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"THE PREJUDICE OF CASTE": THE MISREADING OF JUSTICE HARLAN AND THE ASCENDENCY OF ANTICLASSIFICATION

*Scott Grinsell**

This Article reconsiders the familiar reading of Justice Harlan's dissent in Plessy v. Ferguson *as standing for the principle of constitutional colorblindness by examining the significance of Harlan's use of the metaphor "caste" in the opinion. By overlooking Harlan's invocation of "caste," it argues that conservative proponents of anticlassification have reclaimed the opinion for "colorblindness," and buried a powerful statement of the antisubordination principle that is at the heart of our equality law.*

The Article begins by examining the emergence of a reading of the opinion as articulating a view of equality law based in anticlassification. The Article then returns to the nineteenth century to offer an alternative reading of the opinion. It argues that by time Harlan invoked the caste metaphor in Plessy, *the caste metaphor was part of a longstanding tradition of reasoning about the moral stakes of status hierarchy and social subordination. It examines the emergence, in the nineteenth century, of the image of caste in abolitionist rhetoric and in debates over the ratification of the Fourteenth Amendment during Reconstruction. The Article further challenges the conventional reading of Harlan's dissent, by considering the persistence of the caste metaphor in the context of* Brown v. Board of Education *and its aftermath.*

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Our equality law is haunted by the specter of caste.[1] In his dissent in *Plessy v. Ferguson*, Justice Harlan evoked the image of "caste" when he protested, "[t]here is no caste here," but the power of that phrase has faded in debates over the significance of the opinion for the equal protection tradition.[2] The image of caste in Justice Harlan's dissent has been long overshadowed by his admonition which immediately follows it—that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens."[3] The metaphor of colorblindness now most strongly marks the meaning of Harlan's dissent in debates about the meaning of the Equal Protection Clause. These readings forget the lineage of arguments about caste in the nineteenth century and consequently misread the dissent as articulating a principle of constitutional colorblindness that was ultimately redeemed by the Supreme Court's decision in *Brown v. Board of Education*.[4]

American equality law has long been characterized by struggles between proponents of anticlassification and antisubordination principles. In debates over the meaning of the Fourteenth Amendment, proponents of anticlassification argue that the harms with which the Equal Protection Clause is concerned are directed at the classification of individuals, because such classifications degrade the worth of individuals and ultimately intensify social stigma.[5] Supporters of antisubordination, by contrast, resist

1. Plyler v. Doe, 457 U.S. 202, 218–19 (1982) (Brennan, J., concurring) ("[T]he specter of a permanent caste . . . presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.").

2. 163 U.S. 537, 559 (1896).

3. *Id.*

4. *See* 347 U.S. 483 (1954).

5. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L REV. 1470, 1472–73 (2004).

the view that equal protection should be primarily understood as prohibiting certain classifications, and instead hold "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups."[6] Antisubordination broadly understands certain classifications as sometimes permissible in order to dismantle an entrenched status hierarchy.

Our readings of Justice Harlan's *Plessy* dissent have high stakes. Few texts in American constitutional law have been so thoroughly trodden, or so consistently misunderstood, in arguments over the meaning of equal protection. Over the past twenty-five years, the opinion has become a major fixture in contestation over the constitutionality of affirmative action programs and other interventions to dismantle entrenched status hierarchies in this country.[7] Proponents of anticlassification have appropriated Justice Harlan's dissent in *Plessy* as support for the view that equal protection embodies an aspiration to eliminate distinctions based on race,[8]

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6. *Id.* This line of argument about the Equal Protection Clause is most often traced to the contributions of Owen Fiss. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Recent contributions in this tradition include, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2358 (1997); Reva B. Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111 (1997); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998). It is commonly accepted, however, that the present-day Supreme Court has expressed its assent for anticlassification in its interpretations of the Equal Protection Clause, although scholars continue to debate the persistence of antisubordination values in equal protection doctrine. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Johnson v. California, 543 U.S. 499 (2005); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Rice v. Cayetano, 528 U.S. 495 (2000); Shaw v. Reno, 509 U.S. 630 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

7. Anita A. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 800 (2000).

8. *See* Alexander T. Aleinikoff, *Re-Reading Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 961 (1992) ("Justice Harlan's dissent in *Plessy v. Ferguson* . . . is seen as righteous and prophetic, announcing the proper understanding of the Equal Protection Clause of the Fourteenth Amendment years ahead of its time."); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) ("Given the long and sorry history of racial subordination in the United States, there is tremendous rhetorical appeal to Justice John Marshall Harlan's famous dissent in *Plessy v. Ferguson* that '[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens.'") (quoting 163 U.S. at 559); *see also*, Molly Townes O'Brien, *Justice John Marshall Harlan as Prophet: The* Plessy *Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 754 (1998) ("In his well-known dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan spoke with the voice of a prophet."). For a critique of such colorblind readings of the Fourteenth Amendment, see Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 2–3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."); Frank R. Parker, *The Damaging Consequences of the Rehnquist*

and that *Brown* vindicated the ideal of colorblindness that Harlan first proposed.[9]

By turning to Harlan's dissent, conservative proponents of anticlassification draw upon history to lend authority to their claims about the underlying commitment of our equality law. These invocations of Harlan's dissent, however, rest on a perplexing form of historical authority that eludes easy definition. Justice Harlan's opinion is a dissent, and therefore cannot exert the force of binding precedent. These historical claims are also not originalist, because they do not purport to affirmatively describe the original meaning of the Fourteenth Amendment, or to reveal anything about the intentions of its framers. Advocates for anticlassification, many of whom are forceful proponents of originalism, depart from their own methodology when they make arguments about the meaning of the Fourteenth Amendment. The arguments they offer about the origins of colorblind reasoning in Harlan's dissent rest instead on a narrative about constitutional redemption, and a conception of the fundamental moral commitments of the polity.

This Article explores these arguments and the sources of authority on which they rest, and challenges them by offering a different account of the central claims of Harlan's dissent. The history of "caste reasoning" in our constitutional tradition provides a strong counterpoint to the anticlassification reading of Harlan's dissent. Indeed, it makes any such reading untenable. Re-reading Harlan's dissent in terms of the controversies over slavery and segregation in the nineteenth century demonstrates that by invoking caste, one realizes that the opinion drew upon an existing and richly articulated set of arguments about the nature of status-based harm.[10] The caste imagery deployed by abolitionists during

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Court's Commitment to Color-Blindness Versus Racial Justice, 45 AM. U. L. REV. 763, 773 (1996).

9. Krishnakumar, *supra* note 7, at 800 ("[T]he first judicial citation to the Plessy dissent did not appear until 1961, and frequent quotation of the dissent did not commence until the late 1980s.").

10. A number of commentators have noted the significance of the "caste" language, but there has not been a sustained effort to trace its origins in the nineteenth century and demonstrate its significance for Harlan's opinion. My effort to resuscitate the caste metaphor differs from existing contributions in its effort to reconstruct the meaning of caste in the nineteenth century, as a means to shed light on Harlan's opinion. Jed Rubenfeld, for example, has suggested that the image of "colorblindness" in Harlan's dissent must be understood along with the image of "caste," but he does not substantially develop this line of argument in the historical context of the decision or the nineteenth century, or of the relationship of this lineage to debates over *Brown*. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 460 (1997) ("[W]ithout caste, Justice Harlan's assertion of constitutional colorblindness must be seized from its context, and his recognition of the true constitutional evil of the legislation in *Plessy* must be suppressed. For Harlan's statement of colorblindness was already a statement of the anticaste principle. . . ."). Garrett Epps has also discussed some of the historical objections to Andrew Kull's reading of Justice Harlan's dissent, which emphasized its commitment to colorblindness, but Epps does

the ratification of the Fourteenth Amendment envisioned the harm of slavery as involving the treatment of Blacks as a group and the effects of prolonged oppression. Conservative proponents of anticlassification therefore perpetuate a fiction about the ideas contained in Justice Harlan's dissent, and obscure the antisubordination values that were the central concern of the caste metaphor in the nineteenth century.

This Article argues that interpreters who understand Harlan's dissenting opinion as standing for the anticlassification principle incorrectly read the metaphor of caste, and arguably read it out of the opinion altogether. It further contends that the caste image radically changes the significance of the opinion in our equal protection tradition that warrants reconsideration—and indeed a rejection—of the view that the opinion endorses contemporary anticlassification reasoning.

The caste image had developed a particular set of meanings by the time that Harlan returned to it in his dissent in *Plessy*. For the abolitionists and the proponents of the Fourteenth Amendment during ratification, caste was a nightmarish vision of a status hierarchy that expressed a deep sense of the injustice of the subordination of groups within the social structure. In light of this background, it is the articulation of antisubordination values in the opinion, and not colorblindness alone, that should constitute its significance for debates over the content of our equality law. Further, this Article takes issue with the claim made by advocates of colorblind constitutionalism that *Brown* redeemed *Plessy* by adopting Harlan's metaphor of colorblindness. The colorblind account of the controversies over *Brown* ignores the arguments about caste, and their

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not extensively discuss these objections, or attempt to uncover the meaning of caste over the course of the nineteenth century. *See* Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 417–426 (responding to Andrew Kull's argument that Harlan's image of "colorblindness" is best understood as equivalent to the modern anticlassification principle). Rebecca Scott has argued that *Plessy* must be understood in terms of the idea of "public rights," and offered some discussion to the origins of the caste metaphor in Louisiana, but did not substantially connect these claims to arguments about interpretations of Justice Harlan's image of "caste" or to the meaning of the term over the course of the Nineteenth Century. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777 (2008); *see also infra* notes 90–95 and accompanying text. James E. Fleming has also suggested re-reading Harlan's dissent in terms of an "anti-caste" principle, but offers no sustained historical support for this account of the opinion. *See* James E. Fleming, *Rewriting* Brown, *Resurrecting* Plessy, 52 ST. LOUIS U. L.J. 1141, 1145 (2005). Goodwin Liu has, however, argued that *Brown* did not directly overrule *Plessy* on a colorblindness principle and suggested that, in any case, "Harlan's words, read in context, show that he endorsed colorblindness as an antidote to racial hierarchy, not to mere color-consciousness." Goodwin Liu, *The Meaning of* Brown v. the Board, L.A. TIMES, Dec. 25, 2006, at A31. Hannah L. Weiner has recently suggested has proposed an alternative reading of Justice Harlan's dissent that understands it as supporting the antisubordination position. Weiner, however, does not address the significance of Harlan's invocation of caste. *See* Hannah L. Weiner, *The Subordinated Meaning of 'Color-Blind': How John Marshall Harlan's Words Have Been Erroneously Commandeered*, 11 J. J. L. & SOC. CHALLENGES 45 (2009).

connection to the nineteenth century tradition of such status-based claims, which reemerged in debates over desegregation.

I must make several caveats at the outset. This Article does not offer these historical materials in support of an originalist argument about the meaning of the Fourteenth Amendment that would bind interpretations of Equal Protection Clause to nineteenth century reasoning about caste.[11] Rather, by examining the origins of the caste metaphor, this Article takes aim at the historical narrative on which the "colorblind" reading obtains its authority, and challenges such a reading of Harlan's dissent as providing support for the anticlassification position.[12] To the extent that it makes historical arguments, this Article aims to reconstruct the reasoning about caste that was available to Harlan and that informed his use of the term, not to give an authoritative reading of the Equal Protection Clause.

I also do not seek to take the normative position that a principle centered on the concept of caste is the correct ground for equal protection jurisprudence. The caste metaphor continues to have salience in many other contexts in contemporary debates over the meaning of equal protection. The metaphor has emerged in each of the recent affirmative action cases, and continues to engender powerful feelings in debates over efforts to promote greater equality in this country.

In the Michigan affirmative action cases, for example, Justice Ginsburg recently invoked caste to describe the forms of subordination that justified affirmative action programs.[13] In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, Justice Breyer turned to caste to characterize the system of status relations that our equal protection doctrine aims to dismantle.[14] Segregation, he wrote, had "perpetuated a caste sys-

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11. For an influential argument of this kind, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (examining originalist debates over the meaning of the Fourteenth Amendment to support the view that it can be reconciled with *Brown v. Board of Education*); *see also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

12. In its effort to reconstruct nineteenth century ideas about caste, this Article draws on the methodologies of intellectual history. As Noah Feldman has argued, "Intellectual history has particular value in the context of constitutional thought because constitutional discourse in the United States takes the form of reasoned argument about ideas. . . . [T]o attempt to make sense of American constitutionalism requires an engagement with the reasons people give and have given for the decisions they want to make." Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 428 (2002).

13. *Grutter*, 539 U.S. at 345 (2003) ("[I]t was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial *caste system*, itself the legacy of centuries of slavery.") (emphasis added); *Gratz*, 539 U.S. at 299 ("In the wake 'of a system of racial *caste* only recently ended,' large disparities endure.") (emphasis added) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 273 (1995)).

14. 127 S. Ct. 2738 (2007).

tem rooted in the institutions of slavery and . . . legalized subordination."[15] Additionally, a number of legal scholars have devoted a great deal of attention to the concept,[16] and some have even argued that the Fourteenth Amendment's central commitment is a principle that aims to eradicate caste.[17] These arguments do not attempt to respond to anticlassification readings of Harlan's dissent, and are thus not relevant to the claims made here. I do not attempt to address the meaning of the caste metaphor for equal protection more generally, and while keeping them in view, hope, as much as possible, to leave these questions to future inquiries.

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15. *Id.* at 2836.

