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Molly Ball April 7, 2020

# Do You Know Others? Checking the Current Condition of Equality and Its Association With Association.

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a thesis submitted to the Faculty of Emory College of Arts and Sciences
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Abstract

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By Molly Ball

When I first started brainstorming on this paper, the first wave of Coronavirus-19 hit. Other than packing students and workers home to begin remote work, the world was relatively calm. Then, a couple months into the pandemic, the whole world seemed to erupt in chaos. The killings of people such as George Floyd and Breonna Taylor sparked a worldwide debate as to how black people still face unfair treatment in all aspects of society. The killings of Asian women in Atlanta, Georgia started a conversation as to how Asian women were facing a threat unlike any other group of minorities. All these events seemed more timely than ever to reexamine what equality means in this society and who currently benefits from it.

The current understanding of equality under the Fourteenth Amendment is one that is dictated under the anticlassification principle. Under this principle, judges rule as if they cannot see or know those who face discrimination or injustices in law. They understand equality as an idea that is to treat everyone the exact same, no matter their race or sex. This at first seemed to help the civil rights movement and second wave feminism. Furthermore, there was good intention in using the anticlassification principle, a fact that is sometimes lost within the discourse. However, this principle not only has also ignored the real circumstances the disadvantaged groups face, but it ignores that the structure it stands on is not sustainable for an actual equal world. Most importantly, the principle does not function as a true neutral version of equality. Rather, it uses association to assert a pure form of neutrality, a tactic that has and will, in the long run, hurt disadvantaged groups, particularly intersectional groups.

It is from this that one inquires as to what the United States should do to remedy this problem. In this thesis, I propose that we uncover an artifact from the past, the Equal Rights Amendment, to aid in the quest for equality. With an Equal Rights Amendment, there can be a shift in legal principles, leading to a better view of equality.

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I would also like to thank my professors and teachers from both the philosophy department and the music department. I decided to major in philosophy because I knew nothing about it, and the professors I had made my quest for knowledge be as wonderful as it could be. Even though music was not a subject of the thesis, I still enjoyed majoring in a subject that I felt comfortable and happy in. I appreciate professors for expanding my thoughts on music, and I tried to sneak in as many music references as I could in this thesis to recognize them.

Lastly, I also want to thank my family and friends, who became even more important than I realized during the pandemic. Without them, I do not know how I would have been able to function during this past school year.

Table of Contents

**Introduction: Recognizing the Symptom**

[The] horror is that America changes all the time, without ever changing at all.

– James Baldwin

In other words, for purposes of sex discrimination law, to be a woman means either to be like a man or like a lady. We have to meet either the male standard for males or the male standard for females.
– Catharine MacKinnon, *Feminism Unmodified*

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Another symptom has arisen from a plagued United States for the past 40 years. It is a symptom of a chronic illness that the United States has suffered from since its inception. Every time the public think that this illness has been cured, another symptom reveals itself, revealing that the illness still lurks among us. Denial first ensues when the new symptom reveals itself to the general public. There is a completely different problem, one might offer. In fact, it might not even be such a bad thing- the people succumbing to this illness are just excessively whining and do not know what real pain is, which real pain meaning to the public means symptoms commonly recognized to them. That is why when the symptom erupts, people tend to dismiss it at first, as it is not something they have seen related to the illness. However, when someone important claims to have suffered from this illness, everyone then begins to realize this new symptom may be correlated with the illness. My idol on the screen and the radio has expressed difficulty in living with this symptom. I have a best friend afflicted with this problem. My children might face this challenge and might not be able to tell me about this symptom, because they may think I do not view it seriously. It is from these thoughts and revelations that people realize it is in their best interest to spread awareness of the illness and begin methods of prevention. So, what is this symptom I am explicating in a somewhat ominous manner, and what

is this illness I am talking about that has haunted the United States since its creation?[1] The current symptom I am referring to is discrimination against those under the category of intersectionality, and the illness I am specifically referring to is the overall idea of inequality which groups of people endure in multiple aspects in their lives.

Intersectionality, a theory introduced to the world in 1989 by Kimberle Crenshaw,[2] addresses a concern that people who are part of more than one minority group face a entirely different form of discrimination than other people who are Caucasian women or an African American man. This is not to say that members of more than one minority group are more oppressed than others, intersectional theorists tend not to push this claim, despite people promoting a popular claim insisting that intersectionality means just that. Rather, people who have their feet in both worlds of minority groups (if not more) face a difficult path different from others. The problem faced is that when one participates in activities such as applying for jobs, an African American woman could face discrimination as a woman for being black and for being a female. When viewed in this light, one could begin to view a complex system of discrimination that involves with being not one, but by being a part of two or more minority groups, especially when they cross between race, gender, and/or sex preference. In fact, while the theory of intersectionality has not been approved by the United States Supreme Court, it has picked up global recognition and praise. In doing so, theories regarding how to address intersectionality in the courts have already begun, with Crenshaw herself proposing a solution. However, a bigger theme looms over our heads, a theme that must be realized when looking for the courts to proclaim that people under the category of intersectional theory require special protection under

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[1] It can be argued that the illness I am referring to has existed before the creation of the United States of America. I am not disputing this claim-I am merely making the point that unfair discrimination has plagued the nation for too long.

[2] "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," n.d., 31.

the Equal Protection Clause of the 14th Amendment. In searching for how to legitimize intersectional theory, it almost seems that the search for a more legitimate medicine has commenced in curing the sickness that is unfair discrimination. Therefore, it is required we must procure a medicine more effective than the previous one. However, the problem with the previous sentence is that one then asks what is the cure? I thought we rid ourselves of discrimination years ago in the Civil Rights movement. I thought we rid ourselves of discrimination years ago during the second wave of feminism. Our acknowledgement of the problem and our legal system should have rid ourselves of this detrimental illness to civilization. Why did it not work? What happened?

It is from this troubling puzzle that in solving the problem addressed in intersectional theory, it must be discussed why when the multiple symptoms always fade[3] and the illness continues to persist. It has found a multitude of horcruxes to sustain its life, with all of the general public not knowing the original source that stored its soul in these items. Therefore, it is necessary to look at past cases of discrimination and ask how did they achieve their success. First, there were cases concerning race. While this was challenging to convince the Supreme Court justices that 'separate but equal' could not be tolerated, the Warren Court proved to be a reliable ally in holding the Civil Rights Act of 1964 as constitutional.[4] However, after these wins for race, cases became harder. Gender discrimination was not believed to be a legitimate form of discrimination until Ruth Bader Ginsburg brilliantly argued gender discrimination cases in front of the Supreme Court, with her most famous tactic taking a white man and showing how a white man was discriminated under the basis of sex.[5] Later, when discrimination on the basis of sexual

[3] I am not suggesting that discrimination based on sex or race does not occur: I am merely suggesting that they have been deemed worthy of protection by the U.S. Supreme Court.
[4] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[5] *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

identity was brought up to the court, another white man was presented to the U.S. Supreme Court. What puzzles me the most about the history is that a form of discrimination was not acknowledged without the presence of a white man. In order for minority groups to be taken seriously, a white man was somehow involved when the Equal Protection Clause did not explicitly detail sex could be protected under the Fourteenth Amendment. In using the white man as a means, what does this reveal about how the law treats minority groups?

There is an attitude that law is established and exercised in the nation with some goodwill to its citizens. In doing so, there has been more insistence on people showing goodwill towards the institution rather than the opposite. This can be reflected 60 years ago, when during his 1961 inaugural address, President John F. Kennedy implored the American people to "ask not what your country can do for you–ask what you can do for your country."[6] However, over the years, especially in the second decade of the 21st century, this plea is revealed to not be held by everyone, when in 1986 President Ronald Reagan quipped that "The nine most terrifying words in the English language are: I'm from the Government, and I'm here to help."[7] While Reagan's words were directed towards people who aligned themselves in the sphere of libertarian and conservatives, his words can also address a sentiment groups that have suffered from discrimination have felt throughout their lives, although diverting in the conclusion of the former centerpiece of the Republican Party. How they may resonate with Reagan is the sentiment of having an expectation of government to fulfill a task, but then are let down with the government's actions. However, in differing from a Reagan perspective, they circle back to the words of Kennedy and ask not what they can do for the country-they cannot trust the country yet-but ask what the country can do for us.

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[6] CBS. *President John F. Kennedy's Inaugural Address*, 2011. https://www.youtube.com/watch?v=PEC1C4p0k3E.
[7] Reagan Foundation. *The President's News Conference - 8/12/86*, 2010. https://www.youtube.com/watch?v=1ySHtDHrLJY.

It is this dilemma that faces discrimination cases. Everyone wants to trust the law. Most do. However, if lawyers can only win discrimination cases with the precedent of the white heterosexual man, and if judges can only show sympathy and offer protection to the white heterosexual man, what happens when a judge faces a person who has experiences and difficulties never to be experienced by this type of person? And what happens when people who face discrimination on a daily basis align themselves with a talking point made by James Baldwin:

> There's only been one simple thing: I don't want to be given anything by you. I just want you to leave me alone so that I can do it myself… ...Perhaps I don't think that this Republic is the summit of human civilization. Perhaps I don't want to become like Ronald Reagan, or like the President of General Motors. Perhaps I have another sense of life, which in fact my situation here has forced me to trust, adn perhaps I know more about you and your institutions than you know about me. Perhaps I have a judgment on them. Perhaps I don't want what you think I want. And there's nothing you can give me. Perhaps there's something I can give you.[8]

Even though Baldwin is implementing the 'white man' in a different scenario than ours, his words still apply in delivering a painful realization of what it means to use you, the white heterosexual male, as a tool. We do not want to be given protection by you, who has been grouped as us on a technicality. We want to be left alone by you, and we want to offer our voices and own perspective that the courts should learn about. That is why there must now be an investigation as to why the model majority is used to fight in our place and recognize that this substitution can not be sustained for the long run. Therefore, it must be asked of us, why cannot the courts understand us, and why does it seem we understand them enough to recognize that they have not accepted us? These questions will delve into themes of association, a concept that does not seem relevant or grandiose enough for a powerful magnificent structure that is law, but

[8] PBS NewsHour. *James Baldwin Discusses Racism | The Dick Cavett Show*, 2020. https://www.youtube.com/watch?v=WWwOi17WHpE&t=220s.

nevertheless is a concept that gets to the heart of not only why intersectionality, but also discrimination based on something not alike, has not been addressed appropriately in the courts. It will go into an analysis of the anticlassification principle, its origin, and its original purpose. That is why in reporting on the history and making the premise of intersectionality valid, the association and dependency in the Equal Protection Clause must be addressed and how distrust in the interpretation of the clause festers like a sore.

# CHAPTER ONE: An Exposition of the Anticlassification Principle

**Current System Under the Equal Protection Clause**

…Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind... … I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.

–Chief Justice John Roberts, Confirmation Hearing of John G. Roberts

The man who simply lets his judgment turn on the immediate result may not realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law.

–Herbert Wechsler, "Toward Neutral Principles"

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In searching for a cure, it seems reasonable to look at the current system and get a general idea of equality in the modern era. From this, we can analyze the history of this idea and determine if a flaw exists in this idea. It is from this that it may be best to view how the current chief justice of the Supreme Court views law. In doing so, one may get an indication of the current understanding of equality within the law. As of 2021, the Court is still one led by Chief Justice Roberts. Nominated by George W. Bush, Roberts made his presence known by comparing his role as similar to one of an umpire. In the game of baseball, an umpire's most well known role is to call out balls or strikes. In this position, one does not create the rules of baseball- the person's only job is to abide by the rules. It is from here that we gather a current understanding of equality, a topic that seems to also be included in the realms of calling balls and strikes. It is within this analogy that Roberts created what we begin our journey. As this is a dominant theme of equality within the Court, it seems prudent to now take a hold of this concept and check for any holes, crevices, or cracks within it. If so, we move on and look for another explanation as to why discrimination still haunts the nation. However, if there is something within this idea of balls and strikes that may indicate why areas of discrimination still exist, this

is a suitable starting point. If we can identify the root of this adherence to structure, an answer will hopefully reveal itself as to why things are as they are. Now that we have an idea of balls and strikes and equality, now that we have an idea of what someone such as Chief Justice Roberts analyzes equality, an investigation into this form of judging and its relation to the Equal Protection Clause can be made. In doing so, let us look more in depth into the current functioning of practice of the Equal Protection Clause. From there, one can make their way into the heavy philosophical concerns and critiques after having been given this brief, yet vital information concerning this current era.

The Fourteenth Amendment is one that carries great importance to the citizens, especially to those who faced racial or gender prejudices. Written after the Civil War and listed as one of the three Reconstruction Amendments,[9] the Fourteenth Amendment was created to help the United States reject the ideas of slavery and establish African Americans as legitimate United States citizens. In carrying out this action, legislators decided to write a passage on equality and its value in the United States government. This action led to the creation of a significant fragment of the Fourteenth Amendment that came to be known as the Equal Protection Clause. The words of the Equal Protection Clause declare that "No state shall … deny to any person within its jurisdiction the equal protection of the laws." From this small statement, a commitment was then made to the African American people that laws could no longer be written or permitted to purposefully disadvantage the black race. The declaration of a superior race was no longer tolerated under this clause, and a greater harmony among the old and newly-established citizens of the United States could come to pass. There is no doubt that this clause

[9] National Constitution Center – constitutioncenter.org. "The Reconstruction Amendments - National Constitution Center." Accessed April 2, 2021. https://constitutioncenter.org/learn/educational-resources/historical-documents/the-reconstruction-amendments.

mainly promotes a good idea, which is that African Americans should be protected from harmful laws. Some of the most notable advances in civil liberties have used the Equal Protection Clause to argue that discrimination against race or sex occur; one only has to read cases such as *Brown v. Board of Education*, *United States v. Virginia*, or *Obergefell v. Hodges* to understand what the Equal Protection Clause can do for its citizens. However, like all ideal scenarios, reality enters the arena to derail the abstract. It is a scenario such as this: one perfectly plans a picnic event on a sunny day but makes the mistake of not checking the weather and noticing that the weather forecaster predicts heavy showers on that specific date. Equality carries great value, but it at times interferes (some may even be so bold to add that it contradicts) with the ideals of liberty that also carry value in the United States. Even more strange, equality may even contradict equality itself. It is not absurd to view equality as everyone being treated in the same manner. However, it is also not absurd to view equality as everyone being treated differently to create an equal outcome of human flourishing. While both claim themselves as the definition of equality, these two definitions oppose each, with one holding others to the same standard and the other creating different playing fields for each individual. It is from this curious notion that shouting 'we want equality' is not enough. There are several identities within this field, and it may even be that equality possesses a Jekyll and Hyde identity, in which if we pick the wrong version of equality, we will have doomed ourselves with Hyde. In order to counter these concerns, several systems were put into place for the Equal Protection Clause to still remain legitimate in the eyes of the people.

One such system was the use of legal principles. In its original words and phrases, the Equal Protection Clause communicates that the state must not "deny to any person within its jurisdiction the equal protection of the laws." In reading this clause, one understands the

importance of equal protection. There is agreement that equality remains an important value to the nation and action must be prominent and consistent in order to realize this message. However, there is no instruction as to how equal protection is distributed or in what manner equal protection manifests itself in. The text does not answer what equality means to the writer or the legislators. It does not bestow upon the reader the final answer to the definition of equality. No, it leaves the nation in a tricky bind, as it promises to provide equality but then refuses the meaning of such a treasured quality.

It is due to this particular bind that in actualizing the full potential of the Equal Protection Clause, one must ultimately interpret their own thinking of an egalitarian principle. What this means is that in using a principle, one utilizes a "standard that is to be observed [in the law] … ...because it is a requirement of justice or fairness or some other dimension of morality."[10] Principles do not depend on rules to dictate law. Rather, ones who use principles look at underlying values from multiple rules such as justice, equality, etc. to then judge a case. Cases concerning the Equal Protection Clause are no exception to this. In fact, legal principles are of utmost importance, with renowned law professor Owen Fiss writing that "Primary reliance is instead placed on a set of principles… … to give meaning and content to an ideal embodied in the text… …[and] the Equal Protection Clause has generally been viewed in this [way]."[11] These words reinforce the idea that principles exist to help create a good decision from a hard case. Since equality is not defined for us, we must use a principle to decide what equality means and what words and actions surround its respective definition. It is from these ideas of principles that the next step appears. Legal principles seem to be the intermediate step, the unseen chain linking the problem and the solution together. Unfortunately, the 's' at the end of the term 'legal

[10] Dworkin, Ronald. "The Model of Rules I." In *Taking Rights Seriously*, 14–45. Harvard University Press, 1977.
[11] Fiss, Owen M. "Groups and the Equal Protection Clause." *Philosophy & Public Affairs* 5, no. 2 (1976): 107-77. Accessed March 29, 2021. http://www.jstor.org/stable/2264871.

principles' indicate a plurality of principles. As one soon discovers, there is no one correct way to interpret the Equal Protection Clause. People have different ideas as to what equality is and should be, and legal philosophy does not vanquish this pestering problem. It is from this trouble that while many may research or write on the topic of equality in an intelligent or academic sphere, people's conclusion on this subject will differ, commencing livid debates on which principle the United States should adapt.

Another one of these systems was the establishment of a so-called scrutiny system. The scrutiny system is a method judges use to determine if a law has unfairly curtailed the rights of certain citizens. If not, the law has passed the scrutiny test. If it does, the law is deemed as violating the Equal Protection Clause. In using this system, the Supreme Court primarily utilizes three standards of judicial review to determine a case's constitutional rights, or lack thereof.[12] This practice of scrutiny was first used in the case *United States v. Carolene Products*. In this case, Congress passed the 'Filled Milk Act', which prohibited the shipment of skimmed milk compounded with any fat or oil other than milk fat via interstate commerce.[13] *Carolene Products* filed a claim stating that this act was unconstitutional, and the court had to decide whether or not Carolene Products had the right to partake in the interstate shipping of "filled milk". The Supreme Court ultimately upheld the act of Congress, citing that *Carolene Products* failed to meet its burden of proving that no rational basis for the law existed. While the facts of this case may seem tedious or even downright trivial, its decision has been influential within law, particularly within the topic concerning the protection of race. In what is considered one of the most famous footnotes in the writings of the US Supreme Court, Justice Stone wrote

[12] I am most interested in examining, for the purpose of this thesis, intermediate scrutiny and strict scrutiny, as both terms appear frequently when concerning the Equal Protection Clause.
[13] *United States v. Carolene Products Company,* 304 U.S. 144 (1938).

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation… … Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters,* 268 U. S. 510, or national, *Meyer v. Nebraska,* 262 U. S. 390; *Bartels v. Iowa,* 262 U. S. 404; *Farrington v. Tokushige,* 273 U. S. 284, or racial minorities, *Nixon v. Herndon, supra; Nixon v. Condon, supra:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[14]

It was apparent that race could not be reviewed in the same manner as economic legislation. As the review conducted for economic legislation under the Lochner era only viewed the law unconstitutional if it contradicted itself, Stone asserted that this type of judgment was unacceptable in cases concerning race. This claim was at the time an extremely important one to make, particularly to the majority opinion writer Justice Stone. It was important, given the circumstances of the history of the Court and the world events occurring during the late 1930s.

During this time in Germany, the Nazi Party, spearheaded by Adolf Hitler, was on the rise. It was slowly taking control of multiple nations within Europe, dictating their laws and way of ruling. Most infamously, the Germans placed Jews, gypsies, and other minority groups in concentration camps. In completing such atrocities, the Nazi Party showed the world its terrible power to easily dismantle the rights of minorities and dissenters of the party, and one of these global viewers was Justice Stone. These events that he saw unfold in Nazi Germany traumatized Stone and influenced his idea of creating the footnote, which shows a clear rhetoric of protecting people from the “prejudice against discrete and insular minorities."[15] From establishing this

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[14] *U.S. v. Carolene Products Co.*.

[15] Nelson, William E. *The Legalist Reformation : Law, Politics, and Ideology in New York, 1920-1980*. Studies in Legal History. Chapel Hill: The University of North Carolina Press, 2001. http://search.ebscohost.com.proxy.library.emory.edu/login.aspx?direct=true&db=e000xna&AN=79133&site=ehost-live&scope=site.

footnote, Justice Stone explicitly detailed how topics such as race should be reviewed under multiple forms of scrutiny to ensure the wellbeing of all citizens. From this idea, the three levels of strict, intermediate, rational basis were formed.

