, finally, reflected the influence of classical legal thought, which was at its height during this period. Conceiving law as a "structure of positivised, objective, formally defined rights"[29]—from which the full range of case-resolving conclusions logically could be derived—made it convenient, even necessary, to hold the human subject more or less constant. "Jurisprudence . . . need not vex itself about the 'abysmal depths of personality,'" wrote classical legal theorist John Chipman Gray.

> It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than . . . a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.[30]

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28. 236 U.S. at 17. In addition, the common law sources of constitutional interpretation during this period also constrained the Court in recognizing economic differentiation and particularity. It was difficult for the Court to treat economic duress as the statutorily required "coercion" in *Coppage*, for example, because economic duress was not recognized as coercion in the common law contract doctrine that provided the framework for the interpretation of economic rights under the Constitution. For an interesting discussion of the relation between economic substantive due process and common law doctrine, see Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 23, 28–32 (David Kairys ed., 3d ed. 1998).

29. Mensch, *supra* note 28, at 23.

30. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 29 (2d ed. 1921). For a thoughtful and lively discussion of this view, and of pre– (and post–) New Deal legal subjectivity, see Boyle, *supra* note 3, at 511–16.

2. *Contesting the Minimalist Economic Subject.* While the minimalist economic subject reflected the convergence of a set of dominant intellectual influences, these influences were by no means hegemonic forces. By the 1920s, for example, legal realism had already begun to challenge many of the premises that contributed to this account of the subject. This was true of both the realists' jurisprudential work and their more specific doctrinal interventions. In challenging the strong deductive account of precedent and emphasizing the active, decisional power of the judge, legal realists stressed the factual differentiation among cases and argued that what made cases contentious was the subtle factual variation in the circumstances of the parties.[31] Moreover, in presenting each judge's own experience, environment, or distinguishing characteristics as important influences on the way judges heard facts and resolved cases, the legal realists underscored the salience of such distinguishing characteristics in the lives of parties before the court.[32] As a substantive matter, the realists' challenges to the private law foundations of laissez-faire constitutionalism also implicated the larger conceptual framework that gave rise to the minimalist economic subject. Morris Cohen's *Property and Sovereignty*, for example, collapsed the distinction between private property and the state by arguing that what we recognize as private property is a delegation of specific powers, such as the power to exclude, from the state.[33] This critical account challenged both the naturalness of property (and the economic domain that had grown up around its acquisition) and the presumptive partition of government from this zone of economic activity.[34]

Even before the realist assault reached its height, a group of New Dealers and "people's attorneys," led by figures such as Louis Brandeis, Josephine Goldmark, and Felix Frankfurter, had begun to investigate, aggregate, and publicize the empirical bases for governmental regulatory intervention in economic activity.[35] These efforts, which

31. Mensch, *supra* note 28, at 27.

32. *See, e.g.*, *id.* ("[A judge's decision to apply precedent] is essentially a choice about the relevancy of facts, and those choices can never be logically compelled.").

33. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("[T]he law of property helps me directly only to exclude others from using the things which it assigns to me.").

34. *See* Joseph William Singer, *Review Essay: Legal Realism Now*, 76 CAL. L. REV. 467, 487–88 (1988) (contrasting the classical idea that property rights were created in the private sphere with the realists' view that property rights are a delegation of public power).

35. *See* Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783, 790 & n.34 (1958) ("[T]he key to the Brandeis Brief was the *factual data* he submitted to show the *reasonableness*

documented the impact of unconstrained economic activity on the physical and economic well-being of market participants, were frequently incorporated in appellate advocacy documents that came to be known as "Brandeis briefs." The Brandeis brief worked conceptually as well as empirically. The liberty of contract, as noted above, was preserved through a conceptual structure characteristic of classical legal thought: the sphere of liberty of contract was exclusive of, yet abutted by, the sphere of "reasonable police power" that functioned as its very occasional exception. This quasi-geometric conception rendered the Court's function more classificatory than interpretive. It was not a question of blurry boundaries, but whether a given legislative act fell within one category or another.[36] The Brandeis brief, which showed the way that unencumbered economic freedom harmed the health and morals of workers, helped erode and ultimately collapse the conceptual structure that separated the two categories and made impressively concrete the grounds for regulating inequalities that created unfair, exploitative agreements in the economic domain. The structure of review—which despite the fundamental character of the right claimed, asked simply whether this was a "reasonable exercise of the police power"—permitted this kind of interjection because the vast array of empirical materials and legislative analogues bore on "reasonableness."

These oppositional perspectives, and the larger political context in which they arose,[37] gradually influenced the Supreme Court's doctrine and its conceptualization of the legal subject. Sometimes they were injected directly into the judicial conversation by a participant such as Justice Holmes, whose impatience both with abstract logic as a basis for adjudication and with the Court's constitutionalization of laissez-faire economics often framed his dissents. In *Coppage*, for example, Holmes met the Court's vindication of the symmetry of the

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of the specific law at issue and the *relationship* of the regulation to the *needs* of society.").

36. *See* Mensch, *supra* note 28, at 23–24 (referring to this as an "utterly crucial task of boundary definition . . . assigned to the judiciary").

37. These empirical claims were buttressed or amplified by the growing political support for New Deal interventions and the problematization of the "old Court's" resistance, under such doctrines as the commerce power and non-delegation. Marked movement in the due process and related doctrinal areas began around the time that President Franklin D. Roosevelt, buttressed by Democratic victories in the 1936 elections, proposed the Court-packing plan. Constitutional scholars continue to debate whether this threat provoked the "switch in time that saved Nine," cases such as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (upholding a state minimum wage statute) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act). *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 215 (3d ed. 1996) (discussing Roosevelt's "Court-packing" plan).

yellow-dog contract with a far more particularized account: "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him."[38] He held that such a belief "may be enforced by law in order to establish the *equality of position between the parties in which liberty of contract begins*."[39] Over the longer term, these oppositional perspectives began to affect the majority as well. The first obvious movement came in cases such as *Muller v. Oregon*,[40] where the Court was willing to carve out an exception to the prohibition on regulating the economic domain, based on the distinctive characteristics of women as social and economic actors.[41] But more broadly, this form of argument began to change the terms in which the Court tended to characterize the parties before it, and, ultimately, its conclusions about the appropriate scope of governmental regulation of economic activity.

One can glimpse an interesting transitional pattern in *Adkins v. Children's Hospital*.[42] In this case, a powerful, fact-based brief by Felix Frankfurter requested a shift "from 'judgment by speculation' to 'judgment by experience.'"[43] It amassed an extensive record of the state legislation through which regulation of wages had successfully addressed the gap between women's pay and their subsistence needs. Frankfurter and his judicial supporters in this case clearly lost the battle. The Court, in a characteristic naturalization of economic relations, treated the negotiated employment contract as indicative of the value of the (women) workers' wages and condemned the proposed minimum wage as an exaction from the employer of "an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do."[44]

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38. Coppage v. Kansas, 236 U.S. 1, 26–27 (1915) (citing Holden v. Hardy, 169 U.S. 366, 397 (1898); Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 570 (1911)).

39. *Id.* at 27 (emphasis added).

40. 208 U.S. 412 (1908).

41. For a discussion of the *Muller* decision, see *supra* note 20.

42. 261 U.S. 525 (1923).

43. *Id.* at 535 (quoting Tanner v. Little, 240 U.S. 369, 386 (1916)).

44. *Id.* at 558. The Court notes that

> The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. . . . Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it.

Other features of the opinion, however, signaled a significant shift in the Court's characterization of the legal subject. In rejecting the claim that this case should be controlled by *Muller v. Oregon*, an opinion that had embraced Brandeis's image of a dependent female figure whose maternal role justified regulation of a potentially injurious working life, the Court referred not to an abstract image of woman as *Homo economicus*, but to a particularized account of women's growing political and economic equality, culminating in the nation's ratification of the Nineteenth Amendment.[45] Moreover, in arguing against the rigidity of board-prescribed wage levels, the Court invoked the inevitable factual variation in the circumstances of employers subject to the act. "The law is not confined to the great and powerful employers," the Court noted, "but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood."[46] In an interesting, ironic turn on the reasoning of the Brandeis brief and its realist allies, the Court recognized the particularity and inequality of the party with whom it more readily identified.[47]

The limited fact-sensitivity reflected in *Adkins* eventually broadened into a judicial recognition that disparities in wealth and position could skew the process of economic bargaining and justify governmental intervention. As the Court held in *West Coast Hotel Co. v. Parrish*,[48]

Id. This tautological reasoning leaves no opening for the argument that the bargain may have been infected by radical inequalities of power between the parties, an argument which would make the employer very directly responsible for the sub-subsistence wages of the worker and would create a justification for governmental intervention.

45. *Id.* at 553. The Court declared,

> [W]e cannot accept the doctrine that women of mature age . . . 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.

Id.

46. *Id.* at 557.

47. It is worth noting that the Court's fact-sensitivity in relation to workers in this opinion leads to an implication that some workers are at least in part responsible for their own indigency, for example, through failures of thrift.

48. 300 U.S. 379 (1937).

