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I. Isonomia and Dēmokratia

Brown v. Board of Education is the most celebrated case of twentieth-century constitutional law.¹ Even so, its egalitarian ideal is aggressively under attack. In Parents Involved in Community Schools v. Seattle School District No. 1,² Chief Justice Roberts insisted that Brown was about treating people “as individuals” and did not recognize any distinction between “racial classifications designed to include rather than exclude.”³ Correctly noting that Brown “held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal because government classification and separation on grounds of race themselves denoted inferiority,”⁴ the Chief failed to acknowledge that in Seattle and Louisville no one was being separated or stigmatized—legally or otherwise—in any way; to the contrary, the whole point of the limited racial assignment plan was to make sure that children attended schools together.⁵

¹ 347 U.S. 483 (1954).
² 551 U.S. 701 (2007) (plurality opinion).
⁴ Parents Involved, 551 U.S. at 746.
⁵ What Brown actually said, of course, was that separation based on race “generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” 347 U.S. at 494. In Seattle and Louisville, where race was used as a tie-breaker to make assignments so as to assure reasonable integration, no one was being separated let alone stigmatized as inferior. On the formalism that so muddled the Chief Justice’s reasoning see Steven L. Winter, John Roberts’s Formalist Nightmare, 63 U. MIAMI L. REV. 549 (2009).
In his concurring opinion in *Missouri v. Jenkins*, Justice Thomas took his umbrage to another level. He rejected the idea that “black students suffer an unspecified psychological harm from segregation that retards their mental and educational development.” For Thomas, the conventional understanding of *Brown* rests not just on questionable social science, but “also on an assumption of black inferiority.” On Thomas’s view, psychological harm is entirely irrelevant to the constitutional question. “The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color.”

The more widespread “misreading” of *Brown*, he concludes, “appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.” Similarly, in *Grutter v. Bollinger*, Thomas saw no connection between the maintenance of a diverse student body and “education’s purpose as imparting knowledge and skills to students.” “Diversity,” according to Thomas, is just a “fashionable catchphrase” for what is merely an “aesthetic” preference “to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”

In the legal academy, the idea of equality has fared little better. Dean Robert Post, for example, maintains that “many forms of equality associated with notions of dis-
tributive justice or fairness might actually be inconsistent with democracy.”

Professor Peter Westen famously argued that the concept of equality is empty, its rhetoric confusing and, therefore, that it should abandoned altogether.

These legal and academic arguments against equality find ideological resonance with contemporary libertarian conceptions that root democracy in individual autonomy. But they would have seemed strange and incongruous both to the nineteenth century advocates of racial equality and to those earlier generations of Americans more familiar with democracy’s Athenian origins. This dissonance reflects a momentous shift in our political and legal culture over the last one hundred and fifty years from our civic republican roots to a modern individualist conception of rights and a pluralist conception of democracy. At a time when economic inequality and instability, political polarization, and acute collective action problems (including systemic economic inequality and instability, decaying infrastructure, and global climate change) seem to many to threaten the very project of democratic self-governance, there is something critically important in


16 Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537 (1982); see also Peter Westen, To Lure the Tarantula from Its Hole: A Response, 83 COLUM. L. REV. 1186 (1983) (responding to Kent Greenawalt); Peter Westen, The Meaning of Equality in Law, Science, Math, and Morals: A Reply, 81 MICH. L. REV. 604 (1983) (responding to Erwin Chemerinsky and Anthony D’Amato); Peter Westen, On “Confusing Ideas”: Reply, 91 YALE L.J. 1153 (1982) (responding to Steven Burton). It is important to note that Westen’s argument is purely conceptual and not anti-egalitarian; indeed, many of his examples display moral commitments that a layperson would identify as, first and foremost, egalitarian. See, e.g., 95 HARV. L. REV. at 565-68, 581-84 (discussing racial preferences in graduate school admissions); 83 COLUM. L. REV. at 1187 (“I have no reason to believe that Professor Greenawalt and I disagree about . . . claims for redistribution of wealth, national health insurance, affirmative action for racial minorities, homosexual freedom, and independent women’s athletics. Our disagreement is not about the substance of claims for equality, but about their form. . . .”).

once again recovering and revalidating an older tradition of democratic theory that saw equality as constitutive of democracy and, indeed, at the very center of political life.\textsuperscript{18}

“Isonomia,” the philosopher and classicist Gregory Vlastos tells us, “preceded \textit{Dēmokratia} as the common name for popular government. . . .”\textsuperscript{19} For Vlastos, as for Hannah Arendt,\textsuperscript{20} the political equality designated by the Greek concept of \textit{isonomia} provides the normative force for the democratic ideal. Thus, Vlastos points out that “\textit{Dēmokratia} does no more than describe a fact,” while “\textit{Isonomia} expresses an idea, indeed a whole set of ideas by which the partisans of democracy \textit{justified} the rule of the people.”\textsuperscript{21}

Historically, of course, equality was both relative and contingent: In any given society, only certain people—men, property owners, whites, native-born citizens etc.—were understood to be within its ambit. On the other hand, one can say with confidence that the history of democracy is characterized by the demand of equality; its progress defined by the successive erosion of barriers of class, race, gender, ethnicity, and sexual orientation.

The argument begins, in Part II, with Charles Sumner’s argument in the 1849 school desegregation case of \textit{Roberts v. City of Boston}.\textsuperscript{22} Though the reasoning in \textit{Brown}

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\textsuperscript{19} Gregory Vlastos, \textit{Isonomia} in \textit{Studies in Greek Philosophy—Volume I: The Presocratics} 89 (Daniel W. Graham, ed. 1995) (originally published 74 \textit{Am. J. of Philology} 337 (1954)).


\textsuperscript{21} Vlastos, \textit{supra} note 19, at 96 (emphasis in original).

\textsuperscript{22} 59 Mass. 198 (1849). Sumner’s argument was widely published at the time and is available in a Cornell University Library Digital Collection edition. \textit{Argument of Charles Sumner, Esq. against the Constitutionality of Separate Colored Schools, in the Case of Sarah C. Roberts vs. The City of Boston: Before the Supreme Court of Mass., Dec. 4, 1849} (1849) (hereinafter “Sumner’s Argument”).
v. Board of Education\(^{23}\) is better known and more widely celebrated, it is Sumner’s argument in *Roberts* that presents the more thoughtful understanding of equality. At a time when public education is under attack,\(^ {24}\) Sumner’s adroit use of the Greek concept of *isonomia* both to advance an egalitarian conception of public education and to promote its relation to a healthy democracy serves as a needed tonic.

Part III takes up Post’s contrarian argument in *Democracy and Equality*.\(^ {25}\) Post rejects the widespread intuition that there is an implicit connection between democracy and egalitarianism.\(^ {26}\) On his account, the equality that democracy requires is only the equal treatment of persons as autonomous participants in the public discourse of self-governance.\(^ {27}\) Standing alone, this claim seems unobjectionable; but, as we shall see, its actual elaboration has several patently undesirable implications. It reproduces the long-ago repudiated regime of liberty exemplified by *Lochner*,\(^ {28}\) and with all the same political and epistemic consequences—that is, defense of hierarchy, reification, and indeterminacy. It has the perverse effects of both devaluing equality and depriving it of any independent normative force. And it elides the revolutionary significance of *Brown* in “claiming a place for equality as central as that for liberty.”\(^ {29}\)


\(^{24}\) DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 14 (2010) (“[M]ost of the reform strategies that school districts, state officials, the Congress, and federal officials are pursuing, that mega-rich foundations are supporting, and that editorial boards are applauding are mistaken . . . [and] corrupting educational values. . . . [W]e must preserve American public education, because it is so intimately connected to our concepts of citizenship and democracy. . . .”).

\(^{25}\) Post, supra note 15.

\(^{26}\) Post recognizes that “it is generally thought that implicit within the idea of democracy is a notion of strong substantive equality that flows from the moral equality of all citizens.” *Id.* at 151-52. He insists, however, that the concept of democracy “does not itself entail these principles.” *Id.* at 153.

\(^{27}\) *Id.* at 148.


Part IV turns to the events in Tahrir Square during the initial phase of the Arab Spring. It employs the critical phenomenology of Peter Gabel’s classic *Rights Consciousness* article to explore the social and power dynamics of gender before, during, and after the January 25th movement in Egypt. This discussion will reveal a fundamental shortcoming in the liberal concepts of autonomy and respect for persons—i.e., the failure to recognize that the constitution of “persons” is itself the effect of relations of recognition that only emerge under conditions of equality.

Part V concludes with an evaluation of Westen’s argument that equality is an empty idea suited neither for legal analysis nor moral discourse. Westen’s argument has a certain unimpeachable logic. Its flaw, however, is precisely that it is logical. The “emptiness” that Westen finds in the “idea” of equality is, in parallel with Post, the consequence of a deracinated methodology that elides the social and historical dimensions of actual democratic practice. Equality is not a formal concept, but a political ideal constructed in the public sphere. Just as isonomia provided the normative underpinning for dēmokratia in ancient Athens, the Declaration of Independence’s “all men are created equal” preceded the Constitution of “We the People.” The critical lesson of Roberts and Tahrir is that the communicative values of equality, solidarity, and mutual recognition are the normative preconditions of both liberty and democracy. Democracy requires that we engage with others as partners in a project of collective self-governance. And that is not possible without the constitution of “persons” and of “fellow citizens” that arises from

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31 See Westen, *The Empty Idea of Equality*, supra note 16, at 577-78 (“equality is an entirely formal concept: it is a ‘form’ for stating moral and legal propositions whose substance originates elsewhere, a ‘form’ of discourse with no substantive content of its own”).
32 Declaration of Independence, ¶ 2 (1776).
33 U.S. Const., Preamble.
relations of recognition in the public sphere that only emerge under conditions of equality.