The most stringent of these levels is titled 'strict scrutiny.' First utilized in the infamous *Korematsu v. United States* case*,* strict scrutiny is the standard of judicial review where "The law must be the least restrictive means available to achieve a compelling state interest."[16] Or, to be more explicative, "Under this standard, judges presume that a government action is suspect or unconstitutional; only by showing that the law is the least restrictive means available to achieve a compelling state interest can the government overcome that presumption."[17] Under this form of scrutiny, the judges immediately view the law state in a negative light and are introduced to the law with a healthy portion of skepticism. It is from this basis that the state has to prove that if it does seem at odds with the Equal Protection Clause, then there must be a robust reason for it. Only then can the law be considered acceptable under the US Constitution. Typically, these cases concern themselves with race, as there is legitimate concern that African Americans and other groups face serious threats from the state. The reason for this can easily be justified in looking at the nature of race relations in the United States. Given the nation's past history and even briefly glancing at the current state of affairs, there is a clear want to avoid past mistakes, a clear want to prove that we have progressed, moved onwards. The most obvious way to avoid making this mistake is to establish rules that devoids itself of rhetoric involving race. Therefore, if the state shows clear verbiage of the favoring of a race, there is more of an incentive to deny the state its

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[16] Lisa Baldez, Lee Epstein, and Andrew D. Martin, "ARTICLE: Does the U.S. Constitution Need an Equal Rights Amendment?," *The Journal of Legal Studies,* 35, 243 (January, 2006). https://advance-lexis-com.proxy.library.emory.edu/api/document?collection=analytical-materials&id=urn:contentItem:4JPY-T760-00CV-S035-00000-00&context=1516831.

[17] Ibid.

respective action, even if the favoring of the race in mind has not benefited from the good graces of society and society's way of interpreting law. This has made it extremely difficult for a state to justify a law based on race, prompting a renowned law professor Gerarld Gunther to famously quip that this particular test is "'strict' in theory and fatal in fact,"[18] meaning that almost every case under strict scrutiny does not favor the state.

The next form of scrutiny is named "Intermediate scrutiny", which as its name indicates, involves covering the grey area between strict scrutiny and the rational basis test. First mentioned in the case *Craig v. Boren,*[19] this type of judicial review demands that "The law must be substantially related to the achievement of an important objective."[20] In other words, if a case falls under this category, if the goals of the respective State justify the means, then the law is not considered unconstitutional under the Equal Protection Clause, even if there is a form of discrimination involved. Under this level of scrutiny, there is more leeway in justifying the ends than there is under strict scrutiny. Cases of this sort of nature typically consist of gender discrimination cases, in where biological differences and societal roles of gender consider itself a factor into law.[21]

The lowest form of scrutiny is titled the rational basis test. Typically, the conventional view among scholars is that this test runs in an opposite direction of the strict scrutiny test, or in

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[18] Ibid.

[19] By Joan A. Lukey and Jeffrey A. Smagula, "ARTICLE: DO WE STILL NEED A FEDERAL EQUAL RIGHTS AMENDMENT?," *Boston Bar Journal,* (January/February, 2000). https://advance-lexis-com.proxy.library.emory.edu/api/document?collection=analytical-materials&id=urn:contentItem:3YK4-MW10-00BT-41MM-00000-00&context=1516831.

[20] Ibid.

[21] Due to the expanding thought of gender and its role in society, this form has twisted itself into many shapes as to what the intermediate scrutiny's exact guidelines detail. From this dilemma, there is a debate as to whether or not it should have a relationship more close to strict scrutiny or the rational basis test. There has been substantial push in moving sex discrimination cases into the category under strict scrutiny, with the most successful attempt being *United States v. Virginia*. Despite pushes toward strict scrutiny for cases concerning gender discrimination, later cases such as *Tuan Anh Nguyen v. Immigration and Nationalization Service* seem to have returned gender discrimination cases back to its status in the middle, ambiguous realm.

other words, the rational basis test can be considered as providing "minimal scrutiny in theory and virtually none in fact,"[22] a saying that portrays itself as the inverse of strict scrutiny's 'strict in theory and fatal in fact' mantra. The courts take seriously into account the literal rationality of a government's legitimate interests. In doing so, the judiciary typically sides with the interests of governments in these standards of review. Under this review, the goal is not to question the intent entirely, but just make sure that the intent does not contradict itself. In doing so, the government's actions under this review are almost considered legitimate. The type of scrutiny is so lax that Stevens once remarked that he could recall "Thurgood Marshall remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws.""[2324] Therefore, while the rational basis test may from its namesake seem to concern philosophical concerns of rationality or irrationality, it merely grasps onto a complex term to explain a very simple process.

In the last several pages, I have detailed several systems to provide equality. Legal principles help decide what equality means to judges, and forms of scrutiny were a concrete tool to establish equality. From these dilemmas, one may then ask how the two fit together. Sure, they are distinguishable, but surely these two share some type of relationship with each other. In looking at the two, we have an abstract theory and a concrete method. From this, it seems that the relationship is either that the theory influences the method or vice versa. The cause and effect is of not much importance here. What is important, however, is which legal principle fits with the scrutiny system. What legal principle fits with the concept of levels of scrutiny and makes

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[22] Baldez, Epstein, and Martin, "Does the U.S. Constitution Need an Equal Rights Amendment?"

[23] *New York State Board of Elections v. Lopez Torres,* 522 U.S. 196 (2008).

[24] It was also under this review that the case *US v. Carolene Products* was arguing whether it was rational or not. In looking at the case, it is now with hindsight more clear to see that Carolene Products was fighting an uphill battle, as rational basis essentially expresses the thought that any piece of legislation is rational as long as it does not contradict itself.

this form of justice more successful? While there are several principles that attempt to fit into this glass slipper, none might have been as successful as the anticlassification principle.

**The Anticlassification Principle**

The anticlassification principle is a legal principle that has gained prominence in the past semicentury and is now considered one of the, if not the leading, principle in the judiciary field. It uses an idea that involves justices evaluating cases of discrimination and famously determining that almost all cases concerning race is illegitimate. They typically scrutinize actions and determine whether it fits similar to the standard they judges apply or view it as not similar, a concept aptly described as "ill-fit".[25] If the former, the case brought forth is determined as the state violating the Equal Protection Clause, and if the latter, the case is determined as the state having a legitimate reason in violating the Equal Protection Clause. The anticlassification theory views everyone as deserving of the same laws as others. In doing so,

> pure anticlassification principles would prohibit the preferential treatment of a group, such as minorities, regardless of how the group has been treated in the past by society or employers; preferential treatment only aggravates the goal of moving beyond consideration of those traits. Put another way, how can we be color-blind if we continually take race into account and allow it to guide the implementation of employment policies?[26]

This is a legal principle that has a puritan ideal of equality. It argues for equal distribution of actions, regardless of background. It is the definition at its most natural and most simplistic form. It does not require a background in the social sciences; it only demands others to just believe in the abstract and trust in this particular principle. In doing so, if a case does not fit with these standards, then the case for discrimination is lost. If one claims to have different circumstances

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[25] Fiss, "Groups and the Equal Protection Clause", 114.

[26] Areheart, Bradley A. "THE ANTICLASSIFICATION TURN IN EMPLOYMENT DISCRIMINATION LAW." *Alabama Law Review* 63 (n.d.): 52.

than another, this principle would not find this claim to be a very strong one, as it can find special treatment hypocritical and even dangerous in nature. This principle fits well with the scrutiny tiers, particularly the strict scrutiny tier level. As the anticlassification principle insists that law treat all as equals, regardless of race, it enforces strict scrutiny, as strict scrutiny allows very few instances in which Justices determine a law is protected under the Equal Protection Clause if the law is based on race. Strict scrutiny works under the presumption that all laws based on race are suspect and a potential threat to the ideas of equality in the nation, and the philosophy behind the anticlassification principle supports scrutiny's claim.

While many may argue that it was not always this way, that anticlassification was not always used to decide these important court cases, there is no doubting its current presence in topics concerning the Equal Protection Clause. In at least the past 30 years, this principle has gained attention in the legal and political spheres. It has become a standard as to what equality means and continues to have a strong backing not only by citizens, but also by those in power. To validate this claim, I present several court cases to reveal how the promulgation of neutral laws and principles became a centerpiece in adjudication. Therefore, we turn to several seminal cases of the US Supreme Court. For the purposes of this thesis, I have selected three cases that can show the anticlassification principle at work.

*Brown v. Board of Education of Topeka*

It seems most fitting to start with the case that is considered as a watershed moment in equality, as its prominence may reveal the durability of the principle governing it. In this case, the argument made for the Brown family detailed that segregated schools were a form of racial discrimination. This racial discrimination violated the promise that no state can deny an equal

protection of laws to any persons, as the state in issuing this segregated program denied the equal right for schoolchildren to enroll in public schools, a move which the lawyers defending Brown argued inevitably hurt black schoolchildren. In doing so, they were contesting that the idea of "separate but equal" rhetoric in *Plessy v. Ferguson* was a mistake. While the Supreme Court never overruled *Plessy v. Ferguson*, the U.S. Supreme Court ruled unanimously in *Brown* that public schools must commence integration between schoolchildren. Chief Justice Warren, who authored the opinion for this case, wrote "in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."[27] While nationally applauded, the case has remained an enigma as to what legal principles dictated the ruling. As many comment, some argue on an account of the antisubordination principle, which factors the sociological point of the case and emphasizes that the decision was right, as it recognized the differences, the struggles, that black students faced which were events white students would never encounter.[28] Some, on the other hand, pull reasoning from the anticlassification principle. For those who follow this principle, they would ignore the parts concerning the psychological analysis and the eventual questions concerning if African Americans do deserve a specific remedy for past atrocities done upon them. They would argue that establishing a law based solely on race is abominable, as it indicates a sign of bias and favoritism within the law. They claim that the blindfold lady justice wears is off without, and that is a scary situation to be in. It is from this concern that proponents of the anticlassification principle want the blind put back on. It is only through this manner that justice can function properly.

*United States v. Virginia*

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[27] *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

[28] I will focus on this principle more extensively in the third chapter.

Traveling forty five years after the decision of Brown, a new era of the Court rises. Progress has been made in the Civil Rights Movement and in women's rights. However, what direction this progress has been heading in is still in question. The Warren Court, which dictated *Brown v. Board*, is gone, the Burger Court has come and gone, and the Rehnquist Court is now in session. During these changes of courts and what it meant for jurisprudence, the egalitarian principles remain in flux. Questions concerning who is listed as needing equal protection is still in the air. The debate concerning women's place in the Equal Protection Clause was still a big concern, as people such as the late Justice Antonin Scalia raised the point that the words such as female or women had no presence in the Equal Protection Clause.[29] The lack of women in the clause posed a dilemma for interpreters of the Constitution and became an important topic in the 1996 case *United States v. Virginia*. In this case, it was challenged that the Virginia Military Institute's male-only admission policy was unconstitutional. Women wanted to enroll in VMI, but were met with resistance from the public institution due to their gender. Due to this rejection and the reasoning behind it, the United States sued VMI and claimed that under the Equal Protection Clause, it was unconstitutional for VMI to reject applicants to their gender. In a 7-1 decision, the Court held that VMI's rejection of women was unconstitutional, according to the Equal Protection Clause. Therefore, VMI must begin allowing women to apply to its institution. This is still considered a landmark case for women, and rightly so,[30] with the majority opinion boldly issuing that

[29] Fisher, Max. "Scalia Says Constitution Doesn't Protect Women From Gender Discrimination." The Atlantic, January 4, 2011. https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/.

[30] While it may have not done enough and should not be considered the end towards what rights women possess, there is no denying the progress it made toward women's rights.

> generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men*… …VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F. 2d, at 899; "some women . . . do well under [the] adversative model," 766 F. Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.*, at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.*, at 1412, and "can meet the physical standards [VMI] now impose[s] on men," 976 F. 2d, at 896. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, [n.19] a remedy that will end their exclusion from a state supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future.[31]

This writing put forth the idea that if anyone can commit to VMI's rigorous program, if anyone can reach the bar placed in front of the applicants, anyone can apply and be considered a serious student for the program, regardless of gender. This indicates that women, if they meet the standard that VMI demands of their students, should not be discriminated against. Here, if their physical capabilities are similar, then there is no reason to treat the sexes as different from one another. What matters is the fact that they can do the work. There is no longer a statement that a woman cannot enroll in VMI because she is a woman; there is a statement that women cannot enroll in VMI if she is not on par to what the expected physical requirements. In indicating that what really matters is the physical capability, it plays into the anticlassification principle, as the principle argues for a standard that is expected of all applicants. In allowing all genders to reach for this bar, the case moved gender closer to the proposition that regardless of sex, anyone can have the opportunity to enroll in VMI.

*Obergefell v. Hodges*

Skip a couple decades later, and the 21st century is present. The Roberts Court is in session, and the hot topic has moved from race and gender and now is fixed upon the field of gay

[31] *United States v. Virginia,* 518 U.S. 515 (1996).

rights. In 2015, multiple same-sex couples argued for their constitutional right to marry their respective partners. They argued that states not allowing gay couples to wed is unconstitutional, claiming that not allowing same-sex marriage was a violationg of due process and equal protection. The Supreme Court in a 5-4 decision concluded that banning same sex marriage was unconstitutional under the Fourteenth Amendment, with Justice Kennedy writing in the majority opinion that denying same-sex couples the right to marriage "would disparage their choices and diminish their personhood."[32] It is due to this that five justices decided that it should be constitutional to have same-sex couples obtain marriage licenses in all fifty states. In this case, Kennedy argues that the reason why it violated the Equal Protection Clause is because denying same-sex couples the right to marry discriminates. While not explicit, the opinion bases itself on the anticlassification principle, as it indicates unfair discrimination towards the inablity of the institution of marriage to not prefer the one sort of relationship over the other. If there was a blindfold to marriage, it would not have found qualms with interracial couples or same-sex couples; it would treat them just the same as opposite-sex couples. However, before the time of this decision, states were given the liberty to decide that one specific group deserved a marriage license while another group was not deserving of such. There is a hypocritical standard at play, which proponents of the anticlassification principle would point out, as these critics would favor the same right for every person. Therefore, under the anticlassification principle, one can interpret that all forms of marriages are equal and come to the conclusion that the decision of the Court was correct.

It has just been explained what this particular legal principle is. However, not enough detail has been given to explain why one might find the anticlassification principle appealing.

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[32] *Obergefell v. Hodges*, 576 U.S. (2015).

Why would someone find an even playing field as most suitable for a definition of equality? While the benefits may seem obvious to those who admire it and nonexistent to those who oppose the principle, it would be good to examine what people find appealing about it. In explaining the benefits, it can help one to understand why it has such a massive presence in law.

One, it gives a clear view of neutral. In keeping law neutral, one who subscribes to the notion of the anticlassification principle also incidentally promulgates the ethics regarding the treatment of others (whether these actually are aware of this or not is up to them to find out). In explaining its appeal and the legitimacy of anticlassification supporters, it might be best to reference one of the most influential thinkers of the 1700s, Immanuel Kant. A German philosopher who lived during the Age of Enlightenment, Kant really captured this particular era of civilization in championing the idea of rationality and progress made through logic and reason. He argues in his multiple writings that to be enlightened, one must have human autonomy, a trait which he insists could only be achieved through rational thought. This idea can be clearly seen in his famous essay "What Is Enlightenment," in which he asserts that being enlightened "requires nothing but *freedom*--and the most innocent of all that may be called "freedom": freedom to make public use of one's reason in all matters."[33] This is important, as this will then lay the groundwork of having reason be the basis of all human thought, including equality. In Kant's work concerning ethics, *Grounding for the Metaphysics of Morals,* he claims that morality also grounds itself through reasoning, an act Kant categorizes as 'supreme law'. Kant describes this supreme law as "Act[ing] always according to that maxim whose universality as a law you can at the same time will. This is the only condition under which a will can never be in conflict with itself, and such an imperative is categorical… …[which is to] act according to

[33] "Kant. What Is Enlightenment." Accessed March 30, 2021. http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html.

maxims which can at the same time have for their object themselves as universal laws of nature. Thus, then, the formula for an absolutely good will is constituted."[34] In this quote, Kant argues that good will involves obeying the universal laws of nature. Since these laws are universal, they cannot contradict itself. Therefore, good will, in aligning itself with universal laws, must not contradict itself. This idea can then apply itself to the anticlassification principle, which does seem to tout a universal, non-contradictory treatment of all. While Kant was more focused on ensuring how supreme law fits with the autonomy of a person, his writing has manifested itself into law, particularly in the anticlassification principle. As stressed, the principle dictates equality as setting the same standard for all persons and criticizes judgments that seem hypocritical or contradictory. It does not matter if one is African American or if one is white. If it is viewed that the state is recognized as discrimination on the basis of race without strong governmental interest, any person of any race can bring up a claim of discrimination and not be laughed out of court. In having this principle apply to all equally, no matter the color of their skin, it also invokes the notion that its ruling follows a universal (or in this case, a national) maxim. In this way, no side is favored, and this shows that people in favor may view that what is good is or very similarly aligned to Kantian ethics.

Two, there is a motif of progress instilled in this principle. In disregarding race, gender, and other forms of discrimination and claiming to look at merit or an idealized form of equality, there is a sense of progression as to how we determine the value of a person. No longer does looking at skin or sex have value in the quest for human achievement. That idea is now viewed as scandalous and archaic. Instead, one's worth comes from one's actions and ideas rather than physical features. In determining the value of a human, there is a sense of moving away from the

[34] Kant, Immanuel. *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie Because of Philanthropic Concerns*. Translated by James Ellington. 3rd ed. Hackett Publishing Company, Inc., n.d.

past and then naturally moving towards a utopian world. It is this idea that some reference Martin Luther King Jr.'s "I Have A Dream" speech, imploring all to remember the lines where he has a dream that his children and other black children "will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[35] This very pure form not only paints humans in the form of a Romantic hero that vanquishes the evil of the past, but it claims that humanity has the ability to progress in civil liberties. This sentiment then translates into law through cases such as *Grutter v. Bollinger*, in which Justice Sandra Day O'Connor wrote "race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable."[36] Within this writing, it gives reassurance to people that we are currently on the correct path, in having no regards towards color and sex, we have transcended the barbaric nature of the past. It convinces its readers that humans must be progressing, that humans can make the world a better one. In viewing humanity from this perspective, people may want to gravitate towards this principle, as in doing so, this idea not only fosters these ideals, but it gives hope to the citizens that their nation does not have deep and wounding flaws and that the United State does strive for a more unified nation.

These are some of the positives of adapting an anticlassification principle. It not only has a solid conception of what equality is, but it even has a message of hope and optimism to match. The dual pairing entices people to view this principle as a good one and has for the 50 years been mostly successful in convincing people that its ideas are the best there are. While this principle may seem to adopt an idea of equality created in the late 1700s, it may surprise some that this

[35] NPR.org. "'I Have A Dream' Speech, In Its Entirety." Accessed April 2, 2021. https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety.
[36] *Grutter v. Bollinger,* 539 U.S. 306 (2003).

idea of equality in the law, the idea of a neutral ground, arose in the late 1950s. How does something so recent in history now become a prominent way in how we understand equality? To understand how it became such a major legal principle within a short amount of time, it is now time to turn to a discussion of the person who introduced the idea of pure neutrality within the law: Herbert Wechsler.

**Wechsler**

Herbert Wechsler was one of the legal giants of the 20th century. As a young man, Wechsler already showed great potential in the academic arena. At the age of fifteen, he entered the City College of New York and later attended Columbia Law School, where he finished at the top at the ripe age of twenty-two. He then clerked with Justice Harlan Stone, the figure who penned the majority opinion of *Carolene Products*. While Wechsler admired Stone and thought of the Justice as a great champion of worker's rights, Wechsler found Stone to not fully protect the rights of minorities as ardently as he did with those of the working class.[37] Wechsler after his clerkship would then take on several jobs, including work with the government, working as a litigator, and teaching law. Some of his greatest accomplishments include partaking in a pivotal role in conceptualizing the Model Penal Code, litigating cases that expanded the goals of the Civil Rights Movement, and arguing in front of the U.S. Supreme Court in the prominent case of *New York Times Co. v. Sullivan*.[38] These accomplishments are of great importance to their respective areas and show how Wechsler was a very smart and accomplished person. However, for purposes of this paper, I would like to focus on his famous lecture titled "Toward Neutral

[37] I would like to note the irony, as Wechsler's neutral principle will fit perfectly with the definition of Stone's rhetoric of 'insular and discrete' minorities.

[38] Silber, Norman, and Geoffrey Miller. "Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler." *Columbia Law Review* 93, no. 4 (May 1993): 854. https://doi.org/10.2307/1122990.

