2012

Constitutionalism and The Extreme Poor: New-Dred Scott and The Contemporary "Discrete and Insular Minorities"

john a. powell
Berkeley Law

CONSTITUTIONALISM AND THE EXTREME POOR: NEO-*DRED SCOTT* AND THE CONTEMPORARY "DISCRETE AND INSULAR MINORITIES"*

*john a. powell***

This symposium issue addresses a range of questions concerning the Constitution and the poor. In this Essay, I will share some initial thoughts responsive to what has already been presented in this issue of the *Drake Law Review* and what was discussed during the symposium, and then I will turn to the question at hand and attempt to introduce a few new ideas into the discussion.

First, I will address an issue raised by Mr. Shapiro.[1] When I posed the question to him regarding which period, in his view, best represented an appropriate constitutional interpretation and understanding, he answered with the *Lochner* Era.[2] With that ideal in mind, I would like to offer a few observations, not merely as a rejoinder to Mr. Shapiro, but which reflect views found throughout my writings.

The *Lochner* Era, which most students study, is also the Jim Crow Era. That is not a coincidence, and yet students do not study or recognize the connection.[3] Market fundamentalism, or neoliberalism, which is also

---

* This Essay is derived from an expanded transcript of the Author's lecture at the 2012 Constitutional Law Symposium, "Constitutionalism and the Poor," held at Drake University Law School on April 14, 2012.

** john a. powell, Director of the Haas Diversity Research Center (HDRC) and The Robert D. Haas Chancellor's Chair in Equity and Inclusion, Berkeley School of Law; B.A, Stanford University, 1969; J.D., University of California-Berkeley, 1973; Post-Graduate Human Rights Fellow, University of Minnesota, 1980. The Author does not capitalize his name.

1. Ilya Shapiro, Senior Fellow in Constitutional Studies and Editor in Chief of Cato Supreme Court Review at the Cato Institute. Mr. Shapiro maintained that a range of federal laws regulating the economy were unconstitutional. *See generally* Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 DRAKE L. REV. 1085 (2012).

2. Lochner v. New York, 198 U.S. 45 (1905) (beginning a legal era in which the U.S. Supreme Court struck down laws that limited the free market).

3. In other words, both the jurisprudence of Jim Crow and the substantive due process doctrines are taught separately.

referred to as the free market ideology is closely linked to a very truncated notion of civil rights and human rights. This ideology in the modern era is linked very closely to an expansion of the penal sphere generally and the prison industrial complex in particular, which has been particularly oppressive to the poor and marginalized.[4]

The relationship between race, mass incarceration, and social control is increasingly evident. This is reflected in the writings of scholars such as Michelle Alexander, who argues that our current criminal justice system is analogous to the highly racialized labor systems of African slavery and Jim Crow that preceded them in both purpose and effect.[5] Alexander identifies a linkage between the civil rights backlash and increasingly draconian drug laws.[6] What Bernard Harcourt does, even more explicitly than Michelle Alexander, is demarcate what we consider spheres of appropriate and inappropriate regulation dating back to the sixteenth century.[7] There is an increasing recognition that these spheres—the penal sphere and the so-called private sphere—are in fact connected, even if not so much in theory.[8] Harcourt asserts the conservative position is in support of a highly regulated sphere of social control while maintaining limited or weak control of markets.

Secondly, it is important to note two facts, one empirical and one legal. The *Lochner* Era was predicated in part on the *Santa Clara* decision,[9] which held that corporations are persons under the Fourteenth Amendment and therefore afforded due process protections.[10] This claim was asserted and later prevailed during a period where real people—the

4. This idea is evident in recent works. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 208–20 (2011) (arguing that the expansion of market ideology directly coincides with harsher and more punitive penal spheres); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (Duke Univ. Press English Language ed. 2009) (2004).

5. ALEXANDER, *supra* note 4, at 2.

6. *Id.* at 51.

7. HARCOURT, *supra* note 4, at 1–44.

8. *Id.* at 196–202.

9. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

10. *Id.* at 396. I have written extensively about this issue elsewhere and will not go into much more detail here. *See* john a. powell & Stephen Menendian, *Beyond Public/Private: Understanding Corporate Prerogative*, 100 KY. L.J. 43, 59, 66–74 (2011–2012); *see also* john a. powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 32 CARDOZO L. REV. 885 (2011).

freedmen in particular—were granted limited protection by the Court under the same amendments.

This jurisprudence shaped not only our modern understanding of the corporation but also of the economic market. Much of the market fundamentalism we are debating today can be traced back to *Santa Clara* and the *Lochner* Era, and not to the Founding Fathers or the original meaning or understanding of the antebellum Constitution. The conservatives, or more accurately, right-wing market fundamentalists, have it half right and all wrong. They are right that there was a suspicion of concentration of power in the hands of government. But they ignore that the Founding Fathers were equally suspicious of concentrated economic power, especially in corporations and corporate form.[11]

The call for a free market is little more than a rhetorical device. There is no such thing as a free, unfettered, or unregulated market; every market is structured. Even Mr. Shapiro acknowledged this fact. The *Lochner* Era is part of the process of judicial structuring of the market, including our national economy and our broader conceptualization of the market economy for the benefit of the corporate elites at the expense of workers and other non-elites. In doing so it created a structure that was not just hostile to workers, but hostile to both state and federal regulation. The so-called Constitution-in-exile movement would have us return to the *Lochner* Era.[12]

Empirically, we should not be surprised that this free market did not produce the great leveling of society or the kind of economic Shangri-la or Nirvana that one might expect given what Mr. Shapiro and other market fundamentalists or *Lochner* adherents suggest. In fact, if we look for a period of greater social equality and economic growth, it would be the post

---

11. *See* powell & Menendian, *supra* note 10, at 48–49; *see also* DAVID ROTHKOPF, POWER, INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD 101 (2012) (quoting Thomas Jefferson, "I hope we shall crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.").

12. *See* ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND 111 (2006). The term "Constitution in Exile" was coined by Jeffery Rosen to describe those "who believe that the Supreme Court went awry in 1937 when it began to permit regulation of economic activity." Mark Schmitt, *The Legend of the Powell Memo*, AM. PROSPECT (Apr. 27, 2005), http://prospect.org/article/legend-powell-memo.

war period into the late 1960s, in which the *Lochner* doctrine was thoroughly repudiated[13] and we had much greater economic regulation of the economy, other kinds of regulations, and a robust embracing of civil rights.[14]

Now let us turn to some additional ideas that are important in discussing the role of the market and the corporation. Let's begin by discussing class in the United States, and in particular, the relationship between race and class, which is critical for understanding the right balance for markets. One might assume that a focus on race when discussing markets is largely misplaced; that, if anything, we should be discussing class. Some suggest that race is a confusing, imprecise concept, and we would be better off focusing on class. Unfortunately, we have a limited understanding of both race and class.

Part of the difficulty in understanding either category is that we separate them conceptually and legally. In an earlier article I wrote, titled *The Race & Class Nexus*,[15] I try to show the mutually constitutive and deeply intertwined relationship between both categories. I'm not the only one; there are many other writers who have explored the relations between the two.[16] One example is a very insightful book titled *Fighting Poverty in United States and Europe*, in which the authors, Alberto Alesina and Edward Glaeser, compare U.S. policy to Western European policy.[17] They argue that many of those policies and structures adopted in the United States were formed to accommodate racial concerns, such as the way we structure our welfare system and award block grant funding for states to provide state control over spending.[18] What they are arguing, and what I argue as well, is that racial consideration and motivation cannot always be reduced to who in fact benefits from a set of arrangements. A weak

13. *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 488–91 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

14. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 253–57 (1964) (explaining Congress's power to regulate interstate commerce for the purposes of protecting civil rights).

15. john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355 (2007).

16. *See, e.g.*, ALBERTO ALESINA & EDWARD L. GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE (2004).

17. *See id.* at 15–54.

18. *See id.* at 133–81.

welfare system may hurt more whites than blacks, and yet the hostility toward blacks may still be a primary consideration for hostility toward a welfare state. The structure of program administration, degree of local control, and funding formulas were often arranged to accommodate southern racial strictures at the founding of our country and, more recently, during the New Deal.[19] One might notice that many of the sensibilities and structures not only hurt more whites than blacks, but also created political space and cover for corporations.