> [The] exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless 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 . . . [which] is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse that springs from their selfish disregard of the public interest.[49]

B. The Particularized Subject

The Court's rejection of substantive due process in cases such as *West Coast Hotel* marked the beginning of a period in which it began to articulate a new account of the legal subject. In this period, human beings were no longer assumed to be stripped-down, undifferentiated economic actors. Rather, they came to be viewed as particularized subjects with distinct social histories, living in a world constituted by governmental and other social influences, contending not simply for economic livelihood or advantage, but for rights of equality or privacy necessary to self-respect, or to vindicate a range of personal or group-based goals. Several developments previewed and contributed to this conceptual and doctrinal transition.

Among the first was the now-famous fourth footnote in *Carolene Products*.[50] In a case in which the Court upheld congressional power to prohibit the shipment of "filled milk" in interstate commerce, the Court reserved a set of circumstances under which it might employ scrutiny more active than the increasingly typical deference to "regulatory legislation affecting ordinary commercial transactions."[51] "It is unnecessary to consider now," the Court stated,

> [W]hether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political

49. *Id.* at 399–400.
50. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
51. *Id*.

> processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[52]

This language marked a shift in two respects. First, coming, as it did, between the decline of due process as a judicial vehicle for scrutinizing legislation and the rise of equal protection, it signaled the kinds of governmental roles that might evoke judicial suspicion or endorsement in the future. Those roles identified as suspect did not include the long-controversial regulatory intervention in the economy; instead, the Court was concerned with governmental interventions that restricted participatory political processes or targeted "discrete and insular minorities."[53] The human activity that government should aim to facilitate was no longer (simply) navigation of the economic market, but a broader, participatory notion of citizenship. And, as distinct from in the pre–New Deal period, the governmental role would extend beyond noninterference. The evocation of "discrete and insular minorities" and their participatory disadvantages raised the prospect of a more affirmative, equalizing governmental role—bringing to the social and political spheres what *West Coast Hotel* had belatedly ordained for the economic. Second, this passage suggested that the human characteristics that should be the objects of judicial solicitude or attention are not universal but are, rather, particularized and group-specific. The targets of potentially hostile legislation are to be identified not by their generalized capacity to attain some shared human end, but by the distinctive difficulties engendered by their group memberships and particularized group histories.

The move toward particularity in the judicial depiction of the legal subject also was conditioned by the distinct character of the rights being asserted. The struggle of African Americans for inclusion in the institutions and opportunities of American life provided the factual predicate and the broader social and intellectual context for many elements of this legal transformation. The rights initially sought were framed as nondiscriminatory access to certain opportunities that whites enjoyed. But understanding the context of the claims as a political matter and, as I will argue below, implementing remedies as a legal matter required seeing the ways in which opportunities were importantly shaped not simply by generalized human potential but by

52. *Id.* at 152–53 n.4 (citations omitted).

53. *Id.* at 153 n.4.

group membership and its immediate social consequences. When the Court in *Brown* held that to separate black schoolchildren "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"[54] it recognized that race-based characteristics in that social context made a difference, and that legal subjects had to be characterized and considered accordingly. Moreover, the structure of the equality claim—as opposed, for example, to the liberty of contract claim—required a comparison between groups, and a recognition that significant, legally and politically cognizable consequences could flow from group membership.[55]

Even when one moves beyond the equal protection context to consider the substantive due process doctrine that emerged in this period—primarily in the area of reproductive rights—one sees a set of questions that conduce to a more particularized account of the subject. Reproductive choice, particularly post-conception choice relating to abortion, is not a matter as to which all human beings are similarly situated. The decisions whether to conceive, carry a pregnancy to term, and become a parent bear on men and women differently, for reasons of both biology and socially constructed gender formation. The Court's argument for recognizing a right of reproductive choice in *Roe v. Wade*,[56] for example, included a catalog of gender-differentiated effects:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for

54. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

55. Later in this period claims for equality emerged—particularly in the remedial context—which sought political or legal recognition for groups as groups, and sometimes a remedial perpetuation of, as opposed to an end to, differential treatment. *See infra* note 73. This move clearly brought group membership to the center of analysis in a more straightforwardly determinative way. But even the early nondiscrimination claims required a recognition of the prospect-shaping, differential consequences of group membership in a way that the earlier rights claims had not.

56. 410 U.S. 113 (1973).

> it. . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved.[57]

It is possible to discuss pregnancy in gender-neutral terms, as Justice Stewart attempted to do soon after in a Title VII discussion by making reference to "nonpregnant persons."[58] But the basis of these newer substantive due process claims seemed to point toward a kind of particularization that extends at least to gender differentiation.

This orientation toward particularity also was buttressed by certain analytic and structural features of the litigation in question, particularly the equal protection cases arising in the schools. One can glimpse this shift as early as the NAACP's legal campaign to implement and ultimately displace *Plessy*'s command of "separate but equal" accommodations.[59] The Court's opinion in *Plessy* reflected a classical legal consciousness,[60] in that it sought to resolve the question

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57. *Id.* at 153. Interestingly, both the Court's recognition of a right of reproductive choice and the limitations the Court placed on that right arise from an understanding of the legal subject that is sex- and gender-differentiated. In deciding that the woman's right to choose could not be absolute, the Court invoked certain physiological features of pregnancy that are sex-differentiated:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which [earlier cases] were respectively concerned.

Id. at 159 (citation omitted).

58. *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (rejecting a challenge to a California disability insurance program that excluded pregnancy-related disabilities from coverage, and declining to find discrimination on the basis of pregnancy to be sex discrimination). Subsequently, congressional enactment of the Pregnancy Discrimination Act, an amendment to Title VII, made clear that discrimination on the basis of pregnancy constituted a form of sex-based discrimination. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. 2000e(k) (1994)). In addition to this discussion of the issue in the context of this employment discrimination statute, the views of many, including Justice Ruth Bader Ginsburg and Professor Catharine MacKinnon, that the real basis of reproductive choice should be understood to be equality rather than due process suggests a conceptual connection between equal protection thinking and thinking about due process in this particular area. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992) ("The *Roe* decision might have been less of a storm center had it both homed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970s gender classification cases.") (citation omitted); Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 48–51 (Jay L. Garfield et al. eds., 1984) (criticizing abortion rights' foundation in due process privacy doctrine as rooted in male oppression, and suggesting that the inequality of the sexes provides a better starting point from which to rethink abortion rights).

59. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

60. The broad assimilation of the legal realist challenge also contributed to the gradual demise of the kind of classical legal thinking that characterized *Plessy*. The widespread inter-

whether segregation came within Fourteenth Amendment protection by reference to a structure of distinct, if adjacent, spheres of rights. A right to integrated accommodations, according to the majority, was a social right, whereas the Fourteenth Amendment protected civil or political rights.[61] It was the abstract classification of the right—rather than the characteristics or circumstances of the rights-bearer—that was central to decisionmaking according to this framework.[62] Yet even where the Court more explicitly addressed the features of the subjects before it, it was willing—even eager—to abstract from those social contexts that contributed to group-based differentiation. In a now-infamous passage, for example, the Court noted that

> [T]he underlying fallacy of the plaintiff's argument . . . [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by rea-

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nalization of the understandings, for example, that salient factual variations necessitated hard, affirmative choices (as opposed to smooth deductive application of preexisting rules) by judges, or that differences in the background, training, or intellectual predilections of judges shaped the way that they were able to hear facts, as well as which facts mattered, provided a crucial backdrop for understanding the potent, differentiating power of group-based differences. Although some scholars in this post–New Deal period reacted against the more destabilizing implications of realist insights—through an emphasis on legal process, *see, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW cxxxvii–cxxxix (William N. Eskridge, Jr. & Phillip Frickey eds., Foundation Press 1994) (1958) (emphasizing "the study of law as an ongoing, functioning, purposive process"), or a Bickelian judicial deference to the legislature effected through more vigorous deployment of jurisdictional doctrines, *see, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (2d ed. Yale Univ. Press 1986) (1962) (stressing "the area of choice that is open to the Court in deciding whether, when, and how much to adjudicate")—the realist view of subjects, on both sides of the bench, as the product of complex, formative social influence had begun to enter the legal mainstream.

61. The Court noted: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters and railway carriages has been frequently drawn by this court." *Plessy*, 163 U.S. at 545.

62. This classificatory scheme, in turn, seemed to arise from—or travel in tandem with—an institutionally based view: that the government could act only in certain contexts to ameliorate the effects of group-based discrimination. As the majority noted in the conclusion to its opinion:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . "[T]his end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

Id. at 551 (quoting People *ex rel.* King v. Gallagher, 93 N.Y. 438, 448 (1883)).