Principles of Constitutional Law."[39]

A speech originally presented at the Oliver Wendell Holmes Lecture at the Harvard Law School, Wechsler addresses what he views as two significant problems concerning law. First, he criticizes the idea of judicial review, more specifically, the growing popularity of judicial restraint, or the idea that judges should refrain from administering decisions that the executive and legislative branch would obey. Second, he famously expresses his thoughts concerning equality in the justice system. In this section, he criticizes the then current Justices grounds for making a decision. Wechsler found that there was a concern of Justices varying too much in their decision and issuing judgments not based not on reasoning, but on the result. He iterated this concern, cautioning the audience that "The man who simply lets his judgment turn on the immediate result may not realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law."[40] If principles were not in place, then the judicial branch is nothing but a place to execute important decisions that determine the well-being of citizens without any good or sufficient reasoning. This was dangerous, as a judgment based on the result could be a catastrophe, as it would not only be up to legal professors in the future to discern what these decisions mean to law. It is from this thought regarding the necessity of neutrality in justice that Herbert Wechsler revealed law's role in this pursuit of neutrality in law. He then expands on this idea, intertwining the concepts of neutrality and a decision based on principle. Continuing on, he defines a principled decision as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.... Otherwise, as Holmes said in his first opinion for the Court, "a constitution, instead

[39] Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73, no. 1 (1959): 1-35. Accessed April 1, 2021. doi:10.2307/1337945.
[40] Wechsler, "Toward Neutral Principles", 12.

of embodying only relatively fundamental rules of right, .. . would become the partisan of a particular set of ethical or economical opinions.""[41] In this quote, Wechsler does not just insist that principles must exist within law, but he advocates for a certain type of principle: neutral principles. He declares that in only striving for a correct outcome without a coherent foundation, hypocrisy and chaos will inevitably ensue. Without neutral principles, biases creep in through the back door, creating significant damages to the nation's denizens.

From this speech, Wechsler garnered widespread attention to the newly introduced legal principle. Legal scholars analyzed the idea of neutral principles into legal theory and viewed its potential to positively change the way judges decide cases. One of the most famous proponents of the anticlassification principle came from legal professor Robert Bork. In his work "Neutral Principles and some First Amendment Problems," Bork praises Wechsler's proposal of neutral principles, arguing that "If [the Court] does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution… ...it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power."[42] In subscribing to this idea, he also confirms that there is too much value put into principles. To have legal principles function properly in law, he also agrees that they must be neutral, which in his case means that principles must come only from the text, from the Constitution per se. Essentially, people such as Bork and Wechsler not only agree that legal principles do exist to guide law, but that the principle that should helm the ship is neutral. The last word is a critical part of the text, it is the word that has brought forth a flurry of law review articles debating its place in law. This fascination also intrigued Professor John Hart Ely, who brought forth the ultimate question, which is "[t]he difficult question is what neutrality

[41] *Otis v. Parker,* 187 U.S. 606 (1903); Wechsler, "Toward Neutral Principles", 19.
[42] Bork, Robert H. "Neutral Principles and Some First Amendment Problems." *INDIANA LAW JOURNAL*, n.d., 36.

ought to mean in this context."[43] This then leads to an inquiry concerning the origin of neutral and its importance in law.

In determining what makes one equal, multiple names arise, such as justice, liberty, and fairness. If one types 'equality synonym' into the google search engine, it immediately brings words that include justice, sameness, and fairness. In a more academic realm, one also notices these words intertwine with each other, maybe most notably in political philosopher John Rawls' essay "Justice as Fairness",[44] an essay in which he delineates the concepts of the principles of liberty and equality. These words, while not equivalent to its dominant theme, aid in shaping the theme's identity. In this manner, one word that also associates itself in defining equality is the adjective neutral. While an investigation into Wechsler's definition of neutral is warranted and will be carried out later, it will first do everyone some good to understand how 'neutral' came to formation in the english language and society. Neutral, as a noun, can be traced all the way back to the Latin word 'neuter,' 'ne', meaning 'not', and uter, meaning 'either.'[45] This then evolved to another Latin work, 'neutralis,' translating into 'neuter gender', or 'of neither gender'.[46] The word neutral itself can be dated around the 14th century, as Peter Lyon writes in his hunt for the original meaning of neutrality that "the terms neutral and neutrality date back as far as the fourteenth century where they are to be discovered in diplomatic correspondence and in treaties used in the sense of nonparticipation in an armed conflict between princes. From the Oxford English Dictionary it appears that neutrality — the state or condition of being on neither side or

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[43] Ely, John Hart. "Legislative and Administrative Motivation in Constitutional Law." *The Yale Law Journal* 79, no. 7 (June 1970): 1205. https://doi.org/10.2307/795168.
[44] Rawls, John. "Justice as Fairness." *The Philosophical Review* 67, no. 2 (1958): 164-94. Accessed March 31, 2021. doi:10.2307/2182612.
[45] "Oxford Languages and Google - English | Oxford Languages." Accessed April 2, 2021. https://languages.oup.com/google-dictionary-en/.
[46] Ibid.

inclined neither way — emerged in English language during the fifteenth century in an ecclesiastical context.[47]"

From this small investigation, two things should be taken into notice. One, it is not unnatural for neutrality to appear in law, as the formation of the term arose from political terrain. Having this term embedded in international relations reveals that neutrality arose from a political crisis in an attempt to solve the conflict between two or more parties. That means that in its inception, the word's prominence in diplomacy naturally associated itself with areas of resolving conflict and attempting to maintain peace. In this manner, one can see its relation to some of the roles justice partakes in, such as helping to maintain peace and to dissolve conflict between two warring parties. From this perspective, neutrality naturally occurs in this realm. Two, one can interpret 'neutral principles' as not taking sides, especially when viewing its original form. This is especially relevant to the antidiscrimination principle, which attempts not to favor any race or gender in its implementation in court. The concept of neutrality is one of the dominating themes when interpreting the Equal Protection Clause. The Equal Protection Clause, which aims to provide protection to those who find themselves not benefiting from certain laws, must consider the effect neutrality has upon the American people. Wechsler created the concept of neutral principles, despite a seemingly general claim that justice and law should lack a bias of a party and should remain neutral.

However, it remains to be questioned what the two (or even more) sides are of principles and whether the negation of opinions is enough to be considered neutral, especially in law. What I mean by this is that this principle on face value looks the most fair, the best way to judge cases. It is also easy to comprehend in having a very linear and literal nature. However, are these

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[47] Lyon, Peter. "Neutrality and the Emergence of the Concept of Neutralism." *The Review of Politics* 22, no. 2 (1960): 255-68. Accessed March 31, 2021. http://www.jstor.org/stable/1405320.

thoughts enough to have such a big standing within the field of law? It is from these thoughts that the topic needs to change from what a neutral standpoint is and shift towards a neutral standpoint. In shifting the conversation, a more fruitful conversation into law can occur.

This part tells us of the beginning of the anticlassification principle, which began with Wechsler's lecture at a university. However, I am also curious as to how and why he got to these principles. Why did he think that neutral principles were ideal? Why did he want neutral to be fashioned, what was its appeal? Did he possess a possible agenda? It is from these questions that maybe one can understand its high regard among people such as Bork and even why it may be criticized. Therefore, we must start with something Wechsler was not very fond of.

Before Wechsler came into prominence, one of the trending forms of understanding law was through a school of thought named sociological jurisprudence. Sociological jurisprudence came into beginning as a critique of mechanical jurisprudence, a philosophy that gravitated towards universal principles and earlier precedents made in law.[48] It found popularity during the chaotic Lochner era and was eventually taken over by legal realism. Sociological jurisprudence philosophers argued that judges are persons who are social engineers of the law. In arguing for this form of jurisprudence, Roscoe Pound, the most famous proponent and creator of this jurisprudence, writes that

> It has been felt for some time that the entire separation of jurisprudence from the other social sciences, the leaving of it to itself on the one hand and the conviction of its self-sufficiency on the other hand, was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view but was in large part to be charged with the backwardness of law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal thought and popular thought on matters of social reform.[49]

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[48] Pound, Roscoe. "The Scope and Purpose of Sociological Jurisprudence [Continued]." *Harvard Law Review* 25, no. 2 (1911): 140-68. Accessed March 31, 2021. doi:10.2307/1324392.

[49] Pound, Roscoe. "The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence." *Harvard Law Review* 25, no. 6 (1912): 489-516. Accessed March 31, 2021. doi:10.2307/1324775.

This jurisprudence not only changed legal thinking of the early 20th century, but it even bled into other spheres of law and politics, with some critics arguing that it heavily influenced FDR and the New Deal administration under him.[50] This thinking furthered the notion that it is fully possible to fully measure justice and distribute it in proportions relative to the injustices the respective minority group faces. This thinking seems reasonable and seems like the correct step forward in what justice should be. However, as with anything, it ran into a significant problem: how to interpret the data. On the one hand, these statistics and numbers led some legal scholars to focus not on society but focus on more individual behaviors. In particular, they were much more interested in using social sciences and psychology to gain a new insight into how a judge would make a decision.[51] This curiosity would then end the popularity of social jurisprudence and would begin the era of a new jurisprudence titled legal realism, which focused on the very human aspect of judges which would interfere with their decision-making.

On the other hand, some people such as Wechsler found the social sciences somewhat disturbing, as he thought that incorporating social science into law could be an effective tool for policy makers, even legislators, but was a risky proposition for courts. According to law professor Anders Walker, who writes extensively on the Civil Rights era, "Driving Wechsler's disapproval of sociological jurisprudence was the fact that the Supreme Court had a long and disreputable history of manipulating scientific data to arrive at undemocratic ends."[52] From

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[50] Pound was not too keen of the New Deal admin.; it was a little too excessive; Postell, Joseph. "The Anti-New Deal Progressive: Roscoe Pound's Alternative Administrative State." *The Review of Politics* 74, no. 1 (2012): 53-85. Accessed March 31, 2021. http://www.jstor.org/stable/41346116.

[51] White, G. Edward. "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America." *Virginia Law Review* 58, no. 6 (1972): 999-1028. Accessed March 31, 2021. doi:10.2307/1072084.

[52] Walker, Anders. "ARTICLE: 'NEUTRAL' PRINCIPLES: RETHINKING THE LEGAL HISTORY OF CIVIL RIGHTS, 1934-1964, 40 Loy. U. Chi. L.J. 385." Accessed March 31, 2021. https://advance-lexis-com.proxy.library.emory.edu/document/?pdmfid=1516831&crid=d929be57-40bc-449b-a97b-4e13dd36bc1d&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4W4T-SKM0-00CV-X0RT-00000-

looking at history where social data is concerned, it can be seen why Wechsler was very concerned. One such case of social data could be seen in *Buck v. Bell*, in which the new era of social Darwinism convinced almost all Justices that it was constitutional to sterilize a mentally incapacited woman, with Holmes famously remarking that "Three generations of imbeciles are enough."[53] It is from such a case that Wechsler may be worried of sociological jurisprudence in the time of the 1950s, an era where Civil Rights was attempting to create better legislation for African Americans.

In *Brown v Board of Education*, a substantial portion of the unanimous ruling from the Warren Court cited studies that argue segregation was unconstitutional because it disproportionately harmed black children.[54] This is a seemingly harmless argument that can even be considered a valid one in today's time. Unfortunately, this seemingly harmless argument incurred the wrath and anger of the opposition. Alexander Bickel, a leading scholar of the 20th century, explored in his book, where he wrote that "the Court [normally] relies on its own great and mystic prestige and on the skilled exertion of its educational faculty, and finds them quite sufficient even to overcome or otherwise direct the will of the political branches,"[55] but in events such as those which happened after the announcement of *Brown v. Board of Ed.*, "there might be, not only resistance to the full reach of the new principle, but even difficulty with the enforcement of specific decrees."[56] This became realized after the *Brown v. Board*, as the after effects of this case left the South howling in anger, leading to President Dwight Eisenhower sending the

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[53] *Buck v. Bell,* 247 U.S. 200 (1927).

[54] *Brown v. Board.*

[55] BICKEL, ALEXANDER M., and Harry H. Wellington. "The Supreme Court at the Bar of Politics." In *The Least Dangerous Branch*, 244-72. Yale University Press, 1986. Accessed March 31, 2021. http://www.jstor.org/stable/j.ctt1nqbmb.10.

[56] Ibid.

National Guard to protect black schoolchildren from the irate crowds. If one used principles to say "one party deserves protection from the law more than the other" due to research, one runs into the problem of admitting false or damaging evidence into the picture. Wechsler was concerned not necessarily on biased principles damaging white people (which is an argument heard from members of the conservative viewpoint), but that biased principle would inevitably wound the people needing protection. Wechsler was concerned that if principles through the law could disproportionately favor one party, it was then easy for the law to disproportionately favor the other party in different circumstances. For example, after the ruling and after the federal forces President Eisenhower sent to Little Rock, Arkansas withdrew, there were reports of increased harassment from white students against their fellow black classmates.[57] This led proponents of segregation to make arguments that seem like they are in favor of African Americans when in reality they are really in favor of permanent separation of the races. Such an example is seen in the 1950s when the Southerners would bring up evidence showing support that children would face more pain and suffering in integrated schools.[58] Here, sociological facts were manipulated to argue that Brown was wrong in establishing that black children faced harm in attending segregated schools. Suddenly, an instance occurs when someone suggests that maybe the data proves that segregation is better for everyone, since African American schoolchildren seem to encounter more harm when in an environment with white children. This then bolstered arguments made by the Southerners in the 1950s that they could counter "the Court'[s *Brown v. Board* decision] by producing scientific evidence supporting the claim that it

[57] Walker, "NEUTRAL PRINCIPLES: RETHINKING".
[58] Siegel, Reva. "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown." *Faculty Scholarship Series*, January 1, 2004. https://digitalcommons.law.yale.edu/fss_papers/1102.

was integration, not segregation, that inflicted a variety of harms on those subject to it."[59] As someone who promoted the Civil Rights Movement and was an ally to the black community in achieving legal rights, it would be no surprise if Wechsler was aware of these efforts and factored it into shaping his legal philosophy. If sociological jurisprudence is going to be hijacked by Southerners to keep a sense of racial hierarchy, what was the use of having sociologists? What was the use of having certain reliance on numbers if it did not help those not in power? In having a principle focus on levying the burdens of a disproportionate group, progress would not progress. Rather, it would be stalled and twisted into a lifeless vessel by the Southerners. If the courts based themselves on these statistics, another catastrophe concerning race could have occurred. It was during these instances of manipulating statistics that Wechsler was then doing the opposite of the Southerners by expanding the idea of neutrality not only in law established in Congress, but the idea of neutrality when determining the outstanding principles that govern the United States Constitution, the document that is mother to all law in its nation. That is why in talking in regard to this core of the nation, he proposed a principle that remained stalwart and unchanging. The Court, in his opinion, worked best when they relied on the "fixed "historical meaning" of constitutional provision, provision that were "neutral" and therefore able to be applied equally to all parties at all times, no matter the immediate outcome." In keeping a court neutral, in keeping a court rational, there seems to be a less likely outcome in an action that might have good intentions concerning people and the law, but ultimately produce reckless outcomes.

[59] These claims could even be found in sociologists who had no interest in upholding Jim Crow laws; Daryl Scott, Contempt & Pity: Social Policy and the Image of the Damaged Black Psyche, 1880-1996, at 124 (1997); Siegel, "Equality Talk", 1486.

With hindsight, it can be seen why his concerns were legitimate. The questions in his head such as, 'how could I achieve civil rights as smoothly as possible? and How can civil rights be acknowledged in the courts?' were simple questions with hard solutions. Everything was going too slow. Patience was growing thin. Time was of the essence, as making the African Americans wait for a piece of justice seemed absurd. This blend of urgency and justice led him to the idea that the most effective way to attain civil rights could not occur in its then-current form; another method was needed to quickly bring in his desired results. It was the slow progress of civil rights that "The rough and tumble constitutional politics of the 1930s convinced Herbert Wechsler that "in the end" all constitutional strategies for helping minorities in a democratic system had to be "utilitarian."[60] Wechsler did not concentrate on the most pure path, or choosing a neutral principle because it was what he legitimately believed was the best principle per se. Rather, his decision enacted a form of utilitarian thinking, as this plan is thinking more consequentially, or the benefit of the end product, instead of thinking of the process in of itself. This thinking might perhaps be best explained by John Stuart Mill, who wrote in his well known work *Utilitarianism*

> "It is a strange notion that the acknowledgment of a first principle is inconsistent with the admission of secondary ones. To inform a traveler respecting the place of his ultimate destination, is not to forbid the use of land-marks and direction-posts on the way... ...Whatever we adopt as the fundamental principle of morality, we require subordinate principles to apply it by… … to argue as if no such secondary principles could be had, and as if mankind had remained till now, and always must remain, without drawing any general conclusions from the experience of human life, is as high a pitch, I think, as absurdity has ever reached in philosophical controversy."[61]

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[60] Norman Silber & Geoffrey Miller, Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler, 93 Colum. L. Rev. 854, 873 (1993); Walker, "Neutral Principles."

[61] Mill, John Stuart. *Utilitarianism and the 1868 Speech on Capital Punishment*. Edited by George Sher. Hackett Publishing Company, Inc., n.d.

From this, there is an understanding that there is no urgency to attempt a path towards the goal in only looking at the goal. What must be done is that in accomplishing significant tasks, one must look at the tools that help a person in achieving their respective task. In denying these two adjectives to the term, a struggle exists in determining what neutral meant, other than the inclusion of all. In fact, one such as Ronald Turner could go as far as to say that "while Wechsler's analysis of Brown "has largely been forgotten," the abstractional, ahistorical, and contextual components of his approach have not been discarded and left in the jurisprudential dustbin,"[62] signaling that the original meaning of Wechsler's words have been lost to today's proponents of anticlassification. This has laid out the foundation, the inception of an antidiscrimination principle. There was motivation in Wechsler's plan to use any means necessary to achieve civil rights. In reading "Principles, Politics, and Fundamental Laws", a collection of essays written by Wechsler, he explains "[a]s to the choice of adjective[s describing neutral principles], my case is simply that I could discover none that better serves my purpose [including the words "impartiality" and "disinterestedness"]."[63] This strikes a dissonance between a typical thought of what neutral means to anticlassification advocates, particularly those who follow a more Kantian stance, as in this scenario, Kant's idea of a supreme law ironically aligns itself with the stature of a tool; an instrument. "Though Wechsler sympathized with the notion that counts should protect the interests of "discrete and insular" minorities, particularly racial minorities, he did not think that courts could withstand majority pressure for long, as a matter of political reality."[64] Pressure was key, the key to winning the nine was to win

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[62] Turner, Ronald. "On Neutral and Preferred Principles of Constitutional Law." *University of Pittsburgh Law Review* 74 (March 3, 2014). https://doi.org/10.5195/lawreview.2013.261.
[63] [Anon.]. "INTRODUCTION" In *Principles, Politics, and Fundamental Law*, xi-2. Cambridge, MA and London, England: Harvard University Press, 2013. https://doi-org.proxy.library.emory.edu/10.4159/harvard.9780674436596.intro.
[64] Walker, "NEUTRAL PRINCIPLES", 407.

the public opinion, and the key to achieving what the court should have done in the first place, which was to protect minorities. This was a sure way to have civil rights legislation hold and be good law, and Wechsler was willing to use a principle that could effectively bring an effective result, despite the means.

After knowing this information of Wechsler, it can then be seen how the results he wanted came into fruition. One such example that can be seen as a victory in Wechsler's eyes is the case of *Herndon v. Georgia*. Angelo Herndon, an African American man, was arrested for violating a Georgia insurrection statue which stated that "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state shall constitute an attempt to incite insurrection",[65] a statute later recognized as unfairly coercing African Americans to not using their right to free speech.[66] When working on the case to win at the United States Supreme Court, Wechsler began to form the idea of a neutral principle when strategizing on winning a case for civil rights. In describing this method, Walker claims "Wechsler recharacterized his case in a manner that coincided with a surge in judicial support for "labor's rights" following the 1936 presidential election. For example, Wechsler lifted a discussion of the demonstration that Herndon had organized in Atlanta out of the footnotes and into the main text, making sure to note that Herndon had been demonstrating not just for blacks but for "unemployment relief" and "unemployment insurance" for all workers."[67] This strategy laid in the popularity of labor rights in the 1950s, a topic that appealed to not just an African American base but to the white middle class. It can be seen that this alliance between the two groups somewhat forced the Supreme Court to rule with Herndon. In arguing that a principle guiding the interpretation of the Equal Protection Clause did not focus on a specific group of

[65] *Herndon v. Georgia*, 295 U.S. 441 (1935).
[66] Walker, "NEUTRAL PRINCIPLES".
[67] Walker, "NEUTRAL PRINCIPLES".

persons, there was a larger support and agreement in the public for the advocacy of civil rights. If the Supreme Court went against Wechsler's argument, people would be in more agreement that the Supreme Court's ruling could hurt labor workers, which constituted a substantial portion of white workers. If not for the betterment of African Americans, then they should at least support the argument for the enhancement of their own lives. In allowing the white population to fit into the narrative, it allowed African Americans to advance in the fight for a more progressive society in the topic of civil rights. From this information, one sees how Wechsler's interest was not solely in having an antidiscrimination principle be the end in itself. It is that he wanted to progress civil rights in the United States, and he was not afraid to embrace a utilitarian method, the antidiscrimination principle, to achieve his goal.