II. “The Beautiful System of Our Public Schools”

More than a hundred years before Brown, an African American printer named Benjamin Roberts sued in state court to have his six-year-old daughter Sarah admitted to the all-white public school nearest their home in Boston. He lost in the courts, though he would succeed in the legislature six years later. The 1849 opinion in Roberts v. City of Boston was written by Chief Justice Lemuel Shaw, the leading state court jurist of the antebellum period. Shaw did not deny that African Americans were entitled to equal rights. Rather, he reasoned that equality before the law meant

only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

Because he read state law to give the school committee discretion to make reasonable classifications in school assignments, he found no violation of equality before the law. Roberts’s reasoning was subsequently relied upon in Plessy v. Ferguson. Boston was a center of the antislavery movement, which included amongst its ranks such noteworthy and able attorneys as Wendell Phillips, Ellis Gray Loring, Richard

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35 See LEONARD W. LEVY, LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 7 (1987). Shaw, who was Herman Melville’s father-in-law and principal economic support, is both the model for Captain Vere and the object of Melville’s condemnation in Billy Budd; indeed, much of the detail of the novella is drawn directly from Shaw’s most notorious capital punishment and fugitive slave cases. Steven L. Winter, Melville, Slavery, and the Failure of the Judicial Process, 25 CARDOZO L. REV. 2471 (2004).
36 Roberts, 59 Mass. at 206.
37 Id. at 208-09.
38 163 U.S. 537, 544 (1896).
Henry Dana, Robert Morris, and Charles Sumner. Roberts engaged the young lawyer Morris to file the case, and Morris in turn retained Sumner to argue it before the Supreme Judicial Court. Morris, who was mentored by Loring, was only the second African American to be admitted to the bar in Massachusetts.39 Charles Sumner was a protégé of Justice Joseph Story. A lecturer at the Harvard Law School, he would subsequently be elected to the United States Senate where he was a Radical Republican stalwart, an important influence on the framing of the Fourteenth Amendment, the leader of the Senate during much of the Grant Administration, and a principal author of the Civil Rights Act of 1875.40

Sumner’s argument in Roberts has been widely credited as presaging the reasoning in Brown.41 In Brown, the Court rejected the application of the “separate but equal” doctrine of Plessy to public schools.42 It did so in two steps. First, it considered “the present place” of public education “in American life,” noting that it is the “foundation of good citizenship” and the “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to

41 See, e.g., Finkelman, supra note 39, at 176 (“Sumner outlined an argument against segregation that, with only a few changes and some new social science data, would prevail nearly a century later in Brown v. Board of Education.”); Leonard W. Levy & Harlan B. Phillips, The Roberts Case: Source of the “Separate but Equal Doctrine,” 56 AMER. HISTORICAL REV. 510, 513-14 (1951) (noting “its nobility of sentiment, literary excellence, and grasp of principles which have been validated by modern sociology”); Epps, supra note 34, at 420 (citing Sumner’s use of “anthropological evidence about the nature and effect of caste” as “an eerie foreshadowing of the social science evidence that the Supreme Court would later rely upon in Brown”); see also ROBERT J. COTTRL, RAYMOND T. DIAMOND, & LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 16-17 (2003).
42 Brown, 347 U.S. at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).
his environment.”\footnote{347 U.S. at 492-93.} Second, it considered the psychological harm that segregation inflicts on black children. “To separate them 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.”\footnote{Id. at 494.} On this reasoning, the Court concluded that: “Separate educational facilities are inherently unequal.”\footnote{Id. at 495.}

Sumner’s argument strikes similar themes. But, as we shall see, it departs from \textit{Brown} in one critical respect: its more profound understanding of equality.

The centerpiece of Sumner’s argument is the claim that racial segregation “is in the nature of \textit{Caste}, and is a violation of Equality.”\footnote{Sumner’s Argument, supra note 22, at 16 (emphasis in original).} Exclusion from the public schools, he argues, is “among ‘the humiliating and brutal distinctions’ by which their caste is characterized.”\footnote{Id. at 17.} The school committee is not authorized, he says, to “brand a whole race with the stigma of inferiority and degradation.”\footnote{Id. at 21.} Responding to the argument that by providing equivalent schools to the black children the committee “have not violated any principle of Equality,”\footnote{Id. at 23-24.} Sumner replies:

\begin{quote}
[I]n point of fact it is not an equivalent. We have already seen that it is the occasion of inconveniences to the colored children and their parents . . . besides inflicting the stigma of Caste. Still further, . . . the matters taught in the two schools may be precisely the same; but a school, exclusively devoted to one class, must differ essentially, in its spirit and character, from the public school known to the law, where all classes meet together in equality. . . .

A separate school, though well endowed, would not secure to them that precise Equality, which they would enjoy in the general public schools.
\end{quote}

\footnote{Id. at 24-25.}
Although this argument sounds like Brown’s separate-is-inherently-unequal argument, in point of fact it is not.

One of the peculiarities of Sumner’s argument is the way in which he interweaves very different conceptions of equality. How much of this is intentional, how much attributable to differences in the style of nineteenth century legal argument, and how much the result of the fact that what we have is not a written brief but a subsequently-published oral argument is difficult to say. His close friend, the poet Henry Wadsworth Longfellow, said that Sumner delivered speeches “like a cannoneer . . . ramming down cartridges.”

In any event, the reference to “precise Equality” in this passage is unclear. Is it the greater inconvenience that the black children face? Is it the social stigma that it intends? Or is it the bare fact of different treatment? What does equality mean in this context?

Sumner’s argument starts, in Point I, by tracing the history of the concept of equality from Seneca through the birth of Christianity, the Glorious Revolution, the French Encyclopedia, Rousseau, the French Revolution and the Constitutions of 1791 and 1793. Throughout this discussion, he refers almost indiscriminately to natural equality and equality before the law—though it is clear that he finds the French elaboration of the latter “more specific and satisfactory than the naked statement that all men are born equal.” Then he abruptly turns to Greece, quoting Herodotus that “the government of the many has the most beautiful name of isonomia”—or equality before

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51 DONALD, supra note 40, at 214. Sumner’s oratorical style was highly formal; he would write out his speeches beforehand and commit them to memory. Id. at 214-15.
52 “God is no respecter of persons; . . . he is the father of all; and . . . we are all his children, and brethren to each other. When the Saviour taught the Lord’s prayer, he taught the sublime doctrine of the Brotherhood of mankind.” Sumner’s Argument, supra note 22, at 5.
53 Id. at 5-9.
54 Id. at 9.
the law.” When he comes finally to the Declaration of Independence (“all men are created equal”) and the Massachusetts Declaration of Rights (“All men are born free and equal”), he concludes that the equality which they declare is actually equality before the law:

Within the sphere of their influence, no person can be created, no person can be born, with civil or political privileges, not enjoyed equally by all his fellow citizens. . . . He may be poor, weak, humble, black—he may be of Caucasian, of Jewish, of Indian, or of Ethiopian race—. . . but before the [law] all these distinctions disappear.56

Sumner never makes clear why equality before the law is “more specific and satisfactory” than natural equality. We can infer three possibilities. First, it could be that Sumner views natural equality—though noble—“merely as a sentiment” yet to “pass into a formula to be acted on.”57 On this view, equality before the law is superior because it offers a concrete program of action. There are, however, two related problems with this explanation. First, while equality before the law may be more concrete than the concept of natural equality, as a formula for action it is still stated at a relatively high level of abstraction. Only on a very formalist view of law could one imagine that equality before the law would serve as a sufficient guide to decision in concrete cases.58 Second, and more patently, the notion of equality before the law is conceptually inadequate. As Vlastos says of Solon’s reforms, “unequal laws, i.e., laws which sanction the unequal distribution of political rights and privileges to different social classes, might be upheld

55 Id. (emphasis in original).
56 Id. at 10-11 (emphasis in original).
57 Id. at 7.
58 Consider, for example, the “equal” application of a formerly typical juror qualification statute that limited service to those “of sound mind and good moral character.” See, e.g., Castaneda v. Partida, 430 U.S. 482, 485 (1977).
quite ‘equally.’”59 This, as we have seen, is precisely the conceptual flaw that Shaw exploits in rejecting Sumner’s argument.

Second, it might be that Sumner is not referring to equality before the law at all, but rather to the abolition in France of those “institutions which bounded liberty and equality of rights”60—that is, distinctions of status or birth. This seems closer to what he means: The main thrust of his argument is that race is a distinction of birth not admissible before the law. But this interpretation also presents three problems. First, and most damaging, this leveling notion would obviously be better expressed by the concept of natural equality—that is, that all men are born free and equal—than by the idea of equality before the law. Second, it would not explain Sumner’s claim that inequalities of wealth are as inadmissible as inequalities of birth. Third, Sumner concedes—nearly in the same breath—that though the State must regard “all its offspring with equal care,” it may nevertheless “justly allot higher duties, according to their higher capacities.”61 The State, he says, “imitating the divine justice, is no respecter of persons.”62 But it is apparently a respecter of abilities and conditions, and it is on just this point that Shaw rules against him.

The third possibility, which shall prove more promising, lies in his reference to isonomia—that “most beautiful name.”63 The word, later anglicized to “isonomy,” was imported into England from Italy at the end of the sixteenth century as a term meaning

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59 VLASTOS, supra note 19, at 99. This is closely related to Westen’s observation that equality is conceptually empty. See discussion text accompanying nn. 2—infra.
60 Sumner’s Argument, supra note 22, at 8 (emphasis deleted).
61 Id. at 11. Earlier, Sumner quotes the French Constitution of 1791 to the effect that all citizens, being equal in the eyes of the law, are “equally admissible to all dignities, placements, and public employments, according to their capacity, and without other distinctions than their virtues and talents.” Id. at 8 (emphasis deleted).
62 Id. at 11.
63 Some translations of Herodotus render it as the “fairest” or alternatively as the “most gracious” of names but, for reasons that will soon be clear, I shall adhere to Sumner’s rendering.
“equality of laws to all manner of persons.” By the seventeenth century, it was largely displaced by the phrases “equality before the law,” “government of law,” or “rule of law.” This is how Shaw understands the term—that is, as nothing more than the right to be “regulated by law.”

Vlastos criticizes this tendency of Anglo-American thought to reduce isonomia to equality before the law because it “turned a profound idea into a shallow dogma.” Sumner, apparently, does not make that mistake. In contorting his argument to transmute natural equality into equality under law, he is evidently trying to bend the Anglo-American legal understanding of equality back toward the Greek ideal. “For Greeks,” Martin Ostwald observes, “freedom and equality, as well as the State itself, are entities that citizens share through the community to which they belong.” As Arendt explains, “men were by nature (φυσεί) not equal, and needed an artificial institution, the polis, which by virtue of its νομος [nomos] would make them equal.”

Sumner extols “this remarkable language” which possessed “a single word”—isonomia—“to express an idea which has been practically recognized only in modern times.” What is the meaning of that word? And what does it express?

Ostwald tells us that nomos (νομός) abruptly replaced thēsmos (θεσμός) as the Greek word for law, and that this occurred at the time of the democratic reforms of Cleisthenes around 508-07 B.C. While thēsmos signifies “something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary,”

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65 Roberts, 59 Mass. at 206.
66 VLASTOS, supra note 19, at 105.
68 ARENDT, supra note 20, at 30-31.
69 Sumner’s Argument, supra note 22, at 9.
nomos implies an obligation “motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it.”

Isonomia is a compound of isos, meaning “equal,” and nomos. As Vlastos elaborates, it means more than equal law; it “designates a political order in which the rule of law and responsible government are maintained by the equal distribution of political power.”

This is the sense that Sumner invokes when he says that isonomia, which translates as equality before the law, is the name of “the government of the many” who, in a democracy, make those laws. Isonomia is a reflexive ideal in which, to paraphrase Lincoln, “equal law” designates law that is of the people, made by the people, for the people. Victor Ehrenberg says explicitly that Herodotus did not understand isonomia to mean equality before the law. For him, isonomia set up an “ideal, emphasizing the equal share of all citizens in the State” and represented “a new conception with its apparent stress on absolute equality.” By the time of Cleisthenes’s democratic reforms, isonomia had come to mean “not . . . a state of equal law for everybody” but “the ideal of a community in which the citizens had their equal share.”

