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EQUALITY, RACE DISCRIMINATION, AND THE FOURTEENTH AMENDMENT

*John Harrison**

In *Job* God implies that he, unlike his interlocutor, can catch Leviathan on a hook.¹ Maybe it is presumptuous for mortals to suggest that the actions of government can be disciplined by fine legal distinctions devised by human artifice. Michael McConnell's article, however, asks us to try.² McConnell's historical claims are ably discussed elsewhere.³ I will try to improve our understanding of a technical legal point on which the argument for *Brown* rests: the claim that the Fourteenth Amendment, within its area of application, forbids all race-respecting rules, rather than just those race-respecting rules that do not treat people of different races symmetrically. If that is true, and if public education is a privilege of state citizenship, then the argument in favor of *Brown* is very strong.⁴ My approach to this question will be a bit roundabout, but I think the detour will be a fruitful one. As to the specific problem of separate but equal, my suggestion is that proponents of Jim Crow-type laws, which discriminate by race but do so symmetrically, may have believed that their understanding of the Fourteenth Amendment better accommodated the fundamental fact that the amendment does not refer to race, color, or previous condition of servitude. I think that argument is incorrect, however, and if the amendment does indeed yield some kind of ban on race discrimination, its text is most plausibly

* Associate Professor, University of Virginia School of Law. Mary Anne Case, Barry Cushman, and Michael Klarman provided helpful comments. Some of the analysis here seeks to improve on my last attempt to understand the relationship between equality and non-discrimination. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

1. Job 41:1.

2. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

3. Earl M. Maltz, *Originalism and the Desegregation Decisions-A Response to Professor McConnell*, 13 Const. Comm. 223 (1996). Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995).

4. I will not deal with the other legal prop of McConnell's argument, the claim that public education is a privilege of state citizenship within the meaning of the Privileges or Immunities Clause. That seems to me correct.

read as a ban on all such distinctions, with no exception for symmetrical discrimination.

I. EQUALITY AND DISCRIMINATION

Analysis of the Fourteenth Amendment involves two different kinds of constitutional rules: those that require equality among all persons (or all citizens), and those that forbid discrimination. Although these are thought to be closely related, they exhibit important differences.

A. EQUALITY AS A SIDE EFFECT OF RULES

How might the Constitution go about requiring that all citizens be treated the same with respect to some subject matter? One approach would be simply to lay down rules concerning that subject matter. Such rules, if put in universal form, will produce at least one description under which everyone is the same.⁵ If the rule is that the Ministry of Fruit must give everyone an apple, and the rule is complied with, then everyone will be the same as to the question, whether one has been given an apple. If the rule is that no one may commit arson (or sleep under a bridge), then everyone will be the same as to the question whether one is allowed to commit arson or sleep under a bridge. To continue in that vein, all individuals have the same jury trial right under the Sixth Amendment in that there is a formulation of the jury trial provision that applies to everyone.

With sameness, of course, comes difference. If everyone is given one apple, it is very likely that people will differ as to the extent to which the government has satisfied their hunger for apples. If everyone is forbidden to commit arson, people may differ in the extent to which the government has forbidden their livelihood; it is a cliché to point out that under the bridge law people will differ in the extent to which the government has kept them from sleeping where they would like to sleep. Moreover, there can be difference within sameness—some people may get bigger apples than others, and vagueness about sameness—if A receives an apple and B receives the halves of two different apples, it may not be clear whether they have both received an apple.

5. Almost all rules can be put in universal form. A rule that forbids people over seven feet tall from riding motorcycles, and might be said not to apply to shorter people, can be replaced with the rule that says that everyone, if over seven feet tall, may not ride a motorcycle. If the distinction seems pointless, remember that all that is required is universal *form*.

The important point, though, is that rules can easily produce sameness under some description without mentioning sameness or equality. Anyone in 1866 who actually thought that the Privileges or Immunities Clause of the Fourteenth Amendment established certain rules of private law for American citizens also thought that it established the same rules of private law for all American citizens; on some description that would have been right.⁶ Rules that by their terms apply to everyone, or all members of a specified group, produce equality of a kind among the people to whom they apply.