John Rawls, one of the most important political philosophers of the twentieth century, reminds us that if we wish to look and see if a society is just, we don't look at individuals, but we look at the range and structure of institutions themselves.[20] What I would like to suggest is that the arrangements of our institutions are not only hostile to poor people (consider our system for funding public education as one example), but they are racially tinged throughout. Moreover, constitutional grounds for these arrangements are largely nonexistent at best, and constitutionally problematic at worst. This claim may not achieve such recognition from the current U.S. Supreme Court, but if you go back and read Justice Harlan's dissent in the *Civil Rights Cases*,[21] it becomes clear that the U.S. Constitution does not require this corporatist reading. Justice Harlan has given us a roadmap for an alternative possibility.

Justice Harlan is best known for his dissent in *Plessy*,[22] which foretold *Brown*, yet that was neither his most cherished or important dissent.[23] Rather, he believed his dissent in the *Civil Rights Cases*, which set forth a clear alternative constitutional vision and interpretation of the Fourteenth Amendment, was his most important dissent.[24] He also argued in the *Civil Rights Cases* that the exclusion of blacks from public accommodations was a violation of the Thirteenth Amendment.[25] At issue was the

19. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 21–23 (2005).

20. JOHN RAWLS, A THEORY OF JUSTICE 47–52 (rev. ed. 1999).

21. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

22. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

23. *See* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 146–48 (1995); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 335 (2006).

24. powell & Menendian, *supra* note 10, at 64–66.

25. *The Civil Rights Cases*, 109 U.S at 35–36 (Harlan, J., dissenting); *see also*

constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in public accommodations, public conveyances, and places of amusement.[26] Justice Harlan argued not only that the antidiscrimination provisions of the Civil Rights Act of 1875 should be upheld under the Thirteenth Amendment, remedying a badge of slavery,[27] but that the Act could also be upheld under Congress's enforcement authority under the Fourteenth Amendment.

In arguing that the Civil Rights Act of 1875 could be upheld under the Fourteenth Amendment, Justice Harlan articulated an interpretive understanding of the Fourteenth Amendment, extending broad authority to Congress. In contrast to the constrictive reading of the majority, which emphasized the strictly *prohibitory* features of Section 1 of that Amendment, Justice Harlan countered that the first sentence of Section 1, the decisive phrase that overturns the pernicious *Dred Scott* decision, was affirmative in nature:

> The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section . . . is of a distinctly *affirmative character.* In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became instantly, citizens of the United States, *and* of their respective States.[28]

Since the grant of authority was affirmative in nature, and not simply prohibitory upon states, Justice Harlan argued that Congress's power to enforce is similarly not restricted to prohibiting state action:

> The citizenship thus acquired, by that race, in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial

---

Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, __ COLUM. L. REV. (forthcoming 2012) (manuscript 115–16), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115222 (discussing Justice Harlan's dissent in the *Civil Rights Cases*).

26. *The Civil Rights Cases*, 109 U.S at 7 (1883).

27. *Id.* at 36 (Harlan, J., dissenting). Harlan cites hypothetical laws that seek to curtail the freedom and movement of freedmen to establish the boundaries of the Thirteenth Amendment's protections. *Id.*

28. *Id.* at 46 (first emphasis added).

> branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the *provisions of this article*" of amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action.[29]

As Goodwin Liu described Justice Harlan's constitutional vision, the Fourteenth Amendment's grant of national citizenship is a "font of substantive guarantees" that might be enforced by Congress through affirmative legislation.[30] According to Professor Liu, such legislation includes the authority, if not the duty, to enact national educational legislation, among other provisions incident to full citizenship.[31] This vision of a broad, affirmative authority was rejected by the Reconstruction Era Supreme Court that ultimately upheld "separate, but equal" in *Plessy*.[32] It is curious that despite the disrepute of *Plessy*, so much of the Reconstruction Era's doctrinal foundations remain intact.[33] More pointedly, the accommodations provisions rejected by the Court have now been enacted in the Civil Rights Act of 1964, yet the cramped understanding of congressional power under this Amendment remains. One can see how a return to Harlan's understanding of the Fourteenth Amendment would offer promise for a new constitutionalism.