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71 VLASTOS, supra note 19, at 107.
72 SUMNER’S ARGUMENT, supra note 22, at 9.
73 Victor Ehrenberg, Origins of Democracy, 1 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 515, 530 n.36 (1950). Ehrenberg and Vlastos disagree over the origin and derivation of isonomia. According to Ehrenberg, it derives from isa, meaning “equal,” and nemein, meaning “to distribute” or “share.” On his account, it first emerged as an aristocratic concept referring to equality among peers and subsequently, though quickly, became “the watchword of democracy.” Id. at 530-31. Arendt’s discussion of isonomia, text accompanying note 67 supra, follows Ehrenberg. Vlastos, however, points out that the Greeks used the word isomoiria—which connoted economic as well as political equality—to designate the concept of equal distribution. VLASTOS, supra note 19, at 100-01. Ultimately, Ehreberg conceded the point to Vlastos. OSTWALD, supra note 69, at 123.
74 Ehrenberg, supra note 73, at 531.
75 Id. at 535. As Vlastos elsewhere cautions, this equality pertained only to an exclusive subgroup of citizens: “[T]he isonomia (equality of law) on which they prided themselves was the club-privilege of those who had the good judgement to pick their ancestors from free Athenian stock of the required purity of blood.” Gregory Vlastos, Justice and Equality in THEORIES OF RIGHTS 41, 42 (Jeremy Waldron ed. 1984).
Sumner’s strategy is to map the isonomy of the polis to the public school. Immediately after tracing the history of equality, he turns in Point II,76 to the statutes establishing the public schools. On his reading of state law, “there is but one kind of public school established by the laws of Massachusetts. This is the general Public School, free to all inhabitants . . . whether rich or poor, whether Catholic or Protestant, whether white or black.”77 The Boston schools, he says, “may be more or less public.” But, “if they do not come within the terms of the law, they do not form a part of the beautiful system of our public schools . . . .”78 In a system of racially separate schools, he maintains, “the beautiful character of the system is changed to the deformity of Caste.”79

Sumner’s reference to “precise Equality” should now be clear: It is the precise equality of participation in the general public school. When he says that a school exclusively devoted to one class “differ[s] essentially, in its spirit and character, from the public school known to the law,”80 he is not arguing that separate educational facilities are inherently unequal, but rather that an unequal facility is inherently not a public school. This is yet more clear when one considers that he maintains that separation by economic class is as impermissible as segregation by race. His profound point, in other words, is that a public school is by definition a place “where all classes meet together in equality.”81

76 Sumner’s Argument, supra note 22, at 11-12.
77 Id. at 12. Sumner repeatedly argues against “distinctions of class” from “the poor and outcast to the rich and fortunate.” Id. at 25, 28, 30.
78 Id. at 11 (emphasis added).
79 Id. at 23.
80 Id. at 25.
81 Id.
Sumner was a friend and associate of Horace Mann, who is widely recognized as the father of the public school.\(^{82}\) Known at the time as the “common school movement,” it advocated that children of all economic classes should have access to common state-supported schools where they would learn to be civically responsible citizens.\(^{83}\) Mann also advocated for professionally trained teachers, a longer school year, and the abolition of corporal punishment.\(^{84}\) He became the head of the Massachusetts state school board in 1837\(^{85}\), in 1852, Massachusetts became the first state to enact a compulsory school attendance law.\(^{86}\) Mann’s goal was to bring children of all classes together and provide them with a common learning experience.\(^{87}\) In his final report as Secretary of state’s Board of Education (just before taking John Quincy Adams’s former seat in Congress), Mann proclaimed:

> Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance wheel of the social machinery. . . . The spread of education, by enlarging the cultivated class or caste, will open a wider area over which the social feelings will expand; and, if this education should be

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83 Twelfth Annual Report to the Secretary of the Massachusetts State Board of Education (1848), in Mann, supra note 82, at 91-92 (“And hence it is, that the establishment of a republican government, without well-appointed and efficient means for the universal education of the people, is the most rash and fool-hardy experiment ever tried by man. . . . It may be an easy thing to make a Republic; but it is a very laborious thing to make Republicans; and woe to the republic that rests upon no better foundations than ignorance, selfishness, and passion.”) (hereinafter “Twelfth Report”). See also Cremin, supra note 76, at 8-9, 12; Mark Groen, The Whig Party and the Rise of Common Schools, 1837–1854, 35 AM. EDUC. HISTORY J. 251–260 (2008). As leader of the Radical Republicans during the Grant Administration, Sumner would later insist that: “the New England system of common schools is a part of the republican form of government as understood by framers of the Constitution.” Donald, supra note 40, at 426.


85 Cremin, supra note 82, at 6-7.


87 Twelfth Report in Mann, supra note 82, at 86 (“surely, nothing but Universal Education can counter-work this tendency to the domination of capital and the servility of labor”); id. at 111-12 (“In a social and political sense, [the Massachusetts system of Common Schools] is a Free school system. It knows no distinction between rich and poor, bond and free. . . . Without money and without price, it throws open its doors, and spreads the table of its bounty, for all the children of the State.”). Cremin observes that Mann “was one of the first since Rousseau to argue that education in groups is not merely a practical and financial necessity but rather a social desideratum.” Cremin, supra note 82, at 16.
universal and complete, it would do more than all things else to obliterate factitious distinctions in society.  

It is precisely these values that Sumner invokes in his argument in *Roberts*.

Sumner’s arguments are, as previously noted, widely credited with anticipating the reasoning in *Brown*. In truth, *Brown’s* arguments are but a distant echo of Sumner’s. Recall that the argument in *Brown* proceeded in two steps: First, the Court noted the role of public education in socializing and preparing the child for adult life. Second, it observed that segregation inflicts on black children psychic harm “that may affect their hearts and minds in a way unlikely ever to be undone.” On this basis, it concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place.”

When Sumner considers the harmful effects of segregation, he focuses first on the social implications and psychological impact of segregation on the white students:

> The whites themselves are injured by the separation. Who can doubt this? With the law as their monitor they are taught to regard a portion of the human family . . . as a separate and degraded class . . . . Their hearts, while yet tender with childhood, are essentially hardened by this conduct . . . . Nursed in the sentiment of Caste, receiving it with the earliest food of knowledge, they are unable to eradicate it in their natures . . . . Their characters are debased and become less fit for the magnanimous duties of a good citizen.

Sumner, of course, does not ignore the black children: They “feel this proscription from the Public Schools as a peculiar brand. . . . It adds to their discouragements. It widens their separation from the rest of the community, and postpones that great day of recon-

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88 *Twelfth Report* in MANN, supra note 82, at 87; DOWNS, supra note 78, at 116.
89 347 U.S. at 494. This famous line in *Brown* and the quotation from the district court findings that follows seem to come largely from the testimony of Dr. Louisa Holt. See MARK WHITMAN, BROWN V. BOARD OF EDUCATION: A DOCUMENTARY HISTORY 59-64 (1993).
90 347 U.S. at 495.
91 *Sumner’s Argument*, supra note 22, at 28-29. In making this argument, Sumner was drawing on the 1846 Minority Report for the Primary School Committee, written by Edmund Jackson and Henry Bowditch, which had argued for a “freedom of choice” plan allowing black students to attend either the segregated school or their local common school. Kousser, supra note 34, at 967-69, 976-77.
But notice that, in discussing the effects on the black students, he goes beyond Brown’s concern for the psychic injury to the black children caused by their separation to emphasize the failure of democratic community. Thus, he immediately continues, the “whole system of public schools suffers also.”

The contrast between Sumner’s argument and Justice Thomas’s provocative objections in *Missouri v. Jenkins* is similarly instructive. In *Jenkins*, Thomas rejected the idea that “black students suffer an unspecified psychological harm from segregation that retards their mental and educational development.” He argued that the conventional understanding of *Brown* rests not just on questionable social science, but “also on an assumption of black inferiority.” On his view, psychological harm is entirely irrelevant to the constitutional question. “The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color.” The more widespread “misreading” of *Brown*, he concludes, “appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites.” Similarly, in *Grutter v. Bollinger*, Thomas saw no connection between the maintenance of a diverse student body and “education’s purpose as imparting knowledge and skills to students.” “Diversity,” according to Thomas, is just a “fashionable catchphrase” for what is merely

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92 Sumner’s Argument, supra note 22, at 29.
93 Id.
95 Id.
96 Id.
97 Id. at 121 (“Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination. . ..”).
98 Id. at 122.
99 Id. at 119.
101 Id. at 371.
an “aesthetic” preference “to have a certain appearance, from the shape of the desks and
tables in its classrooms to the color of the students sitting at them.”

Sumner’s argument could not offer a more powerful rebuttal. Where Thomas
thinks that “[p]sychological injury or benefit is irrelevant to the question whether state
actors have engaged in intentional discrimination,” Sumner sees harm to the students
of all races. Where Thomas believes that *Brown*’s adherents must think that “blacks
cannot succeed without the benefit of the company of whites,” Sumner worries that the
whites will not thrive without their black peers. Where Thomas assumes that education is
about “impacting knowledge and skills to students,” Sumner characterizes this as “a
narrow perception” of public education’s “high aim.”

The point of the public school, Sumner explains, is not “merely to furnish to all
the scholars an equal amount in knowledge.” If that were the case, it would indeed be
“of little consequence where, and in what company it be done.” Thus, where Thomas
presumes that diversity is just some faddish liberal slogan, Sumner’s civic republican
vision understands it as the *raison d’être* of the public school:

The school is the little world in which the child is trained for the larger world of
life. It must, therefore, cherish and develop the virtues and the sympathies which
are employed in the larger world. And since, according to our institutions, all
classes meet, without distinction of color, in the performance of civil duties, so
should they all meet, without distinction of color, in the school, beginning there
those relations of equality which our Constitution and laws promise to all.

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102 *Id.* at 355 n.3.
103 *Jenkins*, 515 U.S. at 121 (Thomas, J., concurring).
104 *Id.* at 119.
105 *Grutter*, 539 U.S. at 371 (Thomas, J., concurring in part and dissenting in part).
106 *Sumner’s Argument, supra* note 22, at 29.
107 *Id.*
108 *Id.* at 30.
109 *Grutter*, 539 U.S. at 355 n.3 (Thomas, J., concurring in part and dissenting in part).
110 *Sumner’s Argument, supra* note 22, at 30.
For Sumner, a racially and economically diverse student body is what constitutes the common school as a matrix in which the “virtues and sympathies” necessary to democratic citizenship—tolerance, pluralism, cooperation, negotiation, and compromise—are fashioned. People, in other words, are not in fact born equal; equality is something that, as Arendt notes, must be constructed in the public sphere.\(^\text{111}\)

If Sumner has the better of the across-the-centuries dispute with Justice Thomas, he also has the stronger voice in the chorus with Brown. For while there is an apparent correspondence between the two arguments against segregation, they do not emanate from the same assumptions. This is immediately obvious in their approach to the question of harm. Brown understands the feelings of inferiority generated by segregation as the legal injury that is the gravamen of the plaintiffs’ action. Sumner’s discussion of harm, in contrast, comes in a section of the argument that he identifies as part of “other matters not strictly belonging to the juridical aspect of the case, and yet of importance to its clear comprehension.”\(^\text{112}\) For Sumner, the gravamen of the case is, variously, the institution of caste and the denial of the “precise Equality” of the general public school. When he considers harm, it is not as the injury-in-fact that is the cause of the individual plaintiff’s legal action.\(^\text{113}\) For him rather, the harm of segregation is spread throughout the entire community in injury to the whites, the blacks, and the whole system of public schools.