B. REQUIREMENTS OF EQUALITY

When the Fourteenth Amendment was being drafted, however, it was generally agreed that the federal Constitution should not establish private law for the States, or empower Congress to do so. The States were to be left with much of their discretion as to private rights. One way to describe the Republican program is to say that the States were to retain their discretion concerning private law but were to lose the power to classify their citizens; they could still determine what the rights of citizens were to be, but they had to give those rights to everyone.

One form of rule is often thought to correspond to that condition: everyone must be equal as to X. The rule, "the Ministry of Fruit must give everyone the same number of apples," has that form. The Equal Protection Clause also has that form: no State may deny any person within its jurisdiction the equal protection of the laws. "Everyone must be equal as to X," can be called a universal equality rule. Such rules have several noteworthy features. First, as students of normative equality theory know, the important work is done in the conceptualization of X.⁷ That conceptualization provides the description under which everyone must be the same. Its residue gives the ways in which they may be, and to some extent must be, different.

Second, as that last sentence suggests, some universal equality rules are nonsense. "Everyone must be equal as to X," cannot be complied with for some X's. It is possible to provide for everyone the same number of apples (even if that number has to be zero). It is almost certainly not, however, possible to provide for everyone the same outcome on the subject of apples. Again,

6. It is possible that this is what Earl Maltz means by a rule that provides limited absolute equality. See Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* at 4 (U. Press of Kansas, 1990).

7. See Amartya Sen, *Inequality Reexamined* 12-28 (Harvard U. Press, 1992).

if everyone is given the same number of apples, people will differ in the extent to which their apple hunger is gratified. "Everyone must be equal as to everything," which means that everyone must be the same (or must be treated the same) on every description, is thus nonsense.⁸ Difference in, difference out. A corollary to this point is that just as some universal equality rules are impossible to comply with, others are trivially easy to comply with. "Everyone must be the same in some way" is an example of the latter category.

Third, universal equality rules entail more specific equality rules. If everyone must be given the same number of apples, then individual men and women must each be given the same number of apples. If all citizens must be given the same number of apples, then black and white citizens must each be given the same number of apples. The point can be formulated in more familiar terms this way: if no distinctions may be drawn among persons (or citizens) with respect to the number of apples they are given, then distinctions may not be drawn among persons (or citizens) on the basis of race, color, sex, age, height, or anything else, with respect to the number of apples they are given.⁹

So far I have been interchanging equality among individuals under certain descriptions and rules that are universal in form and can be seen to treat everyone the same in some way. I have run together the requirement that everyone be given the same number of apples with the rule, "give everyone the same number of apples." In that simple example, X is a concept with a relatively clear application as to equality among individuals, although it is still a little vague. For purposes of constitutional law, we are most interested in universal equality rules with the form, "everyone must have the same X," where X describes some body of legal "rights"—that is, of legal positions as described from the standpoint of that individual. The Equal Protection Clause says that all persons are to have equal protection of the laws; the Privileges or Immunities Clause, by saying that the privileges and immunities of citizens may not be abridged, implies that they must be the same.¹⁰ In those provisions, X is the protection of the laws or the privileges and immunities of

8. The more familiar way to put this point in constitutional law is to say that a ban on legal classification cannot be complied with, because all laws classify.

9. Moreover, if no distinctions may be drawn among persons with respect to the number of apples they are given, no distinction may be drawn between citizens and aliens in that respect.

10. I move back and forth between sameness and equality because equality is sameness under some description and the descriptions are provided.

citizens. (I assume for purposes of this discussion that the protection of the laws and the privileges and immunities of citizenship consist of formal legal positions, not practical outcomes.)

Such statements about people's rights often must be translated into statements about the laws that produce those rights. The Privileges or Immunities Clause, for example, applies to the right to make contracts and therefore has implications for contract law. One way of putting the point is to say that the Privileges or Immunities Clause, because it requires that all citizens have the same right to contract, requires that the law of contract be the same for all citizens. Formulated that way, it of course runs the risk of vacuity: there will always be some formulation under which the law of contract is the same for everyone.