In recapping this whole section, Wechsler's extensive background in advancing civil rights for African Americans leads to him promulgating an even playing field. The old hackneyed argument of dropping a bad idea because it was used by a malicious person cannot be used to criticize this legal principle. On the contrary, neutral principles were being used to advance civil rights. This leads to an ironic situation in which Wechsler's utilitarian methods led him to embrace a Kantian goal. Even though the idea of neutral principles itself seems that it comes from the metaphysical, Wechsler began the conceptual idea from a completely different standpoint. In essence, it was a means that justified the end goal. Even though the idea of neutral principles itself seems that it comes from a metaphysical standpoint, Wechsler began his magnum opus from a completely different standpoint.

While the importance of neutrality should not be understated, it should also be addressed that there is a problem concerning the definition of neutrality itself. We understand neutral principles, we went over the etymology of 'neutral,' but we see a somewhat complicated view of

what neutral actually means. The concept itself resembles a mirror of erised,[68] showing to each all their respective, desired definition of neutrality. For example, another manifestation of the neutral principles, a more twisted and demented form, one could say, can be found in *Plessy v. Ferguson*, where its decision to uphold the segregated booths of a train due its promise of maintaining a 'separate, but equal' policy has lived in infamy. However, the neutral principle could also justify this policy if taken in the context of groups, since its claim of administering equal treatment to both groups shows a so-called neutral stance on the issue, as it is not its overarching goal to benefit one side or another. This definition and application of neutral principles was not one Wechsler subscribed to. Nevertheless, these different masks that neutrality wears cause several questions to spring out of the ground. Is it what Wechsler had intended, which was for the Equal Protection Clause to be administered evenly to all different people of difference, including the privileged? Why does Wechsler view *Plessy v. Ferguson* not an acceptable application of neutral principles? It is from these questions and concerns that the word 'neutral' itself must recognize the many faces it wears to the denizens of the United States. Instead, it seems that Wechsler chose another term to associate with neutral principles: association. In doing so, a thorough investigation into association is in order. A symptom has been identified, and now it is time to view association as a potential element as to what exacerbates this symptom.

[68] Rowling, J. K. 2014. *Harry Potter and the Philosopher's Stone*. New York, NY: Bloomsbury Childrens Books.

# CHAPTER TWO: Developing the Discourse

**Several General Criticisms**

Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman?

-Sojourner Truth, "Ain't I a Woman?"

For feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating "women's experience" or "the Black experience" into concrete policy demands must be rethought and recast.

–Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics"

I'm not your friend or anything,
Damn,
You think that you're the man
I think, therefore, I am
-Billie Eilish, "Therefore I Am"

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The first part introduced several key moments in the legal foundation of the Equal Protection Clause and the reasonings behind them. However, they were solutions to symptoms felt in the mid-20th century. They were antidotes to the problems of yesterday. It is from this that we question whether these solutions are sufficient. Maybe, we can even see that even at the principle's inception, something was wrong. Therefore, an account of the anticlassification principle is not enough to figure out what currently plagues the topic of equality in the United States. This is the chapter where dissonance is thrown upon the first chapter. Here, we bring this principle into the now and critique its worth in the present and future. After all, Wechsler seemed to use the anticlassification principle because it was useful to civil rights litigation. It was a tool to advance what is admittedly a very good cause. However, what happens when the anticlassification principle is no longer appealing in its utility and brings impediments to those

who suffer from discrimination? As the principle was chosen due to its efficiency, an investigation is now needed to see not only if any part of the principle was overlooked and deserves to be noted if flawed, but it also demands a reevaluation of its effectiveness in law today.

While some such as Robert Bork have praised the idea of neutral principles, others have approached it with skepticism. One of the most scathing criticisms comes from the currently living Yale law professor Owen Fiss. In his law review article titled "Groups and the Equal Protection Clause," Fiss spearheaded one of the most scathing critiques of the anticlassification principle, in which he says it is not just merely the practice, but the whole structure of the legal principle that is flawed. One such criticism Fiss offers is that the anticlassification principle unintentionally allows preferential treatment towards specific groups. The reason why is that the principle assumes everyone works on the same playing field. The problem is that the field is played on the turf of those who have set the rules for society and in doing so have an extremely unfair advantage.[69] In having the same standard, or the same playing field, the principle complicitly favors groups such as white, male, or both. This then leads to another critique that the principle dons a mask of 'innocence' to promote itself and its criteria.[70] The principle touts itself as pure, as most ideal in a Kantian sense. It represents equality as its truest form. However, while it may be the purest, it may be worth questioning if this principle can adequately be brought down from the starry skies and adjust itself within society. Perhaps, the anticlassification principle caters to an idea we all like but does not cater to an idea that is actually needed. There is caution that justices and those who interpret the law may view differences between different

[69] If one is a baseball fan, think of the turf as similar to the Astros in 2017; Another critique he offers is that the principle depends excessively on the state and not private businesses that discriminate. This is an important critique but not of central focus in the thesis.

[70] Fiss, Owen M, "Groups and the Equal Protection Clause".

groups as an insignificant factor, which may cause alienation between the few and the general public.[71] Fiss is not alone in critiquing the anticlassification principle. Stanford law professor and now Principal Deputy Assistant Attorney General in the U.S. Department of Justice civil rights division,[72] Pamela Karlan, criticizes Wechsler's lecture as one that ignores the original understanding of the Equal Protection Clause. She claims that "the first opinions construing the Fourteenth Amendment had treated it as a prohibition on racial subordination and had recognized its aspiration that blacks become full members of civic society."[73] In other words, the initial understanding of the amendment was that it does recognize the different circumstances between blacks and whites. This idea of different groups facing different challenges was not created in the mid 1900s, as the history surrounding the Equal Protection Clause shows lawmakers then deciding that due to significant disparities, especially in the realm of money, special attention must be given towards African Americans.[74] Therefore, some who consider themselves as originalists of interpreting the Constitution should find the principle as unfaithful in sticking to the original intent of the clause.

These are some of the arguments against the principle. Even those who do argue for the anticlassification principle admit that it still needs to be improved.[75] While many have written

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[71] MATSUSAKA, JOHN G. "Disconnected by Courts." In *Let the People Rule: How Direct Democracy Can Meet the Populist Challenge*, 33-40. PRINCETON; OXFORD: Princeton University Press, 2020. Accessed April 1, 2021. doi:10.2307/j.ctvp2n3x4.6.; Tushnet, Mark. "15 Popular Constitutionalism Versus Judicial Supremacy" In *Taking Back the Constitution*, 241-257. New Haven: Yale University Press, 2020. https://doi.org/10.12987/9780300252903-017

[72] The Stanford Daily. "Law Professor Pam Karlan Joins U.S. Department of Justice," February 11, 2021. https://www.stanforddaily.com/2021/02/10/law-professor-pam-karlan-joins-u-s-department-of-justice/.

[73] Karlan, Pamela S. "What Can Brown Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause." *DUKE LAW JOURNAL* 58 (n.d.): 21.

[74] It might even be questioned as to how this idea would be accepted if introduced to society today. If introduced in the 2010s, it could be a possibility that this principle could be held in a regard so odious that the neutral principles today could be aligned with sentiments such as 'All Lives Matter.'

[75] Dorf, Michael C. "A Partial Defense of an Anti-Discrimination Principle." *Issues in Legal Scholarship* 2, no. 1 (January 12, 2002). https://doi.org/10.2202/1539-8323.1006.

critiques of neutral principles and its role in the Equal Protection Clause, one theme that has not been in the spotlight is the theme of association.

Association also associates itself with the anticlassification principle, as the legal principle seems to inevitably bring up a standard which groups must be like. However, association is not really discussed when addressing the issue of this legal principle. What is more discussed is the topic such as the equal playing field or the definition of neutral. However, we have seen that the principle does not necessarily only apply to neutral. In fact, it may even be questioned even if Wechsler thought neutral was the perfect adjective to describe the ideal legal principle. Therefore, it may be the case that another symptom could be located not only in the area of an equal starting line, but in the area of recognition. With this realization, it is now necessary to conduct a full interrogation of the idea of association.

**Association**

Association is probably one of the most handy tools used in creating a certain type of knowledge. Rising from the Medieval Latin term 'associationem', meaning 'to join with', association first arose in the 1530s, in which it meant an "action of coming together for a common purpose".[76] This definition would then evolve in the 1680s as people having a common purpose through the mind, or through ideas.[77] It no longer applied to similarities between the physical events or actions, but it applied to similarities between non-physical things such as thoughts or personalities. While the term came into fruition during these times, the idea, however, can be seen centuries before the term's emergence. During the times Before Christ, the famous Ancient Greecian philosopher Aristotle wrote "Equality consists in the same treatment of

[76] "Association | Origin and Meaning of Association by Online Etymology Dictionary." Accessed March 31, 2021. https://www.etymonline.com/word/association.
[77] Ibid.

similar persons."[78] This rhetoric shares similarities with the term 'association,' as both the term and Aristotle both establish and expand on an idea of comparing similarities between two persons. These two paths, one of the idea and one of the term, can help one to give a clearer understanding what association is and how Wechsler found this to be a benefit.

At a closer look, association became more of a factor, a factor that Wechsler found vital in fighting for civil rights. It is due to this that one could even find that "Wechsler found problematic, not the neutral application aspect of his argument, but the Court's selection and application of an antidiscrimination rather than a freedom-of-association principle."[79] Without association, there was no path forward for progress. Without association, people in power and those who were everyday citizens had no reason to care about the rights of others. Therefore, Wechsler associated the struggles of African Americans through mediums that included white men, such as having antidiscrimination policies that do not have race as a factor or in associating the struggles of African Americans as a struggle of labor rights, which also appealed to many white working class citizens. In associating African Americans with the majority, more support was given to civil rights legislation and more progress was being made. This is a credible thought, as Wechsler wrote:

> For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt he must carry but also in the benefits he is denied.[80]

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[78] Aristotle, *Politics*, trans. Benjamin Rowett (Internet Classics Archive, n.d.), bk. 7, http://classics.mit.edu/Aristotle/politics.7.seven.html.
[79] Turner, "On Neutral and Preferred Principles", 481.
[80] Wechsler, "Towards Neutral Principles", 34.

What can be understood from this snippet of Wechsler's writing is that he did not quarrel with the non-neutrality of a principle. Rather, Wechsler found it appalling that people of different races were not allowed to mingle, correspond, and associate with one another. This is not a radical claim to make, especially when advocates of civil rights were appalled at the decision of *Plessy v. Ferguson* and had the mission to eradicate Jim Crow laws and segregation that largely manifested itself in the South. However, the freedom to associate does not necessarily comply with a neutral principle, since I explained above that a neutral principle could legitimately apply to a *Plessy v. Ferguson* scenario.

This definition of equality correlates with the neutral principle Wechsler advocates for. In the Equal Protection Clause, it states that the nation provides all persons equal protection of the law, despite race, gender, or sex-preference. In adhering to this section of the 14th Amendment, the antidiscrimination principle takes the idea of Aristotle to distribute a literal equal protection of law, using similar persons in the sense of character rather than physical features. Expressed through the words of Professor Owen Fiss, he writes that one part of the antidiscrimination principle "reduces the ideal of equality to the principle of equal treatment–similar things should be treated similarly."[81] In an attempt to the antidiscrimination principle boxes and scrutinizes actions to determine whether a state action fits similar to the standard that judges apply or view it as an "ill-fit". If the former, the case brought forth is determined as state violating the Equal Protection Clause, and if the latter, the case is determined as the state having a legitimate reason in violating the Equal Protection Clause. From a general outlook, this represents an idea that one must measure up to a certain standard.

[81] Fiss, Owen M, "Groups and the Equal Protection Clause", 108.

From this perspective, let us examine the cases mentioned above and see how the narrative changes when thinking of association as a critical part of neutral principles. Here, one may not be affected by this realignment, but some may find this restructuring a little weird. However, it needs to be done, as it is a critical part of understanding the anticlassification principle.

*Brown v. Board of Education*

Black school children should be allowed to go to school with white school children. However, this decision was made not from recognizing the black school children are different but deserve the same rights. Rather, it should be done, because if the other were to happen, if white school children were not permitted to attend class because they were white, this would be a grave injustice.

*United States v. Virginia*

Women were able to attend the Virginia Military Institute based on their merits. However, it is not because they have gifts or other perspectives in the military that are deemed useful. Why they were given admittance is due to similarity to the male applicants. After all, if men were denied access to a school not based on their merits but rather on their gender, this decision would be considered a violation of fundamental rights. If men were not allowed to do something based on their sex, the nation would be in an outrage.

*Obergefell v. Hodges*

Same sex couples are now able to receive marriage licenses in all 50 states. Was it because we recognize same sex couples as different from us but nevertheless deserving the same rewards and actions that heterosexual couples receive? In using association as a factor, not

necessarily. Rather, it rests on the perspective of a normal relationship: heterosexual parterings. If white heterosexual couples were not able to recieve marriage licenses, the outrage from majority of the population would be too much too take over such a event. Therefore, same-sex marriage should be constitutional, as it can present a hypothetical to heterosexual pairings and ask if the roles reversed, would they be okay with this circumstance?

It is from this change of view that the focus now shifts towards our dependency on association. Is it a medicine that was once helpful but now detrimental after excessive usage? Why I ask this is because in the realm of medicine, some treatments such as antibiotics or vaccines at first relieve people of the pain. However, if the people take an excessive amount of antibiotics when feeling bad, the antibiotic can diminish in effectiveness, even to the effect that they no longer are a threat to the bacteria. In the case of a viral infection, if a new strain adds on to the core structure of the virus, the vaccine as well can diminish in effectiveness. From this analogy, one can hopefully begin to question the topic of association and its effectiveness of curbing racial discrimination. Is association still as effective as it was several decades ago, or does an alteration need to be made? If this is the case, what should be done? I was curious about this theme and its usefulness, but I grew even more curious about association and its supposed benefits on one of the multiple eventful days of 2020: the day that Ruth Bader Ginsburg died. On September 18th 2020, Ruth Bader Ginsburg died from pancreatic cancer. This news was broadcasted nationally, and many citizens, including myself, mourned her loss. It is incredible to think of what legal work she had done to advance the rights of women, especially in the workforce. Her contributions as a lawyer and as a justice on the Supreme Court will hopefully continue to be remembered as acts that helped better this nation. After her passing, the news

media began to broadcast her major accomplishments, both as a litigator and as a Supreme Court justice. When watching these clips and interviews, one case in particular stood out: *Weinberger v. Wiesenfeld*. It is a case that is generally praised and it is cited as a clever and brilliant strategy. However, with this 2020 hindsight, it is worth looking over *Weinberger v. Wiesenfeld* and assessing the impact it has made.

**The Puzzling Case of *Weinberger v. Wiesenfeld***

In 1975, the Court heard a case regarding sex discrimination. However, the case presented itself with a twist: the person who claimed discrimination was a man named Stephen Wiesenfeld. Wiesenfeld's wife died in childbirth, a traumatizing event in more than one way. While obviously the loss of life was a blow to the family emotionally, it also unleashed a serious financial blow to the remaining family. In what was then a stereotypical household, the father typically made the income, especially in the mid 1900s. However, this family was a little out of the ordinary in the fact that Wiesenfeld's wife was the breadwinner of the family before she died. With her death, Stephen Wiesenfeld was left with a child without having a substantial amount of income to take care of the child. This dilemma led Stephen Wiesenfeld to the conclusion that he could apply for social security benefits for himself and his son, since he would not have been the one who provided the main source of income, if his wife survived. However, when going to apply for the social security benefits, he was made aware that even though his son could receive them, he himself could not. This was due to the fact that the Social Security Act provides benefits based on the earnings of a deceased husband and father only, not the earnings of the breadwinner, who happened to be the deceased wife and mother in this circumstance. The benefits that did exist for a deceased wife and mother, however, only benefited children, and not

the deceased's spouse.[82] Due to this situation, Wiesenfeld was denied social security benefits because even though he fit all the economic criteria, he was a man, and that alone prohibited him from receiving financial support. Being a man was an impediment.

His legal team, which included Ruth Bader Ginsburg, found this to be an opportune case to advance women's rights. Taking inspiration from civil rights lawyer Thurgood Marshall's idea of arguing certain cases at the Supreme Court to then build off of each other to pave the way for more rights, Ginsburg found this case to be a very good building block to build a precedent off of.[83] However, what made the case so phenomenal was that it was able to show a man under United States law could be subject to unfair discrimination. Before this case, there was a conception that discrimination under the basis of sex only disadvantage women. There is, of course, plausible reasoning for this statement. Many laws and Supreme Court rulings have found women to be inferior to men, e.g. *Buck v. Bell*; *Bradwell v. Illinois*. Decisions such as the ones just mentioned have been damaging for women. These decisions did not view women as serious working class citizens, and these rulings have led to a life of less dignity than a man's. However, with the script flipped, with this realization that men could also be discriminated against, this specific case revealed to the all male Supreme Court that even someone such as them could or could have been discriminated on the basis of sex, and in revealing this unique point of view, cases that promoted women's rights then had a chance to be recognized and established in law, and the second wave feminists seized that opportunity. From this case, Ruth Bader Ginsburg built a strong foundation to prepare more cases to win in the Court. Each case that won in the Court became a precedent that bolstered the argument of a future case concerning women's

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[82] *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

[83] American Civil Liberties Union. "In Memory of Justice Ruth Bader Ginsburg (1933-2020)." Accessed March 31, 2021. https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020/.

rights; each case became a stepping stone that led to equal rights for women.[84] That is why this case is an important one. Without the case of *Weinberger v. Wiesenfeld*, future cases could not be built on top of it. In essence, it was a critical piece of an intricately built house of cards. With it, one can argue another case that now does not have to prove the sex discrimination exists. Without the case, one cannot attempt to argue for more complex yet important areas of women rights. Instead, one will be stuck attempting to establish the foundation of sex discrimination, which is only to recognize the existence of sex discrimination.

One cannot deny the good impact *Weinberger v. Wiesenfeld* has done for women. With the help of this case, women's rights not only expanded, the idea of women's rights contained more legitimacy in the purview of men's vision. In revealing that men could be discriminated, it then made it evident that the concept of sex discrimination was a legitimate concern for the citizens of the United States. In establishing gender discrimination as a legitimate violation of rights, women could now argue that they faced discrimination on the basis of sex and would not be criticized as to whether or not discrimination on the basis of sex was a legitimate form of discrimination or not. Or, in other words, women could now argue on the basis of sex, because with cases such as *Weinberger v. Weisenfeld*, women now had a clear association with a problem that a man faced. That is what makes this case relevant to this chapter: it heavily ties to the theme of association. In fact, the case in its essence is a topic of association, as it concerns the wants and needs of a woman through finding themselves relatable to a man, who in this case was Stephen Weisenfeld. Therefore, it should now be asked, as we are now supposedly living in a more equal and more humane world that respects people of difference, why could women not get

[84] As the ACLU commented, "She modeled her approach [of selecting cases] after that of Thurgood Marshall on race discrimination, planning for a series of cases at the Supreme Court, each precedent paving the way for the next that would further expand rights and protections," ACLU, "In Memory of".

there themselves? These are questions that will inevitably be asked once the public is finished fawning over the tactic and becomes more attracted towards progress than the event. For gender discrimination to appear legitimate, a white man must associate himself with the problem. Relatability, ties, connections must be made to realize what is wrong and what is right. While it is great that one finds a commonality in harrowing problems, the question must be asked if every problem can relate to everybody. What happens when association no longer exists in explaining a problem? Can association bear the heavy burden of solving all problems of equality? Typically, we have not needed to worry about this problem. After all, law granted African Americans civil liberties after finding a comparison between them with the white working class, and the law also granted women civil liberties after finding similarities between women and men. It is from this that one feels assured in the power of association and of its effects on law. However, race and gender are not the only forms of discrimination in the nation. Disrimination no longer looks on race or gender as its main target but has gone into a more complex burrowing ground that a small group of people label intersectionality. Even though it seems that one may scoff at the idea that this problem will not arise, it may already have in cases regarding intersectionality.