16. *See, e.g.*, Fiss, *supra* note 6, at 151 ("The redistributive strategy could give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time."); Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93 (1941); Kenneth L. Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1, 1–2 (1988) ("Equal citizenship has long been an American ideal . . . [which emerged in the] struggle to rid the nation of slavery and its system of racial caste . . . Whatever else the amendment may mean, it forbids a system of group subordination founded on race and bearing the look of permanence."); Kenneth Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); *see also* Epps, *supra* note 10; Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1326 (1994) (discussing the implications of caste in the Establishment Clause context); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999); Jeffrey Rosen, Kiryas Joel *and* Shaw v. Reno*: A Text-Bound Interpretativist Approach*, 26 CUMB. L. REV. 387 (1996); Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEXUALITY REV. 123 (2001). While the origins of caste have received little attention, Carol A. Horton has recently provided a synthetic overview of "Anti-Caste Liberalism" in the mid-nineteenth century. *See* CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 15–35 (2005). Horton generally locates the origins of anti-caste liberalism in Reconstruction. *Id.* In Part I.A–I.B, by contrast, I suggest that the origins of the caste metaphor can instead be found in the abolitionist movement of the 1830s.

17. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 315–16 (2007) (arguing that among the four principles underlying the Fourteenth Amendment was a prohibition on "'caste' legislation, that is, legislation that created or maintained a disfavored caste or subordinated a group through law. . . ."); Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 3 (1983) ("[E]ach person has the right to be free from the continuing effects of caste discrimination in the laws, programs, official decisions, government, and community affairs of these United States."); Kenneth Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) ("The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who 'belongs.' Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant."); Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) ("[T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.").

This Article proceeds in five Parts. Part I examines the rhetoric about colorblindness in contemporary disagreements over the meaning of the Fourteenth Amendment and the historical narrative about Harlan's dissent on which they rest. Part II explores how the caste metaphor emerged in abolitionist writings about slavery and in early challenges to segregation. Part III examines the use of the caste metaphor in floor debates over the meaning of the Fourteenth Amendment in the late nineteenth century. Part IV turns to the significance of caste during the *Plessy* litigation, and offers an alternative reading of the opinion that accounts for the tradition of caste reasoning with which Harlan would have been familiar.[18]

Part V revisits debates over desegregation, and examines the significance of caste reasoning in the period before *Brown* and in the decision's aftermath. By tracing the caste metaphor in the struggles over *Brown*, this Part also suggests serious problems with the anticlassification argument that situates a relationship between *Brown* and Harlan's dissent. The Conclusion explores what significance the caste metaphor in Harlan's dissent might reveal about the relationships between antisubordination and anticlassification values in the equal protection tradition.

I. THE PROPHETIC VOICE: HARLAN'S DISSENT AND DEBATES OVER ANTICLASSIFICATION VALUES

In debates over the meaning of the equal protection guarantee, supporters of anticlassification have seized hold of Harlan's dissent. These proponents of anticlassification have turned to Harlan's image of a colorblind Constitution to argue that anticlassification is the most basic commitment of equal protection law. This Part illustrates the ways in which proponents of anticlassification have invoked Harlan's opinion and identifies the historical claims on which their arguments rest.

Invocations of Justice Harlan exert an exotic force in these disagreements, because they rest on a perplexing form of authority that is ultimately historical in nature, but that is not in any meaningful sense originalist. The importance of Harlan's dissent to anticlassification arguments rests, instead, on a historical narrative about the meaning of the Fourteenth Amendment in our constitutional tradition. The uses and misuses of Harlan's dissent in anticlassification reasoning reflect the struggles over its meaning that exerts powerful authority as a form of collective self-understanding in constitutional politics and in our political practice.

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18. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1289–90 (1991).

A. *The Anticlassification Position*

Proponents of the anticlassification principle understand the basic commitment of the Equal Protection Clause as prohibiting invidious classification on the basis of certain protected characteristics. In their view, the effort to end the injustice of entrenched social hierarchy requires the elimination of official recognition of these categories.[19] This position was recently summarized by Chief Justice Robert's bold assertion in *Parents' Involved* that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[20]

Anticlassification is concerned with the harm inflicted on individuals when they are categorized on the basis of their race, which is the stigma expressed by the state that all that matters about them is their race. While both the anticlassification and antisubordination are concerned with the problem of putting an end to social hierarchies based on such categories, anticlassification fears that by boldly intervening in ways that take account of race or of gender, we amplify and entrench these harms rather ending them. As Justice Kennedy put it in *Rice v. Cayetano*, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[21] Indeed, "[a]n inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for person and citizens."[22]

Antisubordination departs from anticlassification in that it understands the problem of racial or gender subordination as demanding deep and profound interventions by the state in order to end this social injustice. While both antisbordination and anticlassification are concerned with the problem of social hierarchy, the antisubordination position takes the view that there is a constitutional and moral imperative for powerful structural remedies to end it.[23] It understands that there are costs with such remedies, but argues that such costs are a necessary sacrifice that

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19. *See* Reva Siegel & Jack Balkin, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–13 (2004).

20. 127 S. Ct. 2738, 2768 (2007); *see* Deborah Hastings, *White Man's Burden, Discrimination Suits Flourish*, AP, Apr. 13, 2010, http://news.yahoo.com/s/ap/20090428/ap_on_re_us/us_reverse_discrimination (last visited Apr. 13, 2010); Ilya Shaprio, *The Way to Stop Discrimination on the Basis of Race is to Stop Discriminating on the Basis of Race*, CATO @ LIBERTY, http://www.cato-at-liberty.org/2009/04/22/ricci-v-destafano/ (last visited May 23, 2009).

21. 528 U.S. 495, 517 (2000).

22. *Id.*

23. *See* Fiss, *supra* note 6, at 109.

must be borne by a polity which seeks to create a more just social order.[24] Antisubordination thus conceptualizes a different relationship between the Constitution and such status hierarchies. It suggests that the Fourteenth Amendment acknowledges the existence of such hierarchies and seeks to end them. It is not, in other words, blind to them. The antisubordination position takes notice of them and willingly allows the law to take shape in response to them and to trace their contours.

The anticlassification position involves certain doctrinal entailments. If the Equal Protection Clause is understood to prohibit classification of individuals on the basis of their race, their gender, or their membership in some other protected class, then many efforts to dismantle these status hierarchies are constitutionally impermissible.[25] The most obvious example of such a remedy is affirmative action—which by one account is morally justified as a structural intervention aimed at dismantling racial hierarchy—is constitutionally impermissible. The most powerful support for anticlassification has gained strength in response to affirmative action programs, which have come under attack from conservatives for the way they supposedly promote racial inequality rather than ending it.[26]

Another example of such a remedy are the majority/minority districts in the voting rights area, which their supporters argue help to facilitate representation and political engagement within a minority group.[27] Proponents of anticlassification also would strike down these districts, because of the way that they entrench racial divisions that underscore the harm of race rather than putting it behind us. antisubordination, by contrast, would argue that the fuller participation and that they provide to minority communities not only enhances their reputation but appreciably improves our process of political contestation in ways that,

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24. *See* Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL & PUB. POL'Y 37, 38 (1997) ("[A]ffirmative action should be seen as a strategy of justice, though more a means of distributive rather than corrective, justice[.] I acknowledge that this strategy undeniably works its own wrongs."); Owen Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua Cohen et al., eds., 2003).

25. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Johnson v. California, 543 U.S. 499 (2005); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

26. *Grutter*, 539 U.S. at 353 (Thomas, J., dissenting) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

27. Shaw v. Reno, 509 U.S. 630, 649–50 (1993) ("Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis."); Rice v. Cayetano, 528 U.S. 495 (2000).

over the long run, address the problem of race by enriching the quality of political debate and engagement with our most basic values.[28]

Proponents of anticlassification turn to Justice Harlan's dissent because, in their view, it offers a forceful response to efforts by the state to dismantle status hierarchies. They turn to the colorblindness rationale to underscore the intolerable harms that these interventions perpetuate on the polity and assert that the basic commitment of the Fourteenth Amendment refuses to see such divisions of race. As a doctrinal matter, anticlassification, as expressed in the metaphor of colorblindness, envisions a particular relationship between the law and structures of social hierarchy that says that our laws will not take notice of such divisions, because of the ways that the law's consciousness of them denigrates the social order by reducing the worth of individuals to the color of their skin.

B. *The Rise of "Colorblindness" Rhetoric and the Rewriting of Harlan's Dissent*

For supporters of anticlassification, the metaphor of colorblindness has taken on great significance as description of the harm of classifying individuals on the basis of their membership in certain groups and the aspiration to finally end these harms. This rhetoric about colorblindness can be traced to recent debates over the meaning of the Fourteenth Amendment.[29] Scholars have found that the rhetoric of colorblindness did not emerge and gain its present rhetorical force in these exchanges until the late 1970s and early 1980s.[30] Ian Haney López, for example, has recently suggested that talk of colorblindness first entered our constitutional politics in the 1980s, and has emphasized on the significance of Harlan's dissent for proponents of this interpretation of equal protection.[31] Over the last quarter of the twentieth century, these arguments began to take on new force when, as López argues, anticlassification was transformed

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28. Heather Gerken has suggested, with the concept of "second-order diversity," that such districts improve the quality and richness of democratic dialogue. *See* Heather K. Gerken, *Second-Order Diversity and Disaggregated Democracy*, 118 HARV. L. REV. 1099, 1104 (2005) ("[S]econd-order diversity provides a richer, more textured view of the democratic order. If every decisionmaking [sic] body mirrored the population, as with first-order diversity, we would expect the decisions rendered roughly to mirror the preferences of the median voter. By avoiding the push to the middle in every case, heterogeneity among decisionmaking bodies reveals the views of the full democratic spectrum.").

29. Aleinikoff, *supra* note 8, at 973 ("Harlan's opinion has received prominent play in the conservative attack on race-conscious policies."); Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 485 ("Scalia and Thomas view Harlan's dissent as proof that we have a color-blind constitution.").

30. Krishnakumar, *supra* note 7, at 800.

31. *See* López, *supra* note 8, at 985.

into colorblindness rhetoric that "accords race-conscious remedies and racial subjugation the same level of constitutional hostility."[32]

The first modern citations to Justice Harlan's dissent were by liberals who invoked the metaphor to strike down Jim Crow laws, and later, in support of affirmative action programs. In *Garner v. Louisiana*, decided 1961, which involved the segregation of lunch counters, Justice Douglas invoked the metaphor of colorblindness in Harlan's decision in the last sentence of his concurrence.[33] Douglas cited the opinion to defend his view that "there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."[34] In these early citations, the idea of "colorblindness" was not yet closely associated with the prohibition of all legal distinctions based on race. Harlan's dissent could thus be cited without qualms by liberals like Douglas to support affirmative action and other programs that the dissent would later be invoked to oppose.[35]

Conservatives began to appropriate Justice Harlan's colorblindness metaphor in the heated controversies over affirmative action that began in the late 1970s and early 1980s.[36] In the course of these struggles, conservative opponents of affirmative action began to find that Harlan's dissent had a great deal of rhetorical force, and that it could lend authority to their efforts to end such programs.[37] The first citation to Justice Harlan's dissent in the affirmative action context was Justice Brennan's explicit rejection of arguments made by the parties that Harlan's dissent rested on a colorblind rationale.[38]

Responding to rhetoric that the Constitution should be understood to embrace colorblindness, Justice Brennan wrote, "the shorthand phrase '[o]ur Constitution is color-blind' ... has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."[39] "No decision of this Court," he emphasized, "has ever adopted the proposition that the Constitution must be colorblind."[40] In *Bakke*, the liberal members of the Court strongly resisted these assertions about the meaning of the Equal Protection Clause and wrote in response to conservatives who had

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32. *Id.* at 988.

33. 368 U.S. 157, 185 (1961) (Douglas, J., concurring). *See also* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 246 n.17 (1998) (an account of the emergence of citations of Justice Harlan's opinion in the Supreme Court).

34. *Garner*, 368 U.S. at 185 (Douglas, J., concurring).

35. *Id.*

36. *See* Primus, *supra* note 33, at 246 n.17.

37. *See* Siegal, *supra* note 19, at 30–31.

38. *See* Primus, *supra* note 33, at 246 n.17.

39. Regents of University of California v. Bakke, 438 U.S. 265, 355–56 (1978) (Brennan, J., concurring).

40. *Id.* at 341–42 (Brennan, J., concurring).

latched onto the phrase as a powerful statement of their position. The metaphor had begun to occupy a privileged place in these controversies that reached the core of the equal protection tradition.[41]

In *Fullilove v. Klutznick*, which involved the constitutionality of Congress's use of the spending power to correct past discrimination, Justice Stewart invoked Harlan's dissent to support an equal protection rationale of colorblindness.[42] In the first sentence of his dissent, Stewart referenced Harlan's dissent to situate his position with respect to debates over the meaning of the Fourteenth Amendment:

> "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. The law regards man as man, and takes no account of his surroundings or of his color. . . ." Those words were written by a Member of this Court 84 years ago [in] *Plessy v. Ferguson*. . . . [And] today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong. . . .[43]

From this starting point, Stewart reasoned that among the fundamental protections under the Fourteenth Amendment was a prohibition of "invidious discrimination."[44] "Under our Constitution," Stewart argued, "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."[45] In Stewart's account of the significance of Harlan's dissent, it was the nation's widely shared and longstanding commitment to this principle that gave it force.

During the 1980s, the principle of constitutional colorblindness had come to characterize debates in the popular press about the basic commitments of the Constitution. In 1984, in the *New York Times*, William Bradford Reynolds, the Assistant Attorney General for the Civil Rights Division in the Department of Justice, argued that the Fourteenth Amendment should be understood as resting on a colorblindness principle.[46] Reynolds argued that such a principle should be read to prohibit "quotas" based on race of all kinds:

> [T]he N.A.A.C.P. . . . maintained in *Brown*: "That the Constitution is colorblind is our dedicated belief." . . . That argument prevailed and in what may be the Supreme Court's finest hour, a unanimous Court overturned the separate-but-equal doctrine of *Plessy v. Ferguson* and adopted the view of the lone

41. Bakke, 438 U.S. 265 (1978).

42. 448 U.S. 448, 552–53 (1980) (Stewart, J., dissenting).

43. *Id.* at 522–23 (Stewart, J., dissenting) (citations omitted).

44. *Id.* at 523.

45. *Id.*

46. William Bradford Reynolds, Letter to the Editor, *Racial Quotas Hurt Blacks and the Constitution*, N.Y. TIMES, Dec. 9, 1985, at A22.