If requirements of universal equality as to certain legal rights are to have interesting implications such as forbidding Black Codes, as the Privileges or Immunities Clause was thought to do, they must go beyond requiring that the relevant legal rules be capable of being cast in universal form. They must also require that the legal rules be universal in form when expressed in particular ways. Consider the rule under which only freed slaves are punished for loitering. In its universal form, that rule says that if one is a freed slave, one may not loiter. In its non-universal form, it says that one may not loiter, but does not apply to everyone. If Black Codes are forbidden by a requirement of universal equality as to the criminal law, it must be that the rule is properly understood as a ban on loitering, not a ban on loitering if one is a freed slave.

The move from universal equality to meaningful constraints on government action thus rests on limitations on the permissible characterization of legal rules. This is X again—everyone must be equal with respect to the legal rules and the legal rules must be the same for everyone, when the rules are described in some particular way or some limited number of ways. If one actually wanted to impose a rule of universal equality on an area of law, the key would be to explain which descriptions of the relevant legal rights or the relevant laws count and which can be ignored—which are the descriptions under which everyone must be the same and which are the descriptions under which people can differ. Legal rules, one might say, have some natural form that captures their essence. Expressed in that form, they must be the same for everyone if universal equality is to be achieved.

On this reading, proper application of the Equal Protection Clause or the Privileges or Immunities Clause requires inquiry,

not into equality, but into the natural formulation of the protection of the laws, or the privileges and immunities of citizens. One would want to know why a ban on loitering is natural whereas a ban on loitering if one is a freed slave is not, or why the ordinary rules of real property are natural but become unnatural if they limit the ability of black citizens to own property in towns. This will not surprise theorists of equality, who know well that the problem is describing the space as to which equality is required. It will also not surprise students of the Supreme Court's equality jurisprudence, who know that when the Court departs from treating the Fourteenth Amendment as a source of antidiscrimination rules, it finds itself inquiring into permissible and impermissible government purpose. If a requirement of universal equality with respect to legal rights is to be neither vacuous nor impossible to comply with, it must rest on a theory of the proper form of legal rights and the rules that establish them.

C. DISCRIMINATION

Requirements of universal equality find their content in the answer to the question, "equality as to what?" in the specification of X. That specification must take into account that some forms of universal equality are simply impossible. Universal equality on matters related to apples is impossible in the world as we know it. There cannot be universal equality with respect to many subject matters.

Rules forbidding discrimination do not have that limitation. Bans on discrimination of the kind I am interested in concern the criteria used in making decisions; as applied specifically to legal rules, they concern the criteria contained in the rules. A rule requiring that the rules on voting not take sex into account is an antidiscrimination requirement. This is the kind of rule that McConnell is talking about. He maintains that the Privileges or Immunities Clause forbids the States from using racial criteria in the rules that relate to the privileges or immunities of citizens.

Rules that forbid discrimination can and usually do differ from universal equality requirements in an important way: antidiscrimination rules can address an entire subject matter. It is possible to have a set of rules about voting that never require inquiry into sex. It is sensible to say that the rules about apples are not to discriminate on the basis of sex. If the general form of an antidiscrimination rule is, "do not take criterion Y into account in rules on subject matter X," then the conceptualization of X can be different from the similar X in a universal equality

rule. "The rules on the subject of voting must be the same for everyone," is either nonsense or means something other than what it seems to mean on its face.

If the Fourteenth Amendment were like the Fifteenth Amendment and explicitly forbade discrimination, it would be much easier to apply. But it is not, and we are stuck with the problem of understanding how a requirement of universal equality can be thought to forbid some kinds of discrimination. That is the conceptual difficulty created by the people who adopted the Civil Rights Act of 1866 and then adopted the Privileges or Immunities Clause and the Equal Protection Clause to underwrite it.