> son of anything found in the act, but solely because the colored race chooses to put that construction upon it.[63]

The NAACP's campaign for the integration of postsecondary education took an answer born of classical abstraction and demanded that the Court give it concrete, particularized detail: It might be that the law tolerated separation so long as there was equality, but were the postsecondary educational institutions established for black students actually equal in ways that satisfied the Fourteenth Amendment's command? Answering this question required the Court to focus not on spheres of rights but on the material circumstances,[64] and later the intangible opportunities,[65] that produced inequality for different groups of students in particular educational settings. This reframing helped to create a new image of the subject. The subject in *Plessy* was closer to an unmarked rights-bearer: the challenged regulation, the majority asserted, bore on blacks and whites in the same way. The subject that emerged in cases like *Missouri* ex rel. *Gaines v. Canada* and *Sweatt v. Painter* was one whose group membership shaped his opportunities in tangible ways. No one could claim that a black student who was required to cross state lines to attend law school[66] or who was relegated to an understaffed, underfunded skele-

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63. *Id.* The Court also was sufficiently willing to abstract from the complex and painful legacy of discrimination against blacks to ask, hypothetically, what inferences would be drawn if the roles of blacks and whites were reversed: "if . . . the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." *Id.* The reason whites would be unlikely to acquiesce, of course, had everything to do with their long history of privilege and primacy in U.S. politics and society. The Court did not appear to acknowledge this point, or the fact that it made this hypothetical completely inapplicable to the situation of African Americans facing a law enacted by a white-dominated legislature.

64. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938) ("The basic consideration is . . . what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.").

65. *See* Sweatt v. Painter, 339 U.S. 629, 633–34 (1950):

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

66. *Gaines*, 305 U.S. at 342–43.

ton of an institution[67] was experiencing life as an undifferentiated human being. With the rejection of "separate but equal" in *Brown*, the consequences of group membership that the Court felt compelled to acknowledge included not only material disparities, but systematic threats to psychological development and self-esteem.

After *Brown*, the shift toward particularity was conditioned by a litigation structure that entailed an independent, often extensive, remedial stage. In southern states, where de jure segregation was often easily demonstrable, the remedial phase dominated the litigation, making group-based differentials, and group-conscious means for remedying them, the primary focus of judicial attention at both trial court and appellate levels.[68] As desegregation moved to the North, questions of de facto segregration brought to the fore another issue: the varied roles played by school districts and other arms of the state in bringing discriminatory systems into being.[69] This inquiry tied issues of right and remedy more closely together in some contexts,[70] but it also underscored the state's role in shaping the circumstances in which people lived.[71] And in both southern and northern contexts,

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67. *Sweatt*, 339 U.S. at 633.

68. *See, e.g.*, Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 22–26 (1971) (holding that school districts are not required to adhere rigorously to racial quotas when desegregating, and that the existence of a small number of one-race schools does not in itself indicate de jure segregation).

69. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191 (1973) (observing that "[the] School Board alone, by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy, created or maintained racially or ethnically . . . segregated schools").

70. Ultimately, in some contexts, this connection would restrict the power of the courts to order those forms of remediation necessary to eliminate racially identifiable schools. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that courts lack the power to impose interdistrict desegregation remedies absent evidence of interdistrict violation).

71. In many of these cases, the Court offered precise, detailed analyses of the way that governmental choices could shape, and differentiate, the educational prospects of black and white students. For example, the Court noted in *Keyes* that

> "They [school authorities] must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authori-

remediation dominated, keeping group-based differentiation, as a measure of injury[72] and as a tool for remediation,[73] at the forefront of judicial and public attention. The theme of nondiscrimination and equal opportunity that might have become a basis for the resurgence of a minimalist, undifferentiated subject had little opportunity to assert itself in this context.[74]

> ties have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races."

413 U.S. at 202–03 (quoting *Swann*, 402 U.S. at 20–21).

72. The specific questions about what constituted an injury in these cases varied widely. Some cases asked what number of schools in a given district were still racially identifiable. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968) (identifying the persistence of a dual school system as a measure of continued violation). Other cases investigated what percentage of black students attended majority-black schools. *See, e.g.*, *Swann*, 402 U.S. at 6–7 (stating that two-thirds of the 21,000 black students in the district attended schools that were either totally black or more than ninety-nine percent black). Still other cases asked how many black teachers were employed in nontraditionally black schools. *See, e.g.*, Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 650 (M.D. Ala. 1968) (reciting that of twenty-six newly hired white teachers and six newly hired black teachers, only six white teachers taught in majority-black districts, and all black teachers taught in majority-black districts).

73. Courts in this context focused on such questions as when schools could use racial goals or targets as a means of eliminating racially identifiable schools, *e.g.*, *Swann*, 402 U.S. at 22–25 (asking "to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system"), or when governmental authorities could justify busing students of one race to a school attended predominantly by students of another race, *e.g.*, *id.* at 29–31 (holding that busing students is an appropriate remedy for school desegregation when commuting time for students would be thirty-five minutes at most).

74. Affirmative action took the remedial emphasis one step farther by raising the prospect of remedial action, with all the group-conscious, differentiating analysis that it entailed, largely decoupled from legal determinations of right. The emerging mandate of affirmative action was directed by executive order and congressional action from the mid-1960s and implemented by private employers and state governments thereafter. *See, e.g.*, Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (1994) (requiring any organization that has a contract with the federal government to take "affirmation action" to insure just treatment of employees and potential employees of all races, colors, religions, and nationalities); Exec. Order No. 11,375, 3 C.F.R. 684 (1966–1970) (extending Exec. Order No. 11,246 to the category of sex); Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (requiring employers who have fifteen or more employees to provide equal employment opportunities to persons without regard to their race, color, religion, nationality, or gender). Under Title VII, affirmative action was envisioned only as a remedy for a violation; but given the disparate impact theory of liability introduced under the statute, some employers believed it was necessary to undertake affirmative action in hiring and promotion, in order to defeat the inference of discrimination that might arise from statistical showings of race- or gender-based disparity.

The features of the legal subject produced by these influences were at least threefold. First, the subject was not a universal human actor, but rather a group member whose circumstances and salient characteristics were shaped by highly differentiated, historically specific experiences. Second, the subject's potential to exercise certain rights was less important to the Court than the extent to which particular opportunities had been afforded and enjoyed in practice. Finally, the legal subject's domain was not described as naturalized, but rather as highly conventional, shaped by laws, institutional decisions, and many other social practices.

The shift away from a universalized subject during this period was pronounced. The Court rarely generalized about the aspirations or the potential of human beings, as it did during the *Lochner* period. Instead, the Court described and considered those before it as constituted by their group membership. Generalizations, if any, referred to the relative experience or positions of particular groups, but the Court in many cases eschewed generalizations for more careful, historicized accounts of how differential group circumstances emerged.[75] This tendency to conceptualize a more differentiated subject was signaled doctrinally in the equal protection area by the development of a complicated methodological structure which assigned different levels of judicial deference to challenged legislation in accordance with the nature and history of the group to which a claimant belonged. Opinions such as *City of Cleburne v. Cleburne Living Center, Inc.*[76] contain telling catalogs of the kinds of group-based characteristics that were thought to shape the subject of equality litigation. Ascriptive characteristics that were thought to be inborn or immutable and that had been the source of stigma, stereotypes, or constrained public opportunities put the subject in a distinctive position in regard to governmental action. These characteristics made suspect, or presumptively illegitimate, government action that perpetuated group members' dis-

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75. Two examples of this more detailed exploration of the emergence of differential positions were the discussion of the state's role in generating differential educational opportunity in *Keyes*, quoted *supra* at note 71, and the Court's rendition of legislative findings explaining the exclusion of minority contractors from government contracting opportunities, *see* Fullilove v. Klutznick, 448 U.S. 448, 465 (1980) (reciting that although minorities comprise 16% of the population, only 3% of American businesses are owned by minorities, and further that only 0.65% of gross receipts of all American businesses was realized by minority businesses).

76. 473 U.S. 432, 440–42 (1985) (detailing the level of scrutiny and factors that place various groups under one level of scrutiny or another). Although *Cleburne* is, chronologically, a later case, and, conceptually, a case that I argue reflects a movement back toward a minimalist subject, it contained an illuminating account of the equal protection methodology that had been used throughout the preceding period.

advantage. In cases where more was required than a simple abandonment of discriminatory classifications, these qualities created a claim that subjects within the group could make upon the government for affirmative remedial action.

In the due process area of reproductive rights, a particularized subject emerged in two major ways. First, the recognition of a right of reproductive choice—exercised by a woman in conjunction with her doctor and asserted as against restrictive state legislation—reflected an acknowledgment that pregnancy bears on women in distinctively constraining ways. The Court's discussion of why the right to privacy encompasses a woman's decision whether to terminate her pregnancy, as noted above, is replete with examples of the gender-differentiating effects of that condition.[77] Second, the subject is particularized temporally. The introduction of the trimester test,[78] which structured adjudication of reproductive choice cases throughout the nine months of gestation, acknowledges that neither the state's interest, nor the pregnant woman as subject, can be characterized as static during this period.[79] Her physical condition, her relation to the fetus, and the claims she is able to make in relation to state regulation all shift over the course of the pregnancy. The Court recognized these transitions, when it noted, for example, that the state interest in the health of the mother becomes compelling at the end of the first trimester, "because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth,"[80] or when it finds that the state interest in potential life becomes compelling when "the fetus . . . has the capability of meaningful life outside the mother's womb."[81] The Court's insistence that judges apply different standards to legislation bearing

77. *See supra* note 57 and accompanying text.

78. Roe v. Wade, 410 U.S. 113, 162–64 (1973).

79. The Court noted that "[e]ach [of the state's interests] grows in substantiality as the woman approaches term and, at a point during the pregnancy, each becomes 'compelling.'" *Id.*

80. *Id.* at 163.