> dissenter in that case, the elder Justice Harlan. In any consideration of the Constitution, Justice Harlan's dissent in *Plessy* invariably emerges as the definitive statement of the proper construction of the 14th Amendment. "Our Constitution is colorblind," he wrote. . . .[47]

In the debates over affirmative action, the contours of the anticlassification reading of Harlan's opinion had begun to take shape, and the opinion began to exert a strong influence in these discussions. Out of debates over affirmative action, Justice Harlan's dissent took a privileged place in a story about the tragedy and redemption of America's struggle with race, and as a statement of its most basic and important values.

C. *Justice Scalia, Justice Thomas, and the Underpinnings of Colorblind Constitutionalism*

By the late 1980s, the colorblindness metaphor had become a standard trope in anticlassification arguments. Justice Scalia and Justice Thomas have relied strongly on Harlan's dissent as support for the view that the colorblindness rationale has a long and distinguished history.[48] In *City of Richmond v. J.A. Croson Co.*, decided in 1989, the Court considered a challenge to a program implemented by the City of Richmond, Virginia, which required that 30 percent of the subcontracts in contracts negotiated by the City be granted to minority contractors.[49] The Court struck down the plan under strict scrutiny, finding that it was not supported by a compelling governmental interest and not narrowly tailored.[50] In his concurrence, Justice Scalia invoked Harlan's image of colorblindness to underscore that the distinct constitutional problem in the plan was one of classification on the basis of race:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency-fatal to a Nation such as ours-to classify and judge men and women on the basis of their country of origin or the color of their skin. . . . At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb-for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to

47. *Id.*

48. *See* Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 791 (1996) (concluding that Scalia and Thomas are "committed . . . to the principle that government can almost never classify citizens on the basis of race. . . .").

49. 488 U.S. 468, 477 (1989). *See also* López, *supra* note 8, at 1047.

50. *Croson*, 448 U.S. at 511.

> the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[51]

Scalia's invocation of Harlan's dissent is typical of the ways in which the metaphor has been invoked in support of a colorblindness principle. The dissent functions as a rhetorical flourish in this paragraph, and gives Scalia's reading of the Fourteenth Amendment a strong foothold in the history of argumentation over its meaning.

The metaphor continues to be a forceful statement of the anticlassification position in the Court, especially in cases involving affirmative action or so-called "race-conscious" remedies. Among the current members of the Court, Justice Thomas is perhaps the strongest advocate of colorblindness. In particular, Thomas has drawn on the historical lineage of the colorblindness principle to support his view that it should govern our readings of the Fourteenth Amendment.

In *Parents Involved*, Justice Thomas launched a staunch defense of the anticlassification position, and took aim at the dissenters who "reject[ed] . . . the color-blind Constitution."[52] "I am quite comfortable in the company I keep," Thomas wrote, because "[m]y view of the Constitution is Justice Harlan's view in *Plessy* . . . And my view was the rallying cry for the lawyers who litigated *Brown*."[53] Thomas further cited remarks by Judge Thomas J. Motley regarding the significance of Harlan's dissent: "[Justice Marshall] had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson*. I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days."[54] In his quotation of Harlan, Justice Thomas actually reproduces the sentence before, about the "classes of citizens," and the sentence about "colorblindness," but leaves the intervening sentence about "caste" out of the quotation.[55]

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51. *Id.* at 520–21 (Scalia, J., concurring) (citations omitted).

52. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 (Thomas, J., concurring). On the use of colorblind rhetoric in *Parents Involved*, *see* Jonathan I. Entin, Parents Involved *and the Meaning of* Brown: *An Old Debate Renewed*, 31 SEATTLE U. L. REV. 923 (2008); *see also* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 113–22 (2007).

53. *Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring).

54. *Id.* at 773 (Thomas, J., concurring) (quoting In Memoriam, Honorable Thurgood Marshall: Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (Nov. 15, 1993)) (citations omitted).

55. *Id.* at 780 (Thomas, J., concurring). Despite the length of the quotation, Justice Thomas conspicuously omits the caste language from Harlan's opinion.

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the

Justice Thomas's position in *Parents Involved* thus rests on an unusual claim about its authoritativeness. First, his use of the dissent seems to have very little to do with any possible originalist claim about the meaning of the Fourteenth Amendment. The appeal he makes, instead, seems to involve a broad reference to a historical narrative that connects the meaning of the dissent to our constitutional tradition in two different ways. The first assertion is that Justice Harlan's dissent articulated a version of the "colorblindness" rationale, and the second is that this rationale has been perpetuated in our constitutional tradition in debates over the meaning of the equal protection guarantee. By referencing Harlan's dissent, Thomas gives this reading added historical support, but it is historical support of a perplexing kind. By connecting the image of colorblindness in Harlan's dissent to *Brown*, Thomas offers a particular vision of the history of our constitutional politics that supports an understanding of colorblindness as the strand in a story of redemption that connects *Plessy* to *Brown*.[56] The basis for that redemption, however, is not rooted in any particular interpretive methodology, and draws its authority from a more confusing and elusive source.

To support anticlassification readings of the Fourteenth Amendment, litigants in the Supreme Court frequently turn to Justice Harlan's image of colorblindness. These litigants stress this narrative in order to support their claims. The citations to Harlan's opinion typically leave out the caste language, and have tended to cite only that portion of the opinion that discusses the "color-blind" Constitution. In nearly every major case resting on an interpretation of the Equal Protection Clause since the 1980s, conservative groups have turned to the arguments in Harlan's dissent as support for anticlassification values, and cited that sentence of the opinion advancing "colorblindness" in whole or in paraphrase.[57] These briefs typi-

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> Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Id.

56. On the possibility of constitutional "redemption," *see* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007). *See also* Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385, 390–91 (1999) (describing Justice Harlan as a judicial "prophet" and as belonging, in Robert Cover's phrase, within "a canon of the 'folktales of justice' "). These invocations of Harlan's dissent involve claims that Philip Bobbit classifies as resting on an appeal to narrative "ethos" that address the nature of American democracy. *See* PHILIP C. BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–177 (1984).

57. *E.g.*, Brief Amicus Curiae of Ward Connerly in Support of Petitioners at 7, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 164184 (" 'Our Constitution is color-blind and neither knows nor tolerates classes among citizens.' . . . In *Brown* a unanimous Court adopted Justice Harlan's color-blind view and repudiated *Plessy*) (citations omitted); Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence In Support of Petition for Writ of Certiorari at

cally leave out the "caste" image, and focus instead on the prophetic invocation of colorblindness that, the argument goes, were eventually adopted by the Court in *Brown*. In the most recent reverse discrimination case before the Court, *Ricci v. DeStefano*, proponents of anticlassification have again turned to Harlan's dissent as an authoritative source of the values that they support.[58]

D. *Andrew Kull and the History of Colorblind Reasoning*

Among legal scholars, Andrew Kull is perhaps the strongest proponent of a colorblind reading of the Fourteenth Amendment.[59] Because of the influence of these arguments as proponents of the anticlassification position, it is important to evaluate them and consider the historical claims on which they are based. Kull argues that Harlan's dissent must be situated within nineteenth century arguments that favor a nondiscrimination principle.[60] Kull understands Harlan's dissent as instantiating in the equal protection tradition a colorblind principle that carries forward the nineteenth century history of arguments about anticlassification.[61] "*Plessy* embodies both our constitutional law of racial discrimination and its

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7–8, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2002 WL 32101034 ("Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed. . . . Fifty-eight years later, in *Brown* and its progeny, this Court repudiated Plessy's separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream.") (citations omitted); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 7, Adarand Contractors v. Mineta, 534 U.S. 103 (2001) (No. 00-730), 2001 WL 648599 ("Justice Harlan's vision of color-blind equality before the law would not prevail until *Brown*, 58 years later. In *Brown*, this Court repudiated *Plessy* and 'acknowledged the invidious effect of separating individuals solely because of their race.'") (citations omitted) (quoting Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1073 (Cal. 2000)); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 8, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (No. 05-908), 2006 WL 2430578 (quoting Justice Scalia's discussion in *Croson* of Harlan's dissent); Petitioner's Reply Brief at 3–4, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (No. 05-908), 2006 WL 3381292 ("In *Plessy*, only Justice Harlan foresaw that reading the Equal Protection Clause to allow state-sanctioned race discrimination would 'have no other result than to render permanent peace impossible,' . . . Justice Harlan was right.").

58. *E.g.*, Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners at 9, Ricci v. DeStefano, 126 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507011.

59. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 222 (1992) ("A scrupulous nondiscrimination may yet prove, because of the limitations of human justice, to be the most effective contribution that *law* . . . can make to the achievement of racial equality in this country.") (emphasis in original).

60. *See id.* at 22–53.

61. *Id.* at 2 ("The color-blind argument was the product of the struggle for legal equality for Black Americans . . . and it was discovered nearly at the outset.").

antithesis, crystallized in Justice Harlan's dissent," Kull argues, "and the legacy of the case is the choice it presents us."[62] "With Justice Harlan's dissenting opinion, the color-blind constitution became one of the available meanings of the Fourteenth Amendment," he continues, and "Harlan's luminous opinion gave lasting form to an idea that might not otherwise survived him."[63] Kull marshals a great deal of historical analysis of nineteenth and twentieth century materials to illustrate the long pedigree of arguments about colorblindness.

The key turn in Kull's argument is that nineteenth century arguments about discrimination can be best interpreted as equivalent to the colorblind principle as it is now understood by conservative opponents of affirmative action.[64] Such a view rests on a particular reading of the nineteenth century materials that emphasizes their commitment to anticlassification values.[65] Although he does not devote a great deal of attention to the term, Kull reads the caste language in these debates as support for anticlassification. His central argument, however, turns on the use of the term "discrimination" and "distinction" in these materials, as an early articulation of Harlan's idea of colorblindness.[66]

Although he acknowledges that the Court did not fully adopt a colorblind reading of the Fourteenth Amendment in *Brown*,[67] Kull suggests that that the "briefs and arguments filed in the School Segregation Cases crystallized the legal position of the civil rights movement for the period when its avowed legal objective was a color-blind Constitution."[68] "Taken together," Kull continues, "they represent the high-water mark of the attempt to persuade the Court to adopt Justice Harlan's view of the Fourteenth Amendment."[69] While Kull falls substantially short of giving an account of *Brown* as having redeemed Justice Harlan's reading of the Fourteenth Amendment, he does stress the significance of colorblind arguments in attempting to persuade the Court that colorblindness was the correct ground for overruling *Plessy*.[70]

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62. *Id.* at 118.

63. *Id.* at 118–19.

64. *Id.* at 40–87.

65. Kull, however, does not use the term "anticlassification" anywhere in the book, and instead prefers the term "nondiscrimination" which he equates with "colorblindness." *Id.* at 2.

66. *Id.* at 43 ("If we can agree that a caste society is bad, then segregation is to be condemned without inquiring into the equality of segregated facilities or the harm (by stigma or otherwise) to class members.").

67. *See id.* at 151.

68. *Id.* at 156.

69. *Id.*

70. *Id.*

E. *Justice Harlan and the Uses of History*

The arguments that conservative proponents of anticlassification have made about Harlan's dissent rest on a strange form of authority. As a dissent, it does not carry the authority of binding law, and its authority must come from some other source. It is not clear therefore why his dissent would be such an obvious authoritative ground—with such rhetorical power—for the principle of colorblindness.

The authority of the dissent in these arguments is also not in any sense originalist. Many commentators have noted the inconsistencies between originalism's claim to locate constitutional meaning in a stable and ascertainable past, and the extent to which the meanings it actually provides have emerged from the pressures of popular constitutionalism in the present.[71] Despite their professed support for originalism, Scalia and Thomas are perhaps least originalist when explicating the meaning of the Fourteenth Amendment.[72] Their arguments about Harlan's dissent, and potentially about the Fourteenth Amendment in general, radically depart from the originalist reading.[73] They do not purport to argue that the "colorblindness" image in Harlan's dissent is in any way related to the original meaning or the original intent of the drafters of the Fourteenth Amendment.

Justice Harlan's dissent makes a poor candidate for the originalist method. It was written more than 20 years after the ratification of the Fourteenth Amendment, and Harlan made no assertions that his argument

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71. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–93 (2008) (arguing that *"Heller's* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism. It situates originalism's claim to ground judicial decisionmaking outside of politics in the constitutional politics of the late twentieth century, and demonstrates how *Heller* respects claims and compromises forged in social movement conflict over the right to bear arms in the decades after *Brown v. Board of Education.*"). *See also* Robert Post & Reva Seigel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (describing originalism as a foundation for conservative political mobilization); D.A. Jeremy Telman, Medellín *and Originalism*, 68 MD. L. REV. 377, 380–82 (2009).

72. *See* Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1998) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text. . . ."); Clarence Thomas, *Judging*, 45 U. KAN L. REV. 1, 5–8 (1996).

73. *See* André Douglas Pond Cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachy of Originalism: "The Sun Don't Shine Here in This Part of Town"*, 21 HARV. BLACKLETTER L.J. 1, 4–5 (2005) ("Clarence Thomas abandons his originalist jurisprudential philosophy whenever it fits his political and emotional agenda. He does this in his race jurisprudence and he does it again in *Grutter.*"). *See also* Book Note, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1432–33 (2008) (reviewing CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007)).

about colorblindness rested on any interpretation of such sources. Even if there were some plausible connection between Harlan's dissent and the Fourteenth Amendment, scholars have convincingly shown that the debates over the ratification of the Fourteenth Amendment would not support a narrow reading of the Amendment that focused on "colorblindness."[74]

A different claim about the relevance of Harlan's dissent might rest on the idea of a constitutional canon—or, specifically, a canonical dissent in an anti-canonical case—of certain fundamental texts that articulate widely shared and foundational principles in our constitutional tradition.[75] The argument about constitutional canon seems to make a more limited claim than do Scalia and Thomas. Canonicity describes the relationship among the central texts in our constitutional tradition, and in that sense points to the way in which *Brown* and Harlan's dissent are placed in a new relationship in these arguments.[76] But arguments about canonicity do not seek, as the colorblindness argument does, to speak to the content of the Fourteenth Amendment in such general terms. Canonicity thus explains part of the way that conservatives use the dissent, but it does not tell the full story.