II. UNIVERSAL EQUALITY AND RACE-RESPECTING RULES

A. THE PSYCHOLOGY OF JIM CROW

It may seem that the Jim Crow approach, which permits separate-but-equal, avoids the puzzle I just described because it rests directly on universal equality, without requiring the move to non-discrimination. Universal equality as to X imposes a kind of sameness that is defined by the specification of X. It permits difference in whatever is not part of the definition of X. Consider the rule, "all children shall enjoy equal per capita education expenditures, calculated with respect to the school they attend." "Per capita education expenditures, calculated with respect to the school attended," is the relevant X. The equality rule with respect to it can be complied with in a system of racially segregated schools. Students of all races can have the same per capita educational expenditure. They will be equal in one respect, different in others.

Of course, the relevant universal equality rule probably will not be that specific. It might say, for example, that all students shall enjoy an equal education. If that rule is to make sense, however, it must be capable of being recast in some more particular form, because no two students' educations can be equal in every regard. The form of equality sought by segregated education was equality with respect to quality of education, as measured by various objective criteria. Segregation of common carriers was similar: the segregated cars were supposed to be equal in certain ways. No one could expect them to be the same in every way, because no two things are the same in every way.

It seems likely that approval of race-respecting, but ostensibly equal laws, usually rested on an answer to the question, "equality of what?" To use terms more hospitable to the nineteenth century, the separate-but-equal approach offers citizens of all races the same rights, with the rights conceived in certain ways, but, of course, not others, because citizens cannot have the same rights in every way. If the principle is put as generally as equality of legal rights, the work is done by the characterization of the legal right.

This observation makes it possible to understand parts of the segregation debate that are otherwise unclear. It helps explain why, for example, counsel for Sarah Roberts in *Roberts v. City of Boston* made the point that the black school was farther from her home than the nearest white school.¹¹ They were seeking a formulation of the right that could plausibly be universalized: every student (and it follows, every student without regard to race or color) shall attend the school nearest her home. It also helps explain Chief Justice Shaw's emphasis on the discretion of the school board in determining what kind of education to give Sarah Roberts.¹² He wanted a universal characterization of what all students were equally entitled to that did not entail integration.

The focus on X, on the legal right involved, also clarifies the discussion of segregation on the floor of Congress itself. During the debates on an early version of what became the 1875 Act, a proponent of integration pointed out that a black Senator had not been required to sit in a segregated corner of the room. No, responded a supporter of separate-but-equal, because a Senator has a right to be on the floor (and of course all Senators have the same right to be on the floor).¹³ Implicit in that response was that Senators have a right to be anywhere on the floor they want to be. If a Senator simply had the right to a seat somewhere on the floor, segregation would have been permissible. The specification of the right does the work.

B. THE LOGIC OF JIM CROW

What I have just suggested is in part conceptual history, designed to provide an insight into the way people thought about very complicated matters. It might also be more than that; it might also have implications for legal analysis. On the basis of

11. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 203 (1850).

12. *Id.* at 208-09.

13. McConnell, 81 Va. L. Rev. at 988-89 (cited in note 2) (citing Cong. Globe, 42d Cong., 2d Sess. 242 (1872)).

this observation about the connection between universal equality and separate-but-equal, a proponent of Jim Crow legislation could claim that McConnell lacks a solution to the fundamental problem of the Fourteenth Amendment: he cannot explain how a universal equality requirement can produce an antidiscrimination requirement. It is indeed difficult to explain that derivation given the important differences in logical structure discussed above. Defenders of separate-but-equal, by contrast, could maintain that under their approach black and white citizens have the same rights as a mere logical corollary to the principle that all citizens have the same rights. All the work is done by the formulation of the right. In the school cases, all children have an equal right to education of a certain quality. That form of universal equality is, on certain factual assumptions, consistent with racial segregation. It is also probably consistent with segregation in all sorts of other ways too.

Is that how separate-but-equal really worked, as a conceptual matter? I think not. On the contrary, the Jim Crow system was subject to the same impeachment that applies to McConnell: it too purports to derive a conclusion about the distinctions that may be made in legal rules from a premise of universal equality.