Even when Sumner and Brown sound a common theme, they do so in different registers. Much as Sumner extols the school as the “little world in which the child is


\(^\text{112}\) Sumner’s Argument, supra note 22, at 27. Specifically, his discussion of harm comes in rebuttal to the claim that “the separate schools are for the mutual benefit of children of both colors.” Id. at 28.

\(^\text{113}\) For a discussion of how the individualist assumption of particularized harm displaced earlier understandings of public injury and justiciability, see Steven L. Winter The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371 (1988).
trained for the larger world of life” including “the performance of civil duties,” Brown recognizes that education is “required in the performance of our most basic public responsibilities” and “is the very foundation of good citizenship.” But, the two conceptions are not the same. Thus, Brown explains that education is necessary to service in the armed forces, to the acquisition of cultural values, as preparation for later professional training, and for normal personal adjustment. It is, in short, a resource that provides the individual with the wherewithal “to succeed in life.” Once “the state has undertaken to provide it,” it “must be made available to all on equal terms.” For Brown, then, the legal wrong is the denial of equal “educational opportunities.”

For Sumner, in contrast, the public school is not a resource that must be made available to all on equal terms; it is the place “where all classes meet together in equality,” because only such a school can “cherish and develop the virtues and the sympathies which are employed in the larger world.” For Sumner, in other words, equality is neither a natural-born fact nor an individual right or entitlement. It is a social creation that must be constructed in the public space, nurtured, learned and experienced. Sumner’s more profound argument is that isonomia in the school precedes démokratia in the political and social world.

114 Id. at 30.
115 347 U.S. at 493.
116 Id.
117 Id.
118 Id.
119 Id. at 494.
120 Sumner’s Argument, supra note 22, at 25. See also id. at 30 (“The law contemplates not only that they should all be taught, but that they shall be taught all together.”) (emphasis in original).
121 Id.
III. Founding Democratic Inequality

In *Democracy and Equality*, Robert Post examines the relationship between these two core values. He begins by “fixing” a definition of democracy. It is not enough, he argues, to identify democracy with popular sovereignty and majority rule because the former “is a normative idea” while the latter two “are descriptive terms that refer to particular decisionmaking procedures.” It is perfectly possible, he points out, for “the People” to opt for a tyrannical form of government or a majority of the electorate to vote for particular anti-democratic measures. Thus, he concludes, democracy must be defined in terms of autonomy understood in the Kantian sense of being governed only by those rules one gives oneself. A democratic society, then, is one in which “people have the warranted conviction that they are engaged in the process of governing themselves.”

Even this definition is insufficient, however. In a pluralistic society, people often disagree; under a system of majority rule, the losers will by definition be bound by a rule other than the one they would give to themselves. This gap can be bridged if the dissenters can nonetheless identify with the decisions of the polity and somehow view those decisions “as their own.” This identification can be achieved, according to Post, if people are treated equally as autonomous participants in public discourse. In that case, people can have “a warranted sense of autonomous and effective contribution, through public discourse, to the process of creating the social order in which they live.”

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123 *Id.* at 143. Contrast Vlastos’s observation, text accompanying note 21 *supra*, that dēmokratia “does no more than describe a fact,” while isonomia “expresses an idea . . . by which partisans of democracy justified the rule of the people.”
124 Post, *supra* note 15, at 144. The point of this formulation is to distinguish between actual participation in democratic decisionmaking, which may be lacking in any given case, and the acceptance of particular democratic decisions “as one’s own.” *Id.*
form of equality,” he concludes, “is foundational because it follows from the very definition of democracy.”126

The first problem with this argument is logical. There are other possible bases for identification with the decisions of a polity with which one might otherwise disagree. The most obvious is actual shared participation in political power, as in the case of isonomia.127 Or, as suggested by Sumner’s argument and explored further in Part IV, identification can originate in “those relations of equality”128 that engender solidarity. As such, Post’s argument that autonomy in public discourse is foundational fails on its face because there are other logical possibilities that can bridge the gap and enable citizens to accept “as their own” the otherwise objectionable decisions of a political majority.

To solidify the point, consider Post’s hypothetical dystopia in which people collectively decide the terms of social life by computer vote, but are not allowed to form political parties or discuss issues in public fora. Information is freely available online, but there are no newspapers, broadcast, or other public media. Post presumes that we would not consider this society a democracy because, even though the people determine the rules governing their lives by majority vote, they would feel alienated from the decisions of the collectivity and not experience those rules “as their own.”129

But if that were our society—that is, the one we had grown up in and which our forbearers had found pragmatically useful—it is entirely unclear that we would think it

126 Post, supra note 15, at 148.
127 One of the striking features of Athenian democracy was the use of lot and rotation in the selection of offices. See Kurt A. Raaflaub, Equalities and Inequalities in Athenian Democracy, in DEMOKRATIA, supra note 67, at 140; see also Martin Ostwald, Shares and Rights: Citizenship Greek Style and American Style, in id. at 54. Thus, Aristotle describes isonomia as “to rule and be ruled in turn.” Aristotle, Politics 1317a40–1317b2-10.
128 Sumner’s Argument, supra note 22, at 30.
129 Post, supra note 15, at 144-45. It is unclear whether the fact of alienation is simply built into the hypothetical or whether Post is arguing that this alienation is a necessary consequence of the lack of public discourse. The first sentence of the passage, however, suggests the former.
undemocratic. A good deal of the force of the hypothetical lies in the alien, asocial, almost Orwellian feel that Post gives it. Suppose we modify the hypothetical in one regard. Instead of getting all one’s information in isolation, suppose that before voting everyone gets their information from a webcast of a debate on the relevant social issue. The debate is carried out by means of a deliberative poll conducted by Jim Fishkin in which a scientifically-selected, representative sample of diverse citizens is brought together. The participants are given detailed and comprehensive briefing books and allowed to deliberate over the relevant social question.\textsuperscript{130} Imagine, for example, that the issue is whether we should reduce the escalating cost of health care by prescribing a healthy diet for all members of the society. A representative sample of citizens including cattle ranchers, vegans, health care professionals, overweight people, religious or ethnic groups with specialized dietary needs, etc. is assembled to debate the issue. All citizens are required to watch and register their vote by computer.\textsuperscript{131} Would we not consider the result democratic? Would the voting citizens accept the outcome “as their own” notwithstanding the restrictions on their autonomy represented by the limited participation in the deliberative poll, the lack of a public discourse, and the mandatory voting requirement?

Perhaps Post’s point can be salvaged by reformulating it as the contextual claim that, under conditions of modern life, autonomy in public discourse is the only plausible basis for the warranted belief that the State is responsive to the average citizen’s values and ideas. But that version of the argument faces a second, empirical problem: Under contemporary social conditions, very few people can even credibly—let alone, justifiably

\textsuperscript{130} See JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 25-46 (2009).
\textsuperscript{131} We would need to assume, as well, that everyone has faith in the integrity both of the deliberative poll and of the voting mechanism. But this requirement is consistent with Post’s own hypothetical.
—believe that they have an effective voice in creating the social order in which they live. The most that could plausibly be claimed is that, in liberal democracies, everyone has a formally guaranteed right to contribute to the public discourse that shapes the social order. Even that is waning as it now will often be restricted to a barricaded “free speech zone” miles away from the policymakers one seeks to influence. Moreover, the reality is that one’s formally guaranteed right to contribute is vastly overwhelmed in a public “discourse” (if we can call it that) dominated by bureaucratic organizations wielding sophisticated technologies of communication and opinion-formation. As I have elsewhere observed: “We live in a media age in which the insight that truth is socially constructed has become a practical axiom.”

The third, more fundamental problem with Post’s argument is that, historically and conceptually, democracy has always carried with it strong notions of equality. In the Greek case, as we have seen, it was equality—isonomia—and not autonomy that served as both the condition of and justification for democracy. The connection between democracy and the egalitarian ideal is no less evident in the rhetoric of the founding period: the Declaration of Independence’s pronouncement that “all men are created equal”; the French revolutionary’s slogan liberté, égalité, fraternité; and the American revolutionary desire to live “by no man’s leave.”

Notwithstanding the evident hypocrisy in disenfranchising broad swaths of the population—women, slaves, ethnic

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134 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (“The essence of our free Government is ‘leave to live by no man’s leave, underneath the law’—to be governed by those impersonal forces which we call law.”).
minorities—exhibited by most historical democracies, the idea of democracy as the rule of the people has always entailed strong leveling notions.\textsuperscript{135} “Democracy,” John Quincy Adams declared, “has no monuments. It strikes no medals. It bears the head of no man on a coin. Its true essence is iconoclasm.”\textsuperscript{136} Conceptually, the democratic ideal implies strong egalitarianism because hierarchy is antithetical to self-rule: The subordinated \textit{do} live by some other man’s leave; they live under conditions of heteronomy.\textsuperscript{137} On the collective level, democracy requires equal justice under law. No one is above the law because everyone must be governed by the same law, the law that the people collectively give to themselves.

This intimate, conceptual connection between democracy and the egalitarian ideal—we might say their mutual entailment—is an important part of the resonance and historical power of the claim of equality. (Although we could say with equal force that the egalitarian ideal is an important part of the resonance and historical power of democracy.) The successive democratization of American society—the abolitionist movement, the universal suffrage movement, the public school movement, the women’s suffrage movement, the labor movement, the Progressive movement, the New Deal, the civil rights movement, the women’s movement, the gay-lesbian liberation movement—has been the result of egalitarian assaults on the various forms of social, political, and

\textsuperscript{135} Madison and the other framers understood this, which is why they were so keen to temper it with separated powers, an appointed Senate, and restrictions on the scope of legislative powers.

\textsuperscript{136} Quoted in Jürgen Moltman, \textit{God for a Secular Society: The Public Importance of Theology} 45 (1999).

\textsuperscript{137} Cf. Twelfth Report in MANN, \textit{supra} note 82, at 86 (“If one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may be called; the latter, in fact and in truth, will be the servile dependents and subjects of the former.”).
material subordination. Even the word “democratize” connotes the intimate conceptual connection between democracy and equality: To democratize a practice, resource, or capacity is to make it more fully available to everyone, without regard to status, on terms of equality.

But this intimate relation between democracy and equality creates a practical and conceptual problem for democratic theory: To the extent that democracy presupposes liberal autonomy, it also presupposes inequality. This is easy enough to see with respect to private property. The autonomy to acquire property entails both the right to accumulate it and, of course, to exclude others from using or otherwise appropriating it. But much the same dynamic is true of aspects of liberal autonomy, such as free speech, that we do not typically view as a zero-sum game. Thus, Post argues that attempts to legislate equality in public discourse—prohibitions on racist and other forms of hate speech, regulation of corporate speech, or limitations on campaign expenditures—conflict both with the primary democratic commitment to autonomy and, more acutely, with “the logic of democratic legitimacy” that requires the autonomy of all citizens to participate in

138 Cf. Vlastos, supra n. 75, at 41 (“The close connection between justice and equality is manifest in both history and language: The great historic struggles for social justice have centered about some demand for equal rights: the struggle against slavery, political absolutism, economic exploitation, the disenfranchisement of the lower and middle classes and the disenfranchisement of women, colonialism, racial oppression.”).