Colorblindness readings of Harlan's dissent turn to history for a different sort of authority than either originalism or canonicity. They turn to history, not as binding authority, as it is in originalism, or as a source of relationships among texts, but instead as a narrative about the meaning of the Fourteenth Amendment as it has come to be in our collective struggles over past injustice.[77] They rest, in other words, on profound and elemental collective memory about the reconstruction of our polity in

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74. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–93 (2007) (relying on an account of original understanding to suggest that the Fourteenth Amendment prohibits "class legislation"); McConnell, *supra* note 11.

75. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1019 (1998) (describing *Plessy* as a fundamental example of an anti-canonical text); *see also* Primus, *supra* note 33, at 245 ("When a modern lawyer thinks of *Lochner* or *Plessy*, however, he does not think only of their majority opinions. Each of those cases also contains a famous dissent, and those dissents have in some respects eclipsed the majority opinions.").

76. *See* Balkin, *supra* note 75, at 968.

77. *See* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 343 (2001) ("[I]t is plain that in our constitutional culture we also turn to history as a source of narrative understanding. It is history that supplies the narrative materials through which we forge the collective subject—'We the People'—that is realized through the practice of constitutional argument; and it is history that supplies the field of collective experience through which we make pragmatic judgments about how to realize constitutional commitments and values in practice. This kind of appeal to history, as a source of narrative understanding, of collective identity, and of practical judgment about constitutional values, is a fundamental feature of our constitutional culture, regularly invoked in constitutional argument inside and outside the courts.").

the aftermath of slavery. The colorblind reading of the opinion expresses one conception of the normative commitments that have emerged from these struggles, and that gain authority from their relationship to these shared commitments.[78]

Colorblindness arguments understand Harlan's dissent as drawing upon, and articulating, a strand of dissent that was present at its historical moment; and then contributing that protest to our constitutional culture at the moment that the blight of *Plessy* was put there. As Justice Thomas argues in *Parents Involved*, advocates of desegregation then redeemed the colorblindness principle that Harlan first articulated and gave it expression in our law when the Court decided *Brown* and based the decision on a colorblind reading of the Fourteenth Amendment.[79]

Justice Harlan's dissent thus forms part of a narrative about the history of debates over the content of our Constitution that gives them legitimacy in the present. Such a view of history helps to link the past to the present through a shared understanding of our normative commitments that imagines the nation as engaged in a shared experience of constitutional redemption.[80] The narrative powerfully connects our moment of constitutional resurrection—*Brown*—with the moment of its deepest disgrace, and holds that Justice Harlan foresaw the most significant harms of segregation and articulated a constitutional principle that would ultimately end them.

A narrative about our collective struggles over the constitution's meaning is the most significant source of the authority of Harlan's dissent in colorblindness reasoning. It is a narrative that entices us to believe in the aspirations and possibilities of constitutional law for overcoming past injustice, and that locates a story of redemption in the wake of slavery and segregation an aspect of our shared identity and self-understanding as a nation.[81] Norman Spaulding has suggested that the Reconstruction Amendments present particular challenges as courts struggle to apply them to new situations, because they were written to expressly repudiate historical wrongs, and has detailed the ways that collective memory shapes

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78. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 42 (1983) ("To state . . . that the problem is one of too much law is to acknowledge the nomic integrity of each of the communities that have generated principles and precepts. It is to posit that each 'community of interpretation' that has achieved 'law' has its own nomos—narratives, experiences, and visions to which the norm articulated is the right response.").

79. *See supra* notes 52–55.

80. *See* Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399 (2009).

81. Benedict Anderson has developed a conception of a nation as "an imagined political community" which, "regardless of actual inequality and exploitation that may prevail . . . is always conceived as a deep, horizontal comradeship." BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6–7 (2d ed. 2006).

courts' interpretations of them.[82] These invocations of Harlan rest on forms of collective memory that reconstructs our past and that gives it meaning and moral authority as we attempt to make it relevant to the challenges and political struggles that we face in the present.

The claims made in support of a colorblind reading of Harlan's dissent therefore turn centrally on a particular reading of it as a historical text and of a narrative about our struggles over the meaning of our constitutional values, and to reconstruct our basic normative commitments out of the ashes of past injustice.[83] In the story that proponents of colorblindness tell about the dissent, the opinion had a settled meaning in its nineteenth century context that gave the content of its protest to *Plessy* striking force, and that meaning rested on "colorblindness." It was this meaning that was later elaborated and embraced and in the struggles leading up to *Brown* and that forms the content the Equal Protection Clause.

The next Part proceeds from the nineteenth century and to the twentieth century history of the *Brown* litigation to challenge the peculiar use of history in these arguments to support a colorblind reading of Harlan's opinion. It offers a new reading of the opinion based on a different account of the meaning of "caste" in the opinion, and considers the consequences of this history for locating the significance of Harlan's dissent in the equal protection tradition.

The Article challenges this narrative about the dissent, first, by reconstructing the history of debates about social inequality that rested on the metaphor of caste, and that formed the background to Harlan's claim that "[t]here is no caste here." The Article then argues that the possible links between Harlan's dissent and *Brown* in terms of the caste metaphor, and that view that the relationship between *Brown* and Harlan's prophecy rests on the colorblind argument ignores the resurgence of caste, and its attendant antisubordination reasoning, in debates over desegregation.

I hope to offer a revisionist history that challenges the narrative that proponents of anticlassification have buried. The Article posits a different understanding of the relationship between our contemporary disagreements about equal protection and the history of reasoning about status hierarchies in the nineteenth century that inform readings of Justice Harlan's opinion. From the perspective afforded by this history, it is possi-

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82. *See* Norman W. Spaulding, *Constitution as Countennonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2000 (2003) ("[T]he Reconstruction Amendments represent self-conscious attempts to publicly address the fact of historical injustice through higher law-making. . . . Even if the original text of the Constitution was written against the perceived defects of the Articles of Confederation and the abuses of colonial domination, it's clear and ambitious break with that past eases the work of memory.").

83. Primus, *supra* note 33, at 289 ("To see how the received reading of the redeemed *Plessy* dissent is a significant reimagining of that opinion, it is necessary to read Harlan's dissent as a nineteenth-century contemporary would have.").

ble to reimagine the relationship between anticlassification and antisubordination values in our tradition that takes seriously their common roots, and to appreciate the persistence of antisubordination values in the equal protection tradition from the nineteenth century to the present.

F. *The Problem of Caste in Abolitionist Rhetoric and Republican Ideology, 1830–1865*

In readings of the opinion by supporters of anticlassification, Harlan's invocation of colorblindness dominates the analysis, or the image of caste is left out altogether. In these readings, the salience of caste for nineteenth century readers is lost. When he proclaimed, "There is no caste here," Harlan drew on a tradition of arguing about status-hierarchies in the United States as a form of the subordination of groups that was nearly sixty years old. The caste metaphor can be heard loudly in decades before the Civil War and in abolitionist rhetoric about slavery.

Abolitionists and other critics of slavery seized caste as powerful rhetoric to describe the harms caused by the slave system and the racial hierarchy that it imposed. From the perspective of political actors before the Civil War, the distinct problem posed by caste was that it relegated whole groups in society to a form of inescapable subordination. The high value placed on economic mobility and on free labor was understood to be a glaring contrast to the entrenched hierarchy that was strongly associated with caste systems. To these observers, the most troubling aspect of caste was not that it classified individuals, but that it imposed unjust and lasting forms of subjugation.

The social order imposed by caste was so firmly entrenched, these arguments suggested, that whatever means would be necessary to end it might very well need to be invasive and powerful. The problem of caste perpetuated by slavery was so ancient and so firmly rooted that efforts to demolish it would be protracted, difficult, and painful.

G. *Abolitionist Rhetoric and the "Prejudice of Caste"*

Beginning in the 1830s, members of the antislavery societies in New England frequently deployed the term "caste" as the distinctive feature of slavery in the United States, and the experience of free Blacks in the North. Caste became a metaphor that had rhetorical stakes, because it clarified the social harms associated with conditions under slavery. In the context of these debates, caste began to take on a particular meaning as an image of the social hierarchy under slavery that had emotional resonance and political salience.

In the course of reporting an account of a free Black woman's trial in Massachusetts, an author writing in *The Abolitionist* in 1831, argued that

"[t]he African race are essentially a degraded caste of inferior rank and condition in society."[84] "Marriages," the author continued, "are forbidden between them and whites in some States, and when not absolutely contrary to law, they are revolting and regarded as an offence against public decorum."[85] The author then identified the ways that these legal distinctions were etched into law. "By the revised Statutes of Illinois, published in 1829, marriages between whites and negroes or mulattoes, are declared void and persons so married are liable to be whipped, fined and imprisoned."[86] In this description, the author emphasized the ways that the caste system involved an entrenched hierarchy in which the social status of groups was entrenched in legal categories.

The *Anti-Slavery Record*, first printed in Boston from 1835 to 1837, published an article on "The Right of Northern Interference," which mounted an argument for ending slavery in the District of Columbia:

> By the most express sanctions of the [C]onstitution, [C]ongress has the power to abolish [slavery] at the seat of the national government, and in [C]ongress a majority of forty are free states. . . . To bring the North up to this work, it is necessary that the spirit of slavery in the North be met and conquered. *The prejudice of caste must be killed and buried.* Colored men must be allowed to take the place, freely, to which their manhood entitles them.[87]

In the vision of caste presented by this author, "the prejudice of caste" was the defining characteristic of the social system that slavery had put into place.[88] It was this form of social subordination, the author implied, that most deeply characterized caste. Furthermore, any efforts to end slavery involved not only an end to the ownership of persons, but in fact, an end to the forms of social stigma that the slave system imposed on human beings, and to which it gave social significance.

In 1842, the *Liberator* published an article that described a meeting of the British India Society in which a freedman gave a short speech on the nature of race relations in the United States. The author reported,

> Though he has never been a slave, yet, having suffered deeply from the influence of that unhallowed spirit of *caste*, which

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84. THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY, Nov. 1831, at 134.

85. *Id.*

86. THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY, Nov. 1833, at 164.

87. *The Right of Northern Interference*, THE ANTI-SLAVERY RECORD, Apr. 1837, at 6 (emphasis added). While it was originally published from 1835–37, the *Anti-Slavery Record* was later revived in the 1860s.

88. *Id.*

> leads the (technically) white class to outlaw and insult his descendants, in the remotest degree, of the African race, he can speak, and does speak as one into whose soul the iron has entered.[89]

The notion of the "spirit of caste" referred to the formal categories imposed by a caste system, as well as the ideology that underlined it and the forms of prejudice that it imposed on the lower castes.[90] These forms of prejudice and discrimination against the lower castes created the ground for the legal institutions and the perpetuation of the caste system over generations. In 1856, the *Liberator* published an article entitled "Caste," which discussed the problem of racial prejudice in New England. "While many of the free states have enacted shameful and brutal laws, under the influence of the spirit of caste, it has been remarked that New England was an exception in this matter. But this is not true."[91] Although "the Legislature forced Boston to recognize our common school system as *common*, and put an end to caste schools," there was nonetheless "in Boston a too frequent exhibition of this mean prejudice."[92]

In an article published in 1847, the *Liberator* again took aim at the emergence of caste distinctions as a consequence of slavery. "Free blacks in New York," the author observed, "are not permitted to enjoy rights, as native-born Americans, which are conceded to all foreigners who are naturalized to the soil."[93] The Republican Party in New York, the author wrote, was not "disposed to proclaim eternal oblivion to complexional caste," and was willing to consider the serious harms that it imposed on the country.[94] Here, the harm imposed by the caste system seemed to have more to do with the structure of status relations that it imposed, and less to do with the specific cultural meanings associated with caste.

Authors of pamphlet literature relating to India often juxtaposed to the mobility that characterized American society with the rigidity of the Indian caste system. Descriptions of the Indian caste system in popular magazines frequently emphasized that its particular form of hierarchy was based on a hereditary aspect.[95] "[W]hat is peculiar to [the "Hindoos"] is their division into *castes*. . . . None can ever quit his own caste, nor be admitted into another. The station of every individual is unalterably fixed;

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89. *American Slavery and the Prejudice Against Color*, THE LIBERATOR (Boston), Jan. 7, 1842, at 3.

90. *Id.*

91. *Caste*, THE LIBERATOR (Boston), May 2, 1856, at 71.

92. *Id.*

93. THE LIBERATOR (Boston), Jan. 8, 1857, at 7.

94. *Id.*

95. Nathaniel Hawthorne, *The Hindoo Castes*, AM. MAG. OF USEFUL & ENTERTAINING KNOWLEDGE, at 64.

his destiny is irrevocable; and his course in life is marked out, from which he must never deviate."[96]

In 1845, a newsletter printed by the Society of Friends in Philadelphia published a short essay that described the basic character of the Indian caste system and emphasized that it fixed one's social standing at birth:

> Castes are certain classes whose burdens and privileges are hereditary. The word is derived from the Portuguese *casta*, and was originally applied by the conquerors of the East Indies, to the Indian families, whose occupations, customs, privileges, and duties are hereditary. This term has been sometimes applied to the hereditary classes in Europe; and we speak of the spirit, or the prerogatives and usurpation of a class, to express particularly that *unnatural constitution of society*, which makes distinction dependent on the accidents of birth and fortune. . . . Wealth, talents, education, and religion, or the want of them, create the various classes and distinctions in this country. Wealth . . . [in the] United States, is constantly changing hands.[97]

The important features of caste systems, then, were that they consigned whole segments of society to low standing on the basis of their birth. This conception of the social order was a stark contrast to the impression of broader social mobility in the United States.[98] Caste represented the antithesis of a system where individuals had the capacity to increase their social standing through their own labor.