81. *Id*. It is interesting to note that in these discussions of the trimester test—or, more particularly, of the point at which the state's interest in regulating abortion becomes compelling—the Court seemed to move the focus away from the woman, even as it described changes in her physical condition that give rise to different legal standards. The language quoted above tends to focus on the fetus, or on data relating to the state's interest in maternal health. This emphasis was perhaps understandable in a section of the opinion in which the Court was discussing potential limits on the woman's right of reproductive choice. However, it seems nonetheless clear that in this discussion the woman, as a physical being and as a rights-bearer, was recognized as a subject uniquely mutable over time.

on different stages of pregnancy reflects a subject that is particularized even to the extent of becoming discontinuous over time.

As the subject became less universalized, the emphasis shifted from the subject's potential to the barriers to the fulfillment of that potential—barriers that were the appropriate object of judicial concern. In the pre–New Deal period the only barriers to the potential for economic activity came from within. If the subject was a child, mentally deficient, or otherwise a "ward of the state," he was presumptively unable to exercise his potential; otherwise he was all potential, always judged to be ready and able to fulfill his economic destiny. In the mid-century equal protection cases, the barriers—to education, for example—were outside the subject rather than within, so it was always relevant to ask what kind of barriers lay in the subject's path and how he was faring in overcoming them. As the Court noted in rejecting a "freedom of choice" plan to integrate public education—a kind of plan that perhaps best embodied purely formal equal opportunity:

> Freedom of choice is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, nonracial system."[82]

It was not simply the potential to achieve equal educational opportunity with which the Court was concerned; any barriers that prevented that potential from becoming reality also had to be addressed. Similarly, in the earliest of the *Roe* progeny, the question was not simply whether the claimant had a formal right to obtain an abortion but whether state legislation impinged concretely on the vindication of that right.[83]

82. Green v. County Sch. Bd., 391 U.S. 430, 440 (1968) (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

83. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 434 (1983) (striking down the requirement that second trimester abortions be performed in a hospital because it places a "significant obstacle in the path" of women seeking abortions); Bellotti v. Baird, 443 U.S. 622, 647 (1979) (striking down a parental consent requirement because it places an "undue burden" on women seeking abortions); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (striking down a spousal consent requirement because of the obstacles it creates for women seeking abortions).

Finally, this particularized view of the subject reflected a denaturalized account of that subject's domain. Legal subjects were no longer actors moving unencumbered through a domain shaped by common impulse and natural law. Rather, they were constrained actors negotiating a contingent, conventional terrain, shaped in complicated ways by laws, institutional decisions, and other social practices. As the Court and the nation began to come to terms with a history of state-sanctioned or state-supported exclusion of blacks from many public opportunities, and as courts became involved in some remedial processes and learned about others through exposure to legislative histories, judges began to understand the many ways in which government actors were implicated in stark, life-changing inequalities. The government was neither so innocent of, nor individual actors so exclusively responsible for, the social arrangements that created inequality as the pre–New Deal doctrine had suggested. Governmental and institutional practices of discrimination and exclusion became plausible, sometimes even presumptive, reasons for disparities in group-based achievement or opportunity. The Court's affirmation of the federal minority contractor set-asides in *Fullilove v. Klutznick*,[84] for example, embodied precisely this form of reasoning.[85] These un-

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84. 448 U.S. 448 (1980) (plurality opinion).

85. The Court in *Fullilove* cited both legislative and executive oversight reports that discussed the barriers encountered by minority businesses. These reports made clear the ways in which governmental action can be implicated in the creation or perpetuation of barriers to equal economic opportunity. For example, the Court noted, a report prepared by the House Subcommittee on Small Business Administration Oversight and Minority Enterprise, observed that

> The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees "equal protection of the laws." *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system*.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.

Id. at 465–66 (quoting H.R. REP NO. 94-468, at 1–2 (1975)). The Court also cited approvingly a Civil Rights Commission Report that described "the barriers encountered by minority busi-

derstandings were reflected, in their fullest form, in governmental adoption of race-conscious programs without litigated or institution-specific showings of harm and in the early judicial affirmation of these programs.[86]

Thus by the late 1970s or early 1980s, the particularized, socially differentiated subject had become a dominant, if not universal, feature of Fourteenth Amendment analysis. But some members of the Court, recognizing the magnitude of the shift—in the account of the subject, in the controversial group-based conceptualization of equality claims, and in the prescription of a broad, remedial governmental role—began to voice second thoughts.

C. The Return of the Minimalist Subject

1. *Rejecting the Particularized Subject*. The first signs of judicial reservations about the particularized subject of equality, and the doctrine that helped to create it, began to emerge in the late 1970s. Members of the Court, writing for themselves or for small groups of Justices, began to suggest that adjudicating the equality claims that could be raised by a range of highly particularized, group-identified subjects threatened to exceed the institutional competence of the judiciary. This view was raised most explicitly in Justice Powell's landmark plurality opinion in *Regents of the University of California v.*

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nesses in gaining access to government contracting opportunities at the federal, state, and local levels." *Id.* at 467. The Court noted,

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

Id. Such evidence led the Court to conclude that

> Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination . . . . Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct.

Id. at 477–78.

86. *See, e.g.*, *id.* at 490 (upholding a federal contractor program providing race-based set-asides); Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987) (upholding a voluntarily adopted affirmative action plan for women employees).

Bakke.[87] Although Powell questioned, briefly, whether ascriptive group membership remained in all cases an accurate marker of differential opportunity, his most serious reservations concerned the institutional capacities of the courts. He noted that in the face of ever-increasing pluralist complexity,

> There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary.[88]

An explicit consequence of this view, for Justice Powell and later for the Court, was a reluctance formally to recognize groups as broadly, historically situated. A history of multifaceted, societal discrimination against African Americans was something that individual Justices might recognize as a social fact; yet it was not something that they could take account of, in their judicial capacity, in distinguishing among race-based classifications. By the time of *City of Richmond v. J.A. Croson Co.*[89] a decade later, this concern had developed into a majority conviction that strict judicial scrutiny must be applied to all racial classifications, including those intended to benefit members of "discrete and insular" minority groups.[90] Hence defendants were re-

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87. 438 U.S. 265 (1978) (opinion of Powell, J.).

88. *Id.* at 296–97.

89. 488 U.S. 469 (1989).

90. *Id.* at 493–94 (O'Connor, J., plurality opinion). Justice O'Connor concluded,

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Id. at 493. The argument in *Croson*, as I elaborate below, *see infra* notes 101–03 and accompanying text, did more than simply express institutional reservations about the use of race-consciousness. In quotes such as the one above, it appeared to relinquish, indeed contest, certain central assumptions from the preceding period, such as the notion that governmental actions aimed at ameliorating the position of historically disadvantaged groups are in fact remedial or benign, or the assumption (undergirding such programs, as we saw in *Fullilove*) that disparities in achievement or circumstance between groups are the product of action or perpetuation by governmental authorities. The opinion also went beyond the institutional reservation expressed

quired to demonstrate discrimination within the remedial jurisdiction before they could justify a remedial program that took race into account.[91]

A similar, institutionally based reservation also appeared in the Court's decisionmaking at the other end of the equal protection spectrum. Increasingly, the Court declined to extend the protections of heightened scrutiny to new groups marked by characteristics such as economic status or mental disability.[92] In particular, the Court's resort in cases such as *City of Cleburne v. Cleburne Living Center, Inc.* to an intensified rational relations scrutiny as an alternative to heightened group-based scrutiny, suggested a growing discomfort with calibrating equal protection analysis to particular group-based characteristics. In

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in *Bakke* to argue that race-consciousness creates affirmative social dangers. I develop the latter point further in the discussion that follows. *See infra* note 103 and accompanying text.

91. The Court held that

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia . . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Croson, 488 U.S. at 499. Similarly, the Court concluded that "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.* at 504.

This reasoning was, in the context of the *Croson* opinion, based in part on the more restricted remedial powers of state governments, as compared with Congress. *See id.* at 490:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision.

However, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court appeared to abandon this emphasis on the differential remedial powers of state and federal governments, arguing instead that doctrinal history has established a principle of "congruence between the standards applicable to federal and state racial classifications." *Id.* at 226. Interestingly, the Court in *Adarand* laid the responsibility for departing from this principle with the opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600–01 (1990)—a decision which upheld a race-conscious federal regulation using intermediate scrutiny—rather than with the opinion in *Croson* which, albeit by a plurality, introduced the notion of a lack of federal-state congruence in distinguishing the opinion in *Fullilove*. *Croson*, 488 U.S. at 490–93 (O'Connor, J., plurality opinion). This ascription of responsibility may have been possible because the Court in *Fullilove* failed clearly to articulate any level of scrutiny for the federal program; however, it studiously neglected the departure implicit in that plurality discussion in the O'Connor opinion in *Croson*.

92. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (holding that mental retardation is not a suspect classification); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that relative wealth of families could not be the factor for establishing a suspect class).

his majority opinion, Justice White was explicit about the difficulties judges face in distinguishing the mentally retarded from

> other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[93]

The Court's conclusion in *Cleburne*, that the means-ends relationship of the statute was so attenuated as to raise an inference of arbitrariness or animus,[94] permitted it to invalidate a statute without recognizing characteristics in the targeted group that would entitle it to future solicitude or providing a basis for other groups seeking to make analogous claims[95] in the future.[96]

Viewed one way, these doubts were not unexpected. The Court's ambivalence about acknowledging a differentiated subject paralleled a widespread social controversy about the meaning of group membership and the challenges it presented to a liberal democracy.[97] The debate over race-conscious remedies, for example, reflected the tensions among the distinct accounts of equality evoked by the earlier claims for inclusion: accounts emphasizing nondiscriminatory treatment as both the means and end of equality-related social change; accounts

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93. *Cleburne*, 473 U.S. at 445–46.

94. *See id.* at 446–48 (holding that a city's permit requirement for a group home had no rational basis).

95. In his partial dissent, Justice Marshall objected to precisely this feature of the doctrinal approach. He observed that the scrutiny employed in the case was by no means the standard rational relations review, and noted that

> by failing to articulate the factors that justify today's "second order" rational basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.

Id. at 460 (Marshall, J., dissenting in part).

96. A decade later, a similar focus on the "per se" equal protection violation in *Romer v. Evans*, 517 U.S. 620, 626–27 (1996), permitted the Court to sidestep the doctrinally thorny question of what kind of scrutiny was due classifications discriminating against gays and lesbians. This mode of analysis effectively moved discussion of group-based characteristics off the table, in a context in which prior precedent suggested that it would be primary.

97. *See generally* ROBERT FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS (2d. ed. 1981) (examining issues arising from giving preferential treatment to minorities); CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994) (exploring modern controversies involving multiculturalism).

justifying group consciousness as an (exceptional) expedient in the quest for nondiscrimination; and accounts advocating group-consciousness and group-based governmental recognition as a critical means or even a central expression of equality.[98] Accounts of the second and particularly the third type incited controversy by challenging the traditional, individualist orientation of American liberalism. Given the contentiousness surrounding judicial recognition of a particularized, group-differentiated subject of equality, a partial rejection of this subject grounded largely in institutional considerations might well have been predictable. What we see in the equal protection adjudication of the past decade, however, is a more systematic and extreme response.

In the affirmative action litigation of the late 1980s and early 1990s, the Court began to issue a broader challenge to the institutional recognition of group-based characteristics. In the earlier period of judicial ambivalence (as in the pre–New Deal protection of economic liberty) the Court either abstracted from such characteristics[99] or highlighted institutional factors that placed them beyond the pale of judicial consideration.[100] In later cases such as *City of Richmond v. J.A. Croson Co.*[101] and *Shaw v. Reno*,[102] the Court began to assail notions of particularized, group-based subjectivity not simply as challenging to judicial competence, but as descriptively flawed or politi-

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98. For an account discussing and distinguishing the first two understandings, see generally Richard Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977). For an account developing a conception along the lines of the third possibility, see generally Charles Taylor, *The Politics of Recognition*, *in* TAYLOR, *supra* note 97, at 25.

99. This strategy was less frequent, probably because this judicial ambivalence emerged at the end of a period in which it was a widely established practice to place emphasis on group-based characteristics in Fourteenth Amendment cases, and it might have been puzzling to lower courts (and to lay readers) had the Court abstracted too systematically from such characteristics in its opinions. However, with cases like *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.), ambivalent Justices begin to stress the fact that the Fourteenth Amendment provides protection to *individuals*, a kind of characterization of the legal subject that abstracts from group-based attributes and leans toward a more universalist understanding. *See, e.g.*, *id.* at 289–90 (noting that the rights created by the Fourteenth Amendment are "guaranteed to the individual"). The recognition that the Fourteenth Amendment protected individual or personal rights was, of course, not entirely new: the Court cited, among other cases, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), and *Missouri* ex rel. *Gaines v. Canada*, 305 U.S. 337, 351 (1938), for this proposition. *Bakke*, 438 U.S. at 289. However, the notion that the individual character of the right means that the clause cannot offer protection that is differentially calibrated to the group membership of the claimant appears to be a comparatively newer interpretation that begins to find favor in *Bakke* and the cases that followed it.

100. *See supra* note 62.

101. 488 U.S. 469 (1989).

102. 509 U.S. 630 (1993).

cally dangerous. Moreover, the Court challenged the resort to particularized accounts of human subjectivity not only by the courts, but also by state or federal legislators. It was no longer a question of institutional competence. Acknowledging group-based characteristics was inappropriate for a variety of governmental actors. The Court offered several different arguments, all of which sought to problematize the race-conscious analysis that had emerged over the past three decades.

The Court held, first, that enactments treating individuals as group members were likely to incite social antagonism. The Court in *Croson* noted that "[u]nless they are strictly reserved for remedial settings, [classifications based on race] may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[103] The Court in *Shaw* made the point more strongly, noting that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[104] Second, the Court reasoned that racial categorization produced a kind of infinite regress of racial thinking, postponing the ultimate goal of a world in which citizens regard each other without reference to group-based characteristics.[105] Third, the Court claimed, particularly in cases challenging race-conscious state electoral districting, that institutional approaches correlating race with identifiable political viewpoints, or treating it as constitutive of political preferences, were likely to be insulting to their purported beneficiaries.[106] The Court in *Shaw* contended that

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an un-

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103. 488 U.S. at 493–94. Interestingly, the language that the Court drew on here originally was offered by Justice Brennan, dissenting in part in *Bakke*, to explain why race-based classifications aimed at assisting minorities should be given intermediate scrutiny. *See* 438 U.S. 265, 356–62 (1978) (Brennan, J., dissenting in part). It is also noteworthy that the Brennan opinion upheld the *Bakke* classification under that standard. *Id.* at 362–79. Brennan's words were given a markedly different meaning in *Croson* when they were used to justify strict scrutiny and, ultimately, to strike down a remedial classification assisting members of minority groups.

104. 509 U.S. at 657.

105. *See id.* (holding that gerrymandering "threatens to carry us further from the goal of a political system in which race no longer matters"); *Croson*, 488 U.S. at 495 (holding that race consciousness "assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved" (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting) (citation omitted))).

106. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 911–12 (1995) (noting that when the state distributes voters on the basis of race, "it engages in the offensive and demeaning assumption that voters of a particular race" will vote similarly); *Shaw*, 509 U.S. at 647–48.

> comfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[107]

In *Miller v. Johnson*, as well, the Court described the assumption of a race-based commonality in political perspective as "offensive and demeaning."[108]

Finally, in two recent cases on affirmative action in higher education, the lower courts have explicitly questioned whether group-based membership does, in fact, produce distinctive views or perspectives of a sort that would enrich educational institutions. The Fifth Circuit Court of Appeals in *Hopwood v. Texas*[109] held that "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[110] And in *Grutter v. Bollinger*,[111] a challenge to affirmative action in admissions by the University of Michigan Law School, the district court noted that "a distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so. . . . The connection between race and viewpoint is tenuous, at best."[112]

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107. 509 U.S. at 647.

108. 515 U.S. at 911–12.

109. 78 F.3d 932 (5th Cir. 1996).

110. *Id.* at 945. The court then proceeded to argue that the assumption underlying this view—that "a certain individual possesses characteristics by virtue of being a member of a certain racial group"—"'legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.'" *Id.* at 946 (quoting Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Minorities*, 1974 SUP. CT. REV. 1, 12). Thus it is not clear whether this argument was about the lack of connection between race and characteristics contributing to diversity in the educational environment, or about the inappropriate mode of thought involved in such an assumption.

111. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

112. *Id. at* 849. Thus this point seemed to be made even more strongly in *Grutter* than in *Hopwood*, partly because the court stuck to its ostensibly empirical position, rather than sliding into a critique of the stereotyped thinking involved in the assumption that race contributes to diversity. The court in *Grutter* noted that "[s]ome of defendants' witnesses testified that classroom discussion is improved when the class is racially diverse, and some gave examples of viewpoints expressed in class by underrepresented minority students. However, these witnesses generally conceded that these viewpoints might equally have been expressed by non-minority students." *Id.* at 849–50. There are, of course, many issues that this position does not address—for example, does a particular argument have the same impact on class discussion when it is voiced by a white student as when it is voiced by a student of color. However, its insistence on

The paradigmatic legal subject in these cases was not the group member with a complex, governmentally and institutionally conditioned history. He was the "individual" whose universal, human essence and limitless potential were demeaned by efforts to contain him by reference to group-based descriptions. As the Court in *Miller v. Johnson* declared, "'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, religious, sexual or national class.'"[113] But these cases—and contemporaneous cases from the due process area of reproductive rights[114]—did more than recharacterize the legal subject. They also introduced a new conception of the government's role in relation to this subject.

Government officials, who were frequently—even presumptively—regarded as implicated in patterns of group-based inequality and charged with what was often a staggeringly complex task of remediation, in this recent period were assigned a different role. The government, be it nation, state, or locality, was not presumed to have produced or perpetuated group-based disparities. This shift was conspicuous in the area of reproductive rights. In the abortion funding cases, for example, the Court declined to acknowledge the force of women's economic circumstances on their ability to exercise repro-

the empirical line does seem to chart new ground in opposing the connection between race-based classification and the achievement of diversity.