More recently, we think about *Carolene Products*' famous footnote four.[34] The *Carolene Products* decision not only marked the unraveling of the *Lochner* doctrine, and is often taught for that reason, but footnote four prefigures suspect classification doctrine, strict scrutiny, and fundamental rights theory—all of which we now take for granted. The predicate for the footnote and for more judicial inquiry is not racial or religious minorities or

---

29. *Id.*

30. Liu, *supra* note 23; *see also The Civil Rights Cases*, 109 U.S. at 49–52 (Harlan, J., dissenting).

31. Liu, *supra* note 23.

32. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

33. *See* john a. powell & Stephen Menendian, *Little Rock and the Legacy of* Dred Scott, 52 ST. LOUIS U. L.J. 1153, 1175 (2008); powell & Menendian, *supra* note 10, at 65 ("Despite the accomplished fact of the Civil Rights Act of 1964 [implying the implicit reversal of the Civil Rights Cases] . . . .").

34. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

any other group, but a "discrete and insular minority."[35] What I wish to suggest in this Essay is that the "discrete and insular minorit[ies]" today are the poor or extreme poor.

Consider our conceptualization of poverty. Today, the predominant measure of poverty is a lack of material goods or insufficiency of income. Yet, there are other ways of thinking about poverty. We can think about poverty as transitory and temporary, or what Charles Tilly calls durable inequality and Rebecca Blank measures as prolonged, intransigent poverty.[36] Yet, those measures of poverty based on income are perhaps better understood as a consequence of the condition of poverty rather than its cause. Poverty is not simply a lack of goods or income; it's a multivariate condition that is marked by a lack of membership, citizenship, and human concern.

If we can imagine a government or society that structures its systems to show total disregard for some people or groups, I believe we could advance a whole range of constitutional claims as to why this would be wrong. Unfortunately, I believe that is where we are now, as evidenced by the concerns raised in this symposium; both *Carolene Products* and Justice Harlan's dissent in the *Civil Rights Cases* suggest why: citizenship, belonging, and fair and equal access to the political process is deserving of special protection. When an individual is placed outside of the polity, it raises Article IV, Section Four concerns of the republic. It also raises concerns of badge and incident of slavery, if not slavery itself, and it raises concerns of privileges and immunities as citizens.[37]

As I have argued elsewhere, the most important thing our government or any government extends to its people is the right to belong.[38] Membership preconditions all other claims. A lack of membership effectively denies any possibility of making claims or having a voice in the political process.

When we examine the long history of the United States, who belongs in the polity—who is worthy of concern—has been an enduring and deeply

35. *Id.* at 152 n.4.

36. *See generally* REBECCA M. BLANK, IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY 9–12 (1997); CHARLES TILLY, DURABLE INEQUALITY (1998).

37. *See* Balkin & Levinson, *supra* note 25 (manuscript at 113–21).

38. *See* john a. powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA L. REV. 969, 987–88 (2004).

divided question.[39] From the first Immigration and Naturalization Act, which permitted only "free white persons" to become naturalized citizens,[40] to the infamous *Dred Scott* decision, which held that persons of African descent—not merely slaves of freed slaves—were not and could never become U.S. citizens, to Arizona's anti-immigrant SB 1070, which practically sanctions racial profiling, the question of not just citizenship, but membership, has been a fundamental dividing line in our history.

It is clear that the issue of membership and citizenship is fundamental to belonging and these concerns are reflected in the Constitution.[41] Chief Justice Taney's legal holding in *Dred Scott* was that black persons were not and could never become U.S. citizens, but he added, "that they had no rights which the white man was bound to respect."[42] The concern of the radical Republicans of the Civil War and Reconstruction period, as distinguished from the moderate Republicans of that time, let alone Republicans today, was to extend belongingness in the form of citizenship and membership in the political community and economic and social life of the reconstituted nation.[43] They sought to accomplish this end through the vehicles of the Thirteenth, Fourteenth, and Fifteenth Amendments. In a sense, they sought to overturn *Dred Scott*, not just as a legal doctrine, but to reverse the entire pernicious theory that undergirded it.[44]