The concern with social hierarchy reflected in popular accounts of other caste systems and in abolitionist rhetoric was connected to the most basic ideological commitments of the Republican Party before the Civil War. While there were important differences between the ideology of Republicans and of the abolitionists, both movements were deeply concerned about the problem of social division on account of birth. William Forbarth has explained some of the important distinctions between the two ideologies: "Free Labor ideology was still rooted in a regime of artisanal and petty entrepreneurial production," Forbath argues, while "[a]bolitionism looked forward, as it were, to the emerging factory and wage labor regime. Both, to be sure, were individualistic ideologies. But the former's definition of freedom was bound up with traditional republican notions of social equality and widespread distribution of productive

96. *Id.*

97. *Castes*, THE FRIEND. A RELIGIOUS & LITERARY J., June 7, 1845, at 294.

98. *See id.*

property."[99] Republican and "free labor" ideology were more critical of the dominant modes of economic life, while abolitionism was more "bourgeois" in its orientation, and was more inclined to protect the free market principles in the labor market.[100]

As Eric Foner had observed, Republicans understood that "wage labor was a temporary status," and that "laborers for hire do not exist as a class."[101] They believed in a form of economic mobility that permitted members of the working classes to ascend in society based on merit. Moreover, the Republican Party in the 1850s emphasized that "free labor was degraded by slavery," and that the "invariable stigma" that attached to labor would prevent northern laborers from settling in the territories.[102]

Republicans also used the caste metaphor to describe the status of poor whites under the slave system. "They are depressed, poor, impoverished and illiterate, [and] degraded in caste," Jacob Collamer, a Congressman from Vermont, argued in 1856, "because labor is disgraceful."[103] These claims were, however, made in the context of a larger critique of the stagnant social order of slave societies. The limitations imposed on social mobility by the slave system, the claim went, did not only extended to blacks, but also to whites as well, whose place in the social structure was fixed, and who were unable to improve their lot through the hard work and initiative to which Republicans attached high value.

H. *Charles Sumner and the Caste Metaphor*

In the 1840s, the Republican politician Charles Sumner turned to caste to describe the effects of slavery and of racial segregation in the North. Sumner became involved in challenges to the Massachusetts public schools in the late 1830s, and in early public statements regarding the significance of race, he began to develop rhetoric that he would continue to use throughout his political career, including in debates over the ratification of the Fourteenth Amendment.[104]

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99. William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 1985 WISC. L. REV. 767, 783; *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 65 (1979) ("Southern society, with its aristocracy based on slaveholding, seemed . . . the direct antithesis of the egalitarian ideals of the North.").

100. Forbath, *supra* note 99.

101. *See* FONER, *supra* note 99, at xxi. On the persistence of this ideology in Reconstruction, *see* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 97–127 (1980). *See also* DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872 (1967).

102. FONER, *supra* note 99, at 58.

103. CONG. GLOBE. 34th Cong. 3d Sess. App. at 53.

104. Sumner maintained close relationships with abolitionists through the 1830s and 40s, and even subscribed to the *Liberator* starting in 1835. "Unlike the Garrisonians who denounced the Constitution as a proslavery document and desired no union with

In December 1849, Sumner represented the plaintiff Sarah Roberts before the Massachusetts Supreme Judicial Court in the case of *Roberts v. City of Boston*.[105] Roberts was a Black child who had been excluded from Boston public school. Roberts argued that she had been excluded from the school in violation of the Massachusetts Constitution and the Massachusetts education laws, which guaranteed education to children generally, and not only to White children.[106]

In oral arguments before the Supreme Judicial Court, Sumner embarked on a lengthy discussion of the harms associated with caste. Sumner argued that "[t]he separation of children in the Public Schools of Boston, on account of color or race, is in the nature of *Caste*, and is a violation of Equality."[107] Sumner then offered a definition of caste and clarified the harm that it imposed on members of the lower social orders. To understand the essential features of caste, it was necessary he said, to carefully consider the example of caste in India:

> [Caste] has become generally used to designate any hereditary distinction, particularly of race. It is in India that it is most often applied; It is there that we must go in order to understand its full force. A recent English writer on the subject, says, that it is "not only a distinction by birth, but is founded on the doctrine of an essentially distinct origin of the different races, which are thus unalterably separated." This is the very ground of the Boston Schools Committee.[108]

Sumner's description of caste rested solidly on a conception of caste as a system of social organization that was based on a view that social groups had different origins and should be forever separated.

Sumner then turned more directly to the Indian example. For him, it was the example of caste in India that was the extreme case against which American racial injustice should judged. It represented an example of social harm that was so striking that it helped to clarify the harms im-

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slaveholders, Sumner prided himself upon his 'strong attachment to the Constitution and the Union.'" DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 133 (1981).

105. 59 Mass. 198 (1849). On the *Roberts* case *see* Morgan Kousser, *The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988) (discussing the origins of the challenge to the segregation of Boston public schools); KULL, *supra* note 59, at 40–52.

106. *Roberts*, 59 Mass. at 201–02.

107. ARGUMENT OF CHARLES SUMNER, ESQ. AGAINST THE CONSTITUTIONALITY OF SEPARATE COLORED SCHOOLS, IN THE CASE OF SARAH C. ROBERTS VS. THE CITY OF BOSTON (Dec. 4, 1849), *in* ABOLITIONISTS IN THE NORTHERN COURTS: THE PAMPHLET LITERATURE 493, 508 (Paul Finkelman ed. 1988) [hereinafter ARGUMENT OF CHARLES SUMNER].

108. *Id.* (citation omitted).

posed by the segregation of public schools in Boston because it represented a symbol of the perpetual and inhuman subjugation of social groups. Sumner continued:

> The Brahmins and the Sudras, in India, from generation to generation, were kept apart. If a Sudra presumed to sit upon a Brahmin's carpet, he was punished with banishment. It is with a similar inhumanity, that the black child who goes to sit on the same benches at school with the white child, is banished, not from the country, but from the school. In both cases it is the triumph of Caste. . . .[109]

Sumner then embarked on several pages of description in which he related missionary accounts of the caste system in nineteenth century India. "So strong is my desire that the Court should feel the enormity of this system," he wrote, "that I shall here introduce an array of witnesses to the unchristian character of Caste, as it appears in India, where it has been most studied and discussed."[110]

The image of caste in India was powerful because it figured the problem of social subordination as part of a social hierarchy that had deep roots in a society that was ancient and that would be extremely difficult to dismantle. Sumner did not speak of what remedy would be required here, but the image of the prohibition of a Sudra stepping on a Brahmin's carpet suggests that he thought the problem of school segregation was about more than discrimination.[111] Instead, it was about a set of social practices, deeply held beliefs, and underlying social realities that rendered the hierarchy real and permanent—keeping individuals locked in low social positions worked to demean their worth.

Sumner's comparison to India involved a repudiation of slavery as un-Christian and barbaric. The historian Sarah Barringer Gordon has traced the emergence of a set of arguments about polygamy and Mormonism in the nineteenth century that claimed that these practices were inconsistent with Christian values, and should therefore be rejected.[112] Sumner's characterization of slavery as "barbaric" was consistent with a

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109. *Id.* at 509.

110. *Id.*

111. *See id.*

112. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 55–58 (2002) ("In nineteenth-century American thought barbarism occupied a special, un-Christian place. It constituted the inversion of progress, a Manichean counterweight to its successor, civilization. . . . The identification of civilization with Christianity was deep and widespread; for many theorists and politicians in the nineteenth century, civilization was founded on a basic commitment to Christianity. The party that identified itself successfully as the protector of Christian civilization (and the vanquisher of barbarism) thus acquired significant spiritual as well as political advantage.").

style of constitutional argument that rested its claims broadly on the Christian values that Americans shared. The claim of barbarism argued that those who support such a practice were outside the Christian community to which all Americans were thought to belong.[113] The assertion that slavery was properly outside this community of belief, and associated with a society thought to be uncivilized, was a powerful claim.

Sumner compiled these descriptions of the Indian caste system from a short book published by Joseph Roberts in 1849, entitled *Caste, In Its Religious And Civil Character, Opposed to Christianity.*[114] Roberts introduced the series of quotations from missionary accounts with a description of the origins of the caste system and its basic features. "Caste is as impolitic as it is unjust, it keeps up, more than any other thing, the want of cordiality betwixt the rulers and the ruled; it feeds the evil, the vain prejudices of people it cherishes nationalities so exclusive, so abhorrent, in the feelings of the high caste man, that he deems all of Christian birth as the most impure, most loathsome in his sight."[115] Roberts also made a revealing comparison of the caste system in India to the systems of hereditary distinctions in Europe that helped to clarify the harm imposed by caste. "Civil distinction in Europe," Roberts argued, "depends not on birth only: it depends chiefly on personal talents and personal industry."[116] The "idea of Caste" in India, he continued, was "not the same as ideas of civil rank and distinction entertained by the nobles and Lords of England."[117]

The descriptions of caste that Sumner culled from the pamphlet were vivid. One of the quotations from Reverend W. Bridgnall focused, in particular, on the forms of "subjugation" imposed by the Indian caste system:

> I perfectly agree ... [that] in considering the institution of *Caste* as the most formidable engine that was ever invented for perpetuating the subjection of men; so that, as a friend of humanity only, I should feel myself bound to protest against and oppose it; but in particular as a Christian, I deem it my obvious and imperative duty wholly to discountenance it, conceiving it to be utterly repugnant to the whole spirit of Christianity.[118]

The caste system represented to Sumner the most stratified and oppressive form of social hierarchy imaginable. It was also a form of hierarchy that

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113. *Id.*

114. CASTE IN ITS RELIGIOUS AND CIVIL CHARACTER, OPPOSED TO CHRISTIANITY: BEING A SERIES OF DOCUMENTS BY THE RIGHT REVEREND BISHOPS HERBERT, WILSON, CORRIE, AND SPENCER, AND BY EMINENT MINISTERS OF OTHER DENOMINATIONS (Joseph Roberts ed., 1837).

115. *Id.* at 18.

116. *Id.* at 114.

117. *Id.*

118. Sumner, *supra* note 107, at 18.

imposed a lasting stigma on members of the lower castes: "Caste makes a man think that he is holier than another, and . . . it makes him despise all those who are lower than himself."[119]

As he concluded the section of his argument about the Indian caste system, Sumner again emphasized the ways in which caste imposed disabilities on the basis of one's membership in a certain group. "We abjure all hereditary distinctions," he argued, "but here is an hereditary distinction, founded not on the merit of the ancestor, but on his color. We abjure all privileges derived from birth; but here is a privilege which depends solely on the accident, whether an ancestor is black or white."[120] The "hateful institution" of caste entrenched whole social groups in an unjust and immovable hierarchy. The problem for Sumner was not just that of discrimination, but of the "institution" of caste, and the social practices and attitudes surrounding it. Caste came to express a certain vision of the harm of slavery that indicated that an end to discrimination would not be enough, and that a wider range of interventions would be necessary to finally wrest the social order from its grasp.

II. THE END OF CASTE: THE CASTE METAPHOR AND THE RECONSTRUCTION AMENDMENTS

A. *The "Question of Caste" During Reconstruction*

In the years after the Civil War, Sumner continued to evoke caste to describe the harms perpetrated under slavery. Sumner's interest in caste deepened, and it became consistent theme in his rhetoric with respect to slavery. As he continued to use the metaphor during these years, Sumner laid increasing emphasis on the aspects of caste that were related to its stigmatic aspects that extended to groups. He was of course concerned with the way that caste limits the opportunities of individuals, but in the course of his advocacy for the Reconstruction Amendments, caste, for him, powerfully depicted the impact of slavery and its aftermath.[121] The way that caste framed the harm of slavery also posited a set of remedies that could not be easily cabined and required an extensive and thoroughgoing effort to break apart the crushing hierarchy that it imposed.

At the war's end, the metaphor of caste continued to resound in abolitionist newsletters and the popular press. In 1865, for example, the *Anti-Slavery Reporter* of Boston made the following observations about the disenfranchisement of Blacks throughout the country: "[T]his disenfranchisement is perpetual hereditary, and insurmountable. It is more deeply seated than Oriental caste. It clings to each man and his posterity forever,

119. *Id.* at 19.
120. *Id.* at 20.
121. *Id.*

if there be a traceable thread of African descent."[122] "No achievements in war or peace," the author continued, "no acquisitions of property, no education, no mental power or culture, no merits, can overcome it."[123]

In 1869, Sumner published a lecture that he gave in Boston on the "Question of Caste."[124] Caste, Sumner argued, was "nothing less than the claim of hereditary power from color."[125] The examples of real caste systems in India and elsewhere constituted a "living admonition to mankind."[126] Caste, "he contended, "is essentially barbarous, and therefore appears in barbarous ages, or in countries not yet relieved form the early incubus. It flourished side by side with the sculpted bulls and cuneiform characters of Assyria, and side by side with the pyramids and hieroglyphics of Egypt."[127] Although they varied somewhat depending on the context, in all of the countries where it had developed, caste systems had certain qualities in common. "The system," he wrote, "had two distinct elements; first, separation, with rank and privilege, or their opposite, with degradation and disability," and "secondly, descent from father to son; so that it was perpetual separation from generation to generation."[128]

Sumner drew the comparison between caste in the United States and India in clearer terms than he had in his earlier writing. Sumner again argued that caste in the United States, not unlike caste in India, was constituted by a system of social subordination:

> Change now the scene,—from ancient India, and the shadow of unknown centuries, to our Republic, born of yesterday. Here the Caste claiming hereditary rank and privilege is white; the Caste doomed to hereditary degradation and disability is black or yellow, and it is gravely asserted that this difference of color marks difference of race, which justifies the discrimination. To save this enormity of claim from indignant reprobation, it is insisted that the varieties of men do not proceed from a common stock,—that they are different in origin,—that this difference is perpetuated in their respective capacities, and the apology concludes with the practical assumption, that the white man is a superior Caste not unlike the Brahmin, while the black man is an inferior Caste not

122. *Anti-Slavery Reporter*, Aug. 1, 1865, at 191.
123. *Id.* at 191.
124. Charles Sumner, Lecture: The Question of Caste (1869).
125. *Id.* at 3.
126. *Id.* at 8.
127. *Id.* at 7.
128. *Id.*

> unlike the Sudra, sometimes even the Pariah; nor is the yellow man exempted from this same insulting proscription.[129]

The vision of caste that Sumner depicted in his short pamphlet underscored that caste systems granted social standing through a system of hereditary privilege, and that they impose "insult" and "indignant reprobation" on the lower castes in such a system. Caste was, in other words, a profound social stigma, and it was in this precise sense that he saw a close relationship between caste systems in other societies, and the structure of American race relations.