Consider bans on interracial marriage, the form of separate-but-equal law that was most seriously discussed during the framing of the Fourteenth Amendment. Under such a ban, all citizens are subject to the same race-respecting rule: people may marry only individuals of their own race. Defenders said that such a rule was acceptable even though a rule that forbade black citizens to marry would not be. They explained that the difference was that an antimiscegenation rule was the same for everyone. By itself, that is no explanation; under some description, every rule will be the same for everyone, and hence for people of different races. What is also true about an antimiscegenation law is that it is a race-respecting rule of a particular form: it has racial symmetry.

A requirement that race-respecting rules be symmetrical, however, is just as much about the use of race-respecting criteria as a McConnell-like ban on race-respecting rules altogether. It permits some race-respecting rules but forbids others: a law providing that whites may marry after a one-day waiting period but that people of other races may marry only after a one-week waiting period would violate a symmetry requirement.¹⁴ If this is

14. One interesting feature of this example is that it is not even clear who is being favored. From the standpoint of the parties' convenience, whites are. One could also

what Jim Crow means, it cannot claim unproblematic derivation from the Fourteenth Amendment's universal equality requirement as to the protection of the laws, and its requirement of equality among citizens with respect to their privileges and immunities.

To see this point, consider waiting periods. If the racially asymmetrical rule on waiting periods is invalid under a universal equality requirement, that must be because the right to marry after one day and the right to marry after one week are not the same right to marry. Evidently, then, the waiting period is part of the right to marry expressed in its natural form. This is odd. It implies, for example, that minors could not be subject to a longer waiting period than adults.¹⁵ On the other hand, if the racially symmetrical rule on marriage is consistent with universal equality, then the natural formulation of the right to marry does not include the ability to marry a black person, because not everyone has that right. One might think such a formulation is perfectly natural, on the theory that marriage has nothing to do with race, until one realizes that the Jim Crow proponents think that the ability to marry someone of your own race *is* part of the right to marry, because they say that under the symmetrical but race-respecting rule everyone has the same right to marry—the right to marry someone of one's own race.¹⁶

It is difficult to explain how a requirement of universal equality as to legal rights, or some subset of legal rights, has systematic consequences for race-respecting rules.¹⁷ That is true whether the race-respecting rules are symmetrical or not.

account for the distinction on the theory that the government is less concerned about whites, and hence will permit them to marry in haste and repent at leisure.

I also should note that I do not deal here with the argument that the symmetrical rules I am talking about are not race-respecting at all because, for example, one can ask whether marriage partners are of the same race without asking what their races are. That argument does not appeal to the constitution's apparent use of universal equality rules.

15. One might think that under the system that distinguishes between adults and minors, everyone does have the same right to marry, because everyone has the right to marry after the one-day waiting period upon attaining one's majority. That, however, involves a different formulation of the right to marry: it includes age-respecting rules. If so, why does it not include race-respecting rules?

16. Another way to defend the ban on interracial marriage would be to say that race does indeed have nothing to do with marriage, in that choice of the race of one's marriage partner is not part of the right at all, and therefore may be freely regulated by the state. But that is separation without equality; it would permit a rule that forbids black citizens but not white citizens from marrying Asians.

17. It is easy to lose sight of this difficulty because universal equality rules, as noted above, do seem to have antidiscrimination implications: if everyone must have the same right to own property, then black and white individuals must have the same right to own property. The gulf remains, however, because the latter rule still depends for all its content on the formulation of the right to own property. The requirement that the laws on

C. THE TEXT

Let us assume that we have made the leap from universal equality to some regulation of race-respecting rules on the subjects of privileges and immunities of citizens and the protection of the laws. That is no small leap, but it also was made by the people who adopted the Civil Rights Act of 1866 and the Privileges or Immunities Clause. If the Constitution does indeed regulate the use of racial classifications, which is the more persuasive account of the text: that it forbids race-respecting laws, or that it forbids them only if they are asymmetrical?¹⁸