**What is Intersectionality to ...?**

Intersectionality is a concept that wrestles with multifacetedness of identity, including "the interactivity of social identity structures such as race, class, and gender in fostering life experiences, especially experiences of privilege and oppression."[85] In its current form, it wrestles with topics such as the mixture of gender, race and sexuality and theorizes as to what these mixtures mean in one's life. It has since assessed multiple groups that cross paths with each, such

[85] Gopaldas, Ahir. "Intersectionality 101." *Journal of Public Policy & Marketing* 32 (2013): 90-94. Accessed April 1, 2021. http://www.jstor.org/stable/43305317.

as asian women, black homosexuals, etc. However, before its expansion into the vast areas of human identity, it originally focused around the black woman. The idea began to rise in prominence with the works of feminists such as Sojourner Truth, who talked of the plights black women must endure and their identity in society in her work "Ain't I a Woman?" In this speech during which predated the Civil War by a decade, she remarks on the tribulations the black woman faced, remarking "That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman?"[86] Truth describes this mundane action to highlight a unique perspective, which is that even though she was a woman, she is not treated like a white woman. In her experience, men never viewed her as a woman. If they did, they would act the same as they have around white women, they would have engaged in the then standard societal procedures such as helping a woman into a carriage. This never happened with Truth, in her recollection. It was from this type of experience that she determined that she must not be identified as a woman but as something else. This was an important moment of a realization that black women and their fight for equality may be on a different and even steeper climb than the paths of black men and white women. After the time of Truth, works concerning the multitudes a person carries have been explored by women such as Angela Davis, Maria Lugones, and Claudia Jones, all phenomenal women who expanded common understandings of what gender and race meant to society. With the works of exemplary scholars such as the women listed above, there has been an ever growing awareness and recognition of intersectionality and its critiques of society today. While it now seems like an all encompassing phenomenon that finds itself relevant in all areas of life, some may find it

[86] Truth, Sojourner. "Sojourner Truth: Ain't I A Woman? (U.S. National Park Service)." Accessed March 31, 2021. https://www.nps.gov/articles/sojourner-truth.htm.

surprising that its official term did not come into fruition until the 1980s, where it was officially introduced to the world by Kimberle Crenshaw in a law review. In her seminal work "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," she begins with the claim that "Black women are sometimes excluded from feminist theory and antiracist policy discourse."[87] With this statement, she questions whether law has identified all forms of discrimination and criticizes how law classifies it. Why she does is that she found that multiple forms of discrimination still exist, such as discrimination against women of color, and law has not done anything as of yet to rectify or to acknowledge this claim. It is because of this dilemma that she argues that the problem a black woman faced was entirely different from other disadvantaged groups such as black or female. The black woman faced a problem unique to others, and this was the problem of intersectionality.

What can be arguably claimed as the most poignant example she raised was the case of *DeGraffenreid v General Motors.* In this case brought up to the U.S. District Court for the Eastern District of Missouri, five Black women alleged that the employers of General Motors discriminated against Black women. They claimed that the company did not hire Black women before the year of 1964 and that all of the Black women hired after 1970 lost their jobs disproportionate to other social groups.[88] Despite these womens' claims, the judges ruled against the black women, stating that they did not face discrimination because General Motors did not show discrimation towards African Americans or women. The first reason they gave for their decision was that Title VII of the Civil Rights Act, a statute designated to protect employees and

[87] Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," n.d., 31.
[88] Crenshaw, "Demarginalizing the Intersection of Race and Sex", 141.

job applicants from employment discrimination based on race, color, religion, sex and national origin,[89] did not mean that an employer had to recognize the fact that women of color could face different from of discrimination than what the authors of Title VII expected. The judges wrote that "The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."[90] In saying this, the judges who decided on this case found that this claim the black women made was not legitimate, as they found that black women were not distinct from black men in discrimination cases. They even went further to question if making this argument was reasonable, as it could lead to a rabbit hole concerning class identity. It is from this decision that Crenshaw found that black women faced a serious problem, as this opinion added on towards of pile of cases that Crenshaw interpreted as dismissing the idea that black women faced discrimination that is identitical to one a black man or a white woman faces. The Court in taking each group seriously completely tossed aside the notion that other forms of discrimination exist. She says that "The court's refusal in *DeGraffenreid* to acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences. Under this view, Black women are

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[89] "Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission." Accessed April 2, 2021. https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

[90] Crenshaw, "Demarginalizing the Intersection of Race and Sex",142; It should be worth taking a look at the inception of Title VII, the iconic Pauli Murray actually promoted Title VII, as "When the sex amendment was in danger of failing in the Senate, Murray used her race-sex analogy to dispel the impression that the prohibition of sex discrimination was necessary only as a protection for white women. In a memorandum circulated among Senators and eventually reviewed by the White House,98 she insisted that including sex as a prohibited basis for discrimination was the only way to extend the benefits of Title VII to the group that most needed them: black women." (Serena Mayeri, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective).

protected only to the extent that their experiences coincide with those of either of the two groups."[91] There is a faulty presupposition in this type of thinking that the two are separate, distinct, and that cases must adhere to one or the other. A black woman cannot get hired because a hiring manager already has African Americans employed (they are all men) and women employed (they are all women). Due to this logic made by the company, no discrimination occurs, a claim that the court reinforces. However, as Crenshaw notes, discrimination is not that simple. Discrimination occurs in other categories that the law has yet to define, and it is because of this absence of ideawithin the legal system that black women can expect little protection, a sobering fact that requires some sort of action and discourse.

While *DeGraffenreid v. General Motors* was decided in this manner, the confusion and the absence of clarity on the topic of intersectionality still lingers in the air. An example can be seen in 1980 case *Jeffries v. Harris County Community Action Association,* where the court faced another case of an African American woman who sued the corporation she claimed unlawfully terminated her contract. She claimed her termination was wrong, as it was based on the areas of race, sex, and race and sex. When the court had to decide the validation of the last claim, they in a surprising turn said did recognize that black women did face certain forms of discrimination that differ from black men and white women. They wrote "discrimination against black females can exist even in the absence of discimination against black men or white women," which then expanded upon the writings of the 1964 *DeGraffenreid v. General Motors*."[92] While it is admirable that the courts recognized this discrepancy between groups, it has rendered precedent useless. In having the DeGraffenreid case deny the concept of intersectionality but then having it

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[91] Ibid.

[92] Li, Peggy. "Recent Developments Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, August 31, 2013. https://doi.org/10.2139/ssrn.2318802.

acknowledged in Jeffries, no clear path is made available to those in the judiciary branch. A judge is able to decide if discrimination of race and sex is a legitimate form of discrimination and then  and cite stare decisis in either decision, since cases for different opinions exist. It is due to the indecisiveness of the courts that the problem might have grown larger, due to the blurriness of stare decisis. Simply put, the precedent that has not walked a fine line but rather has danced in an illogical waltz. In 1998, the judges on the ninth circuit decided in *Lam v. University of Hawai'i* that "the [district] court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism "alone" and looking for sexism "alone," with Asian men and white women as the corresponding model victims."[93] In this, the jargon and tone of the court reveals that it is a problem that women of color are still not recognized as facing legitimate forms of disctimination. However, these ideas are not recognized in the 2012 case of *Shao v. City of New York*, Connie Shao, a Chinese American female, was fired from her position as the City University of New York's Director of Finance, despite having received positive employment evaluations. She claimed that her contract was terminated due to alleged "discrimination on the basis of her race, national origin, and gender; retaliation; and hostile work environment in violation of Title VII of the Civil Rights Act of 1964."[94] The US District Court for the Southern District of New York Judge found that Shao's claims that evidence of racial or gender discrimination were not sufficient to allow the court to side with Shao and that her claims were needed to be addressed by a trial court rather than a federal disctrict court.[95] While it may be interpreted that Shao did not have enough evidence to

[93] Li, "Recent Developments",164.
[94] *Shao v. City University of New York et al.*
[95] Ibid.

show a violation of Title VII, it should be questioned that if Shao did agree to a trial, could she provide the evidence needed to show she was discriminated against as a Chinese American female? What if the evidence needs to be placed in a different category? And what if the discrimination she faced was unique compared to Chinese American males and white females? These questions and the pause that ensues after it show that intersectionality is an area that needs more analysis and discussion not only in the public, but also within the courts.

**The Problem of Association**

As established, there are three levels of scrutiny. In the legal doctrine that categorizes as to what degree states can lay down laws or statutes that contains discriminatory practices, racial discrimination is viewed under strict scrutiny, and gender discrimination is viewed under intermediate scrutiny. However, the three-tier scrutiny faces possibly its most infuriating challenger when a case involving a person such as an African American female cannot be neatly fit into one category. When a woman of color brings a discrimination case to the court, how does she address her accusation?[96] Does she categorize it as discrimination against her race? Her gender? Is it even possible that she can list her form of discrmination as a mixture of both? That does not seem quite accurate, as displayed in the case above. Of course, the straightforward answer seems to be that she should claim discrimination as an African American woman. But where does that lie on the scrutiny tier? It is not exactly in strict scrutiny, as it is not purely a race problem, but it is not exactly in the intermediate scrutiny either, as it is not purely a gender problem. Rather, it inhabits a grey zone, which does not exist within the legal system. Or maybe

[96] It is also worth mentioning that intersectionality does not only apply to women of color, but to others who are a minority in two or more groups, eg African American homosexual, Asian American female, etc.

there is not a grey zone, as this signifies that law has thought of this problem. Maybe, we need to look a little outside of the scrutiny test and look at the principles that guide it.

This has been the main focus of intersectionality, the idea that cases concerning both race and gender do not squarely fit into a category or classify an individual.[97] Because of this, the main focus has been attempting to determine its category. In recognizing the problems that intersectionality present, advocates of advancing this type of equality hope to have people who feel intersectional scrutiny feel recognized in the law. They feel that they are protected and also included in the discussion when in comes to arbitrary forms of discrimination. There is an importance in this discussion, as it not only first recognized the problem of discrimination on an intersectional level, but it is actively trying to find a place where intersectionality can be recognized. However, in doing so, questions are not asked about the system in its whole, but merely about its placement within it. Rather, it is worth asking a different question before arguing about why justices should recognize intersectionality as a crucial factor in discimination. It should be asked, what made it possible for justices to accept that the Equal Protection Clause extends itself to those who are not detailed in the 14th Amendment? It seems that association is an answer to seriously consider. Ginsburg successfully argued for the law to protect a person on the basis of sex, despite the 14th Amendment never addressing that women is the subject of the Equal Protection Clause. The text itself would not indicate that one should be protected from discrimination on the basis of sex, yet the Justices now recognize this form of discrimination exists. This is a very puzzling circumstance, as it allows for some forms of discrimination as valid, but then at the same time has the possibility of denying the existence of discrimination concerning a blend of multiple factors. Was it that these Justices immediately found

[97] It is also worth mentioning other combinations as well, race and children, race and LGBTQIA, etc.

discrepancies between current society and the constitution? Did they even know different forms of discrimination occurred? And maybe most importantly, can the anticlassification principle acknowledge these different manifestations fo discrimination? To answer this question, it is time to go back to the *Weinberger v. Wiesenfeld* case. This case has been remembered for advancing women's rights, but there is now an excessive reverence for the decision. Certainly, Ruth Bader Ginsburg created a plan that even Gloria Steinem has called 'genius'.[98] However, this type of finessing has led the majority of the people to the wrong conclusion. They take more pleasure in manipulating a conservative justice to get what they want in regards to work discrimination. It then leads women who find themselves into a state of shock when they learn that a substantial number of men will still not support *Roe v. Wade*, as one has not made the argument that a man has been discriminated against as to what he can or cannot do with his body. It is in this situation that women realize that finessing the court system is not enough–the method cannot forever achieve the same goal. In fact, it would not be surprising that feminists such as Ruth Bader Ginsburg would appreciate it if justices could recognize gender discrimination without feeling personally invested in the case. Therefore, it must be re-examined the constant vehement praise that goes into using this tactic, the question concerning how one can view another as having faced discrimination when the former is not at all like the latter, and the final return to the topic association, which is prominent in race and gender, but elusive when combined into one. Maybe it is what Crenshaw said, which is that

> These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account women are subordinated. Thus, for feminist theory and

[98] Cohen, Julie, Betsy West, Ruth Bader Ginsburg, Bill Clinton, and Sharron Frontiero. 2018. *RBG*.

> antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating "women's experience" or "the Black experience" into concrete policy demands must be rethought and recast.[99]

In this particular section, Crenshaw boldly brings up the topic that maybe the structure we currently use cannot work. Maybe, a new structure must be set, a structure that can fully realize the idea of equality. Perhaps, it is time for a new principle to take its place, a principle that can accommodate the Black woman. However, I am getting ahead of myself here. Before fully diving into this idea espoused form Crenshaw, we must go back to association and fully flesh out what now seems to be an alarming concern.

From the mindset of someone such as Wechsler, progress is made through having problems disadvantaged groups typically had and finding a way for it to be relatable to those who typically benefit from law. However, what happens when a case can no longer include everybody? What if discrimination occurs that a labour worker or a white man cannot relate to? Can the anticlassification principle be used anymore? Or is it time to resume the journey to equality? What comes next concerns how discrimination of sexual orientation is categorized relative to other groups that face discrimination. Even though all groups face discrimination, do people identifying under the structure of intersectionality face problems that other groups do, and how will the law address their distinction, if it even can associate with it? What is so important about the last question is the work 'associate'. With association, with the account of *Herndon* and the account of *Weinberger v. Wiesenfeld*, there is a theme that white men could grasp, and thus a relatable story. However, in regards to such areas such as intersectionality, the white man seems to have a harder time finding an association. But why is it so hard to associate? Is it that the ones in the dominant group know about the struggles of the other parties but judge them as

[99] Crenshaw, "Demarginalizing the Intersection of Race and Sex", 140.

insignificant? Or, is it more that they do not comprehend the problems of others, and it is because of this lack of knowledge, this lack of information that others may regard as almost innate that intersectionality is not yet settled in law?

For a large part of history, there has been a tendency to absorb knowledge not through others, but through the I, the ego. It may have begun with Aristotle, who claimed that equality means treating similar persons the same.[100] If a person is good, the person is treated like other good people in society. If a person is bad, the person is treated like other bad people. In defining equality as having two similar people receive treatment, it not only creates the concept of association, but it also creates a standard to judge people as whether they are the same or not, or in the scenario presented, whether they are good are bad. From this, one then begins to wonder what is similar to what; who is similar to whom? Here, there is a comparison of two objects, and ultimately, the relationship will morph into the subject and the object that is relative to the subject. This idea may have then trickled down through history when the father of modern philosophy, Renee Descartes, began his quest to know who he was through eliminating all knowledge and senses of his surroundings and reflecting on what he determined was true and false. As he wrote in *Meditations on First Philosophy,* "I shall proceed by setting aside all that in which the least doubt could be supposed to exist, just as if I had discovered that it was absolutely false; and I shall ever follow in this road until I have met with something which is certain, or at least, if I can do nothing else, until I have learned for certain that there is nothing in the world that is certain."[101] What Descartes states is that in his process of learning what is true, he cannot immediately trust external sources to obtain knowledge. Instead, he himself must eradicate all the distractions that disguise themselves as truths. It is from this that one identifies this type of

[100] Aristote, *Politics*.
[101] Descartes, René. "Meditations On First Philosophy," n.d., 33.

inquiry as an egocentric approach, in which a "[Cartesian Subject] [is] endowed with rationality and scientific knowledge to overcome all obstacles facing humanity. Here was born the "Imperial Being" who defined himself as the center of the world… … [and] aspired to live in a world without others."[102] From this moment, in order to think, it must be from the point of the self. In this circumstance, knowledge comes from me, thoughts and ideas are within me. Then later on, it would develop to the idea that what I know must be true, what I think must be true, and that is all that matters. From this, this viewpoint is not only seen in works of other philosophers such as Kant, who in his essay placed doubt on institutions and others and rather focuses on the ego to use reason, but it can also be seen in the workings of power in the United States today. It is from the viewpoint of those historically and currently in power that approach the problem of judging through their eyes and their perspectives. It was through the standpoint of the men who established the United States and then stayed in power. So, when someone who is not a white man brings her own perspective and her own approach, knowledge conflicts and truth wavers.

While this is a very effective way to receive knowledge of some things, it should be noted that all this knowledge comes from himself, from what he determines as true. Or, one may put it in this manner, all knowledge comes from what he associates from his point of view. He is the object, and everything else revolves around him. This is an important conflict that barrels right into the entire conflict of inequality. People do not know everything, we are all fallible beings, but association, which ties itself with the association principle, demands all to know everything, or at the very least know something that is the equivalent to another person's

[102] Ndlovu-Gatsheni, Sabelo J. "A World without Others? Specter of Difference and Toxic Identitarian Politics." *International Journal of Critical Diversity Studies* 1, no. 1 (2018): 80-96. Accessed April 1, 2021. https://www.jstor.org/stable/10.13169/intecritdivestud.1.1.0080.

circumstances. It does not allow one to stop and exclaim 'I have never encountered this problem, I most likely never will, so why am I comparing my circumstances or other circumstances noted in the law if it never occurred?' Instead, it forces judges to make an awkward leap. Association convinces the judges that two themes are similar when in reality a juxtaposition occurs. Philosopher Annette Baier, who gained prominence through her feminist philosophy in the 20th century, articulates this situation well in writing on the concept of trust. While this thesis is not necessarily about trust, Baier's writing still hammers the point of why association is not a sustainable method. In her work she describes trust as "accepted vulnerability to another's possible but not expected ill will (or lack of goodwill) toward one."[103] Trust furthermore requires a voluntary agreement.[104] While this may at first seem irrelevant to the topic, it remains present in the conversation, as she elaborates how trust has been misconstrued in situations when levels of power are different. As Baier rightfully points out, many social philosophers of the past viewed trust on the themes of contract. In the two part invention that is trust, both parts are equally shared and worked in harmony in a very scrutinized and balanced manner. However, there is a presupposition of both parties being equal. It has been in many instances just in present day life when people who have unequal amounts of power must trust each other, e.g. boss and the employee, the teacher and the student, and friends in certain circumstances. It is from this that the narrative has been dictated that every interaction is equal. However, Baier points out that without the women's side, an incomplete understanding of trust exists. It is from this that association is shown to have a weakness. Association relies too much on the group in power, and in doing so leaves the one without power without a voice and a necessary perspective on what must be done to have equality exist in a legitimate form. This is relevant because one of the

[103] Baier, Annette. *Moral Prejudices*. Harvard University Press, 1995.
[104] Baier, *Moral Prejudices.*

purposes of law is to organize society and to create a world that is fertile for all to flourish.[105] However, when laws and social circumstances are pre supposed to be equal but are not in reality, the women's narrative is not fully cemented. The perspective comes from the other side, and it is from this side that determines that the current social setting is fair. The field is made by the current group in power, and it is up to the them to decide if a woman's problem can be similar to the other sex.

This problem explains one of the reasons why Wechsler's so-called neutral principles are not sufficient in bringing about equality. However, to explain the problem in the context of Wechsler, it is best to look at a very illuminating section of the writing of University of Houston law professor Ronald Turner. In explaining why association was a key element for attaining civil rights, Turner provides an anecdotal account Wechsler gave in where he recalled an encounter with Charles Houston, an African American lawyer. He wrote "In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess."[106] While this situation of not lunching with an associate is unfortunate (depending on your extrovert/introvert character), Turner raises a flaw of Wechsler's lament, articulating that

> In this paradigm of problematic presumptuousness Wechsler audaciously speaks for Houston (a prominent African- American lawyer) and constructs an all-consideration-of-race-is-symmetrical world in which Wechsler is supposedly equally affected and disadvantaged by the white supremacist regime that banned Houston (but not Wechsler). For Wechsler, "the fact that a white man and a black man cannot eat together in a white restaurant involves a symmetrical burden for both, a simple denial of associational freedom.[107]

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[105] This is not to say that current law is doing that at the present moment, I am suggesting one of the functions of an ideal law.