Sumner described the caste metaphor at great length, because it helped to clarify the nature of the harms imposed on members of the lower castes in a social structure with a hierarchy of this kind. In debates over the appropriate response to correct the harms exacted by slavery, Sumner again turned to caste to describe hierarchy that it has imposed. Caste was, in Sumner's eyes, the most vivid description of the rigid form of social hierarchy that slavery imposed on Blacks.

B. *Caste and the Ratification Debates*

In debates in Congress over the proposals leading to the passage of the Fourteenth Amendment, proponents of broader constitutional guarantees of equality frequently returned to the metaphor of caste to characterize the social hierarchies that they hoped to transform. Among the advocates for the legislation, Senator Sumner was perhaps most inclined to advance arguments based on the caste metaphor. In these floor speeches, however, Sumner now used "caste" not to refer to the set of social relationships that had existed under slavery but instead to describe the new forms of subordination that he feared would emerge in its aftermath. While Sumner did not often speak about the remedies that caste would justify, the metaphor of caste invoked an image of a profoundly entrenched hierarchy that was so problematic—so "demonic"—that it justified interventions in the social order.

"Others may be cool and indifferent," Sumner argued in 1869, "but I have warred with Slavery too long not to be aroused when this old enemy shows its head under another alias."[130] "It was once Slavery; it is now Caste," he continued, "The old champions reappear, under other names, and from other States, each crying out, that under the national Constitution, notwithstanding even its supplementary amendments, a State may, if it pleases, deny political rights on account of race or color and thus establish the vilest institution, a Caste and an Oligarchy of the Skin."[131] Sumner

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129. *Id.* at 10–11.

130. CONG. GLOBE, 41st Cong., 3d Sess. 902 (1869).

131. *Id.*

later invoked the dangers of caste as he excoriated those who would include skin color among the "qualifications" and "regulations" that the proposed amendment would allow states to adopt with respect to potential voters. The champions of such provisions, he argued, would create a "monopoly of rights" that would limit opportunity for all.[132]

Perhaps to some extent influenced by Sumner's rhetoric, many other advocates for the proposed Amendment invoked the image of caste. Senator Wilson, also from Massachusetts, said for instance, "Men who, in the lights of this age in America that flash upon us from the battlefields and patriot[s'] graves, continue to champion the lost cause of slavery, caste, and human equality, are certain ... to meet the doom of men in other lives who have disowned, scoffed and reviled the sublime creed of human equality and brotherhood."[133]

Representative H.C. Van Wyck of New York returned to the caste metaphor in debates over a bill he had introduced regarding the imprisonment of American citizens overseas. Although the bill was not directly relevant to the Fourteenth Amendment, it is revealing that Van Wyck felt it appropriate to turn to the caste metaphor here as well. "The meanness of caste in this country on account of color," he said, "is not more wicked than the caste of nation, religion, or blood in Great Britain. Conservatives talk of a white man's government, [but] in Great Britain only a certain kind of white man's blood is entitled to consideration."[134] "Restrict freedom to color, caste, and blood," he continued, "and you are turning back the hands on the dial of freedom."[135]

In February, 1872, after the passage of the Fourteenth Amendment, the Senate considered a bill that would have repealed Section III of the Amendment, which imposed certain limitations on the Southern states from holding political office. In the course of debates over this provision, Sumner offered an example of the continuing stigma imposed by segregation:

> Colored children, living near what is called the common school, are driven from its doors, and compelled to walk a considerable distance, often troublesome, and in certain conditions of the weather difficult, to attend the separate school. One of these children has suffered from this exposure, and I have myself witnessed the emotion of the parent ... The superadded pedestrianism and its attendant discomfort furnish the measure of inequality in one of its forms, increased by the weakness or ill health of the child. What must be the feeling of

132. *Id.*

133. CONG. GLOBE, 36th Cong., 3d Sess. 153 (1860).

134. CONG. GLOBE, 90th 2d Sess. 469 (1968).

135. *Id.*

> a colored father or mother daily witnessing this sacrifice to the demon of Caste?[136]

This vision of caste was different the broad appeals to the "demon of Caste" that Sumner had made in earlier speeches. Here, he aimed to give caste a personal dimension, and to show vividly its impact on the lives of children. The stigma of caste passed down from parent to child and could not be eliminated by any means. Sumner underscored that it was not only the black child who was born into such an oppressive system of status relations who suffered, but also the parents as well, who watched their children suffer at the hands of the injustices of the caste system that flourished under slavery.

C. *Caste and the Legacy of Reconstruction*

After the Reconstruction Amendments had been enacted, the caste metaphor continued to be invoked in disagreements about their plausible reach. Throughout the 1880s and 1890s, debates about the problems of segregation continued to frequently turn on the caste metaphor. The images that these commentators invoked drew from the meanings of caste that had emerged in abolitionist circles and occupied a prominent place during the ratification debates.

The New York *Independent* published a short essay in 1881 that offered harsh criticism of a law passed in Texas that prohibited intermarriage between Whites and Blacks.[137] "Such legislation has its basis in race caste," the author contended, "and is intended to mark the black race as an inferior and degraded race of beings unfit to intermarry with the true superior white race."[138] In 1882, John Miller McKee, writing in *Cumberland Presbyterian Quarterly*, advocated the passage of laws "fixing a standard of education, of intelligence, of character, a standard of manly competence for the high and sacred trust of voting."[139] In support of these new voting regulations, McKee argued that "It would not be a rule of race nor of caste; and it would be his own fault if with schools and trades open to qualify his manhood, he should long fail to take his place as a voter." Indeed, "the [F]ourteenth [A]mendment could not have been better pleased."[140]

Justice Harlan's contributions to the efforts to dismantle segregation were recalled in the following way in an editorial published in Southern Republican newspaper in 1883:

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136. CONG. GLOBE, 42nd Cong., 2d Sess. 385 (1872).

137. THE INDEPENDENT, March 17, 1881, at 33.

138. *Id.*

139. John Miller McKee, *What Will the Negro Do With Himself*, CUMB. QTL'Y REV., Apr. 1882, at 129, 137.

140. *Id.* at 138.

> It will be remembered that Judge Harlan was not rocked in the cradle prepared by the genius of universal emancipation . . . but from boyhood to ripe and useful manhood, having been born in the midst of slavery, he was surrounded in his native State by all the influences of the demon of caste. Notwithstanding, he rises above all these, clothed in the judicial garments of the Supreme Court. Solitary and alone, he offers a classic . . . rebuke to the Court. . . .[141]

The writer of this obituary turned to caste to describe the structure of status relations in the South, and in doing so, recalled Sumner's phrase "demon of caste" that had redounded through the debates over the ratification of the Fourteenth Amendment.

Thaddeus B. Wakeman, a New York lawyer, wrote an essay in 1891 in the *Open Court*, a literary and political magazine, which directly referenced Sumner's usages of caste the caste metaphor to describe racial subordination.[142] Wakemen argued,

> [T]he Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, which Senator Sumner supposed would protect the freedmen from caste, and which were to stand as his proudest monuments, have by their failure tended to justify and establish the very caste, they were passed to prevent . . . [a] land of caste is a land of bondage, ever deepening from generation to generation.[143]

For Wakeman, writing from the perspective of the 1890s, it was caste that was the most central commitment of the Fourteenth Amendment. It was Sumner's invocation of this "caste and its evils" that depicted the social hierarchies that the Reconstruction Amendments aimed to dismantle. Wakeman argued that the Fourteenth Amendment took aim at caste, and that it sought to end it. This formulation suggests that, under such a conception, these status hierarchies were conceptualized by our equality law, and perhaps even that it sought to intervene in them and reconstruct them. For Wakeman, the Constitution was not in any sense blind to caste, but instead that it took caste properly in its sights and aimed to "prevent" its entrenchment over time.

The image of caste persisted into the 1890s and continued to be closely associated with the problem of social hierarchy. In some of these discussions, the eradication of caste was understood to be the principle at the heart of the Equal Protection Clause. These invocations of caste sug-

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141. KENTUCKY REPUBLICAN, 1883, at 45.

142. T.B. Wakeman, *Planetary Statesmanship and the Negro*, OPEN COURT, Aug. 1890, at 2433.

143. *Id.* at 2434.

gested that the Constitution set its sights on these status hierarchies and sought to dismantle them. While commentators did not extensively write about the remedies that would be justified by caste, the orientation that they suggested between the Constitution and these status hierarchies strongly suggested that caste justified such interventions. Caste was so invidious, and so alive, that the remedy that would be necessary to end it would be a dramatic and costly one. The metaphor of caste continued to frame these debates about the social status of African Americans and the Constitution in the years after the Reconstruction. It remained a feature of debates about the meaning and possibilities of our equality law.

III. RE-READING JUSTICE HARLAN

In the litigation that culminated in *Plessy*, the lawyers who mobilized to challenge racial segregation in Louisiana drew on the arguments about caste that had developed over debates about slavery and during Reconstruction. These arguments turned to these debates not primarily for the image of colorblindness, but based instead on a series of arguments about caste that had come to have a particular meaning in debates about the values embraced by the Fourteenth Amendment. Caste re-emerged over the course of this litigation in ways that foreground the problem of status harm. Justice Harlan's invocation of the metaphor should be understood as addressing the problem of social subordination presented in the briefs and over the course of the litigation. This Part examines Justice Harlan's dissent in view of the tradition of arguments about social subordination and the significance of the caste metaphor in these debates.

A. *The Caste Metaphor and the* Plessy *Litigation*

For the lawyers who argued *Plessy*, the metaphor of caste became a powerful image for describing the social practices they sought to challenge. The claims that Homer Plessy's lawyers made during the litigation were articulated in a language of caste that drew on a set of meanings that had developed over many years, and that had become a symbol in controversies over the meaning of equal protection.

Rebecca Scott has argued that the origins of the *Plessy* litigation can be found in Louisiana in the 1890s, and that it was the idea of "public rights" that contributed the basic structure of their arguments about segregation. "For Plessy's fellow activists in New Orleans, 'public rights and privileges' were essential to the substance and symbolism of the equal dignity of citizens in the public sphere," she argues, "and a claim of equal standing in public directly challenged the effort to impose white

supremacy. . . ."[144] Scott suggests that the pattern of legal challenges and precedent for articulating claims of status harm under the Louisiana Constitution's "public rights" provisions—with deep roots in the French Enlightenment—provided the relevant intellectual background that gave the claims about the harm of segregation their content.[145] Although she does not develop this claim substantially, Scott urges that it is this background of ideas about public rights that should inform our readings of caste in Justice Harlan's opinion.[146] Scott, however, does not aim to show how this should alter our interpretation of the opinion or the ways that it was related to a longer tradition of arguments about caste.[147]

A different reading of the briefs filed in *Plessy*, however, suggests that they not only drew on the "public rights" tradition from Louisiana's constitution and culture, but also the precedent of arguing about the meaning of the Fourteenth Amendment in terms of caste. The authors of these briefs understood that they were writing for a national audience, and as this Article has suggested, there was a richly articulated tradition of arguments from caste that could inform its articulations of the distinct harms of segregation on railroad cars in Louisiana.[148]

Plessy's brief filed in the Supreme Court, drew on caste imagery to describe the nature of the slave system and the social structure that it imposed. "Slavery," the brief argued, "was a caste, a legal condition of subjection to a dominant class, a bondage quite separable from the incident of ownership." "It was the subjection to the control of the dominant race *individually and collectively*, which was the especially distinctive feature of slavery as contra-distinguished from involuntary servitude."[149] The brief returned to the caste metaphor in its final paragraphs:

> Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair—the two obvious and controlling indications of race and—in traveling through that portion of the country where the "Jim Crow Car" abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result, the indignation, the protests, the assertion of pure Caucasian ancestry. . . .

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144. *See* Scott, *supra* note 10, at 781.

145. *Id.*

146. *Id.* at 803. ("And although Justice Harlan's famous dissent in *Plessy* did not use the words 'public rights,' his claim that the Constitution 'neither knows nor tolerates classes among citizens' and thus '[t]here is no caste here' echoes the plaintiff's brief in its underlying logic.").

147. *See id.*

148. *Id.*

149. Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896), 1893 WL 10660, at * 32–33 (emphasis added).

> But the conductor, the autocrat of Caste, armed with the power of the state conferred by this statute, will neither listen to denial or protest. "In you go or out you go," is his ultimatum. . . . You would feel then and know that such assortment of citizens on the line of race was a discrimination intended to humiliate and degrade the former subject and dependent class—an attempt to perpetuate the caste distinctions on which slavery rested.[150]

Caste now emerged in a narrative that aimed to evoke the nature of the status-harms that segregation imposed in the aftermath of slavery. It was "subjection" and the "humilat[ion] and the "degreda[tion]" of caste that was its most fundamental aspect.

The vision of caste presented to the Court in the plaintiff's brief was not one that emphasized the classification of individuals. Instead, the image of the Justices of the Supreme Court becoming Black and subjected to segregation was intended to convey an impression of the status harms associated with segregation. It was in this context that the problem of caste most clearly presented itself. It was here, in view of a social hierarchy turned upside down, that the metaphor of caste was offered to the Court as a central commitment of the Equal Protection Clause.