139 The inevitable inequality that follows from protecting the right of property was forthrightly acknowledged both by Madison in The Federalist No. 10 (“From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . .”) and by the Supreme Court during its infamous substantive due process era. Coppage v. Kansas, 236 U.S. 1, 17 (1915) (“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.”). It was a mainstay of Legal Realism that this inequality is in no way “private” or “natural,” but rather a product of the background distribution of entitlements enforced by the legal system. See Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POLI. SCI. Q. 470 (1923); Morris Cohen, Property and Sovereignty, 13 CORNELL LAW Q. 8 (1927).
public discourse in order to maintain their identification with the process of creating the social order in which they live.\textsuperscript{140}

Democratic theory resolves the conflict between autonomy and equality by recasting the latter as formal equality. As Post writes, the “one person, one vote” principle “signifies that each person is to be regarded as formally equal to every other in the influence that their agency can contribute to public decisions.”\textsuperscript{141} In the context of public discourse, “the relevant equality of agency inheres in the liberty to express oneself in the manner of one’s choice.”\textsuperscript{142} He thus concludes that “many forms of equality associated with notions of distributive justice or fairness might actually be inconsistent with democracy.”\textsuperscript{143} Democratic equality, he wryly notes, “can easily be experienced as thin and formal.”\textsuperscript{144}

Post suggests that strong egalitarianism may yet have a place to the extent that it enhances democracy. Imagine, he says, a group of citizens with the autonomy to participate in public discourse but who are so destitute, marginalized, and stigmatized by the majority that they are alienated from the polity and can no longer identify with its decisions as their own. In that case, democracy requires rectification of those inequalities: not because it is fair and right to do so, but because it is necessary to restore the sense of identification needed for democratic legitimacy. “The distinction is significant,” he says, because it means that: “Democracy does not require the full rectification of these

\textsuperscript{140} Post, supra note 15, at 149-51.
\textsuperscript{141} Id. at 148. Of course, this way of putting the matter—i.e., as “formally equal” in their influence on public decisions—ironically hints at the out-sized influence of money in the real world of politics. See note 133 supra.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 149.
\textsuperscript{144} Id. at 148.
inequities, but only the rectification necessary to maintain democratic legitimacy.”

This argument is “unsettling,” he concedes, because it implies that “democracy is quite compatible with important forms of status subordination.”

It is a remarkable conclusion. If, as Post says, democracy were compatible with status subordination it would mean that—on his own account—heteronomy would somehow be compatible with autonomy. But, that cannot be right. Indeed, Post began with “the unobjectionable premise” that democracy depends on “the distinction between autonomy and heteronomy.” How could this happen?

The short answer is that contradiction and incoherence are direct consequences of the relentless abstractionism of his argument. To start with a rigorous and monochromatic definition of democracy and then proceed to its implications is, inevitably, to distort the concept precisely because it is abstracted from the social context of concrete historical practices that give it meaning. This was precisely the methodology of the *Lochner* era Justices, who started with reified, formalist conceptions of property and freedom of contract and deduced the necessary rules of social relations that flowed from them. The result, of course, was a formal equality in which everyone was equally free “to make contracts regarding labor upon such terms as they may think best” without any regard to the real-world differences in bargaining power. For the *Lochner* era Justices, as for Post, inequality was not an insistent moral question, but a necessary consequence of a

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145 Id. at 152-53.
146 Id. at 153.
147 Id. at 142-43 (quoting NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 137 (Peter Kennealy, trans. 1989)). To be exact, Post considers autonomy and heteronomy only in the context of lawmaking. Id.; but see notes 134 and 135 supra and accompanying text.
148 *Lochner*, 198 U.S. at 61. As discussed below, text accompanying nn. 156-61 infra, *Plessy*’s “separate but equal” doctrine is a similar artifact of constitutional formalism. See Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1530-31(1990); see also id. at 1458-60 & 1483-85.
foundational commitment to liberty as the primary value. Yet, as the Legal Realists pointed out, the forms of inequality ratified by *Lochner* and its progeny were in no way “necessary” or “natural,” but rather a product of the background distribution of entitlements enforced by the legal system. In much the same way, Post treats his concept of democratic autonomy as an analytical truth rather than the particular, historical and, therefore, contestable assumption that it is.

So, too, the abstractionism of Post’s argument condemns him to the charge of indeterminacy so famously leveled by Holmes against the formalism of the *Lochner* era. For all its analytic rigor, Post’s argument remains ungrounded and, thus, can easily be flipped: One can without any difficulty imagine a parallel argument that starts with the equality of all citizens as foundational to democracy and then unpacks the implications of that principle to conclude that various forms of autonomy are inconsistent with democracy. Thus, Post chides egalitarians for not recognizing that, in a democracy, we “decide the meaning of moral equality in the context of public discussion and debate,” and complains that they instead defend equality employing “the idea of rights . . . defined by reference to various forms of philosophical reason.” But one could argue with equal conviction that, in a democracy that takes the equality of all citizens as foundational, we decide the meaning and proper scope of autonomy “in the context of public discussion and debate” and not, as he does, “by reference to various forms of philosophical reason.”

I am not suggesting that we would do better to choose equality over liberty as the foundational point for an analytic dissection of the nature of democracy. A complex human practice such as democracy encompasses multiple values that entwine, diverge,

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149 See note 139 supra.
150 *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (“General propositions do not decide concrete cases.”).
151 Post, *supra* note 15, at 152.
and often conflict.\textsuperscript{152} It cannot, therefore, be reduced to a single principle that holds sway over all others. “In politics,” as Benjamin Barber notes, “to seek a ‘best policy’ is not a matter of disclosing a cognitive truth, but a matter of recognizing adversarial interests, of forging common values, in deciding what to do in common at the very moment that we cannot agree on the ‘truth’ or even on whether there is such a thing.”\textsuperscript{153} And this is precisely what is missing in Post’s analysis. He offers no normative discussion of how best to mediate between conflicting values; no question of “who are we?” or “whom should we become?” Instead, there is the assertion of a particular principle as “definitional” and the insistence on submission to the power of a purely deductive, abstract argument.

There is, thus, a striking isomorphism between the hierarchical form of Post’s argument and the substance of his conclusion insulating from democratic condemnation “important forms of status subordination.”\textsuperscript{154} But, when the conventional understanding of democracy is made dependent on an abstract conception of autonomy as exercised by individuals who are themselves viewed in abstraction from their constitutive social contexts, it should hardly surprise that the corresponding notion of equality will be a formal one that is every bit as much emptied of all substantive content. Famously, formal equality both conduces to and underwrites substantive inequality as we have seen with respect to property and free speech. The law, in all its majesty, prohibits the rich as well

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\begin{enumerate}
\item As Arendt cautions, freedom is “only one of the many problems and phenomena of the political realm properly speaking, such as justice or power or equality. . . .” HANNAH ARENDT, BETWEEN PAST AND FUTURE 145 (1968).
\item Benjamin Barber, Misreading Democracy, in DEMOKRATIA, supra note 67, at 365. Democratic politics, he continues, “is ineluctably pragmatic . . . and, so, turns its back resolutely . . . ‘away from abstraction and insufficiency, from verbal solutions, from bad \textit{a priori} reasons, from fixed principles, closed systems, and pretended absolutes and origins.’” Id. at 366 (quoting WILLIAM JAMES, PRAGMATISM AND THE MEANING OF TRUTH 31 (1978)).
\item Post, \textit{supra} note 15, at 153.
\end{enumerate}
as the poor from sleeping under the bridges of Paris. It affords exactly the same right to try to obtain social goods (such as property, education, and free speech) to all. It is just that some will be much better situated to succeed than others.

Post’s argument has the further undesirable effect of devaluing equality and depriving it of normative content. In arguing that the principle of autonomy requires that inequalities be rectified only to the degree that they interfere with democratic legitimacy, he relegates equality to a mere means: His argument thus robs equality of any independent normative force, making it relevant only to the extent that it operates as a tool of legitimation. In so doing, it radically denatures the demand of equality by making legitimation rather than fairness the measure of its scope.

Finally, Post’s argument turns its back on several of the most important lessons of Brown. Among the reasons for Brown’s iconic status is that it stands in stark contrast to the jurisprudence of the Lochner era. That era was characterized by the “primacy” of its “concern with liberty over equality.” The ground-breaking significance of Brown, as Owen Fiss says, is that it claims “a place for equality as central as that for liberty.” Where that earlier era was satisfied with formal equality before the law, Brown insists on the critical significance of context and social situation in assessing the demand for

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156 Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 341 (1949) (“Nothing in the annals of our law better reflects the primacy of American concern with liberty over equality than the comparative careers of the due process and equal protection clauses of the Fourteenth Amendment.”).

157 Fiss, supra note 29, at 4.

158 Plessy, 163 U.S. at 544 (“The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law. . . .”); Lochner, 198 U.S. at 58 (statutes limiting work hours “deny the right of an individual, sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution. . . .”).

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equality. More importantly, Brown’s rejection of Plessy was also the rejection of a worldview—now often referred to as “market fundamentalism”—in which autonomous individuals were understood to arrange their relations solely by means of voluntary consent and the role of the courts was to protect such private ordering. On that view, formal equality would suffice because it was enough that the State remain neutral to allow private ordering to flourish. As Sumner understood a century earlier, Brown’s central insight is that, because we are formed as individuals in social institutions such as the school, “meaningful constitutional autonomy requires affirmative access to the processes by which both the individual and the community are constituted.”

IV. Gender Equality in Liberation Square

At the height of the celebration in Tahrir Square following Mubarak’s ouster, CBS correspondent Lara Logan suffered a brutal sexual assault in which she was stripped, violated, and beaten with poles by a crowd of two-to-three hundred men for more than 25 minutes. The shocking incident was all the more poignant because of the reaction of the women in the crowd—many of whom threw themselves on Logan in an effort to shield her from the ongoing assault. The near-fatal attack ended when she was pulled to safety by a group of baton-wielding Egyptian soldiers.

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159 Michelman, *Traces of Self-Government*, supra note 18, at 31 n.146 (Brown is “a supreme example of deciding with an eye to context.”); see, e.g., Brown, 347 U.S. at 492 (“We must consider public education in the light of its full development and its present place in American life”); id. at 493 (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

160 See Plessy, 163 U.S. at 551 (“If the two races are to meet on terms of social equality, it must be the result of . . . a voluntary consent of individuals.”); *Lochner*, 198 U.S. at 61. This point and its implications for constitutional law were first developed by Duncan Kennedy in his classic *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1755 (1976).

161 Indeterminacy and Incommensurability, supra note 148, at 1534.

Ironically, Logan was unaware of the endemic nature of sexual harassment and abuse of women in Egyptian life. On a holiday weekend following the end of Ramadan in 2006, groups of men roamed Cairo’s streets hunting young women down in packs and attacking them. Women were chased, groped, and had their clothes torn. The official response of the Mubarak government was that none of it had happened. A 2008 study by the Egyptian Center for Women’s Rights found that 98% of foreign women visiting Cairo and 83% of Egyptian women reported experiencing some form of sexual harassment. The same study found that 62% of Egyptian men admitted engaging in harassment of women and 53% blamed the women for “bringing it on.” When the World Economic Forum evaluated the state of gender equality worldwide, Egypt ranked 125th out of 134 countries. Forty-two percent of Egyptian women are illiterate. Only about 25% work outside the home. Genital cutting is still widely practiced; some put the number as high as 80%.