The question of belonging in *Dred Scott* was not circumscribed to race. The question of who or what counts as a member pervades the decision. In some ways, *Dred Scott* can be understood as a corporations case. Corporations had been steadily enjoying an expansion of standing rights in the antebellum period, including the right to bring claims in state

---

39. *Id.*; *see also* powell & Menendian, *supra* note 33, at 1162 ("[M]embership is the most important good that human beings distribute to one another in a community. Communities of people extend rights and privileges to members that are not granted to non-members. In that way, membership informs all other distributive choices: 'it determines with whom we make those choices, from whom we require obedience and collect taxes, [and] to whom we allocate goods and services.' It follows that membership is prior in importance even to freedom. Without membership, no freedoms will be established, recognized, or protected." (alteration in original) (footnotes omitted)).

40. Immigration and Naturalization Act of 1790, 1 Stat. 103 (1790).

41. *See* john a. powell, *Poverty and Race Through a Belongingness Lens*, POL'Y MATTERS, Mar. 2012, at 5–6.

42. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

43. *See* powell & Menendian, *supra* note 33, at 1172.

44. *Id.* at 1170.

and federal courts.[45] As quasi-persons, there was a growing fear that slaves or freedmen would seek to exercise similar rights. The Taney Court reached a compromise in which corporations enjoyed citizenship rights under Article III, Section Two of the Constitution, but not under Article IV, Section Two.[46]

The standing claim in *Dred Scott* posed the issue of whether standing rights were available to blacks under Article III, Section Two's diversity of citizenship clause.[47] Since the Court had extended standing rights to corporations, how could they then deny them to other quasi-persons, such as freedmen, or even slaves? And if freed slaves enjoyed citizenship rights under Article III, on what basis would they be denied under Article IV's Privileges and Immunities Clause? These questions deeply concerned southern jurists up until *Dred Scott*.[48] The Court needed to protect standing rights for corporations without endangering southern laws or exposing the South's racial codes to federal litigation brought by black plaintiffs. In short, the Court needed to find a way to deny black plaintiffs' access to federal courts without undermining corporate standing rights. That solution to this Gordian knot was *Dred Scott*. The *Dred Scott* decision cordoned off federal courts from black plaintiffs by creating a super-subcategory for blacks as the anti-citizen, forever excluded from membership and the circle of human concern.[49]

If Justice Harlan, Goodwin Liu, and others are right, then both government and society have a responsibility to create fair structures, markets, and institutions, but also from a constitutional perspective, to ensure the security and opportunities necessary and essential not only to participate in the political and social life of the community and the democracy, but to receive the standing and respect of that community. This is the essence of Justice Harlan's claim that the citizenship guarantee

45. *See* David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 DUKE L.J. 695, 722–26.

46. *See id.*

47. *See Dred Scott*, 60 U.S. (19 How.) at 403–12, *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see also* Stuart A. Streichler, *Justice Curtis's Dissent in the* Dred Scott *Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 512–13 (1997).

48. *See* powell & Menendian, *supra* note 10, at 54–56.

49. *See* john a. powell, *Poverty and Race Through A Belongingness Lens*, POL'Y MATTERS 15–16 (2012), *available at* http://www.nwaf.org/FileCabinet/DocumentCatalogFiles/Other/PMpowell.pdf.

is an affirmative right,[50] and Goodwin Liu's claim that Congress has the authority, if not the constitutional duty—not just moral obligation—to make available resources necessary to foster enjoyment of that guarantee, such as the right to an education.[51]

To accomplish this constitutionally noble end, we must first understand what these societal and institutional structures are, how they are working, and what kind of effects they are creating. We must also be attentive to the ways in which policies, institutions, and markets are interacting to distribute opportunity across our society. This is precisely where we fall short: we turn a blind eye to those structures, ignoring the work they do.