In this way, the lawyers for Homer Plessy adopted the metaphor of caste that had originated with abolitionism and emerged again in debates over ratification of the Fourteenth Amendment. The arguments about subordination, and the rhetoric of "subjugation" persisted, and continued to shape ways that the harms of slavery could be comprehended from the perspective of its aftermath. The briefs drew on a particular strategy for articulating status harm in existing practices of constitutional politics, and it was in view of this tradition, and its invocation in the briefs, that Harlan used the term.

B. *The Caste Metaphor and Harlan's Dissent*

A more accurate reading of the caste metaphor in Justice Harlan's opinion strongly argues against a view of the opinion that focuses exclusively on the parts of the opinion—most notably the image of colorblindness—that invoke anticlassification values. By taking account of the caste metaphor, the rest of the opinion can be understood to be concerned, in other respects, with the problem of social hierarchy and the subordination of social groups. A proper reading of the opinion is one that understands the significance of status-based harm for Justice Harlan's

150. *Id.* at 35.

reading of the Fourteenth Amendment, and substantially alters interpretations of the paragraph where colorblindness appears.[151]

Justice Harlan invokes the caste metaphor in the following paragraph of the opinion, which begins with an assertion of the problem of social hierarchy:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.[152]

The first part of this paragraph is not concerned with the problem of discrimination, but instead begins with a description of the substantial inequalities separating whites from blacks. The image of caste at the end of this paragraph adds substantial emphasis to the view of social inequality that precedes it.[153] The colorblindness imagery is thus embedded in a paragraph that begins with a discussion about social hierarchy and the subordination of groups.

The rest of the opinion is rife with discussion of status-based harm. In a powerful passage, Justice Harlan described the harms caused by segregation in terms of subordination:

> May it not now be reasonably expected that astute men of the dominant race ... that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a 'partition,' and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a movable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race.[154]

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151. At the same time, Justice Harlan's views on race were of course extremely complex and at times conflicted. *See* TINSLEY E. YARBOROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 160 (1995) (noting that passages in the dissent "prompt speculation whether the justice who denounced segregation in transportation, voting, places of public amusement, and the jury box might have a different stance in more sensitive areas of human interaction").

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

153. *Id.*

154. *Id.* at 562.

The images of separation that Justice Harlan describes in the jury-box underscore the humiliation felt by Blacks who must face down the psychical separation from Whites. Segregation on public highways, Harlan concluded, was a "badge of servitude," that is "wholly inconsistent with the civil freedom and the equality before the law established by the [C]onstitution."[155] Further, the prohibition of physical contact in these passages recalled the abolitionists' and Sumner's concern with that aspect of the caste system that insisted on spatial separation.[156]

Harlan's emphasis on the "badge of servitude" imposed by slavery and the subordinating effects of slavery are given a renewed emphasis by the inclusion of the "caste" metaphor in the dissent. The paragraph in which Harlan discusses colorblindness and the problems inherent in discrimination must be understood in view of Harlan's' fundamental concern with social hierarchy. The dissent is of course to some extent concerned with the problems of anticlassification, but the discussion of colorblindness is actually a much more limited section of the dissent, and in fact emerges in a paragraph that begins by underscoring the problem of social hierarchy.

As late as 1912, in a law review article that summarized Harlan's great dissents, there was no mention of the colorblind language.[157] In fact, the article's reading of the dissent understood its ground to be subordination and not classification.[158] The article emphasized the impact of segregation on African Americans, and did not conclude that Harlan's dissent should be read as a prohibition of classification.[159]

IV. A PROPHETIC VOICE IN A DIFFERENT KEY: THE RETURN TO CASTE IN *BROWN*?

Proponents of anticlassification have urged that the commitment to colorblindness in Harlan's dissent should be understood as having been redeemed by *Brown*.[160] Such arguments for *Plessy*'s significance rest on an

155. *Id.*

156. *See supra* notes 91–97 and accompanying text.

157. *See* H.B. Brown, *The Dissenting Opinions of Mr Justice Harlan*, 46 AM. L. REV. 321 (1912).

158. *Id.* at 337–38.

159. *Id.* ("Mr. Justice Harlan dissented [in *Plessy*] upon the ground that the legislation was inconsistent, not only with the equality of rights which pertain to citizenship, but with the personal liberty enjoyed by everyone within the United States. He thought the arbitrary separation of citizens on the basis of race, while they are on the public highway, was a badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution, and could not be justified upon any legal grounds. He assumed what is probably the fact, that the statute had its origin in the purpose, *not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons.*") (emphasis added).

160. *See supra* notes 19–38 and accompanying text.

idea of a constitutional canon, and that our readings of *Plessy* are closely linked to our readings of *Brown*.[161] In the narrative offered by proponents of colorblindness, the relationship between the two decisions is best understood as one in which *Brown* redeemed Harlan's dissent in *Plessy* by appropriating the colorblind ideal.[162]

A study of the period before *Brown* from the vantage point of caste language, however, suggests a different relationship between the two opinions in the equal protection tradition. In the period leading up to and immediately following *Brown*, opponents of segregation in the South frequently returned to the metaphor of caste to describe the social hierarchies that they aimed to dismantle. The caste language that emerged in debates over the meaning of segregation figured the problem of segregation as one that involved the subordination of groups. While it was informed, in many cases, by new social science research, opponents of segregation continued to recall early debates over slavery and Harlan's reference to caste.

Revisiting discussion of caste and of Harlan's dissent in the period before *Brown* and in its immediate wake suggests that colorblind arguments misunderstand the significance of Harlan's opinion from the perspective of *Brown*, by suggesting that *Brown* canonized its commitment to anticlassification.[163] This Part does not aim to give a comprehensive rereading of *Brown*, but instead to show a common lineage in the tradition of caste reasoning in the nineteenth century, which connects Harlan's dissent to *Brown* in ways that challenge the conventional reading of Harlan's dissent as a canonical text.

A. *Caste and Debate over Segregation, 1935–1954*

Legal scholars have powerfully challenged the view that in the period immediately following *Brown*, the decision was best understood as resting on an anticlassification principle. Reva Siegel has reconstructed the

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161. Primus, *supra* note 33, at 257 ("By rejecting *Plessy*, *Brown* stripped *Plessy* of its authoritative status. But it also did more than that. Because *Brown* is a canonical decision, it transformed *Plessy* into an anti-canonical text: it made *Plessy* into a [negative] reference point rather than a mere irrelevance. In so doing, it reversed the yoked pair of *Plessy*'s majority and dissent, made the authoritative anti-authoritative and set the stage for Harlan's opinion to become canonical.").

162. *See id.*

163. In situating *Brown* with respect to *Plessy*, I recognize that there are significant problems with this chronology as a historical matter. *See* Kenneth W. Mack, *Rethinking Civil Rights Era Lawyer and Politics in the Era Before* Brown, 155 YALE L.J. 256, 263 (2005) (arguing that the *Plessy* to *Brown* narrative has emphasized a view of legal liberalism that does not give adequate attention to the broader range of concerns that motivated African American lawyers in the early Civil Rights Era); Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890*, 77 FORDHAM L. REV. 1479 (2009).

history of the debate over segregation in the years before *Brown* to illustrate the ways that antisubordination and anticlassification values were transformed during the aftermath of the decision.[164] "The anticlassification principle with which we are familiar today," Siegel argues, "did not organize early debates over *Brown*. In fact, in the decision's immediate wake, debate often focused on questions of group harm, and many justifications offered for *Brown* sounded like a defense of the opinion might today."[165] In the accounts offered by these scholars, the debate surrounding the *Brown* decision involved articulations of both anticlassification and antisubordination values.[166]

This scholarship has identified substantial difficulties with arguments that posit *Brown* as embracing Harlan's description of colorblindness. I do not mean to repeat these efforts, and instead approach these materials with the smaller goal of demonstrating the significance of reasoning about caste in these debates. The resurgence of caste in *Brown* suggests a different connection between Justice Harlan's dissent and *Brown* decision in the equal protection tradition. Even if these arguments did not directly reference the metaphor of caste in Justice Harlan's dissent, they drew on a tradition of argumentation about status hierarchy through the caste metaphor that extended to the nineteenth century. The relationship between the dissent and *Brown* should be reevaluated in terms of this common language about status relations.

In the debates over segregation before *Brown*, the caste metaphor again gained salience as a description of the status harms associated with racial hierarchy. Between the late 1930s and the early 1940s, sociologists and lawyers began to describe the problems of these social harms in terms of the caste metaphor. The sociologist W. Lloyd Warner first revived the caste metaphor with his 1936 article, "American Caste and Class," which attempted to describe the plight of African Americans from the perspective of caste systems.[167] This literature was distinctly focused on the problem of social subordination as the more troubling consequence of segregation. Warner defined caste in the following way:

> Caste . . . describes a theoretical arrangement of the people of the given group in an order in which the privileges, duties,

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164. Siegel, *supra* note 5; *see also* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 207 (2008) ("During the Brown litigation, lawyers advocating a blanket prohibition of racial classifications never put forth these arguments in isolation from other, more context-based, color-conscious arguments relating to the meaning of the Fourteenth Amendment. At a time when the problem of 'benign' racial preferences and affirmative action was rarely even considered, civil rights advocates easily moved back and forth between making anticlassification arguments and claims based on what has come to be known as 'antisubordination' principles' . . . .").

165. Siegel, *supra* note 5, at 1474.

166. *Id.*

167. W. Lloyd Warner, *American Caste and Class*, 42 AM. J. SOC. 234 (1936).

> obligations, [and] opportunities ... are unequally distributed between the groups which are considered to be higher and lower ... A caste organization ... can be further defined as one where marriage between two or more groups is not sanctioned and where there is no opportunity for members of the lower groups to rise into the upper groups or of the members of the upper to fall into the lower ones.[168]

Warner's article helped to encourage a vast literature in the years before *Brown* that explored the problem of race relations through the lens of caste.[169] An especially influential contribution in this vein was Gunnar Myrdal's book on race relations in the United States, *An American Dilemma*, which was published in 1944.[170] Myrdal used the term "caste" to describe the nature of status relations in the South. "The caste system governing the relations between whites and Negroes," Myrdal wrote, "in the South not only had its birth in rural areas but also its integration into the social structure of a relatively static rural society."[171] The influence of these sociological accounts of caste could even be felt in a report issued by President Truman's Committee on Civil Rights in 1947, which used the caste metaphor to describe the problem of segregated institutions.[172]

While they wrote from the perspective of academic sociology and related disciplines, a number of these scholars continued to reference the earlier, nineteenth century lineage of arguments about social subordination in terms of the caste metaphor. Oliver Cox, for example, writing in

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168. *Id.* at 234.

169. For Warner's own contributions, *see*, e.g., W. Lloyd Warner & Allison Davis, *A Comparative Study of American Caste*, in RACE RELATIONS AND THE RACE PROBLEM 219 (Edgar T. Thompson ed., 1939); W. LLOYD WARNER, BUFORD H. JUNKER & WALTER A. ADAMS, COLOR AND HUMAN NATURE (1941). For other literature on caste, *see* JOHN DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN (1937); BUELL G. GALLAGHER, AMERICAN CASTE AND THE NEGRO COLLEGE (Gordian Press 1966) (1938); DONALD YOUNG, RESEARCH MEMORANDUM ON MINORITY PEOPLES IN THE DEPRESSION (Arno Press 1972) (1937).

170. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

171. *Id.* at xxxviii. Myrdal's book is rife with the caste metaphor. *See id.* at 57 (discussing the "White Man's Theory of Color Caste"); *id.* at 88 ("The caste system has inherited the defense ideology of slavery."); *id.* at 145 ("The belief in the innate inferiority of the Negro ... is strategic in its justification of color caste."); *id.* at 222 ("[I]n certain respects, the surviving caste system shows even more resistance to change than did slavery.").

172. PRESIDENT'S COMM. ON CIVIL RIGHTS, *To Secure These Rights* 82 (1947), *available at* http://www.trumanlibrary.org/civilrights/srights2.htm#79 ("[W]e believe that not even the most mathematically precise equality of segregated institutions can properly be considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group.").

1942, summarized the contributions of scholars to the analysis of caste in American society, "We do not know who made the first analogy between race relations and the caste system of India," Cox wrote, "but it is certain that the idea was quite popular during the middle of the last century.[173] One of the most detailed and extended discussions of this hypothesis is that of the Hon. Charles Sumner published in 1869."[174] The discussions of caste that emerged in sociological writing in the years before *Brown* echoed the nineteenth century concern with social hierarchy. Even when these writers did not directly reference these debates, it was clear that they were aware of them, and understood their arguments to involve similar claims about the moral harms of the subordination of social groups.

Lawyers also frequently invoked the caste metaphor in the emerging debates over the legality of segregation. In a Article published in the *Columbia Law Review* in 1949, the student author argued that "[w]hatever their express purpose may be, segregation laws seem really to represent an effort to impose on the racial minority the status of an inferior caste."[175] A student writing in the *Michigan Law Review* in 1951 similarly analogized caste to segregation, and cited to Myrdal, as well as to the portion of Justice Harlan's dissent in *Plessy* that invoked the caste metaphor.[176]

B. *Caste and the Antisubordination Interpretation of Brown*

The briefs filed in *Brown* returned to the caste metaphor in powerful ways as part of the arguments they made against segregation. The brief for the Appellants, which was drafted by Thurgood Marshall, Spottswood Robinson, and other leading lawyers of the civil rights movement, invoked caste to describe the fundamental aspiration of the Equal Protection Clause.[177] Plessy had in their view, "maint[ained] of a racial

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173. Oliver C. Cox, *The Modern Caste School of Race Relations*, 21 SOC. FORCES 218, 225 (1942).

174. *Id.* (citing CHARLES SUMNER, THE QUESTION OF CASTE (1869))

175. Note, *Is Racial Segregation Consistent With Equal Protection of the Laws?* Plessy v. Ferguson *Reexamined*, 49 COLUM. L. REV. 629, 637 (1949).

