Equal Protection, Colorblindness, and the "Real Differences" among Groups

David A. Strauss

The Equal Protection Clause is about discrimination, especially racial discrimination. It has been the setting for one of the great success stories of American public law. For more than a decade after Brown v. Board of Education—the 1954 decision in which the Supreme Court held that official racial segregation violates the Equal Protection Clause—racial discrimination was, literally, a violently controversial issue. Today the controversy, in many respects, has disappeared: it is not respectable to defend discrimination against blacks, at least openly. Many social forces contributed to this transformation, but unquestionably the law—in the form of both Supreme Court decisions and acts of Congress—helped carry it forward. We should not lose sight of how substantial an achievement this is.

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But perhaps we ought to be a little uneasy when an issue that once was so divisive suddenly becomes so one-sided. There may be something a little complacent, a little self-congratulatory, about the consensus on racial discrimination. Some of the problems and tensions that made racial discrimination such an explosive issue may have been ignored, rather than resolved. These problems and tensions have, I think, recently begun to surface, and they can be expected to play a large part in the future development of the law under the Equal Protection Clause.

The focal point of these tensions is the metaphor of colorblindness. For most people—including the Justices of the Supreme Court—"colorblindness" is the essence of the prohibition against discrimination. According to this view, the ideal society is one in which race is wholly irrelevant—as irrelevant as, say, eye color, or the day of the week on which one was born. Eliminating discrimination is basically a matter of relegating race to its proper, irrelevant status.

But eradicating discrimination is not that easy, and ultimately colorblindness will not work as a foundation for equal protection law. The evil of racial discrimination is not that it is irrational. It is that discrimination reduces its victims to second-class citizenship and conveys the message that certain people are less human than others. The problem is not race-consciousness but real differences in status and social position. Even if old-fashioned prejudice were eliminated, real differences in the social positions of different groups would continue to exist, and they would continue to suggest that certain people count for less than others. The next task of equal protection law is to go beyond colorblindness and to find a way to deal with the real differences between groups in society.

These issues are strongly emerging in debates about discrimination on the basis of sex. At first the opponents of sex discrimination adhered to an ideal parallel to colorblindness. Women, they said, must be treated in the same way as men. Under this banner, the opponents of sex discrimination fought many forms of discrimination, especially in employment; they had considerable (although far from complete) success. But the problem with the ideal of sex-blindness is even less subtle than the problem with colorblindness: few people believe that sex-blindness is a satisfactory, comprehensive ideal for society. No one would argue that the ideal society is one in which a person's sex is in all respects as irrelevant as eye color.

Some feminists have instead developed the position that the differences between men and women, far from being irrelevant characteristics to which one should be blind, are crucially important. Some of these feminists have emphasized what they see as women's distinctive ways of thinking and approaching problems. Others have focused on what they say is the most significant difference between men and women—that men exert power over women, that men have dominated and subordinated women. The task of the law, they say, is to do something about this difference in power and status. To be blind to this difference is to ignore the problem of discrimination, not to solve it.

This same theme—that the task of the law concerning discrimination is not to ensure that groups are treated identically but to deal with the differences between them—has appeared in other areas as well. One important example is found in the laws that forbid discrimination against the handicapped. An ideal that required "blindness" toward a person's handicap would be incomplete and misleading at best. Treating a handicapped person as if he or she were not handicapped only works sometimes. Ultimately the problem is to decide how much, in effort and resources, we are willing to expend to take account of the special needs of the handicapped in order that they may participate more fully in society.

Finally, of course, the need to deal with the real differences between groups, instead of being blind to them, is presented by the situation of black Americans: the fact that, as a group, black Americans' level of employment, housing, income, education, personal security, and health care are decidedly unequal to those of whites. The great success of Brown, we like to think, was to abolish a system in which blacks and whites were separate and unequal. But we live in a racially separate and unequal society today. The proverbial man from Mars would recognize that at once if he visited one of our major cities. In many ways the problems are different from those that Brown addressed; but they are problems that suggest a racial caste system, and they will not go away no
matter how resolutely we pretend to be blind to race. They will continue to assert themselves, and sooner or later the law of equal protection will have to come to grips with them.

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Redistributing Speech

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In the Lochner1 era, the Supreme Court interpreted the Constitution to forbid government interference with the operation of the economic marketplace. According to the Court, an unregulated marketplace served the interests of the public as a whole, both affirming individual liberty and promoting economic growth. This understanding was decisively rejected by the public during the New Deal, and the Court eventually relented. The perception that emerged—the conventional wisdom of constitutional law—that private power may distort the economic marketplace and produce unfortunate distributive consequences; in these circumstances legislative intervention is permissible.

In the free speech area, by contrast, understandings analogous to the pre-New Deal view of the economic marketplace tend to dominate. Indeed, the premises of modern free speech law have much in common with those of the Lochner Court. The notion of a "marketplace of ideas" continues to have enormous power; interference with that marketplace is said to violate the Constitution. In Buckley v. Valeo,2 for example, the Supreme Court held that Congress could not limit expenditures in the context of electoral campaigns. The Court explained that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Similarly, in Miami Herald Publishing Co. v. Tornillo3 the Court held that the state of Florida could not require a newspaper to publish replies to its own criticisms of candidates for public office. This principle extends broadly in free speech jurisprudence. Redistributive arguments are not treated as a legitimate reason to regulate speech.

A central question for the next quarter-century is whether it is appropriate to permit and perhaps even require government to intervene in the "marketplace of ideas," as it now intervenes in the economic marketplace. Under a familiar understanding of the constitutional protection of free speech, redistributive measures might be thought compatible with the first amendment. That understanding suggests that the first amendment is designed to enable public decisions to be made as a result of broad deliberation among the citizenry.4 Disparities in access to the channels of communication and in available resources might severely distort that process. If some people have more resources than others, or if some have greater access to the means of communication, the deliberative process may produce results based more on economic power than on political debate.

From this perspective, some aspects of current first amendment law might be thought to make the same mistake as the Supreme Court in Lochner. What appears to be government "neutrality"—refusal to intervene in the marketplace—may in reality reflect a conscious choice that helps some at the expense of others. This formulation appears especially powerful in light of the arguments that eventually undermined Lochner. When the Court rejected Lochner, it recognized that there was nothing natural or inviolate about the existing distribution of wealth and entitlements. The existing distribution was itself a conscious social choice, indeed a product of the legal system.5 The same is true with respect to the entitlements that lie behind the exercise of free speech rights. In these circumstances, reallocation of political and communicative rights, benefiting those without access to the public, may be constitutionally justifiable.

In some areas, the distorting effects of limitations on access are sufficiently severe to justify and perhaps even require government action.

All this suggests that a major constitutional debate looms on the horizon with respect to two competing conceptions of the first amendment. Under a marketplace conception, the first amendment requires neutrality, and neutrality is understood as nonintervention in the "private" system of speech that derives from the existing distribution of resources. Under a deliberative conception, the first amendment authorizes—and may sometimes compel—government to intervene in order to bring about a genuine process of deliberation among the citizenry.

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1So-called after Lochner v. New York, 198 U.S. 35 (1905).
4See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).
5See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).