[106] Turner, "On Neutral", 477.

[107] Turner, "On Neutral", 478.

In this scenario, Turner points out that there is something odd in comparing how whites carry the same woes as the african americans. It seems odd, since it seems to have an event in which the white person is upset because he has no one to lunch with, while the African American is upset because he has not even been given an offer to an adequate place to enjoy his lunch. These two complaints differ in their reasonings of the same problem, and it seems that if carried through association, those who attempt to understand the African American's perspective will not understand that person, but will rather understand their own interpretation of the African American perspective. Even though Wechsler may have advanced civil rights, there is still more work to be made, since these conflicting thoughts and different scenarios of association still exist and have not been either addressed or solved properly. This example of what Wechsler's concern was in this scenario may have indicated a significant flaw of the antidiscrimination principle: association cannot in the end achieve actual equality. It can go towards the principles, but it hits multiple roadblocks when interacting with thoughts and ideas different from others.

This problem also is seen when applied to the scenario of intersectionality. In law professor Serena Mayeri's work, "A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective," Mayeri notes the tactics women attempted to gain equality with some degree a success. The tactics they used were in the fashion of Civil Rights leaders who were attempting to achieve equality for black citizens. However, when using such tactics, women such as Ruth Bader Ginsburg were only able to procure some rights for some women. With using this form of association, the case of *Craig v. Boren* decided that women's rights fell underneath an intermediate form of scrutiny, a decision that left feminists displeased.[108]

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[108] Mayeri, Serena. "'A Common Fate of Discrimination': Race-Gender Analogies in Legal and Historical Perspective." *The Yale Law Journal* 110, no. 6 (April 2001): 1045. https://doi.org/10.2307/797563.

Ultimately, the women, who tried to expand their rights even broader (and rightfully so) through mimicking the process of civil rights, ended up failing to procure their rights and even to an extent curtailed the progress of those attempting to ensure the protection of rights for African Americans.[109] This read is a rather interesting one for several reasons. One, it shows that the relationship between the black community and white women have not significantly enhanced since the early 20th century. Two, it shows the failure of association. Women attempted association through African Americans, who were attempting association through white men. However, this unstable ladder fell, and women, especially women of color, who were least connected to the ladder, suffered in association. This shows that association is unstable, that the source has not yet shifted from white men to black men. It is still fixed upon the white man, and women and women of color are just not as similar to them as black men are in crucial parts of law.

These perspectives and philosophical enquiries are then most succinctly and enwrapped by Catherine MacKinnon in her work *Feminism Unmodified*. In her work full of essays and talks with college students, she critiques the way that laws viewed and still view women. One of her most poignant critiques concerned the idea of similarity, and how the female was judged on how similar she was to a man. She argues that this judging between sex was detrimental to the female, as "Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female

[109] Mayeri, "A Common Fate", 1007.

standard, but do not be deceived: masculinity, or maleness, is the referent for both."[110] In this writing, she delivers a staggering blow to the state of law and hammers home the problem of equality today. She refers to the problem that men are focused on the problem in the manner of a Cartesian egocentric approach. They absorb knowledge from the areas around them, and it was from their view that law was created. However, in doing so, they remain blind to areas not in their purview. They did not take into account that scenarios exist that they could not only imagine, but they would never experience. In faced with that problem, they must make an awkward leap to solve the problem, and this unfortunate leap cannot adequately prepare one to safely land onto the grounds of realized equality. This is the problem that intersectionality presents: their experiences may well be far from any experience a man may face.

In understanding this dilemma more, a more practical analogy may be of some use. A doctor encounters a female patient. She complains of some discomfort breathing and some upper back pressure. However, she says she has not felt any chest pressure. Because of this, the doctor rules out the possibility of the woman having a heart attack, since heart attacks always included chest pressure. It may even be that the doctor wonders if she is exaggerating how bad she feels, and dismisses her without any treatment. In looking at multiple studies, the doctor would not be entirely at fault. All the studies show that chest pressure and heart attacks always correlate with each other, and upper back pressure is not a general symptom of a heart attack. So what went wrong? As it turns out, the problem was that very few studies have been done with women and their heart attack symptoms. Almost all research prior to the 21st century concerning heart attacks was done through analyzing the male body. Since the male body was the subject, doctors had knowledge of the medical problem only through that medium. However, as recent studies

[110] MacKinnon, Catharine. *Feminism Unmodified*. Harvard University Press, 1987.

show, women are more likely to face symptoms 'uncommon' rather than normal symptoms of a heart attack. In fact, common symptoms such as chest pressure may not even appear.[111] Does this mean that doctors were intentionally ignoring the woman's complaints? I doubt it. Rather, it seems much more reasonable to argue that they simply could not associate the symptom with the diagnosis because of their limited knowledge. It is from this example that there is something vital about the others that the ones in power do not know, and because they do not know, they cannot solve the problem. This leads to what is one of the most damning points of association and the anticlassification principle: association cannot accommodate what we do not know. Because intersectionality is a concept that is possibly the least relatable to the dominant group in the US, association has failed to recognize what intersectionality is and what it means in law.

Another way to perhaps explain the weird case of association and the standard would be to go back to cases such as *Weinberger v. Wiesenfeld* and the others I have mentioned in the previous chapter. In re analyzing these cases, one might notice something odd. As I have stressed, since it cannot be stressed enough, Stephen Wiesenfeld and Gerald Bostock were both white men. Their circumstances were ones that may have been viewed as somewhat unusual, as I am willing to guess that even in today's times, a significant number of persons still imagine a white male as being a breadwinner for a family who also has a wife and maybe kids. However, what makes both cases appealing is the fact that they are both men. *Weinberger v. Wiesenfeld*, his case, became the standard to future cases, a step for females to live up to. Even though MacKinnon does not focus on homosexuality in *Feminism Unmodified*, for *Bostock v. Clayton County*, his case, became the standard for future cases. The male standard was set up for other

[111] www.heart.org. "Heart Attack Symptoms in Women." Accessed March 31, 2021. https://www.heart.org/en/health-topics/heart-attack/warning-signs-of-a-heart-attack/heart-attack-symptoms-in-women.

people of differing sexual orientation to follow. While it is a great tactic, one has to ask the question no one wants to ask: would the justices have not ruled the way they did they felt it did not apply to men? And if so, is this an admittal of not feeling the urgency and oppression that women felt? Let us say that there is still some use in this field. We can use the tactic that Ruth Bader Ginsburg used to find discrimination in the intersectionality sphere. We find a white male, the standard that can associate with the others, is being discriminated against for his race and gender. In other words, we find a job that hires persons of color, but they are lacking in the area of white men. It may even be that they will accept persons of color, even if the white man was more proficient in the task and the scores/resume reflected his efficiency. Now, am I saying that this is an impossible hypothetical? No, even though it seems highly unlikely, it could be possible. However, one must step back, reflect on this tactic, then in a stupified manner shout 'this is the most absurd thing I've ever heard!'

In this function, having an understanding of knowledge and using knowledge to govern law means little if we understand it from only an individualist standpoint, from a 'all knowledge comes within me' sentiment.[112] Therefore, acquiring knowledge from a standpoint which concerns all, is very useful, especially in understanding others. We then move to another question: who are the others? Are they the people who suffer the most or those in power? Are they the people who have the power to create the narrative of world/nation history? This is relevant, because while everything around us influences us, some may assert their importance in our lives. Some make their presence known, and as a result, whether intentionally or unintentionally, masks or diminishes the presence of other groups. In making their presence shine too brightly, it then creates a false illusion of them being the Sun and everything must

[112] Do not worry libertarians, I did not say to drop it entirely, I said to add more standpoints along an individualist standpoint.

revolve around them. It is in this area of thought that I begin the critique of association. It is from these realizations of epistemology and society's interactions with others that we realize that not only we gather a significant amount of what we know from interaction, but we have holes of knowledge in absence of non-interaction or have grave misunderstandings of our current forms of knowledge. Here, it might seem useful to use association to help fill these holes.

However, after the Burger Court, decisions made tended to be considered more 'conservative', more strict in terms of adapting text to modern practices. This also changed perspectives as to determine the consitutionality of arbitrary discrimination cases. In shying away from sociological findings and events of their respective present and found an attraction towards the words and origins of the amendments themselves; they preferred primary sources rather than secondary or tertiary sources regarding the constitution. It was in this situation that Ruth Bader Ginsburg presented her argument of *Weinberger v. Wiesenfeld,* where she presented a white heterosexual man who suffered from gender discrimination. In presenting the plaintiff who aligned himself with one the Burger Court recognized, the case had a strategic advantage. However, in doing so, they lost a valuable perspective that the text and the origins surrounding it did not have: the perspective of the people who faced such areas of discrimination.

It might have been acceptable if *Weinberger v. Wiesenfeld* was a one time problem, if this never had to be repeated again. However, it has happened multiple times, and serious damage is now occurring. Not only have the courts lost its pulse on the people, it completely forgot that a human existed. It did not take into account the knowledge others had but referred to its own and to those who no longer are with us (but somehow the ghosts of yesterday are the ones to progress us forward? Why are we so ashamed of current generations?). The case of *Wiesenfeld* and the whole topic concerning intersectionality highly suggests this sentiment to be true, that the case

and utilization of the seeming sun was not a one time problem. It may be even worse, and it is due to this that we may now have to reckon with the fact that the freedom to associate in this current era does not advance the nation's question for a more perfect union among its people. While its intentions still remain pure, association cannot assimilate. It can at times lead to some empathy, but there is a reliance on the one in power, meaning that he must feel the the discrimination is important enough to view as similar, and therefore a threat to humanity.

It is from this that the question is thus: should association be the medium through which persons of color get justice? Must they wait for the white man to face oppression and weigh the burdens for others to receive justice? If this is the case, I fear for the next form of discrimination that will be highlighted after the troubles concerning intersectionality cease, as I fear that even fewer white men will experience the unimagined form of discrimination. As the availability of white men to use as examples of multiple forms of discrimination diminishes, the more one recognizes that this solution, this vaccine, is beginning to lose its effectiveness. Since this is the case, it now seems prudent that maybe an update needs to be made on the vaccine. A new treatment is now required for this new strain.

# CHAPTER THREE: In Recapitulation, We Have Got It From Here… Thank You For Your Service [113]

[113] A Tribe Called Quest, *We've Got It From Here… Thank You 4 Your Service*, Epic Records, 2016, CD.

**Moving On**

If they don't give you a seat at the table, bring a folding chair.

–Shirley Chisholm

Every constitution in the world written since the year 1950, even Afghanistan, has the equivalent of an equal rights amendment, and we don't… ...I would like to show my granddaughters that the equal citizenship stature of men and women is a fundamental human right that should be right up there with free speech, freedom of religion [and] the ban on discrimination based on race or national origin.

–Ruth Bader Ginsburg, "Searching for Equality: The 19th Amendment and Beyond"

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Before identifying the step that can eradicate these symptoms from reappearing, here is a brief summary of the last two chapters. Conflict emerges; people disagree on an issue. Tension is tight, hair is raised, the air ringing with uncertainty. Differences remain, no matter how much one wishes or attempts to squash them, and these differences propel people to decide the relationship between difference and equality. It is from this conflict that the next question arises: How does one solve the problem? How can I be right?

The first chapter, I introduced the anticlassification principle and what it has done to attempt to quell these problems. I explained how the current system has attempted to iterate that despite differences, we are all one, we are all the same. As poetic and eloquent this mantra portrays itself as, the inferences and meanings derived from this sentence have been consistently misread and misinterpreted, a point I made in the second chapter. It is also within the second chapter that I point out a certain criticism to this principle that deserves more attention in the public discourse of the anticlassification principle: association. I found that the nation has been using tactics that enforce a unity tailored towards a certain group of persons. This problem is especially prevalent in the current handling of cases relating to the Equal Protection Clause,

especially when the problem depends on association. We have selected association as a critical part of defining equality, which means issues are resolved if one does notice that there is a similarity between the person who faces discrimination and the white male. Something goes very wrong during these steps. Somewhere, the rhetoric becomes a topic of colorblindness, a term that we do not deserve to utilize at this moment or the near future. We enter a world where one group of people view current laws as fair in areas concerning race and gender, and another group view the same laws as blatantly discriminatory. The problem is attempting to find ways we are similar to each other, finding ways that can relate to us. It instinctively looks like a fool proof way to achieve justice, because it relies on the foundational supposition that we are all the same. Unfortunately, the world is slowly but surely realizing that this foundation is not stable, making current problems hard to decide, as it is making us come to the realization that we do not relate with each other in all circumstances, especially when it comes to intersectional relations. Those who fall under multiple categories of discrimination have very little to associate with the group that holds the current standard of equality. This is made evident in presenting the concept of intersectionality, revealing that putting one group as the bar is not sufficient, as it cannot help everyone. Here, the divide seems more clear to the observer. What the observer sees is that no one cares about the struggles of the other. They only see themselves in the other. When there is a difference, there is either disregard for this problem or a denial of the severity of the problem. That is why we must not focus on what is similar, but we must recognize and embrace a different form of unity that embraces differences. I am not he, as you are not he, as you are not me, yet we are all still together.[114]

[114] A reference to The Beatles, "I Am the Walrus," 1967, 6 on Magical Mystery Tour, Capitol, 1967, LP.

As these chapters refer to the defining and critiquing of a legal principle, the next order of business that naturally follows is finding a solution to this problem. The question then must be asked: even if one of these is the root of all problems, is there anything we can do to solve this problem? Can we find a potential solution, a metaphorical vaccine, to make this harrowing symptom disappear? Or do we have to accept the current state of affairs and move to the second most concerning problem and amend all problems from there? It is from this analysis that it seems more reasonable that we should not be looking for solutions that can relate to everyone. Rather, we should be looking for solutions that are detailed towards everyone, and if this complaint will not be addressed or fixed by the courts, then as Shirley Chisholm said, it is time to "bring a folding chair"[115] and enter ourselves into the discourse. It is from this that I propose a solution that has ebbed and flowed in the minds of United States citizens in the last half century: an implementation of an Equal Rights Amendment (ERA). I suggest that with a newly formed and approved ERA, the problem of association is significantly quelled and a new era of civil liberties can begin.

## The Equal Rights Amendment: The Past and the Present Circumstances

The journey and history of the Equal Rights Amendment has been one of twists, political machinations, and disappointment. The conception of the ERA began in 1920, a monumental year for womens' rights. The decade began with the ratification of the 19th Amendment, which gave women the right to vote. With this right, women were slowly but surely gaining recognition that they were humans, second to no one. They could now participate in an activity that had great effect on the nation in voting for leaders who best represent their interests and create change in

[115] "Before Hillary Clinton, There Was Shirley Chisholm." *BBC News*, January 26, 2016, sec. Magazine. https://www.bbc.com/news/magazine-35057641.

listening to the female sex.[116] While this was a great achievement, just like the decade, the fight for women's rights was far from over. Topics concerning social and economic autonomy still remained as a great barrier on the road towards realizing the breadth of women's rights. Women still had troubles having a stable financial income, and most of their wealth was under their respective husbands' control. Until the 1970s, women could get fired from work from being pregnant, and sexual harassment was not considered a cause for legal action.[117] Due to infuriating problems such as these, feminism still persisted, largely under the presence of women such as Alice Paul.

In the first three years of the 1920s, renowned suffragist and feminist Alice Paul initiated a discussion of adding an amendment that stated women were equal to men.[118] This amendment would follow in the footsteps of the 14th Amendment, specifically the Equal Protection Clause, which guaranteed equal protection among races. That is why as the leader of the National Woman's Party (NWP) in the 1920s, Paul made the writing of the ERA an important part of the work of the NWP. From working together, the NWP in 1923 announced its intentions of issuing an amendment that promoted equal rights for women.[119] A flyer issued by the NWP promoted the ERA fight for issues such as parents having "Equal Control of Children," and men and women having "equal rights throughout the United States and every place subject to its

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[116] A major part of these interests was changing how law dictated the family structure, an interesting part of history explored by Siegel, Reva. "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown." *Faculty Scholarship Series*, January 1, 2004. https://digitalcommons.law.yale.edu/fss_papers/1102.

[117] Hill, Jessica. "Fact Check: Post Detailing 9 Things Women Couldn't Do before 1971 Is Mostly Right." USA TODAY. Accessed April 1, 2021. https://www.usatoday.com/story/news/factcheck/2020/10/28/fact-check-9-things-women-couldnt-do-1971-mostly-right/3677101001/.

[118] Zimmerman, Joan G. "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923." *The Journal of American History* 78, no. 1 (1991): 188-225. Accessed April 2, 2021. doi:10.2307/2078093.

[119] "The Equal Rights Amendment Is 97 Years Old and Still Not Part of the Constitution. Here's Why | History | Smithsonian Magazine." Accessed April 1, 2021. https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/.

jurisdiction."[120] While it looks un-noteworthy and seems to bear no usage of inflammatory language, these words reflected an idea of what a woman's place was in society, and this was radical. In a time when society would constantly deny women autonomy and the access to economically provide for herself, women were demanding a change from the then status-quo. With this new phase of feminism in motion, Paul found it prudent that the ERA should support women having the same freedom as men. She wanted women to be allowed into the same field as men and then show that women's ability to accomplish work in a man's field was not an impossible feat. It was in this sentiment that Paul and the NWP promulgated the idea that it is only when the same standards are applied to women that true equality could be reached. With the help of the then newly created Women's Liberation Movement (WLM), Paul and the NWP began promoting an ERA which stated "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[121] While the newly crafted ERA did not become established in the 1920s, the writing and the message of equality for women did not stop and disappear in the 1920s.

In the 1950s-70s, second wave feminism, which manifested itself greatly in the Women's Liberation Movement, began advocating once more for equal rights for women. In this version, Congress passed the amendment which stated as thus:

1. Equality of rights under the law shall not be denied or abridged by the US or any State on account of sex.
2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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[120] U.S. Capitol Visitor Center. "Handbill, 'Equal Rights Amendment,' ca. 1920s." Accessed April 1, 2021. https://www.visitthecapitol.gov/exhibitions/artifact/handbill-equal-rights-amendment-ca-1920s.

[121] North, Anna. "The Drive to Pass the Equal Rights Amendment, Explained." Vox, January 8, 2020. https://www.vox.com/2020/1/8/21054914/era-yes-equal-rights-amendment-virginia-date.

3. The amendment shall take effect 2 years after the date of ratification.[122]

This time, people began to listen to their voices. Women such as Ruth Bader Ginsburg, Shirley Chisholm, and Gloria Steinem began to build pathways for the ERA and its ideas to make its way into law and into Congress. With the womens' fiery determination to make the ERA an official amendment of the U.S. Constitution, they were able to persuade the U.S. House of Representatives and the U.S. Senate to pass the ERA.[123] All that was needed was for 38 states to ratify the ERA in order for it to find its place in the Constitution. That was all that was needed. However, before the minimum number of States needed to pass the ERA could pass and introduce this ERA to the Constitution, a new character entered into the narrative, a character that helped spearhead a countercultural movement in response to the amendment. Under the supervision of a woman named Phyllis Schafly, a more conservative group of women known as STOP ERA attacked the ERA and halted efforts to pass it in the Senate. They campaigned around the nation, arguing that with the ratification of an ERA, women would inevitably be harmed, listing the possibility of women having their names submitted into the military draft or women being financially impacted in a negative manner.[124] Through the achievements of Schafly and her supporters, the number of states needed to pass the ERA was not met. Despite being given a 7-year extension to pass the amendment, the states still did not pass it, and the ERA was lost within the political void. The general population is unaware of the amendment that almost

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[122] Ibid.

[123] The House voted 354-23 in Times, Eileen Shanahan; Special to The New York. "Equal Rights Amendment Passed by House, 354-23." *The New York Times*, October 13, 1971, sec. Archives. https://www.nytimes.com/1971/10/13/archives/equal-rights-amendment-passed-by-house-35423-amendment-for-equal.html; the Senate voted 84-8 in "U.S. Senate: The Senate Passes the Equal Rights Amendment." Accessed April 1, 2021. https://www.senate.gov/artandhistory/history/minute/Senate_passes_ERA.htm.

[124] Times, Nathaniel Sheppard Jr ; Special to The New York. "Foes of Equal Rights Plan, Buoyed by Success, Intensifying Efforts." *The New York Times*, October 14, 1979, sec. Archives. https://www.nytimes.com/1979/10/14/archives/foes-of-equal-rights-plan-buoyed-by-success-intensifying-efforts.html.

came to fruition, and the era of the ERA was seemingly over. However, unbeknownst to the masses, the ERA has slowly crawled its way over the finish line.