176. Joseph S. Ransmeier, Note, *The Fourteenth Amendment and the Separate but Equal Doctrine*, 50 MICH. L. REV. 203, 248 (1951) ("Yet a third possible purpose of separate education might be an intention on the part of the dominant group to discriminate, to impose upon the separated group the badge of *an inferior caste* . . . .") (emphasis added); *id.* at 249 n.225 (citing Justice Harlan's dissent as support for its invocation of caste); *see also* Monroe Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 COLUM. L. REV. 201, 204 (1949) ("The Supreme Court's role in the American caste order may be clarified by first briefly summarizing and illustrating the role in this respect of law in general. The federal and state governments have swung between two legal poles, one favorable and one unfavorable to the Negro.").

177. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, Brown v. Board of Educ., 347 U.S. 483 (1953), 1953 WL 48699.

caste system in the United States."[178] At the start of the brief, the lawyers argued:

> Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system.[179]

By carefully reviewing the ratification debates, the brief emphasized the centrality of caste to the drafters of the Fourteenth Amendment. The brief stated, "It was this inferior caste position which the Radical Republicans in Congress were determined to destroy. They were equally determined that by federal statutory or constitutional means, or both, Congress would not only invalidate the existing Black Codes but would proscribe any and all future attempts to enforce governmentally-imposed caste distinctions."[180] These arguments in the brief drew from the nineteenth century background of caste reasoning. While the more recent sociological arguments were clearly relevant in some sense as well, it was the nineteenth century lineage of arguments about caste, and especially the arguments that emerged in debates over slavery and during the ratification of the Fourteenth Amendment that were most relevant.

Parties who submitted amicus curiae briefs in *Brown* also drew significantly on caste reasoning in the arguments that they made in opposition to segregation.[181] These arguments tended to draw less direct support from the nineteenth century materials on caste, but nonetheless discussed caste at length for its rhetorical power as a description of the social harms associated with segregation.

Although the Court did not specifically invoke caste in its decision, at least one member of the Court suggested that an anticaste principle should constitute the basic commitment of the Fourteenth Amendment. "[T]he [Reconstruction] Amendments have as their basic purpose protec-

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178. *Id.* at *62.

179. *Id.* at *17 (emphasis in original).

180. *Id.* at *80; *see id.* at *119 ("Senator Howard, among others, asserted categorically that the effect of the due process and equal protection clauses of the Fourteenth Amendment would be to sweep away entirely all caste legislation in the United States.").

181. Brief for American Jewish Congress as Amicus Curiae, Brown v. Board of Educ., 347 U.S. 483 (1952), 1952 WL 82044, at *12 ("Those who insist upon the caste system in our society freely and unstintingly agree to the ritual of equal physical facilities so long as somehow there is also an accompanying communication that the Negro is inferior and is to remain so."); Brief for American Veterans Committee, Inc., Amicus Curiae, Brown v. Board of Educ., 347 U.S. 483 (1954), 1952 WL 82042, at *6 ("The Fourteenth Amendment was adopted precisely to abrogate the disadvantages resulting from an inferior caste status imposed by law.").

tion of the negro against discrimination," he wrote in his Conference notes, and "the abolition of such castes."[182] Although Justice Black eventually became a stronger proponent of anticlassification reasoning in later decisions, in the discussions in the Court over *Brown*, he was impressed by the argument that caste had a central place in the early debates over the Amendment.[183]

In the aftermath of the *Brown* decision, commentators frequently turned to the idea of the elimination of "caste" to describe its basic aspiration. Phineas Indritz of the American Veterans Committee argued in 1954, in the *Journal of Negro Education*, that in *Brown* the "Court thus excised the legal foundation of the massive color-caste structure of racial segregation in America."[184] "The roots of the color-caste system," Indritz suggested, "originated in forced manual labor and grew to fruition as the system of slavery" became gradually entrenched. Furthermore, the Black Codes under Jim Crow were "designed to keep the negro in the inferior caste system into which slavery had submerged him."[185] Although Indritz did not specifically cite the caste language in Harlan's opinion, he did conclude that "Justice Harlan's eloquent dissent was prophetic," because "history has shown that the much of the blame for the . . . 'problem of the color line' rests on the coddling and cynical acquiescence of the *Plessy* decision. . . ."[186]

Writing in 1958, the political scientist Guy Johnson explored the origins of "race-caste" system in the South as part of an effort to put recent efforts at desegregation in context.[187] Johnson wrote, "In assessing the evil results of compulsory segregation, it is admittedly hard to separate the consequences of Jim Crow as such from the consequences of the larger system of caste relations of which Jim Crow is but one part."[188] In Johnson's view, perhaps the most damaging aspect of caste was the impact it had on the psychology of Blacks. Johnson observed:

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182. Schmidt, *supra* note 164, at 220 (citing Transcription of William O. Douglas, Conference Notes—First Brown Conference (Dec. 13, 1952), William O. Douglas Papers, Box 1150, Library of Congress, Manuscript Division, Washington, D.C. (on file with author); Transcription of Tom Clark, Conference Notes—First Brown Conference (n.d.), Tom Clark Papers, Box 27A, Tarlton Law Library, University of Texas (on file with author)).

183. *Id.*

184. Phineas Indritz, *The Meaning of the School Decisions: The Breakthrough on the Front of Racial Segregation*, 23 J. NEGRO EDUC. 355, 355 (1954). Indritz had also filed a brief in *Brown* on behalf of the American Veterans Committee that emphasized similar caste-based arguments. *See* Brief for American Veterans Committee, Inc. Amicus Curiae, *supra* note 181.

185. Indritz, *supra* note 184, at 355.

186. *Id.* at 356.

187. *See* Guy B. Johnson, *Freedom, Equality, Segregation*, 20 REV. POL. 147 (1958).

188. *Id.* at 156.

> The system of caste and segregation works so thoroughly and automatically that it has tended to produce in the Negro masses a type of character which is painfully like the white man's stereotyped image of the Negro. It is a sorry spectacle indeed when the white man points to the results of this vicious circle as proof of the necessity for its continuation, but this is precisely what the Negro has been up against .... [I]t will be several generations before the Negro can overcome this damage to his morale and his motivation.[189]

For Johnson, the distinct harm of segregation was that it subordinated Blacks in ways that impressed on them a feeling of inferiority that made rendered it very difficult to rise in the social structure.[190]

In the period after *Brown*, there were few judicial citations to Harlan's dissent, and it was not a prominent feature of the controversies about desegregation.[191] Nonetheless, many lawyers in this period continued to understand its central principle as directed at caste, and did not generally understand the metaphor of colorblindness to constitute its central ground. Reflecting on the importance of Harlan's opinion, Alfred H. Kelly wrote in 1956 that "the former slaveholder and opponent of abolition [spoke] to the revolutionary intent of the [Fourteenth] [A]mendment: its purpose had been, he thought, to destroy all caste and racial class legislation in the United States."[192] Kelly examined the background to the Fourteenth Amendment in the nineteenth century, and emphasized the emergence of arguments about caste in the years before the Civil War and during Reconstruction.[193] Kelly also discussed Sumner's arguments about caste in the *Roberts* case as evidence of early discussion about the problem of desegregation.[194]

Kelly concluded that, "In our own time, another Radical evolution of social political ideology has undoubtedly brought the force and intent of the amendment with respect to race and caste far nearer to the old antislavery ideal out of which the language of the first section grew."[195] It

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189. *Id.* at 157.

190. *Id.*

191. *See* Krishnakumar, *supra* note 7, at 800.

192. Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1049 (1956).

193. *Id.*

194. *Id.* at 1056 ("Sumner's argument in the resulting *Roberts* case stands even today as the classic argument for the incompatibility of "equal protection of the laws" and state-sanctioned caste institutions. Asserting that his animating principle of equal protection was derived properly from the language of the Massachusetts Constitution of 1780 declaring that 'all men are born free and equal,' he asserted that segregated schools violated equal protection and the state constitution by imposing inconvenience upon Negro children and 'by establishing a system of Caste [as] odious as that of the Hindoos.' ").

195. *Id.* at 1086.

was aspiration to end caste, and not the image of colorblindness, that for Kelly, was the principle at the heart of Harlan's decision, and that marked its significance for contemporary debates over desegregation.

★ ★ ★

In the controversies over *Brown*, when opponents of segregation invoked caste, they drew upon a long history of reasoning about social hierarchy with deep roots in the nineteenth century. It was in this lineage that Justice Harlan's dissent also found support. During the *Brown* era, the relationship between anticlassification values and antisubordination values was more fluid; the fact that the anticlassification principle emerged in certain of these debates did not preclude talk of status harm.[196] Indeed, it was not until disagreements over *Brown* had subsided that anticlassification was understood to be its central commitment.[197] The tradition of caste reasoning and the contributions of sociologists in the "caste school"[198] offered lawyers a way of talking about the problems of social hierarchy and social subordination entailed in segregation.

Caste was a powerful note in the antisubordination claims that emerged in debates over *Brown*. By examining the persistence of the caste metaphor during the debates over segregation, the influence of the caste metaphor linked the antisubordination reasoning in Harlan's dissent to the claims made by civil rights lawyers, sociologists, and in public discussions about the harms associated with segregation. Even to the extent that Harlan's dissent was not explicitly discussed, the caste reasoning in the dissent draws from the same lineage of status reasoning as the lawyers in *Brown*. The anticlassification view that it was in their shared commitment to a colorblindness rationale that Harlan's dissent and *Brown* most closely overlap is therefore profoundly misleading.

196. *See* Siegel, *supra* note 5, at 1474–75 ("But what revisiting this debate makes clearest is that, in this early period, talk of classification and subordination did not have the same significance it now has. The understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted.").

197. *Id.* at 1478 (arguing that anticlassification has the "power to answer and to defer questions about the Constitution's meaning, and at times have enabled it to vindicate antisubordination commitments in ways that 'hotter' talk of group harm cannot."); *see id.* at 1500–1546 (elaborating these arguments by turning to debates over *Brown*'s rationale from 1960–70).

198. *See, e.g.*, Cox, *supra* note 173.

CONCLUSION

Readings of Justice Harlan's dissent seem to rest on little more than faith. It is a puzzling fact about the equal protection tradition that a dissenting opinion in a case, now overturned, has come to stand at the foundation of so much law. Proponents of the anticlassification position turn to history not because of what it reveals about the intentions of the framers of the Fourteenth Amendment or its meaning in the nineteenth century, or because of its status as binding law. Instead, they appeal to our elemental, collective self-understanding about the history of the long struggle to end slavery and segregation. Those who read the opinion as resting on "colorblindness" therefore make arguments about the meaning of this history and appeal to one widely held view about its significance for constitutional law.

The ways in which proponents of anticlassification have seized hold of Justice Harlan's dissent illustrate the complicated and often contradictory forms of authority that history exerts on our constitutional discourse. History can exert powerful authority in our disagreements over the meaning of the Constitution that is not originalist, but instead of a more uncertain, but potentially even more powerful kind. Justice Harlan and *Plessy* are now part of the nation's collective memory about this country's struggle to end racism, and it is therein that the dissent finds its power and why it exerts such constant—and often emotional—force in the equal protection tradition.

A reassessment of Justice Harlan's dissent by reconstructing the history of the caste metaphor provides significant grounds to be skeptical of arguments that posit the dissent as the fount of modern colorblindness reasoning. The importance of caste as an image of social subordination in these early debates suggests that Harlan's opinion should be understood as articulating a concern about the social hierarchies that had been created under slavery and that persisted with state sanction under Jim Crow.

Such a reading of the opinion would claim the opinion as evidence of the longstanding influence of antisubordination reasoning in the equal protection tradition. The opinion, of course, was concerned with classification as well, but it was subordination that gave the caste metaphor in the opinion its most fundamental commitment. The fact that Harlan was able to say "colorblindness" and "caste" in the same breath reveals tectonic shifts in the forms of argument in our debates over the meaning of equal protection. In the late nineteenth century, anticlassification and antisubordination were not polar opposites that were understood to have very different consequences for permissible interventions by the state to restructure the social order, but instead part of a more flexible vocabulary for discussing the harms inflicted by racial status.

The efforts by proponents of colorblindness to claim *Brown* as a reassertion of Harlan's dissent are also suspect in view of the salience of

antisubordination arguments in the period leading up to the decision and during its initial reception. Understanding the meaning of caste in the context of these debates is beyond the reach of this Article's claims about the misreading of Harlan's dissent. The reemergence of caste reasoning in the mid-twentieth century, and its explicit references to this earlier tradition, suggests that colorblindness was not the most significant contribution of Harlan's dissent to arguments about the problem of segregation for these interpreters. Witnesses to the Court's decision in *Brown* invoked caste in view of the arguments about social hierarchy in the nineteenth century. It was the specter of caste, and not colorblindness, which gave readings of Harlan's dissent their greatest force.

A clearer account of the history of caste reasoning also helps to reveal the common roots of antisubordination and anticlassification values. These modern concepts obscure the more fluid and wide open set of arguments about the nature of the social harm imposed by social hierarchies of various kinds. Struggles over the translation of these conceptions of status arrangements to legal doctrine has made it easy to forget the ways in which the concern with classification and subordination overlap and reinforce one another in our equality law.[199]

Revisiting the caste metaphor in Harlan's dissent challenges the colorblind reading of the opinion in current debates over the fundamental aspirations of our law. Harlan's proclamation—"There is no caste here"—should be restored in the equal protection tradition for what it reveals about the persistence of antisubordination reasoning throughout the nineteenth century, and the resurgence of these arguments in the debates over *Brown*.

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199. Balkin, *supra* note 19, at 28. Stating:

> In short, application of the anticlassification principle often depends on judgments concerning the presence, absence, or degree of status-harm—the very sorts of judgments with which the antisubordination principle is concerned. These judgments may be conscious or unconscious, explicit or implicit, and they shift in time, in response to social mobilizations and other developments. But they are present, nevertheless, in the evolving ways that Americans understand the practical implications of the anticlassification norm.

Id.