113. 515 U.S. at 911 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

114. In the due process area of reproductive choice, the Court has made a more equivocal or episodic retreat from a posture of focusing on the group-based particularities of the claimants' lives. The "undue burden" test itself—first introduced in the funding context and later used in *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (O'Connor, J., plurality opinion), to replace the trimester test—gives the Court broad scope to acknowledge or ignore the effects of (sub)group membership or other contextual variations on a woman's right to choose. As the opinion in *Casey* made clear, the Court will sometimes acknowledge the effect of these particularized characteristics on the woman's right to choose—as in the three-judge opinion's nuanced analysis of spousal abuse and its implications for the constitutionality of spousal notification provisions. *See id.* at 887–98 (noting that the notification provisions would deter women who fear spousal abuse from obtaining abortions). But more frequently the Court will willfully abstract from the effects of subgrouping, particularly on the ability to exercise reproductive choice. In considering the twenty-four hour waiting period at issue in *Casey*, for example, the three-judge plurality becomes almost incoherent in its assertion that, while the waiting period may disadvantage women who have to travel, miss work, or explain their whereabouts to resistant spouses, "a particular burden is not of necessity a substantial obstacle." *Id.* at 887. Whatever ultimately constitutes an "undue burden" in the Court's mind, several Justices are prepared to abstract from these sorts of particularized difficulties in concluding that women's due process rights have been preserved.

ductive choice.[115] In an argument oddly reminiscent of *Adkins v. Children's Hospital*, the Court reasoned that the government is not responsible for the woman's indigency:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[116]

This shift in assumptions may be seen in the affirmative action cases, in the Court's resistance to broad accounts of discrimination intended to implicate state actors ("societal discrimination"[117] or discrimination within a state educational system as a whole[118]) and insistence on institutionally specific showings. But it is even more salient in cases in which the Court, rejecting a state's assumption that it is implicated in patterns of inequality, hypothesized more individual or choice-based explanations for group-based disparities. In *Croson*, for example, the facts that only 0.67 percent of government contracts were awarded to minority business enterprises, and minority business enterprises were almost nonexistent within local contractors' associations, did not raise

115. *See* Harris v. McRae, 448 U.S. 297, 316–17 (1980) (holding that a state is not obligated to fund medically necessary abortions for indigents); Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a Connecticut regulation funding childbirth but not nontheraputic abortions).

116. *Harris*, 448 U.S. at 316–17. In concluding that the government is not responsible for the pregnant woman's indigency, the Court focused in particular on the fact that the statute proscribing coverage of abortions did not create this indigency. *Id*. However, the Court refrained from considering the more important possibility, that other governmental rules or policies may have contributed to the woman's indigency, therefore making it appropriate that the government fund her (medically necessary) abortion. Far from acknowledging this possibility, the Court made indigency sound as if it were inherent, a character trait of the woman or women in question.

117. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–09 (1978) (opinion of Powell, J.) (stating that societal discrimination cannot justify race-conscious remedial action by a university).

118. *See* Hopwood v. Texas, 78 F.3d 932, 949–52 (5th Cir. 1996) (requiring a showing of discrimination within the University of Texas, and within the law school in particular, rather than throughout the state public educational system, to justify a race-conscious admissions policy).

an inference of governmental discrimination.[119] "Blacks," Justice O'Connor opines, "may be disproportionately attracted to industries other than construction."[120]

The government's role in regard to remediation has been revised as well. For, in the most recent affirmative action cases, the Court not only concluded that group-based characterization is wrong-headed or divisive; it also concluded that such characterization may, in and of itself, be a violation of equal protection. Cases like *Croson* or *Bakke* focused on the harm to third parties in developing a notion that race-conscious remedial measures might violate the Fourteenth Amendment.[121] But in later cases, the Court increasingly conceptualized the equal protection violation as the classification or treatment of both beneficiaries and third parties as group members rather than as unmarked individuals. In *Miller v. Johnson*, for example, the Court noted that the "'injury in fact' was 'denial of equal treatment . . . , not the ultimate inability to obtain the benefit.'"[122] The plaintiffs in *Shaw v. Reno* were injured by being deprived of their right to a "'color-blind' electoral process."[123] Government officials, who have been

119. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–506 (1989).

120. *Id.* at 503. Ironically, in advancing this choice-based explanation, Justice O'Connor relied on precisely the kind of group-based generalization that she elsewhere critiqued as demeaning and divisive. *See id.* at 493–94 ("Classifications based on race carry a danger of stigmatic harm . . . . [and may] promote notions of racial inferiority and lead to a politics of racial hostility.").

121. *See Croson*, 488 U.S. at 477–86 (emphasizing Croson's concrete economic harms); *Bakke*, 438 U.S. at 276–81, 298 (emphasizing Bakke's loss of educational opportunity, with a discussion of equal protection noting that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making"). However, it is worth noting that even in *Croson*, the Court was beginning to emphasize the plaintiff's right "to be treated with equal dignity and respect"—a right which presumably was implicated by a race-based criterion for awarding contracts—along with the more concrete harm of losing government contracts. 488 U.S. at 493.

122. 515 U.S. 900, 911 (1995) (quoting Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993)).

123. 509 U.S. 630, 641–42 (1993) (noting that the plaintiffs' claim alleged that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process"). This definitional posture means that neither the group-based identities of the claimants nor most of the factual circumstances that surround them are determinative in assessing the constitutionality of the action undertaken. It is pressed with such insistence in the recent cases that the race-conscious drawing of a North Carolina electoral district in *Shaw* and the exclusion of virtually all blacks from the reconstituted city of Tuskegee in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), become moral and presumptive legal equivalents. *See Shaw*, 509 U.S. at 639–41 (concluding after examination of the facts of *Gomillion* and similar instances of electoral discrimination against blacks that "[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past"). This inclination to find comparability in arrangements disadvantaging blacks and in those disadvantaging whites, notwithstanding the stark differences in history and com-

largely extracted from paradigmatic accounts of the emergence of inequalities, had a removed and contained role in their remediation. They were no longer enjoined by the Equal Protection Clause to vindicate various group-members' potentials as full citizens, or equal students or workers. In fact, the governmental charge in these cases was not even the provision of equal opportunity—although that kind of charge continued in cases such as *United States v. Virginia*,[124] which involved unequivocal instances of institutional exclusion. The government obligation under equal protection became simply not to classify parties on the basis of group membership without highly precise and particularized justification.[125] Group-consciousness that used to be regarded as remedial was now recognized as creating a prima facie violation. Through these decisions, the fluidity and fact-sensitivity of the boundary (which existed for many years after *Bakke*) between the remedy for past discrimination and the enactment that denies equal protection to third parties has been transformed. By insisting that any classificatory action by government on the basis of race presumptively implicates equal protection, the Court has reestablished a formalist structure of adjacent but firmly bounded spheres: An enactment that violates the norm of group-blind treatment is a constitutional problem, not a constitutional remedy.

2. *Strict Scrutiny and the Communication of Oppositional Views*. By all of these analytic means, the Court has communicated a forceful message that group-based understandings of the legal subject have become suspect in the Fourteenth Amendment context. As in the pre–New Deal period, however, this view is not uncontested, in either the political sphere or the domain of legal theory. The debates about

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parative opportunity for the two groups, is interestingly reminiscent of the *Plessy* Court's rationale that whites would not infer inferiority if the segregating legislation had been enacted by blacks. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896):

> The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.

124. 518 U.S. 515, 519 (1996) ("The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords.").

125. *See, e.g.*, *Miller*, 515 U.S. at 911 ("'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, religious, sexual or national class.'" (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))).

the meaning of equality that preceded the Court's *volte-face* continue unabated, with many participants endorsing the group-conscious views abandoned by the Court. Moreover, in the world of legal scholarship, new theoretical work highlights the role of group membership in constituting the individual and underscores the importance of group-based perspectives in many of the institutional contexts at issue in equal protection law. Critical race theory—a body of work that questions the achievements and the neutrality of equality doctrine and seeks to highlight, through critical analysis and experiential argumentation, the distinctive perspectives of people of color—has flourished even as the Court has retreated from the particularized subject.[126] This work explicitly contests the group-blindness of recent doctrine by elaborating the particularized perspectives shaped by racial group membership; it challenges that doctrine's ahistoricity and abstraction from context by tracing the present consequences of the past history of the racialized subject.[127] Yet here, as in the years preceding the New Deal, one question is whether proponents of these critical perspectives have the opportunity to make their voices heard by the Court. This may seem less crucial than in the context of economic due process, because the Court has moved to its present position *from* a more particularized view of the subject, and presumably knows at least something about group-based subjectivity and perspective. However, the Court's reasoning has shifted pointedly since the first moves in *Bakke*, and critical perspectives on the Court's evacuation of the subject have multiplied and flourished during that same period. A process of amicus exchange, such as that facilitated by the Brandeis briefs, might give the Court an opportunity for reflection and reconsideration of its direction.

However, the structure and direction of current doctrine in the equal protection area have made it difficult for critics of the Court's approach to play an active role in the litigation process. The devel-

126. Recent scholarship in this field includes CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (collecting sixty-three articles on critical race theory); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (compiling twenty-seven influential writings); Symposium, *Asian Law Journal*, 81 CAL. L. REV. 1241 (1993) (addressing race issues from an Asian-Pacific American perspective); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (exploring the role of narrative forms in legal thought); Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.–C.L. L. REV. 297 (1987) (assessing the critical legal studies movement's understanding of the role of race in American life).