Over the course of the early 21st century, several important events have significantly influenced how society perceives women. In the 2010s, fourth wave feminism achieved mainstream success. Due to events such as the reporting on Harvey Weinstein's sexual harassment towards women, the release of President Trump's infamous Hollywood Access tape, and multiple reports of men in high positions of power sexually assaulting their women colleagues/subordinates, interest in the protection of the female's basic dignities has risen. From events such as these, people began once more to care about protecting a woman's life and protecting her dignities; the public began to realize that a woman's life faces unfair challenges than men do not typically face, and it is now time to look for a remedy to this problem. One such remedy that has been tossed around is the idea of reawakening the ERA from its little state of purgatory. While the ERA seemed like a lost cause, some have hope in awakening this lost amendment. In 2017, the state of Nevada ratified the ERA, being the first state to do so in more than several decades, and in the next year, Illinois also followed suit in ratifying the ERA.[125] Last, but not least, in the year 2020, Virginia became the 38th state to ratify the ERA, reaching the minimum requirement for the ERA to become an official amendment. From this landmark, the ERA has crossed the finish line and could potentially be brought into the welcoming arms of the people and the legislature. While I wish this was the tale I could tell, I did mention this ratification occurred in the year 2020, so to assume good things occurred when thinking of the year 2020 would show a serious lack of knowledge of what can only be declared as an inevitable infamous watershed moment of history.

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[125] 159, and 139. "The Equal Rights Amendment Explained | Brennan Center for Justice." Accessed April 1, 2021. https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

In 2020, the Department of Justice issued an opinion that Congress does not have the power to renew the ERA.[126] While not commanding Congress to do so, having the Department of Justice dispute the current legitimacy of the ERA is not something to take lightly. Then on March 17th 2021, the House of Representatives voted 222-204 to remove the ERA deadline.[127] This shift in partisan lines reveal that the ERA's passage through the House and through the Senate seems very dim. While there is a question as to how important the timeline is to the Constitution, there is a more pressing concern as to why some may not want the current version of the ERA to pass.[128]

The ERA that arose from the 1920s and stayed in the 1970s ensured the protection women receive under the law is the exact type of protection that men receive. Again, this does not only consider the difficulties women face, but it also limits the thinking, the knowledge of what gender is within the law. In other words, the ERA corrects the wording of the Equal Protection Clause to include women, but it does not expand on what equality means for women. The ERA remains stuck in the concept of association and will continue to not understand the uniqueness of problems women face within law, as its jargon still carries the idea that women are equal to men, that women will have to act properly according to the rules that are tailored towards the well-being of men. The judicial branch is still free to use their knowledge of how men view women, and nothing will have changed for women's rights. In other words, the ERA is nothing more than decoration to make the Constitution look modern without actually

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[126] "Ratification of the Equal Rights Amendment," January 8, 2020. https://www.justice.gov/olc/opinion/ratification-equal-rights-amendment.

[127] CNN, Veronica Stracqualursi. "House Passes Joint Resolution to Remove ERA Deadline." CNN. Accessed April 1, 2021. https://www.cnn.com/2021/03/17/politics/congress-era-deadline-joint-resolutions/index.html.

[128] There are many concerns that those identifying as conservatives have that are not addressed in this thesis. However, I will attempt to go over what I view as the most popular arguments against a new Equal Rights Amendment.

modernizing. It will be the equivalent to the person who declares 'I stand with women' but then has no care or concern for the current policies that keeps a woman in a secondary role to man.

This critique then becomes even more severe when it goes back to the topic of race and gender, as it finds that the current ERA does not help with the case of intersectionality, either. In a somewhat ironic twist of fate,[129] women of color were omitted not only from the credit, but they were also omitted from the rewards white women received from the work of second wave feminism. While the impacts of second wave feminism have generally been a positive force for good in the world, one of the biggest critiques it faces was its blase attitude toward women of color. In the mid to late 1900s, feminists such as Claudia Jones and Angela Davis noticed how some of the most oppressed persons in the US were and are still women of color. Not only did they face hardships in being black, they also faced difficulties in being a female in a nation that did not afford the same dignity as they did upon men. These two impediments to prosperity then contributed to an economic disadvantage, a situation that gave rise to the idea that Jones wrote that the "triply-oppressed status of _____ women is a barometer of the status of all women, and that the fight for the full, economic, political and social equality of the _____ woman is in the vital self-interest of white workers, in the vital interest of the fight to realize equality for all women."[130] However, this analysis was in part largely ignored by the US mass. The center of second wave feminism focused on the white woman. The prominent faces of this wave were people like Gloria Steinem or Betty Friedan, and the issues raised during this movement centered

[129] What might be the most ironic fact is that the woman who really helped get women the rights they currently possess was Pauli Murray, a black woman. At the height of her power, Murray was able to pave the way for women to receive rights within the law (Mayeri). With her work, lawyers such as the late Ruth Bader Ginsburg were able to fashion legal arguments that were able to persuade judges and justices to rule in favor of distributing rights to women.

[130] Viewpoint Magazine. "We Seek Full Equality for Women," February 21, 2015. https://www.viewpointmag.com/2015/02/21/we-seek-full-equality-for-women/.

on the struggles of a housewife.[131] Unfortunately, women of color did not share this burden of being a housewife, as women of color mostly worked and therefore could not relate to the problems of white women. In the rise of a new ERA and in the arising anticlassification principle, women of color's circumstances were and would continue to be ignored. The ERA does not include women of color in its text, a problem that would appear great if a case concerning intersectionality was presented in front of judges who base their ideas on textualism.[132] Women of color are pointing out that their omission from the ERA highlights a sentiment that contrasts the progress of the past hundred years. They are lamenting the fact that women of color typically notice that a white woman faces difficulties that differ from other races of women. This also applies between other minority races as well. Therefore, we come to several questions worth answering: what do we do with the current ERA? Is it valid? And do we want to keep the ERA as it was issued in Congress during the 1970s or should we throw it away and begin a construction of a new equal rights amendment? Should we go back to the original argument presented in the 1920s?

After giving information of the history of the ERA and of the underlying legal principle that would rule it if actualized, I think that this current situation the ERA brings forward a silver lining into this chaos. Why I find it a silver lining is because in having the ERA officially expire, the old idea of association can officially come to an end. A new ERA can detail that everyone cannot be treated similarly; historical and social impacts carry a significant weight. Therefore, the people of the 21st century can remember the old ERA and its advocates, thank them for their service, but also gently remind them that we have got it from here. It is now time to progress the

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[131] One of the most notable works that carries this sentiment in Friedan, Betty. *The Feminine Mystique*. New York :Norton, 1963.

[132] Constitutional textualism is a form of reading the said document on the words inscribed in the text, Murrill, Brandon J. "Modes of Constitutional Interpretation," n.d., 28.

ideas of the old ERA and view this turbulent time as an emergency brake to re-evaluate the path towards equality.

**ERA: 21st Century and Beyond**

The question is thus: How can we ensure that the ERA actually makes a difference to those who need the ERA? In analyzing this topic, one might feel a little lost as to how to improve possibly one of the most important drafts of writing in current existence. The current pending ERA dictates an old view, a view that caters not to the powerless, but the ones historically in power. How does one attempt to pass the amendment with this knowledge now present in their mind? Fortunately, for the past decades, multiple legal scholars have offered suggestions as to what the ERA should look like if now passed, ranging from minute details to a rehaul of the whole idea of the underlying egalitarian principle. However, no work may have contributed as much or has addressed the big concerns as poignantly as Catharine MacKinnon and Kimberle Crenshaw's proposal of a new ERA.

In the past several years, MacKinnon and Crenshaw collaborated together to create a new template of how to create equal rights for all the people. In their work "Reconstituting the Future: The Equality Amendment," they argue that the Equal Rights Amendment needs to be overhauled, that a revision is needed. They first recount the claim that the Constitution was not perfect or inclusive of all at its inception. They remind readers "White supremacy and male dominance, separately and together, were hardwired into a proslavery and tacitly gender-exclusive Constitution from the beginning."[133] Furthermore, the judiciary would also defend the origins of the Constitution that looked to exclude the people on the basis of race and/or gender.

[133] Crenshaw, Kimberle, and Catharine MacKinnon. "Reconstituting the Future: An Equality Amendment." Accessed April 1, 2021. https://www.yalelawjournal.org/forum/reconstituting-the-future-the-equality-amendment.

In particular, they argue that the "Judicial interpretation has continuously hobbled the Fourteenth Amendment's promising guarantee of equal protection of the laws."[134] Examples that support this claim consist of cases such as *Washington v. Davis*, in which the Court ruled that laws that were non-discriminatory in language but had disparate impacts were constitutional,[135] or *Shelby County v. Holder*, in which the Court removed a critical section of the Civil Rights Act which curtailed the ability of certain districts to change election laws based on their historical and current actions concerning voting discrimination.[136] It is from this that they address the role of groups that have faced oppression for centuries. They iterate that these groups have received adequate protection from discriminatory laws, and some groups concerning sex and gender even face the danger of losing their rights, as the Equal Protection Clause never describes gender or sex as a category susceptible to being the subject of discrimination cases. Due to the current principle's disability to understand others and unfortunate tendency to epitomize one group, the Justices were and currently are not able to fulfill the promise the Equal Protection Clause made to those who face unfair discrimination. After laying out these grievances, the two legal professors then lay out their own ERA. It also addresses add in the problem of intersectionality within law, writing that

> Women, within and across racial groups, are comparatively impoverished and economically insecure. They are violated with impunity, exploited economically and sexually, and deprived of social stature and human dignity. The intersectional effects of race and gender are facilitated within the U.S. sociolegal system, cumulatively stacking the deck against women of color, depriving them of the most basic means to articulate meaningful claims within existing constitutional doctrine.[137]

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[134] Crenshaw, and MacKinnon, "Reconstituting the Future", 347.

[135] *Washington v. Davis,* 426 U.S. 229 (1976).

[136] *Shelby County v. Holder,* 570 U.S. 529 (2013).

[137] Crenshaw, and MacKinnon, "Reconstituting the Future", 356.

It is from this complaint that they begin their journey in rewriting the ERA to include not only the protection of gender, sex, and race, but they begin to include those who fall within multiple categories.[138]

The first section focuses particularly on women, addressing the fact that women do have equal rights as other adult citizens. It finally admits women into the record and gives a tasteful homage to the women who came before and advocated for the ERA, whether it be from the 1970s or the 1920s. The second section establishes that other minority groups, such as sexual identity or sexual orientation, also deserve equal protection under the law. This section also addresses intersectionality, stating that the equality of rights should not be denied by sex and/or race. The 'and/or' jargon is critical, as these words reflect that one can face discrimination from a combination of matters regarding sex and race. In other words, it includes intersectionality as a category that needs protection. Three, it recognizes that discrimination not only happens on an

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138

> Whereas all women, and men of color, were historically excluded as equals, intentionally and functionally, from the Constitution of the United States, subordinating these groups structurally and systemically; and
>
> Whereas prior constitutional amendments have allowed extreme inequalities of race and/or sex and/or like grounds of subordination to continue without effective legal remedy, and have even been used to entrench such inequalities; and
>
> Whereas this country aspires to be a democracy of, by, and for all of its people, and to treat all people of the world in accordance with human rights principles;
>
> Section 1. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.
>
> Section 2. Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). No law or its interpretation shall give force to common law disadvantages that exist on the ground(s) enumerated in this Amendment.
>
> Section 3. To fully realize the rights guaranteed under this Amendment, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to abolish prior laws, policies, or constitutional provisions that impede equal political representation.

individual level, but whole groups also suffer under discriminatory acts. It recognizes this, as the two women admit the words "disadvantage" and "groups", words that do not relate to the anticlassification principle's ideas of individuality and equal playing field, into the ERA they crafted.

In addressing new forms of discrimination along with the idea of disadvantaged groups, MacKinnon and Crenshaw have added ideas that will fight off unfair discrimination. In drafting a new ERA, two major accomplishments that have been made. One, this new ERA will finally pull the category of intersectionality out of the shadows and finally address its problems. Two, it will force judges who favor the anticlassification principle to abandon the legal principle and help them adopt a different principle that is much more fitting to combat discrimination: the antisubordination principle.

**Benefits of a New ERA**

As mentioned in the last paragraph, the new ERA accomplishes something that the old ERA could not do, which is to cover more ground of discrimination. In Section 2 of the this ERA, there is an acknowledgment of the presence of women, women of color, and the LGBTQ[139] community. This ERA acknowledges the differences of everyone's circumstances in a respectful manner. It expands upon former women's contributions, as it understands the necessity of women entering the man's world and then adds the caveat of wanting women to be protected from the man's world; the lion's den. Most importantly, intersectionality is recognized in the amendment with the writing 'and/or'. The importance of this cannot be stressed enough, as for decades judges had no idea how to handle these types of cases. As shown, some found this

[139] For a more extended definition, Gold, Michael. "The ABCs of L.G.B.T.Q.I.A.+." *The New York Times*, June 21, 2018, sec. New York. https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html.

form of discrimination as legitimate, and some did not. Intersectionality was a puzzle that very few could solve, as many do not know what it is like to experience a form of discrimination that did not target one specific feature. This new ERA recognizes that intersectionality is a form of discrimination that is very unique and has struggled in having people understand its problem. Having it in writing introduces judges to this concept and makes them aware that discrimination does not have to be based on one factor, but it can occur through the combination of many factors, such as gender and race, or sexual orientation and race.

Another benefit is that the ERA does not rely on the precedent of a man. No longer does race and gender focus on the mind of a man. Cases do not have to refer to the problems a white man must face to achieve legitimacy in the eyes of the Court. The ERA recognizes the "concrete historical situation of subjected, violated, and denigrated people," and gives the focus towards groups such as women of color. As the two women write, in recognizing groups, "Here, they are women."[140] The rhetoric in this ERA makes it clear that the question 'can it happen to YOU' should not be the legal framework and instead recommends the framework of 'it happened to THEM,' which substantially diminishes the judges ego and knocks down the bar that disadvantaged groups currently need to be deemed as worthy of protection.

From detailing the positives of this ERA in depth, one notices that this version of equality differs significantly than the one proposed by Wechsler. How it differs is that rather than advocating for an equal starting point, these authors advocate for a new definition of equality termed substantive equality, which Catherine MacKinnon defines as a form of equality that looks at past injustices and bases remedies and actions on account of such injustices.[141] However, this

[140] Crenshaw, and MacKinnon, "Reconstituting the Future", 359.

[141] Ibid.

form of equality does not fit with the main legal principle of today. This ERA focuses on group and equality that sees differences, while the anticlassification principle attempts to use no vision as the goal of equality. It is from this that people will point out that the amendment and the principle will fit as perfectly as two magnets that face each other with similar poles. This is correct. These two are not compatible with each other, which leads to another reason to implement the ERA: it will finally be able to replace the anticlassification principle with another legal principle.

For most of this thesis, there has been an enormous amount of attention given to the anticlassification principle. However, in critiquing it, it is then questioned as to whether or not it is the only principle that works. As I stated in the first chapter, legal scholars discuss different forms of legal principles and what form is most prudent to pursue in enforcing law. It is from this that some claim that due to the insufficiency of the anticlassification principle producing a fair system of justice, judges should implement another approach to equality. As of now, one of the more popular theories, and the theory I am currently supporting, is the antisubordination principle.[142]

## The Antisubordination Principle

The antisubordination principle was and still remains as one of the most popular answers in rectifying the faults of the anticlassification principle. In 1976, Owen M. Fiss, who heavily criticized the anticlassification principle, offered a different legal principle that would benefit the United States more than the anticlassification principle. Instead of a principle that based itself on the three tier scrutiny and focused on individual persons, he fashioned a principle titled the

[142] Fiss addressed this legal principle as the group disadvantaging principle. However, it has also been known as the antisubordination principle.

'antisubordination principle.' Under this principle, Fiss advocates for the Equal Protection Clause to protect specially disadvantaged groups, which have the three characteristics of "(a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed."[143] Fiss also writes that the antisubordination principle addresses

> The concern … … [of] laws or practices that particularly hurt a disadvantaged group. Such laws might enhance the welfare of society (or the better-off classes), or leave it the same; what is critical, however, is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group. p. This is what the Equal Protection Clause [under the group disadvantaging principle] prohibits.[144]

In issuing this idea, Fiss does not advocate the application of the Equal Protection Clause on a purely neutral level. Instead, he would rather want judges to recognize that certain minority groups face challenges that people grouped in the white male category do not encounter. Under this principle, judges would understand that some groups face more hardships than others and would make assessments understanding these disparities and their function in law. One example of this can be seen in the before mentioned *Brown v. Board of Ed.*, in which some argue that the factoring of the social data and the recognition of the struggles that were distinct to black students would never encounter was the correct way of deciding the case. In asserting the historical and distinct damages African American schoolchildren faced in participating in school segregation, the idea of a neutral principle diminishes, as neutral principles would also take into account the minds of white schoolchildren and also view segregation through that particular

[143] Fiss, "Groups and the Equal Protection Clause", 109.

[144] Fiss, "Groups and the Equal Protection Clause", 157.

lense. In focusing on the social data and history of slavery and racial injustice, a more substantive form of equality rises in the waning of neutrality.

While race is Fiss' main topic of his paper, this principle does not just limit itself only towards cases of racial injustice. On the contrary, this principle aptly works for other groups that face discrimination, i.e., women and women of color, as with this principle, all groups facing oppression can, including intersectional groups, can also benefit from this legal principle. While he concentrates his work on the African American community, he does specifically articulate that his idea is not merely limited to this group.[145] This principle extends itself to all groups that are social, currently reside in a constant state of subordination, and do not have major political power. In having that be its biggest concern, it can be that groups may fluctuate and change in terms of discrimination and power. It can also be that a new group appears that we currently have not identified yet as facing discrimination. The principle is ready to change along with the groups and recognize differences of power and quality of life, making it acceptable for this legal principle to recognize intersectionality, sexual identity, and other groups as facing discrimination. Therefore, intersectional groups are not an addition, but rather an extension of the principle, as they do fit the criteria Fiss creates. As long as there are groups that remain unequal, any group that finds itself as vulnerable to laws of the State can find a more fitting principle to address racial and/or gender cases.

It is from that Fiss argues that this legal principle is a more appropriate system the Court should adapt, as it recognizes that specific groups of persons face discrimination more than other groups. Through this recognition, more appropriate solutions and policies can be enacted. That is not to say that this principle abandons certain groups. Rather, it adds to the sentiment that

[145] Fiss, "Groups and the Equal Protection Clause",163.

ignoring disparities among each group, ignoring past events that have created unfair and unjust impacts on certain groups, carries dangerous consequences.

While the antisubordination principle is not a major force in the Court's proceedings as of today, the principle still has had some presence within several notable Supreme Court decisions. During the Warren Court in the 1950s and 60s, one notices an emphasis on providing groups with protection under the fourteenth amendment. As legal professors Reva Siegel and Jack Balkin recount, in *Green v. County School Board,* a case under the Warren Court in 1956*,* "the Court held that a facially neutral policy of "school choice" would predictably preserve white- and black-identified schools and that the continued existence of such schools violated the Fourteenth Amendment."[146] In this example, the Court shows a rejection of neutral principles, as they found that the concept of school choice, a policy seems neutral, will create disparate impacts that would obstruct the goal of racial integration in schools. In recognizing this concern, the Warren Court leaned more on a legal principle that aligned itself with the sentiments of Fiss and other proponents of the antisubordination principle. This principle did not merely extend themselves to the topic of race. In 1971, the Burger Court wrote in *Griggs v. Duke Power Co.* that "practices having a disparate impact on blacks and women violate Title VII if such practices are not justified by a business necessity."[147] Again, there is a strong emphasis on the impact and not as much on keeping the logic 'neutral.' These cases recognized that some groups face more challenges than others, and they interpreted the Equal Protection Clause to provide help to communities that faced unfair unfair discrimination laws. In having the decisions focus on historical and social imbalances, the Warren and Burger Courts realized a form of legal theory that shares very similar features to Owen Fiss' proposal.

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[146] *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).
[147] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

In installing this principle, there is hope that the law can help the people who need protection from discriminatory acts, and it is due to this reason that Fiss felt comfortable in justifying that the antisubordination principle is a necessary in affecting better change for discrimination cases. In having this principle be conveyed in the ERA, there is now a reason for judges to follow this principle more strictly.