The argument in favor of Jim Crow goes like this: The Privileges or Immunities Clause forbids abridgements on the basis of race. Abridgement is about reduction, and so must be understood in terms of more and less. In order to tell whether someone's privileges have been abridged on the basis of race, one compares an individual of one race with an otherwise-identical individual of another race and sees whether one of them has less by way of legal rights than the other. Under a ban on interracial marriage, for example, the answer is no. If one compares otherwise identical black and white citizens (or citizens of any two different races), one finds either that they have the same right—the right to marry someone of their own race—or that they have rights that are different—the right to marry a black person and the right to marry a white person—but that the difference does not represent an abridgement because neither right is greater than the other.

That seems to me to be the same sleight-of-hand as last time: it requires that we adopt a particular characterization of the right involved, and therefore forgets that antidiscrimination rules are usually about subject matters rather than rights in any particular formulation. If we ask whether the black citizen's right to marry a white person has been abridged on the basis of race, the natural answer is yes. If we compare that black citizen with an otherwise-identical white citizen and ask if the former's right to marry a white person is less than the latter's, the answer is yes. As for this idea of substituting one right for another, so that the right to marry a person of your own race makes up for the inability to

property ownership not discriminate on the basis of race does not require any particular formulation of the right. It is about a subject matter, not a particular set of legal rules.

18. In this connection it is more fruitful to concentrate on the Privileges or Immunities Clause than on the Equal Protection Clause. It is hard to think of many interesting race-respecting, but symmetrical, rules that concern the protection of the laws; moreover, the Privileges or Immunities Clause is the natural home of the debates over marriage and segregation, including school segregation.

marry a person of another race and leaves you with the same quantum of rights as someone of another race, it works by appealing to a particular metric in measuring people's rights. That way of thinking is appropriate to universal equality, not nondiscrimination.

III. ORIGINALISM AND CONSTITUTIONALISM

One response to my argument about the text is that it shows how ridiculous originalism is. Leviathan cannot be caught on any human hook, and it is silly to argue that great questions like public segregation turn on what we find by examining a 130-year-old document with a conceptual electron microscope. That objection, however, does not go to originalism. It applies just as well to closely parsing a 32-year-old document, like the Civil Rights Act of 1964. The objection is rather to legal formalism, to which I plead guilty. Intentionalists, original and otherwise, will be uncomfortable with any reading that introduces such shearing forces between what the adopters of a provision thought they were doing and what they turn out, on close analysis, to have done.

In fact, the debate about *Brown* is not mainly about originalism. It is mainly about constitutionalism, about the practice of being ruled by this particular written document. A non-originalist who thought that the Constitution was the supreme law most likely would say that the document should be understood as if it had just been ratified. To say that *Brown* is correct under such a canon is to say that in 1954 the Fourteenth Amendment would have been understood to forbid school segregation. If the non-originalist constitutionalist is also an intentionalist, the question is whether, had the document been adopted in 1954, the people would have wanted it to outlaw school segregation. It is far from clear that they would have. One thing that *is* clear is that people who in 1954 wanted to outlaw school segregation, and make sure they had done so, would not have proposed the Privileges or Immunities Clause and certainly would not have proposed the Equal Protection Clause.

A non-originalist *textualist* assessing *Brown* would use arguments a great deal like those I have used. A reading under which the Privileges or Immunities Clause is about equality, and hence perhaps about nondiscrimination, was as available in 1954 as in 1866. Moreover, my argument about the relative merits of a complete ban on race-respecting laws and a ban only on asymmetrical race-respecting laws was as available in 1866 as in 1954.

My argument uses only the concepts of general equality and non-discrimination, ideas we know were in circulation back then.

If a textually identical Constitution adopted in 1954 would not have produced the result in *Brown*, then the question that case raises goes to the authority of the written constitution, whatever its vintage. That question is separate from, and much more important than, the question whether the text should be understood as of some date. If it is silly to be governed by James Madison's or John Bingham's intentions, it is almost as silly to be governed by their words.