Perhaps the most striking thing about the attack on Logan, however, was that it stood in such stark contrast to the weeks that preceded it. Egyptian women had reported that Tahrir Square was largely free of sexual harassment during the uprising. Members of the Muslim Brotherhood, who frequently formed human chains around their female members to protect them from the widespread groping, soon found that it was not necessary in Tahrir Square. Nazly Hussein, a 27 year-old psychologist, recounted her experience as she attempted to reach the square on the first day of the protests. People,

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she said, would bump into her and then excuse themselves. “I’m thinking: ‘Excuse me’? Where was that yesterday? And the year before? And the year before?” Once she reached the Square, she found that “for the first time people would come up and talk to me like a human being and not like a woman; it was great!”  

This sudden transformation of social relations amidst rising social movements is both typical and constitutive. By examining the psychological dynamic that explains this transformation of gender relations, we can make sense as well of its seemingly anomalous reversal. More importantly, we will be able to see why the communicative values of equality, solidarity, and recognition rather than the principle of personal autonomy form the *sine qua non* of democracy.  

In *Rights Consciousness*, Peter Gabel offers an astute phenomenological account of social movements. He starts with the observation that our day-to-day interactions with others are characterized by the performance of scripted social roles that simultaneously connect us and protect us from the Other, thereby frustrating our desire for recognition. He gives the example of a bank teller who affects a cheerful mood and who suggests in all her words and gestures that she is glad to see me. Yet I detect in all these words and gestures an artificiality—her words are somehow “processed”; her gestures, ever so slightly delayed. . . . [S]he is playing the role of being a bank teller, while acting as if her performance is real. As I move toward her from my place in line, I feel myself becoming a “customer” . . . , and she sees in me the same artificiality and delay-time she experiences in herself. . . . We each sense in the other the desire to recognize each other precisely through the amount of vigilant tension required to prevent this recognition from occurring. We may in fact make some minimal contact in “asides,” in the interstices of our public performances, asides that we intentionally marginalize as private moments. But on the whole we deny

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167 *Id.*  
ourselves access to each other out of obedience to the demand implicit in the other’s façade.\textsuperscript{169}

The repetition and concatenation of such performances means that our everyday world is one in which “alienation envelops us in a qualitative milieu of blocked connection.”\textsuperscript{170}

Alienation, of course, is a charged concept with many meanings; for Gabel, it is the “paradoxical form of reciprocity between two beings who desire authentic contact with each other and yet at the same time deny this very desire in the way that they act toward one another.”\textsuperscript{171}

In a society characterized by hierarchy, oppression, and rampant powerlessness, a rising social movement must challenge the boundaries that constitute its qualitative milieu and “dissolve the fabric of performances that normally enclose the public world.”\textsuperscript{172} Thus, the kind of event that sparks an uprising is typically one that rips away the façade of “normal” social performances to expose their inhumanity; in the case of the Arab Spring, it was literally the self-immolation of Mohamed Bouazizi, a destitute twenty-six year-old college graduate provoked to fatal protest when the police would not even allow him to sell fruits and vegetables on the street.\textsuperscript{173} The act of self-immolation,
as the political theorist Banu Bargu explains, “makes visible the invisible violence of the State.” 174

What happens next is highly contingent. It is not enough that many people experience the same concrete needs or grievances. They must also be ready to put themselves at risk, for in releasing their desire for recognition they expose themselves to humiliation or worse. They will do so only when they can reasonably anticipate that others will reciprocate. As Gabel puts it, “they can acquire the ontological capacity to ‘gather steam’ only through reciprocal recognition of a universal need.” 175 Typically, this takes one of two forms: either through solidarity on the basis of shared deprivation or through a more thoroughgoing redefinition of social identity:

For the movement to succeed in driving its energy into public space, which it must do in order to sustain itself as a movement in the face of the anxiety and resistance that it provokes in the anonymous “public” and even within its own members, it must engage in a struggle with the existing . . . “belief-system” over the very meaning of who “we” are and how we are really constituted as social beings. 176

When the movement succeeds, it enables “the unique release of connection that constitutes the movement itself” 177 and “produces a disalienating energy that wants to challenge everything” that stands in its way. 178

The one unprecedented aspect of the Tahrir Square uprising was the role of social media in coordinating participants in advance; more than 100,000 people pledged online

175 Gabel, supra note 30, at 1587.
176 Id. at 1588.
177 Id. at 1586.
178 Id. at 1587-88.
to join the protests, significantly reducing the problem of failed reciprocation. At first, the public mocked the Facebook protesters. Before long, however, everyone joined in. As the Egyptian writer, Mansoura Ez-Eldin, reported:

Shopkeepers handed out bottles of mineral water to the protesters, and civilians distributed food periodically. Women and children leaned from windows and balconies, chanting with the dissidents. I will never forget the sight of an aristocratic woman driving through the narrow side streets in her luxurious car, urging the protesters to keep up their spirits, telling them that they would soon be joined by tens of thousands of other citizens arriving from different parts of the city.

In the square, volunteers distributed free tea, cake, and wafers. One shouted: “This is the people’s water” as he filled protesters’ water bottles. Others swept the streets or organized neighborhood defense committees. The people who joined the protestors in the square formed “a vast tapestry of diversity” that “cut across Egypt’s entrenched lines of class and religious devotion,” representing most every element of Egyptian society—the secular young, the dispossessed, wealthy businessmen from the suburbs, turbaned clerics and veiled women, doctors and other medical professionals, engineers and peasants. As the days progressed, they set up clinics, soundstages, a detention center and security teams to man the barricades guarding the entrances to the square.

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179 David D. Kirkpatrick & David E. Sanger, A Tunisian-Egyptian Link That Shook Arab History, The N.Y. Times, February 14, 2011, A1. In Wael Ghonim’s own words: “I have never seen a revolution that was preannounced before.” Id.; GHONIM, supra note 173, at 134-60.
182 Euphoria of the Crowd, supra note 181.
The watchword of the uprising was “the people and the army are one hand”\textsuperscript{188}—serving simultaneously as a strategic plea that the army stay neutral and as a rallying cry for the protesters. “This is the Egyptian people. We used to be one hand.”\textsuperscript{189} In the euphoria of the uprising, people—especially women—expressed a new-found sense of collective identity: “For the first time, people feel like they belong to this place.”\textsuperscript{190} “We feel this is our country now.”\textsuperscript{191} “You feel like this is the society you want to live in.”\textsuperscript{192} One sign read, simply: “Egypt is mine.”\textsuperscript{193}

These feelings of unity and belonging unleashed a strong sense of energy, empowerment, and rebirth. As she broke up bricks to be used as weapons, one demonstrator said: “I’m fighting for my freedom. . . . For my right to express myself. For an end to oppression. For an end to injustice.”\textsuperscript{194} “The words of people,” another protester said, “are stronger than guns.”\textsuperscript{195} Many in the square said they woke up smiling “for the first time.”\textsuperscript{196} One shopkeeper who did not himself participate said: “If someone asked me when I was born, I would say Jan. 25.”\textsuperscript{197}

The “carnivalesque”\textsuperscript{198} atmosphere in the square was accompanied by a sensation of harmony and safety. Many experienced what they described as a sense of “family.”\textsuperscript{199}

\textsuperscript{188} Opposition Unifies, supra note 185; David D. Kirkpatrick, & Kareem Fahim, Mubarak’s Backers Storm Protesters as U.S. Condemns Egypt’s Violent Turn, The N.Y. Times, February 3, 2011, A1; Mubarak Out, supra note 187.
\textsuperscript{189} Opposition Unifies, supra note 185.
\textsuperscript{190} Euphoria of the Crowd, supra note 181.
\textsuperscript{191} Women Fight, supra note 166.
\textsuperscript{193} Mubarak Won’t Run Again, supra note 184.
\textsuperscript{194} Street Battle, supra note 186.
\textsuperscript{195} At Night in Tahrir Square, supra note 192.
\textsuperscript{196} Seizing Control, supra note 182.
\textsuperscript{197} Anthony Shahid, Egypt’s Leaders Seek to Project an Air of Normalcy, The N.Y. Times, February 8, 2011, A1.
\textsuperscript{198} Euphoria of the Crowd, supra note 181.
\textsuperscript{199} Demoralizing, supra note 165.
Young women, who made up about 25% of the demonstrators, found encouragement rather than harassment: “The same men they were afraid to talk to in the streets were saying, ‘Bravo, the girls’ revolution.’”\(^{200}\) As one male participant observed: “You see all these people, with no stealing, no girls being bothered, and no violence.”\(^{201}\)

Although the violent attack on Logan appears all the more jarring against this backdrop, there are at least two reasons it is less anomalous than it might seem. First, and most obvious, Logan was not a part of this new-found community. She was Other. When her camera lights went dark amid the frenzy of the celebration, the cries “take off her pants” were accompanied by cries that she was an Israeli agent and Jew.\(^{202}\) Second, and more importantly for our inquiry, the phenomenological architecture of a social movement carries with it the seeds of its own regression. As Gabel explains:

> [W]hile a rights-victory can both strengthen the movement’s confidence and awaken a feeling of possibility among a great many people, it can for these very reasons work to contain the movement and ultimately contribute to subduing its transformative potential. For the possibility that is either strengthened or awakened by such public victories . . . is the possibility that “we” will actually have to change, and in a way that would require us both to open ourselves to each other in a new way. . . . The very success of the movement, therefore, evokes in a somewhat heightened way the fear of loss that the movement intends to surpass, and it does so not only in those who are most opposed to the movement, but also in those who constitute it.\(^{203}\)

The very night of Mubarak’s ouster, several Egyptian women reported being groped and harassed in the square.\(^{204}\) In the weeks following, reason for disappointment grew. The committee formed to revise the Constitution, which included no women, proposed that any new president be prohibited from marrying a non-Egyptian woman. Women demon-

\(^{200}\) Women Fight, supra note 166.
\(^{201}\) Mubarak Won’t Run Again, supra note 184.
\(^{202}\) Supra note 162. During the demonstrations, the Mubarak government had detained Logan for three days under the pretense that she was an Israeli agent.
\(^{203}\) Gabel, supra note 30, at 1590.
\(^{204}\) Women Fight, supra note 166; The Other Side of Tahrir Square, supra note 166.
strating against this provision on International Women’s Day were taunted and intimi-
dated, their posters destroyed and defaced. Some were groped; others were chased by
groups of men.205 Counter protesters chanted “the people want to bring down women,” a
play on the chants heard in Tahrir Square during the uprising.206 “The men,” one demon-
strator ruefully observed, “are back to their old habits.”207

What can we infer from these developments? As a hard-nosed realist (and with
twenty-twenty hindsight), one might say that the upsurge of connection characteristic of
social movements is transitory and fragile and that entrenched power structures can be
expected to realign and reassert themselves as the movement fades. From the perspective
of liberal theory, one might say that these events make plain the critical importance of
rights of bodily integrity and personal autonomy as pre- or co-original conditions of
public autonomy. Indeed, chief among the demands of the women protesting in Tahrir
Square on International Women’s Day was the call for better laws against sexual harass-
ment and sexual violence.208

From the perspective of feminist theory, one would say that gender is a system of
power relations and that harassment and sexual violence are practices of subordination.
Their sole purpose is to humiliate, intimidate, devalue, and dehumanize. American offi-
cials in Abu Ghraib and Guantanamo understood this well, using the same tactics on their
male prisoners. So, too, the post-Mubarak military command which, in the period after

205 Id.
206 Caroline Davies, Tahrir Square Women’s March Marred by Counter Protests, The Guardian, March 8,
207 Jenna Krajeski, Women and Men in Tahrir Square, The New Yorker, March 8, 2011,
208 Id.; Women Fight, supra note 16; The Other Side of Tahrir Square, supra note 166.
the uprising, used forced pelvic examinations—so-called “virginity tests”—against detained women activists as a means of torture and intimidation.\textsuperscript{209}

What the liberal conception of respect for persons does not adequately recognize is that the very concept “person” is historically and culturally contingent. Indeed, the liberal conception of personal autonomy is itself the social product of the processes of modernity.\textsuperscript{210} To put it more provocatively, the liberal conception gets it backwards. It is not that the sanctity and inviolability of the person is a prerequisite of political participation. It is, rather, that one must first struggle to be recognized as a person before such basic rights as autonomy and bodily integrity will even be protected. At common law, the master had the legal right to chastise his wife as well as his slave.\textsuperscript{211} Personal autonomy is not a condition of the political, but a consequence of it. The struggle for equal rights \textit{is} the struggle for recognition (and vice versa). The Tahrir Square uprising exemplifies the emergence of personhood in the enactment of relations of equality and recognition. Or, as Ms. Hussein so tragically said of her experience in the square, “for the first time people would . . . talk to me like a human being and not like a woman.”