This then leads to the last argument for a new ERA, which is the fact that it provides judges a more clear answer as to how to decide cases. Or, more specifically, like a railroad switch, it has the ability to switch the railroad track that judges are on and join the rail that aligns itself with the antisubordination principle. Currently, the power to decide which legal principle best suits cases of discrimination ultimately still belongs to the judges. In giving such autonomy, most judges, especially those in the 21st century, are more prone to using the anticlassificaion principle. As stated previously, cases such as *Washington v. Davis* and *Shelby County v. Holder* were decided respectively in the 1970s and the 21st century, and the reasoning behind these arguments rested on the so-called neutral principles. While these cases tended to appeal to a political ideology, what might be even more shocking is that cases such as *US v. VA* and *Obergefell v. Hodges*, cases that appealed to a different audience, mainly used language that cited the idea of neutrality, but which really then results into association. These examples show that current Justices which differ in legal jurisprudence still adhere to the same legal principles. With this insight, one can note that the anticlassification principle is still a major player in the field of law, and many do not use the antisubordination principle, leaving the latter to remain in the gutter. It is from this unwillingness to create a principle change that there needs to be a spark to enact this change.

The principle may not in itself be sufficient to create change, but maybe an external factor can help aid it. Maybe, with a new tool, the antisubordination principle can function properly within law. This is where the ERA can help. As Section 3 conveys the idea that certain groups face certain disparities, the amendment in being an amendment demands the judges to read it and takes its words to heart. The judges must consider the words 'groups' and 'disparities' and come to the realization that both history and impact matter. The ERA will pry the judges hands off of the bar and help them take the plunge to using a more better principle. In other words, the ERA with its words and intent pressures the judges to use the antisubordination principle. In having explicit language describing the injustices particular groups face, judges who want to use the anticlassification principle are restricted from doing such. Judges who discern what principles in the 1700s currently mean can easily adapt to the antisubordination principle already, as it seems to be the current position that such justices currently agree that there are disparities among groups. Textualists, who would look solely at the words of the Constitution devoid of any context, would have to use the antisubordination principle, as the amendment would explicitly state to not treat everyone as having the same background. In looking at the words themselves, especially in the third section, these logophiles will have to incorporate the meanings of words such as 'disadvantage,' 'and/or', and 'groups.' Originalists, who have not already looked at the origins of the 14th Amendment and noticed that the writers' intent of the Equal Protection Clause was to address disparate impacts and remedy the impacts of slavery,[148] would have to look at the intent of this ERA.[149] They would understand who Crenshaw and

[148] Karlan, "What Can Brown Do for You".

[149] The only problem it may face is from originalists, who may argue that this was not the sentiment that the Founding Fathers carried into the Constitution. If originalists want the pure text of the Founding Fathers from 1776, if originalists want the equality that the Founding Fathers want from 1776, I recognize that this paper has limited appeal to these people.

Mackinnon were and what they found was the problem of equality as we understand it today Therefore, originalists would find themselves basing decisions off of the antisubordination principle when confronted with discrimination cases. Through the newly constructed ERA, a new vaccine is made, and there is hope that whenever problems do occur, we do not reject the rise of the problem but are constantly vigilant of its appearances and create multiple variations of a vaccine.

**Several Criticisms and My Responses to Them**

Despite the benefits of obtaining an Equal Rights Amendment, a few noteworthy criticisms appear in front of us. One addresses that idea of antisubordination principle and points out a potential flaw within this idea. Another critiques the feasibility to create another ERA, citing the partisan environment of today. Another also then asks what is the relationship between the courts and the people, and should this issue involve the people? While there are more criticisms that exist, I find the ones just listed to be of great importance and deserve to have some responses addressed to them. Therefore, it is now time to go into these criticisms at length and explain why I find my proposal to still have merit, even if these criticisms are valid.

The first criticism does not come necessarily against the ERA, but it attacks the antisubordination principle. While the principle and the amendment are not the same, it is worth it to go over the criticisms, as the ERA does promote this legal principle. In this critique, one is presented with a general criticism from conservative thinkers. One of the most common criticisms argues that this principle bears no difference to the practices of discrimination. In protecting specific groups, critics argue that this is a form of reverse discrimination. As Amy Ansell, the Dean of Liberal Arts at Emerson College, writes,

> the notion of reverse racism evolved as an outgrowth of the color-blind notion hegemonic in the post-civil rights era that any preferences or penalties associated with racial group membership are morally wrong and legislatively inadmissible. Identification of reverse racism rests on an assumption of symmetry; that is, racism is racism irrespective of the color of the beneficiary or victim… ...These include: (1) that the governmental pursuit of racial redress inflicts new harms on 'invisible victims' (i.e., white men); (2) that the awarding of preferences to designated racial groups constitutes a constitutional infringement of individual equal protection before the law; and (3) that the reinscription of race-consciousness is deleterious to the national interest in moving beyond the legacy of racism.[150]

What this definition conveys is a sense that any argument using race causes serious harm. These critics argue that any preference given to a race is an acknowledgment that one race is deserving of a position more than another. In fact, these critics may even state that this idea and rhetoric is downright dangerous, as it leads to a possible scenario where the white man will face hardships and the law will find this acceptable. After all, if reverse racism attacks the white person, what good will this action do? Reverse racism, in attempting to remedy past problems, inevitably create a scenario in which 'an eye for an eye makes the world go blind', making it miserable for all races. What makes this argument important is that this is an argument that is gaining more and more traction in the United States. According to one study, white people feel that anti-white bias is more prevalent than an anti-black bias.[151] In other words, white people view that society now favors black people and now has practices and laws that disfavor white people. While it may seem ludicrous if one is black, this idea remains wildly popular, as this sentiment can be seen within the debate regarding affirmative action, which is the process of admitting students through multiple factors including race. This particular application process remains controversial, as a substantial number of people are not in favor of affirmative action, arguing

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[150] Ansell, Amy, and Solomos, John. Race and Ethnicity: the Key Concepts. London: Taylor & Francis Group, 2013. Accessed April 1, 2021. ProQuest Ebook Central.

[151] Norton, Michael I., and Samuel R. Sommers. "Whites See Racism as a Zero-Sum Game That They Are Now Losing." *Perspectives on Psychological Science* 6, no. 3 (May 2011): 215–18. https://doi.org/10.1177/1745691611406922.

that considering race as a factor, having race considered in an area typically judged on merit and grades, is wrong and even abhorrent.

As for the first criticism regarding reverse discrimination, there is a fear as to whether or not discrimination can be in the favor of the African Americans or other minority groups. However, when comparing it to the concern of discrimination today and the faults of the anticlassification principle, I think the current system of the anticlassification principle has flaws that are too difficult too ignore. Reverse racism again expects the playing field to always be the exact same. However, when registering the historical context of multiple communities, it is hard to register that the even playing field exists. I think that some of the arguments that people make concerning reverse racism can ignore some historical facts and also ignore the power differences of both sides. As legal professor Stanley Fish argues in his well known book, *There's No Such Thing As Free Speech, and it's a Good Thing, Too,* he notes that

> it would be bizarre to regard their respective racisms—if that is the word—as equivalent, for the hostility of one group stems not from any wrong done to it but from the wrongs it is able to inflict by virtue of its power to deprive citizens of their voting rights, to limit access to an educational institution, to prevent entry into the economy except at the lowest and most menial levels, and to force members of the stigmatized group to ride in the back of the bus; the hostility of the other group is the result of these actions, and while hostility and racial anger are unhappy facts wherever they are found, there is certainly a distinction to be made between the ideological hostility of the oppressor and the experience based hostility of those who have been oppressed.[152]

Again, Fish reiterates the concern of historical context. The past damages done to groups such as the African American community, women, or women of color are too important to ignore. This is a critical reason as to why reverse racism should be viewed with extreme caution. Furthermore, reverse racism ignores the fact that what they call reverse racism, if it

[152] Fish, and Fish, Stanley. There's No Such Thing As Free Speech : And It's a Good Thing, Too. Oxford: Oxford University Press USA - OSO, 1994. Accessed April 1, 2021. ProQuest Ebook Central.

is that, allows some people from disadvantaged groups to have an opportunity to live a good life. Racism, on the other hand, has done monstrous things, such as slavery, segregation, and police brutality. Policies that have protected specific communities have not typically deteriorated the quality of life of the white person. Usually, the white person is left alone in such policies. Therefore, it seems a little odd that those who view reverse racism as a legitimate threat. It is from this analysis that it seems almost absurd to put these two together and think they are the same thing.

Another critique concerns the optimistic nature of the democratic majority. In arguing for an ERA, I am asking for a consensus, an idea that seems absurd in current times. What I have proposed is not only for a bipartisan vote from the US House of Representatives and the US Senate, but I have also asked for the cooperation of 38 states to ratify this amendment. In a time that is just off the heels of a riot on Capitol Hill, the idea of bipartisanship seems almost too ideal. In fact, it would not be a surprise if some question if my head is stuck in the clouds.

While these arguments are legitimate and cause people to think, my proposal is still worth fighting for several reasons. One, if the ERA is passed by a slim majority, meaning that it barely passes the state ratification or that a little less than half of the population still opposes it, the nation has to respect the decisions the Supreme Court makes, and current events in history show that even if the nation disagrees with the Supreme Court, they will still respect the decision issued. In 2000, Al Gore stated that while he disagreed with the Court's decision, he would not contest the decision concerning the 2000 presidential election.[153] This example shows that even though people may gnash their teeth at the result, they are willing to abide by the Court's

[153] Balz, Dan. "Al Gore Addresses Letdown of His Loss - Chicago Tribune," November 15, 2002. https://www.chicagotribune.com/news/ct-xpm-2002-11-15-0211150323-story.html.

decisions.[154] Two, I argue that for this topic, there is actually a lot of support for the ERA, despite its aura of divisiveness. In a poll from The Associated Press-NORC Center for Public Affairs Research taken in early 2020, roughly 75% of Americans support the passing of an Equal Rights Amendment.[155] There is already a huge following for people to recognize equality for women and others excluded from the Constitution and its current Amendments, so acknowledging for an ERA would not be a task similar to moving the heavens. There is a tendency for people to forget that the most common and simple solution is still a solution. It should not be discarded just merely because of practicality, as this solution never remains entirely lost within turmoil and chaos. It still exists in the nation, but people at times forget that it exists, as their minds have darkened with cynicism, due to experience and age. However, this dark cloud cannot confuse one's mind when a small ray of light appears. If there is a chance, it would then seem even more komish if we dictated our own tragedy in denying ourselves an easy solution through doubt. It is from this that I want to once again reiterate the tremendous effects of having an overwhelming majority agree on an issue and having legislators enact on their behalf. Lastly, even though getting the majority population to agree on my idea is inefficient and tedious work, the result that comes from promulgating this idea for years yields more benefaction and happiness. Yes, campaigning for an Equal Rights Amendment is hard work, it will be tedious. Nevertheless, in the long run, the installation of an ERA will be seen as something that people for generations to come would take pride in and find as a piece of writing that is worth the hard work.

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[154] Furthermore, there is also the idea that if the people do not like the ERA, they can repeal it, but if that happened, the nation should seriously reflect on its status as an advocate for civil liberties.

[155] Budryk, Zack. "Poll: Three-Quarters of Americans Support the Equal Rights Amendment." Text. TheHill, February 24, 2020. https://thehill.com/regulation/court-battles/484312-poll-three-quartes-of-americans-support-the-equal-rights-amendment.

The last critique concerns the role of the judges and the public in a democracy. In this concern, some may warn against having the many dictate all of government in the most literal sense. There is a concern that with having all the people run most of the government process, there could be chaos and events that may lead, ironically, to the destruction of democracy. Therefore, people then ask what role should the people play in a democracy, and can it be that the people can inadvertently interfere with the process of a democracy? This worry is perhaps expressed most poignantly by Ronald Dworkin, a prominent 20th century legal scholar and philosopher. Dworkin is perhaps most well known for his critique of positivist law and proposing that law is dictated through principles.[156] It is because of his extensive research and analysis of law and government that it would be of no surprise that Dworkin would comment on the workings of a democracy. In one writing, Dworkin argues that a well-maintained democracy does not involve the participation of all in every single policy or issue. Rather, everyone is involved in having the benefits given to them by a democracy. He writes

> Since the Enlightenment political philosophers have debated the merits of two rival views about what democracy—government by the people rather than some electoral aristocracy—really is. The first is a majoritarian conception: that a majority of voters should always have the power to do anything it thinks [is] right or in its own interests. The second is communal: it insists that democracy is [a] government of, by, and for not the majority but the people as a whole. The communal conception of democracy requires that each citizen have not only an equal part in government but an equal place in its concern and respect. Democracy, on that conception, is not undermined by but requires a system of individual rights guaranteeing the integrity of each person's basic interests and needs. On this view, majority tyranny is not just a possible vice of democracy, but a denial of it.[157]

It is from this text that Dworkin reiterates that the majority does not always have to participate to ensure the safety of a democracy. Having a democratic majority is difficult, as no one exactly

[156] Dworkin, *Taking Rights Seriously*.

[157] Dworkin, Ronald. "The Future of Abortion | by Ronald Dworkin | The New York Review of Books," September 28, 1989. https://www.nybooks.com/articles/1989/09/28/the-future-of-abortion/.

knows what if humans as a collective will produce the best ideas. Sometimes, following the whims of every person can lead to the ironic demise of a democracy. We should all be extremely wary of this, given the US election crisis of 2020 and the events that followed soon after. Despite not being a majority of the people, a substantial amount of people thought the election was a fraudulent one, and senators such as Joshua Hawley and Ted Cruz arguing that if the people feel that the election was fraudulent, then the senate should not certify the results of the 2020 election, a harrowing declaration that spearheaded the events on the Capitol Hill. Just from this one current event can people recognize the importance of what Dworkin has to say. In fact, I do not necessarily disagree with Ronald Dworkin's insights - I am not foolish enough yet to contest his ideas with such bold conviction at my age. Nevertheless, I will explain how I am not interested in debunking Dworkin's words, but more interested in incorporating some thoughts which can create an even more comprehensive and a better way of thinking about law.

In reading this section of Dworkin's piece, it may first irk some people to have the majority of the people establish to propose an amendment that will inevitably change how Justices view the law. Some may argue that this initiative should be left to the judiciary. However, I argue it should not for the important reason that it promotes what Dworkin wants: an environment which "requires that each citizen have not only an equal part in government but an equal place in its concern and respect". In approving and establishing an amendment that emphasizes equality and includes women of color and other marginalized groups that the majority then promotes the idea critical of a democracy. It is because of what the majority is promoting that this is an instance where a decision of the majority is a good one. In granting an ERA, this piece of legislation combines both arguments of democracy and brings out the best parts of what a democratic institution can offer to its citizens. Therefore, I would hope that

people would not object to my argument. I think this is a critique that is suited for this topic, even though the parallel lines they run are razor thin. I do not contest that having the few to decide on certain topics is undemocratic. I understand its importance, and possibly most importantly, its efficiency. I am merely arguing that in this case, having a majority works better. In this scenario, I am avoiding Dworkin's topic, as I am simply weighing the importance of majority versus the few; I am not cancelling the latter. I view one as being more suitable for this topic. Therefore, I believe I have escaped this dangerous battleground of democratic ideals, though I have possibly landed myself in a different minefield.

I also want to circle back to my concern on the democratic majority being unwieldy and dangerous. I recognize that this falls into the trap that I sprung onto association. Association was a good utility until it stopped being a utility and ended up devolving into a hindrance. Majority opinion can also become a hindrance. That is why I should be clear that this is the next rung on the ladder, not the target, whether that be realizing human emancipation, maintaining our higher faculties, or abiding by categorical imperatives. However, I do not think that I am merely chasing another symptom. Rather, I am stating that there is a problem, one that may take a while to solve, but I think I am getting closer to solving the problem. In saying that, I maintain that we still need the cure, but we are closer to finding it by eradicating one symptom that is association, finding a temporary sanctuary in the many, while being consciously aware that this is not the end. We still have a long way to go, progress has been made.

**Conclusion: Persisting**

Every single day I fight another war
Every single night I feel more powerful
So this is what it takes to live my way
So the world will take me as I am

-Rina Sawayama, "Take Me As I Am"

The nature of injustice is that we may not always see it in our own times.

-Justice Anthony Kennedy, *Obergefell v. Hodges*

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The Equal Protection Clause has been one crucial cog in ensuring that this promise is either delivered or always ensuring that our lives will be better than our predecessors. While it has contained missteps such as *Plessy v. Ferguson,* it has in cases such as *Brown v. Board of Education* and *United States v. Virginia is given* hope that we can advance toward a greater nation where groups historically disadvantaged can finally receive the ideals of life the nation has promised them as citizens. From assessing what was right and wrong in the Court's decisions, there is even more hope that we are closer to an answer as to what can get us to a place where unnecessary discrimination disappears. Of course, some think that the anticlassification principle still is a worthy principle, despite its flaws. If they can somehow escape the perils of association and treat the intersectionality in a proper manner, that would be great-I typically do not continue to refute an idea once it is fixed. Unfortunately, as it seems for the past several decades, this solution, if it does exist in the anticlassification principle, will not come in time. Time is running out, and something must happen. That is why it is time to realize that the current system must go and a new one must take its place.

The United States of America is not a nation that actively attempts to discriminate on arbitrary grounds. It has always promulgated itself as the land of opportunity. On the feet of the

Statue of Liberty, it is inscribed "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"[158] Furthermore, while our past remains regrettable, just as I am sure our present and our future will also be looked and scorned at by our successors, our progression into perfecting our principles concerning “liberte, egalite, and fraternite” also gives Americans pride in our country.

However, it is also these same exact ideas regarding opportunity and progress that we cannot rest on our laurels and admire our past accomplishments the way Narcissus too ardently admired his reflection in the lake.[159] That is why constant reflection is needed in viewing how laws treat the American people today. In keeping with the American tradition, we must further investigate discrimination occurring in the now and attempt to discover why discrimination keeps occuring and maybe even suggest methods of eradicating, with the hope that at the worst, it eradicates one symptom and at its best eradicates the illness.

We clearly have a long way to go with intersectionality. This can be seen in the recent 2021 attacks in Atlanta Georgia, in which a man shot and killed eight people in three Asian massage parlors, with six of them being eight women. The nation saw the police officer defend the shooter as having a really bad day. There is an argument as to whether this was an attack towards Asain women or not. I do not know who will win this argument, but either way, I am warning my Korean mother and grandmother, who were planning to visit me, to not come. I am warning them them, who love Atlanta and Duluth,[160] to rethink coming for some time. This event

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[158] Lazarus, Emma. “The New Colossus.”

[159] Park, Hanna. “He Shot at ‘Everyone He Saw’: Atlanta Spa Workers Recount Horrors of Shooting.” NBC News. Accessed April 2, 2021. https://www.nbcnews.com/news/asian-america/he-shot-everyone-he-saw-atlanta-spa-workers-recount-horrors-n1262928.

[160] Area near Atlanta with a prominent Korean area.

has just revealed to a number of people that Asian women have been treated in such a way that is violent and demeaning. This was news to a lot of people, and because of this, the nation still has a long way to go to recognize the hardships of communities people are not a part of.

Earlier in this thesis, I have addressed concerns about the democratic majority. It is certainly not infallible, as everything else in this world. There is a possibility that admitting we are not similar to others could never be a popular opinion, and if that is the case, then it is the case of disassociation that we need to focus on, the idea that we can work on our knowledge not by association, but expand our knowledge and ideas through the negative of it. Therefore, why am I not also critiquing this and declaring that achieving a democratic majority is sufficient? Am I chasing another symptom and eradicating the illness? Does my declaration leave this illness untreated? Do I betray my introduction? This is a difficult question, not only that these questions would attack my credibility in writing and arguing, a trait that I quite pride myself in. So, here goes. I cannot say without a doubt that this is the cure to the illness of inequality. It could happen that another variant pops up. Then, what makes this answer special, if there is no guarantee of the end? This is what makes it special. We have been stuck in this pattern for decades since the formation of the Equal Protection Clause. The remedy was first used in the 1950s but was displaced soon after. So, having this will eradicate the current problem. However, there is a part of the ERA and the antisubordination principle that I think carries a trait that can help end any other illness that comes along. In analyzing and acknowledging disparities, there is more vigilance and wariness in deciding the severity of the problem. It gets rid of a concern of the anticlassification principle that in treating everyone as equal, some problems that should be of concern are discarded as irrelevant. In installing this particular policy and theory, its idea and its wording is a constant reminder that one must always look out for the little person. It is from this

that even if these advancements can only cure the problems of the past century and cannot extend to problems of the future, I think that it is still the right step forward. It is the way that one can finally take people as they are: shining, complex, and different.