127. A paradigmatic example of this strategy, offered as a critique of the Court's opinion in *Croson*, can be found in Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

opment of an elaborate equal protection methodology, and the Court's decision to apply strict scrutiny to all classifications involving race, have meant that the Court no longer engages in the broad-ranging "reasonableness" inquiry that facilitated the deployment of legislative facts by lawyers such as Brandeis and Frankfurter. The showings necessary to satisfy strict scrutiny have become increasingly narrow and stylized: the defendant must document past discrimination in the same jurisdiction that enacted the remedy[128] and demonstrate narrow tailoring by showing that race was one among multiple factors in "diversity" cases,[129] or show a tight numerical relation to remedial goals and initial attempts at race-blindness obtained in cases involving remedies for past discrimination.[130] Amici still might be able to gain some purchase in the educational context through empirical arguments that diversity is valuable in educational settings, or that race-based experience contributes to diversity of perspective[131]—a conclusion lower courts recently have called into question.[132] How-

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128. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (holding that a claim of past discrimination in a particular industry cannot justify a racial quota); *id.* at 509 (O'Connor, J., plurality opinion) (suggesting that findings of discrimination within a jurisdiction might justify use of a racial preference). More recently the Fifth Circuit Court of Appeals in *Hopwood v. Texas* suggested that defendants implementing a race-conscious admissions plan need to demonstrate past discrimination in the same institution implementing the plan. *See* 78 F.3d 932, 950–52 (5th Cir. 1996) ("In sum, for purposes of determining whether the law school's admissions system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the relevant alleged past discriminator.").

129. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978) (opinion of Powell, J.) (extolling an admissions program involving the weighing of numerous nonobjective factors). But in two recent cases, lower courts suggested that diversity is not a compelling state interest that could justify race consciousness in the educational context. *See Hopwood*, 78 F.3d at 945–46 (asserting that there is no indication other than Justice Powell's "lonely" opinion in *Bakke* that diversity is a compelling state interest; moreover seeking racial diversity may fuel racial hostility, reflect stereotyped thinking, and correlate poorly with the kinds of diversity that educators seek); Grutter v. Bollinger, 137 F. Supp. 2d 821, 843–50 (E.D. Mich. 2001) (stating that a Supreme Court majority has never found diversity to be a compelling state interest, either in *Bakke*, or in the cases that followed; furthermore, even if intellectual diversity is important it is linked only tenuously to racial diversity).

130. *See, e.g.*, *Croson*, 488 U.S. at 507–08 (noting the City of Richmond's failure both to consider race-neutral means and to tailor its quota narrowly).

131. The University of Michigan cases illustrate the energy that defendants and their supporters have put behind this effort. A huge compilation of expert opinions in these cases attempts to document the varied, positive effects of racial diversity on the educational environment, in order to encourage the (continued) recognition of diversity as a compelling state interest. *See Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 241 (1999) (reprinting eight expert reports).

132. *See supra* notes 109–12 and accompanying text. However, one recent decision in these cases suggests that this strategy may be unavailing. In *Grutter v. Bollinger*, the district court held that the evidence of the educational value of racial diversity could not justify the defendants'

ever, the Court's insistence on adjudicative as opposed to legislative facts seems likely to limit the role played by external critics in shaping the Court's views.[133] A poignant perspective on these new limits is provided in a brief written by Professor David Strauss for an organization of municipalities that served as an amicus in *Croson*.[134] In this brief Strauss painstakingly compiled a catalog of all the race-conscious set-aside programs enacted by state and local governments.[135] It was a strikingly Brandeisian move, aimed at persuading the Court that such programs constitute a well-grounded and plausible response to past discrimination, at a time when the Court had not yet embraced strict scrutiny and the elaboration of its component parts that constitute doctrine today. Yet the jurisdiction-specific standard of "strict scrutiny" that the Court imposed in that very case rendered such arguments all but irrelevant in future cases.

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plan because the Court had never held—by a legally binding majority—that diversity was a compelling state interest:

> The court does not doubt that racial diversity in the law school population may provide these educational and societal benefits. Nor are these benefits disputed by the plaintiffs in this case. Clearly the benefits are important and laudable. Nonetheless, the fact remains that the attainment of a racially diverse class is not a compelling state interest because it was not recognized as such by *Bakke* . . . .

137 F. Supp. 2d at 850. This conclusion, one should note, is based on a narrow and perhaps inappropriately conclusive reading of the *Bakke* decision. While the Court may be technically correct that the diversity rationale was not specifically endorsed by a majority in *Bakke*, the explicit support of the Powell opinion, 438 U.S. at 311–12, the more general endorsement of race-conscious remediation implicit in the Brennan opinion, *see id.* at 369–79 (advocating that a state government may adopt race-conscious programs for the purpose of combating the effects of societal discrimination), and the reliance of subsequent courts on the diversity rationale, *e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 568 (1989) (citing *Bakke* for the principle that "a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated"), *rev'd on other grounds*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987) (observing that a hiring and promotion plan "thus resembles the 'Harvard Plan' approvingly noted by Justice Powell" in *Bakke*); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."); Higgins v. City of Vallejo, 823 F.2d 351, 358–59 (9th Cir. 1987) ("The City's plan is similar to the 'Harvard Plan' for university admissions that Justice Powell approved."), might reasonably be regarded as making a sufficiently strong case for diversity as a compelling state interest as to leave the matter to some degree open, and to permit courts to consider "legislative"-style findings on this point of the type offered in *Grutter*.

133. *See, e.g.*, *Croson*, 488 U.S. at 503–04 (rejecting the notion that findings of fact for one jurisdiction—including a nationwide jurisdiction—might be relevant to another jurisdiction).

134. Brief of Amici Curiae National League of Cities et al., *Croson* (No. 87-998).

135. *Id.* at app. I, app. II.

III. THE COURT, THE SUBJECT, AND THE FUTURE

A comparison of the contemporary legal subject that is emerging in Fourteenth Amendment cases with the subject of the pre–New Deal period yields intriguing similarities. Legal doctrine in both periods reveals a largely undifferentiated subject, described primarily by reference to a few universal characteristics and analyzed more frequently in his potential to achieve certain goals than in his tangible accomplishment of these objectives. Opinions from these periods also reveal a minimalist conception of the government's role in the life of this subject. The government is not understood to be broadly or presumptively implicated in the creation of group-based inequalities among human subjects, or in these subjects' abilities to achieve their goals. It is only occasionally thought to be justified in intervening—to protect those unable to bargain in the pre–New Deal economic domain, or to prevent frank, group-based denials of access in the contemporary period. The government's responsibilities toward the subject under the Fourteenth Amendment consist largely of specific forms of noninterference: with the right to participate in varied forms of economic engagement, in the pre–New Deal period; and with a right to avail oneself of a range of civic and institutional opportunities, unencumbered by racial characterization or classification, in the more recent period.

This analysis suggests one answer to the descriptive question, is there currently a revival in pre–New Deal legal thinking? But it does not address that question's analytic and normative counterparts: What might be responsible for this aspect of the revival, and should we regard the reemergence of a minimalist subject as a promising or an ominous development? In the remainder of this Essay, I will explore how these questions might be answered. This inquiry points to disparities, as well as similarities, between the pre–New Deal and the contemporary judicial moment.

First, the Court, at the turn of the twentieth century, wrote in a legal and intellectual context in which universalist notions of the subject predominated. Industrialization was slowly giving rise to a competing discourse of class-based differentiation, but political thought and particularly legal doctrine prior to *Lochner* was marked by liberal, undifferentiated, universalist conceptions of human subjectiv-

ity.[136] In the contemporary period, however, the Court has embraced the minimalist subject against the backdrop of a very different account of the subject. A characterization of the subject focused on group-based differentiation has not only become a prominent feature of social and political discourse, but it has been widely, if not unproblematically, incorporated into legal discourse. As a practical matter, the Court is obliged to extirpate this conception from legal doctrine. As a conceptual matter, the Court is obliged to relinquish the knowledge that several generations of Justices have gained about the differences that group-specific histories can make and the varied, complex ways in which government actors can be implicated in group-based inequalities. In the pre–New Deal period, some Justices genuinely may have conceived the subject as an undifferentiated actor moving freely in a realm substantially unstructured by governmental action; in the contemporary period, this kind of judicial innocence—about a more differentiated subject and a more complex relation between the subject and the government—is unlikely.

Similarly, the pre–New Deal view of the subject was based on an understanding of economic activity occurring within an autonomous, natural realm whose unencumbered operation produced broad social benefits. The current shift in the characterization of the subject could not conceivably be buttressed by an account of broadly beneficial action within a natural, quasi-autonomous domain. The protected realm in the later cases is much broader and comprehends a number of distinct spheres of activity—such as political participation and education—that are regarded as wholly conventional and difficult to describe in the naturalized terms of neoclassical economics, or classical legal theory. Thus, the reemergence of the minimalist subject is unlikely to be based on a straightforward, ontological view—of a particular realm of human interaction as natural or of the subject as uncontestably undifferentiated. The reemergence of this view in Fourteenth Amendment doctrine is more likely to rest on the judicial choice of a particular account of the subject that it knows to be contestable. The reasons for this choice must be discerned and evaluated.