V. When Ideas Lose Their Meaning

In \textit{The Empty Idea of Equality},\textsuperscript{212} Peter Westen argues that all equality claims logically collapse into rights claims and that the rhetoric of equality is both unnecessary

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\item[\textsuperscript{210}] “\textit{Down Freedom’s Main Line},” supra note 17, at 208, 223-27.
\item[\textsuperscript{211}] Reva B. Siegel, \textit{“The Rule of Love”: Wife Beating as Prerogative and Privacy}, 105 YALE L.J. 2117, 2122-27 (1996). Many of the early emancipation cases took the form of an action for assault, because only a free person could sue for assault. \textit{See}, e.g., Dred Scott v. Sanford, 60 U.S. 393 (1857).
\item[\textsuperscript{212}] Westen, supra note 16.
\end{enumerate}
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and confusing. “Equality,” he concludes, “is an idea that should be banished from moral and legal discourse as an explanatory norm.”

Westen’s argument is based on an insight first developed by Professors Tussman and tenBroek in their classic—indeed, visionary—article on Equal Protection. All laws categorize and, therefore, necessarily introduce inequality. A statutory classification may, however, still be “equal” if it “includes all who are similarly situated and none who are not.” But, Tussman and tenBroek pointed out, the meaning of “similarly situated” is opaque. It cannot refer to all who possess the classificatory trait specified in the statute because that would mean that all statutory classifications would be self-proving: The equal protection requirement would be satisfied as long as “the law applies equally to all to whom it applies.” Nor could it mean that the categorization must be “natural” because it is nonsensical to speak of the universe as “carved . . . at a natural joint.” People are alike and unalike in innumerable ways. Thus, Westen observes, the determination that two people are alike (or unalike) necessarily depends on some independent moral standard or legal right “by reference to which they are, and thus are to be treated, alike.”

It follows, he concludes, that the injunction “treat similarly situated people alike” collapses

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213 Id. at 542.
214 Tussman & tenBroek, supra note 156 (cited in Westen, The Empty Idea of Equality, supra note 16, at 544 n.24). One of the striking things about the Tussman & tenBroek article, published five years before Brown, is that it largely predicted the course of the Warren Court’s subsequent Equal Protection jurisprudence.
215 Id. at 343-44 (“Here, then, is a paradox: The equal protection of the laws is a ‘pledge of the protection of equal laws.’ But laws may classify. And ‘the very idea of classification is that of inequality.’”).
216 Id. at 345.
217 Id.
218 Id. at 346.
219 Westen, The Empty Idea of Equality, supra note 16, at 545. Westen includes within “rights” liberties, prerogatives, privileges, powers, exemptions, and immunities and says that a right “may consist of a principle or policy.” Id. at 541-42 & n. 15. He does, however, assume that in any event the standard of treatment will be expressed in a rule. Id. at 547-50.
into the directive that all those covered by a moral or legal rule should be treated according to that rule.\textsuperscript{220} The concept of equality, he concludes, is empty.

As we shall see shortly, Tussman and tenBroek developed the argument in a different, more concrete and pragmatic direction—explaining why equal protection doctrine is necessarily elaborated in a means/ends analysis.\textsuperscript{221} Even so, Westen’s point is logically undeniable. The judgment that two persons or things are “equal” only makes sense with respect to some standard of measure.\textsuperscript{222} Application of that standard of measure to each will yield the same result without any additional requirement of equality. For Westen, then, equality is simply a tautology.\textsuperscript{223} He views equality as an entirely formal concept lacking any substantive content.\textsuperscript{224} Westen maintains, moreover, that the unnecessary translation of rights claims into equality claims “engenders profound conceptual confusion.”\textsuperscript{225} Accordingly, he argues that the use of equality “as an explanatory norm” should be eliminated from moral and legal discourse.\textsuperscript{226}

Westen offers four reasons in support of his claim that equality discourse results in conceptual confusion.\textsuperscript{227} More interesting, however, are three of his specific examples:

\begin{itemize}
  \item \textsuperscript{220} \textit{Id.} at 547 (“Hence ‘likes should be treated alike’ means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard. . . . [E]quality is entirely ‘[c]ircular.’”)
  \item \textsuperscript{221} Tussman & tenBroek, \textit{supra} note 156, at 342-53.
  \item \textsuperscript{222} Westen, \textit{Tarantula, supra} note 16, at 1188 (“Equality,” the noun, is the relationship of identity that obtains among two or more persons or things by reference to a given standard of measure.”).
  \item \textsuperscript{223} \textit{See, e.g.}, Westen, \textit{The Empty Idea of Equality, supra} note 16, at 547-48 (“Equality is an undeniable and unchangeable moral truth because it is a simple tautology. This should come as no surprise; as an a priori moral truth, equality could scarcely be anything else.”).
  \item \textsuperscript{224} \textit{Id.} at 547 (“Equality is an empty vessel with no substantive moral content of its own.”). In the same way, he views justice, \textit{id.} at 556, and freedom, \textit{id.} at 547 n.31, as entirely formal concepts.
  \item \textsuperscript{225} \textit{Id.} at 542.
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.} at 579. His four objections are that equality analysis: (1) conceals the nature of the underlying substantive right at stake; (2) suggests a false equivalence between the rights of persons across contexts; (3) conflates the standard of review without regard to the differential importance of the underlying right; and (4) leads to the erroneous conclusion that judicial remedies in equality cases are more flexible (allowing leveling in either direction) than in other kinds of cases.
\end{itemize}
(1) rationality review in an obscure (subsequently overruled) case, Morey v. Doud\textsuperscript{228}; (2) the debate over affirmative action; and (3) the argument over legislative apportionment in Reynolds v. Sims.\textsuperscript{229} Each example reveals a different flaw in Westen’s otherwise impeccably logical analysis.

(1) Morey involved an Illinois statute providing for the licensing and regulation of companies selling or issuing money orders. The statute exempted by name money orders issued by the United States Post Office, American Express, and Western Union.\textsuperscript{230} The Court assumed that regulation of the Post Office was beyond state authority and that the exclusion of Western Union, which was regulated by the Federal Communications Commission, was reasonable.\textsuperscript{231} On that basis, it treated the statute as an exemption of “a particular business entity and not of a generic category.”\textsuperscript{232} It concluded that the statute worked an unreasonable discrimination because its effect was “to create a closed class by singling out American Express money orders.”\textsuperscript{233}

For Westen, the “obvious difficulty” with the Court’s reasoning is that there was no way of knowing whether the statute treated the two companies alike or unlike without first identifying the rule by which the companies’ conduct should be governed. If the appropriate rule was that every company that lacked the size, assets, and lobbying power of American Express ought to be bonded, then by that standard the companies were treated \textit{alike}; if the appropriate rule was that every money order issuer ought to be bonded, then the companies were treated \textit{un}-alike.\textsuperscript{234}

\begin{itemize}
  \item \textsuperscript{228} 354 U.S. 457 (1957). As Westen notes, \textit{The Empty Idea of Equality}, \textit{supra} note 16, at 575 n.132, Morey was overruled in City of New Orleans v. Dukes, 427 U.S. 297 (1976). There, the Court identified Morey as not properly applying the rational basis test to economic legislation. \textit{Id.} at 306.
  \item \textsuperscript{229} 377 U.S. 533 (1964).
  \item \textsuperscript{230} \textit{Morey}, 354 U.S. at 461.
  \item \textsuperscript{231} \textit{Id.} at 462 n.5 (citing Currency Services v. Matthews, 90 F. Supp. 40, 43 (D. Wisc. 1950) (three judge district court).
  \item \textsuperscript{232} \textit{Id.} at 464.
  \item \textsuperscript{233} \textit{Id.} at 467.
  \item \textsuperscript{234} Westen, \textit{The Empty Idea of Equality}, \textit{supra} note 16, at 576.
\end{itemize}
There are two problems with this analysis, however. First, the Court did identify the standard by which the companies should be classified. Second, the Court considered and rejected—though, perhaps, erroneously—the very argument that Westen refers to: i.e., that the size and assets of American Express rendered the bonding and other security requirements unnecessary.

As Tussman and tenBroek explained, the only way to determine whether a statute treats similarly situated people similarly is to test the classification against the purpose of the law.235 A statute that includes within its ambit all those whose conduct falls within the purpose of the law would achieve “the ideal limits of reasonableness.”236 Most statutes, however, are over- or under-inclusive with respect to their underlying purpose.237 In such cases, the court must assess the sufficiency of the fit between the statutory classification and the law’s purpose. That, of course, is exactly what courts do when they apply the familiar standards of means/ends review under the Equal Protection Clause: They ask whether the means chosen (that is, the statutory classification) bears either a rational relationship to a legitimate state purpose; a substantial relation to an important governmental purpose; or are narrowly tailored to achieve a compelling state interest.