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136. In some of the most prominent struggles for equality during this period, such as the effort to secure women's suffrage, the appeals were made primarily in universalizing terms, by emphasizing women's essential similarity to men. This became less true by the second decade of the twentieth century, when advocates of women's suffrage began to argue that women could make a distinctive contribution to politics, a form of argument that assumed a sex-differentiated legal or political subject. *See, e.g.*, AILEEN KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920, at 44–71 (1965) (detailing the shift from "justice" to "expediency" as the justification for the suffrage movement).

It is possible that this choice is driven by the Court's view of the institutional costs and benefits of a particular account of the subject. The Court may have retreated from a particularized subject, for example, because it regards a more differentiated subject, and the account of social and legal formation in which it is embedded, as more appropriately the object of *legislative* attention. The world of legislative fact-finding, according to this view, is the context in which the differentiated subject can come to life, and in which remedial arrangements reflecting complex patterns of governmental responsibility can be forged. The crude tools of the law make difficult the apprehension of a particularized subject, but the Court's abandonment of its beachhead in this area may permit the legislature to take up the task with a lighter and more precise touch.

While intriguing as a theoretical proposition, this hypothesis does not seem to describe the way that the Court has proceeded in recent equal protection cases. In many of the cases discussed above, the Court is intervening in state and federal *legislative* efforts to address group-based differentiation through group-based remedies. The plausibility of the view that the Court is permitting the legislature to handle complex subjectivity may turn on whether the new strict scrutiny is actually "fatal in fact" or whether it simply structures legislative efforts to respond to the particularized subject of inequality.[137] However, early returns—and the emerging right to "color blind" public opportunity and governmental nonclassification—suggest that "fatal in fact" will be the more frequent outcome.[138] The injunction forbidding action on the basis of group status appears to be directed not just

137. Another theory is that the Court in the recent affirmative action cases has become less concerned with descriptive nuance in characterizing the legal subject and more concerned with descriptive nuance in characterizing legislative processes, with an eye to preventing process failures—such as that hypothesized by the Court in *Croson*—that involve rent-seeking behavior, "we/they thinking," or some similar defect. While it may be argued that legal thought has recently come to be guided less by sociological thinking (which might focus on the differentiated subject and the complexities of governmental implication in that subject's plight) and more by public choice thinking (which might focus on particular kinds of failures in enacting legislation), *see* Jonathan Simon, *Law After Society*, 24 LAW & SOC. INQUIRY 143, 149–54 (1999) (describing the decline of sociological thinking in law and government), it is not clear that this explains what the Court has done in recent cases. For example, the hypothesis of legislative capture by minority interests that Justice O'Connor raised in *Croson*, *see* 488 U.S. at 495–96 (observing that five of nine Richmond city council members are black), is undermined by Justice Marshall's discussion of the biracial character of the prevailing coalition, *see id.* at 554–55 (remarking upon the election of a black mayor with the support of all four white city council members).

138. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920–28 (1995) (rejecting Georgia's districting plan); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (holding the city's race-conscious plan for contractors unconstitutional); Hopwood v. Texas, 78 F.3d 932, 955 (5th Cir. 1996) (employing strict scrutiny to strike down a race-conscious admissions process).

at courts but at legislative bodies at both federal and state levels.[139] Moreover, developments in a distinct but related area, that of federalism and the Commerce Clause, call into question the Court's inclination to defer to legislative factfinding.[140]

More plausibly, the Court may have retreated from the particularized subject because of its own institutional difficulties in managing the doctrinal consequences of a more complex view of human subjectivity. The meaning of group-based disparities, and the attribution of governmental responsibility for particular failures of opportunity, are fiendishly intricate matters. In an increasingly complex society, calibrating the level of protection according to group-based history, or maintaining a flexible yet intelligible line between group-based remedies and group-based violations, may be a monumental task to which courts as an institution are ultimately unequal. This interpretation has a kind of intuitive appeal, for there is no denying the difficulty of the genealogical and compensatory project attempted, say, by the Warren Court, in a multicultural society. Yet the Court's response seems in some ways to be disproportionate to this objection. One might imagine a Court with these reservations requiring more precise specification of the government's role in perpetuating unequal opportunity, as has indeed happened in some cases.[141] But a wholesale rejection of the constitutive effects of group-based histories or memberships, or a finding that any failure to treat legal subjects as individuals constitutes a presumptive constitutional violation, seems too great a shift to be occasioned simply by such institutional reservations. It also is unclear that the challenges faced by the Court in managing complex subjectivity are decisively greater now than they were in 1980, when Congress and the *Fullilove* Court produced their exhaustive hypothetical account of the government's role in unequal economic opportunity. It seems possible that these challenges have come to be re-

139. It is interesting that in a doctrinal context in which the Court has become more sensitive to the norms of federalism and frequently more deferential to the decisions of state governments, the states were the first to be restrained in their efforts to address the circumstances of group-based inequality. First was *Croson*'s effort to disempower the states in relation to the federal government, followed by *Adarand*'s effort to reestablish parity among state and federal government, but at the level of more restricted action ordained for the states by *Croson*.

140. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607–27 (2000) (striking down a portion of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994), and rejecting congressional factfinding about the commerce-related effects on the lives of women who have been subject to gender-based violence).

141. *See, e.g.*, *Croson*, 488 U.S. at 509–11 (O'Connor, J., plurality opinion) (describing factual circumstances under which a state might be authorized to engage in race-conscious remediation).

garded in a different normative light, as the Court responded to the outcry from a newly mobilized group of self-described victims, or otherwise developed a new perspective on its role. It is thus possible that the change is not even primarily about the Court's view of the subject per se, but about some larger shift in judicial understanding to which a particular view of the subject is a logical concomitant.

Robert Post has observed, for example, that there are distinct roles that courts—and the law—play in establishing social order.[142] Sometimes courts may use law to articulate or enforce a view of community;[143] at other times, they may use law as a form of management, to order society according to "the logic of instrumental rationality";[144] at still other times, they may use law to facilitate self-determination.[145] Each of these views, Post notes, tends to be associated with distinct conceptions of the subject.[146] The reemergence of the minimalist subject may mark a change in the Court's mode of operation in the Fourteenth Amendment area. The Court may have abandoned the managerial rationality of the Warren Court era—a period when judges displayed confidence in their ability to restructure complex public institutions to rectify social inequalities—for an effort to forge community under the banner of color-blindness, or to create an enlarged zone of democratic engagement, where individuals can direct their courses free from governmental interference or supervision. A vision of a subject that is undifferentiated and not importantly subject to social formation could be conceptually consistent with, and even instrumentally necessary to, either of these efforts.

The recent cases provide some interesting evidence that the Court has indeed reconceptualized its equal protection role in these ways. Insistent, rhetorical efforts to rally citizens around an ostensibly uninterrupted legal and moral tradition of color-blindness characterize many of the recent equal protection opinions. And opinions that invoke a "color-blind electoral process" or a right to compete for governmental contracts without the intervening influence of race evoke an emphasis on self-determination, in what might be termed a

142. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 1 (1995) ("[C]onstitutional values often subsist in the very legal structures in which they find their actual embodiment. These structures frequently involve patterns of rules that establish recognizable forms of 'social ordering.'").

143. *Id.* at 3–4.

144. *Id.* at 4–6.

145. *Id.* at 6–10.

146. *Id.* at 10–11.

"liberty approach to equality" under the Fourteenth Amendment.[147] We see in cases from *Croson* to *Miller* to *Hopwood* a large, varied sphere of opportunity through which the subject is presumed to move unimpeded by group-specific, historical factors, and through which the subject is expected to move unassisted by the governmental actors who once worked vigorously to secure his equality. Governmental interference with that area—even, in most cases, for remedial purposes—is construed to be a violation of the fundamental right in question, that of equality.[148] The Court may be adjusting its view of the subject, with all the relinquishment of social knowledge that this entails, to facilitate a new conception of its role in this domain.

Though these explorations can set the terms on which our normative assessment will begin, reaching a conclusion will require us to evaluate more information than we have now: information about the plausibility of conceptual justifications for the recent shift and about its effect on the different constituencies that the Fourteenth Amendment has been understood to serve. For the moment, however, the descriptive assessment seems clear. With the circumscribed governmental role, stripped-down subject, and neoclassical structure of spheres of rights, it seems that we truly have come back to the future. The subject—understood as a differentiated, historicized, socially constructed denizen of a conventional, legally created world—has been exiled once again.

147. I am grateful to Professor Jack Boger for suggesting this phrase for conceptualizing the Court's approach.

148. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (setting out an "exceedingly persuasive justification" requirement for gender-based government action); Romer v. Evans, 517 U.S. 620, 634 (1996) (holding "Amendment 2" to the Colorado Constitution, which singled out homosexuals as a group that could not be protected by antidiscrimination laws, to violate the Equal Protection Clause). In *Virginia* and *Romer*, the Court could act on behalf of excluded groups under the neoclassical framework because the basic right in question, which the government infringed by its group classification, was equality.