The Morey Court proceeded in just this fashion. It first identified the purpose of the statute238 and then noted that the exemption of American Express “does not conform to this purpose.”239 It acknowledged the State’s argument “that the characteristics of the

235 Tussman & tenBroek, supra note 156, at 346 (“[W]here are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law.”).
236 Id. at 347-48.
237 In actual fact, most statutes are both over- and under-inclusive. See, e.g., id. at 352-53 (discussing Hirabayashi v. United States, 320 U.S. 81 (1943)).
238 Morey, 354 U.S. at 464. (“The purpose of the Act’s licensing and regulatory provisions clearly is to protect the public when dealing with currency exchanges.”).
239 Id. at 466.
American Express Company make it unnecessary to regulate their sales.\textsuperscript{240} But, the Court rejected that argument on two grounds. First, it noted the lack of fit between that purpose and the statutory classification: On one hand, American Express would remain unregulated even if it failed to maintain its then-current level of assets and financial security and, on the other hand, its competitors would continue to be subject to regulation even if they were to achieve parity with American Express. Second, the Court noted that American Express’s local outlets were indistinguishable from those the law regulated: “That the American Express Company is a responsible institution operating on a worldwide basis does not minimize the fact that when the public buys American Express money orders in local drug and grocery stores it relies in part on the reliability of the selling agents.”\textsuperscript{241}

It may well be that, as reflected in this last statement, the Morey Court was all wrong about the economics of the market in money orders. So, too, the Morey Court may have misapplied the rational basis test as the dissenters argued\textsuperscript{242} and the Court later concluded.\textsuperscript{243} On either count, Morey was wrongly decided—but not because of a logical error of the sort Westen identifies. To the contrary. The Morey Court considered whether American Express and the plaintiff’s business were similarly situated with respect to the only available standard of measure—i.e., the purpose of the statute.

\textsuperscript{240} \textit{Id.} at 467.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Morey}, 354 U.S. at 471 (Black, J., dissenting) (“whatever one may think of the merits of this legislation, its exemption of a company of known solvency from a solvency test applied to others of unknown financial responsibility can hardly be called ‘invidious.’”); 354 U.S. at 472 (Frankfurter, joined by Harlan, JJ., dissenting) (“Legislation . . . addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. . . . To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic.”).
\textsuperscript{243} \textit{See} note 228 \textit{supra}. 

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The theoretical flaw in Westen’s argument is that his analysis is abstract while the question of equality is pragmatic. For Westen, the standard of measure that determines whether two persons or things are similar must be stated as a rule.\textsuperscript{244} Egalitarians are less concerned with abstract symmetry than with the equality of real-world, social conditions. From this perspective, the test of equivalence is the underlying purpose of the relevant statute, practice, or institution. This, in fact, was the approach taken by Sumner in \textit{Roberts}. He argued that blacks could not be excluded from the general public school because the very purpose of that institution was to educate all classes, groups, religions, and races together in common preparation for citizenship.\textsuperscript{245} Similarly, in \textit{United States v. Virginia},\textsuperscript{246} Justice Ginsburg argued that if the mission of the Virginia Military Institute was to produce citizen-soldiers with such qualities as love of learning, leadership, commitment to public service, and patriotism, then women who otherwise met the admissions requirements were surely similarly situated with respect to that purpose.\textsuperscript{247}

(2) Westen frames the issue of affirmative action by contrasting \textit{Sweatt v. Painter}\textsuperscript{248} with \textit{DeFunis v. Odegaard}.	extsuperscript{249} He asks: “Why would anyone assume that because whites and blacks were constitutionally equivalent in \textit{Sweatt}, they must also be constitutionally equivalent in \textit{DeFunis}? The answer, I believe, is that people confuse

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\item \textsuperscript{244} Westen, \textit{The Empty Idea of Equality}, supra note 16, at 547-50. See text accompanying note 234 supra. Ironically, this was the very point that distinguished the majority from the dissents: The majority insisted that the category of exemption had to be stated in generally applicable terms. See text accompanying nn. 240-41 supra. The dissents, in contrast, thought it sufficient that the legislation dealt with the known facts. See note 242 supra.
\item \textsuperscript{245} \textit{See} text accompanying nn. 76-88 supra.
\item \textsuperscript{246} 518 U.S. 515 (1996).
\item \textsuperscript{247} \textit{Id.} at 545 (“Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.”).
\item \textsuperscript{248} 339 U.S. 629 (1950).
\item \textsuperscript{249} 416 U.S. 312 (1974).
\end{itemize}
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equivalences in mathematics with equivalences in law and morals.”\textsuperscript{250} Westen thinks that opponents of affirmative action simply miss the fact that “the equivalence of blacks and whites for purposes of the 1946 Texas Law School admissions policy does not prove their equivalence (or lack of equivalence) for purposes of the 1974 Washington Law School admissions policy.”\textsuperscript{251} The relevant questions, according to Westen, can only be whether Herman Sweatt and Marco DeFunis were similarly situated with respect to: either (a) a constitutional right not to be stigmatized as racially inferior; or (b) the admissions policies of their respective schools. Thus, he observes that, “even if the substantive right in question is a right not to be classified solely on the basis of race . . . [that] right . . . may outweigh a state’s interest in promoting segregation and yet not outweigh a state’s interest in promoting integration.”\textsuperscript{252}

Westen’s mistake here is to ascribe confusion to those who merely disagree with him. Justice Thomas, as we have seen, does not accept that infliction of stigma or psychological harm is the gravamen of the Equal Protection violation.\textsuperscript{253} To the contrary, what Thomas finds stigmatizing is the assumption that separate is inherently unequal. For him, the Equal Protection guarantee is simply the right of individuals to be “treated equally by the State without regard to their skin color.”\textsuperscript{254} For other opponents of affirmative action, the evil is that race-based decisionmaking of any kind is “destructive of democratic society.”\textsuperscript{255} Thus, they worry that such preferences will lead to racial Balkanization, hostility,
and conflict. Still others object that racial preferences demean individual dignity because they allow for decision on a basis other than personal merit. For all these opponents, the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

One may disagree with these ways of thinking about affirmative action, as I do. One may, accordingly, find Westen’s characterization of the issue superior. Still, there is something profoundly amiss in the claim that everyone who holds a different position is simply confused. In a democracy, we expect to disagree—often vigorously. There are, in our society, profound ideological differences over affirmative action as on other issues. We must either “agree to disagree” or sit down together and iron out our differences. Either way, democracy requires that we engage each other with tolerance on terms of mutual recognition and respect.

(3) Westen cites Reynolds v. Sims as another example “of the distortion created by equality arguments.” Writing for the majority, Chief Justice Warren argued that “all voters, as citizens of a State, stand in the same relation [with respect to the allocation of

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256 See, e.g., City of Richmond v. Croson, 488 U.S. 469, 473 (1989) (plurality opinion) (racial classifications “lead to a politics of racial hostility”); Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting) (racial preferences lead to “the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict”); Adarand Constructors Inc. v. Pena, 525 U.S. 300, 239 (1995) (Scalia, J., concurring) (“To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”).

257 See, e.g., BICKEL, supra note 255, at 133 (“a racial quota derogates the human dignity and individuality of all to whom it is applied”); Parents Involved, 551 U.S. at 746 (plurality opinion) (“[o]ne of the principal reasons race is treated as a forbidden classification is that it demean the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities”) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)); Shaw v. Reno, 509 U.S. 630, 657 (1993) (race-based governmental actions “reinforce the belief . . . that individuals should be judged by the color of their skin”); Croson, 488 U.S. at 493 (plurality opinion) (“To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

258 Parents Involved, 551 U.S. at 748 (plurality opinion).

legislative representation] regardless of where they live.” Westen complains that, by thus framing his position as an argument for equality, Warren put the dissent “on the defensive . . . having to argue against equality.” Accordingly, he says, Justice Harlan made a mistake in not grounding his response in an alternative conception of equality:

Just as the majority argued that votes should be weighted equally in proportion to each voter’s share of the total number of votes cast in the state in which he resided, Justice Harlan could have argued that votes should be weighted equally in proportion to each voter’s share of the total number of votes cast in the legislative district in which he resided. . . . Instead, he allowed the majority to claim equality by default. . . .

It is ironic that Westen chooses the reapportionment issue to exemplify the indeterminacy of equality discourse for it was in these very cases that Justice Frankfurter made the point that is the basis of Westen argument: “Talk of ‘debasement’ or ‘dilution’ is circular talk. One cannot speak of ‘debasement’ or ‘dilution’ of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.” And it is doubly ironic because Warren recognized that equality is necessarily relative to some standard of measure, looking to the underlying purpose of the apportionment scheme. Fully aware of Frankfurter’s argument in Baker that the apportionment issue asks the Court to choose “among competing theories of political philosophy,” Warren responded in kind—that is, with a substantive political theory:

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that

260 Reynolds, 377 U.S. at 565.
262 Id. at 595.
264 369 U.S. at 300 (Frankfurter, J., dissenting).
each citizen have an equally effective voice in the election of members of his state legislature.265

Imagine the infinite regress that would ensue had Harlan made Westen’s suggested argument. Suppose Harlan had argued that voters were treated “equally” because their votes had been counted the same as those of other voters in their legislative district. Suppose, too, that—though each has a single representative—District A has a population of 8,349 and District B a population of 143,839.266 The voters in District B look over at District A and wonder why they don’t have 17 representatives. They are told in response that each district has to be treated the same and, therefore, that each district can only have one representative. But what is a “district”? Surely, it is not a natural kind. Whether the two districts are being treated the same depends, therefore, on some standard of measure by which to determine what counts as a “district.” Is it determined by geographic size? By economic value? By the number of homes? By the number of cities, towns, or villages?267 We could endlessly multiply criteria, all of which would render the districts “equal” as a matter of formal logic. But, of course, the intellectual exercise would be beside the point. The question of how to define equal districts can only be answered with a substantive theory of democracy. Warren has one: It is not self-government unless every citizen has an equally effective voice in determining the rules by which he or she will be governed. “One person, one vote” is not the product of mere mathematical equivalence. It is, rather, the consequence of an historic political conception—isonomia—in which each citizen has an equal share.

265 Reynolds, 377 U.S. at 565.
266 The hypothetical is taken from Harlan’s discussion of apportionment in New Jersey at the time of the ratification of the Fourteenth Amendment. Id. at 605.
267 Cf. id. at 562 (majority opinion) (“Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”)
VI. The Peremptory Ideal of Equality

In *The Human Condition*, Arendt tells the amusing story of a proposal before the Roman Senate to require all slaves to wear distinctive clothing so they could readily be distinguished from free citizens. The proposal was quickly rejected as too dangerous, lest the slaves recognize each other and become aware of their potential power. Modern interpreters, she reports, inferred that the number of slaves must have been very large to have provoked such a fear. Yet, the number turned out to be much lower than thought. The profound political insight of the ancients was that appearance in the public sphere was itself the danger. Thus, speaking of the eighteenth century, Arendt observes that one of the important side effects of the actual emancipation of laborers was that a whole new segment of the population was more or less suddenly admitted to the public realm, that is, appeared in public. . . . The decisive role of mere appearance, of distinguishing oneself and being conspicuous in the realm of human affairs is perhaps nowhere better illustrated than in the fact that laborers, when they entered the scene of history, felt it necessary to adopt a costume of their own, the sans-culotte, from which during the French Revolution they even derived their name.268

Appearance in the public sphere is a first and necessary step to recognition—which leads, in turn, to respect, respect to empowerment, empowerment to participation and, thence, democracy.

The critical lesson of Roberts and Tahrir is that democracy requires the practices and institutions—whether the public school or the public square—that, by enacting conditions of equality, constitute us as “persons” and “fellow citizens.” Westen finds equality empty because his methodology is empty. Equality is not a formal concept, but a political ideal. It is not an *a priori* moral truth, but a profound social and historical product. Equality is a political value that is constructed in political struggle by human beings.

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268 ARENDT, supra note 111, at 217-18 & n.53.
insistent that they be recognized in their full humanity—equal in dignity, in voice, and in privileges. *That* is the peremptory force of the ideal of equality.