Even when we have a basic analysis of the operation of societal structures, we may ignore their effects or rationalize them on non-constitutional grounds. As we better understand the relationships between school funding formulas, patterns of residential developing and housing, and unemployment, policymakers may ignore these relationships for various reasons or even defy mandates to implement more equitable policies. I have looked at structural marginalization—the way in which our structures unevenly distribute benefits and burdens across society. The issues of poverty and race are prominently featured in that analysis. The poor, especially the extreme poor—those who live in neighborhoods of concentrated poverty—are the truly disadvantaged in our society, and they are overwhelmingly people of color. They live outside the margin of society. They are often not afforded human dignity or concern or membership in the imagined community. They are the discrete and truly insular minorities in our country.

Another dimension to this perspective is the research emerging in and around the mind sciences. Research demonstrates not only the range of implicit or unconscious associations that lead to discriminatory treatment even against the conscious will, but also that our very perception of others is framed by social categories.[52] Research has shown the part of the brain that lights up when you see another human being does not light up when you see certain categories of people.[53] Those categories include homeless

50. *See* powell & Menendian, *supra* note 10, at 64.

51. *See* Liu, *supra* note 23.

52. Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 847–49 (2006).

53. *Id.* at 852.

people and people with disabilities.[54] In other words, some people do not even trigger in-group responses as being human.[55] They have been pushed out of what I call the circle of human concern. I would argue that they are the new discrete and insular minorities. They are the most vulnerable in our society and their social and structural exclusion and marginalization calls into question the legitimacy of our societal order.

As *Carolene Products* and the Reconstruction Amendments illustrate, the Court has a special role in our constitutional order in relationship to the discrete and insular minorities. However, the Court has abandoned this role and has instead taken on a special role for protecting the wealthy. The Reconstruction Amendments were largely used to enhance the power of the elite, and not the disposed, discrete, and insular minorities or even freed slaves. This is a complete distortion of the Constitution as amended, and a distortion of our democracy.

The circle of human concern is represented institutionally primarily through public space, yet we are in an era in which the public is increasingly suspect and efforts to privatize both government authority and property and to delegate public functions are expanding rapidly. This debate is framed narrowly in terms of public versus private. I have recently written that this heuristic public/private divide creates a blind spot and distorts not just the stakes but also power relationships.[56] A better way of understanding these relationships is not in terms of two domains, but four: public, private, nonpublic/nonprivate, and corporate. Privatization serves to undermine and limit democratic space and increase opportunities for profit.

Public space is what it represents: collective action, public infrastructure, and services such as schools, police, and parks. Private space is popularly understood to be the universe of nonpublic space; it is conceived as a place in which government is limited, if not cordoned off, and involves minimal surveillance and maximal autonomy and liberty. Yet, the way the Founders of the republic understood private space was different; private liberty was not understood to be solely a function of limiting government but the reach of the powerful.[57] The private sphere was a place where even the church could not intrude.

---

54. *Id.* at 848 tbl.1.
55. *See id.* at 852.
56. powell & Menendian, *supra* note 10, at 65.
57. *See supra* note 11 and accompanying text.

The third sphere is perhaps the least intuitive.[58] It is neither public nor private. Who inhabits the nonpublic/nonprivate sphere? Historically, women and slaves inhabited this sphere. Today, undocumented immigrants, the incarcerated and formerly incarcerated, and to some extent, the disabled also inhabit this space. It is the domain for those who enjoy a limited public voice and truncated private freedom—free from the interference, regulation, or supervision of others. To nineteenth century Americans, a home may have been a man's castle, but a woman's dungeon. Women literally could not participate in public space; not only did they lack the power to vote, but they were barred from certain forms of employment and lost property rights upon marriage. The suffrage and women's rights movement was an attempt to reconfigure that space and to extend the public voice.

When we look for the discrete and insular minorities identified in *Carolene Products* footnote four,[59] we find them existing outside the circle of human concern and outside the law in the nonpublic and nonprivate space. It is this group that cannot use the political domain to protect itself. The first and most important good that a legitimate society distributes to its members is belonging and selfhood.[60] The marginalization and inequality that is placed on this group is durable and categorical. It is this group that needs the special protection of the Constitution and the Court, not the super-citizen corporate elites. If this group is left to linger in the shadows of humanity, there is a danger that the membership will continue to expand and cause the circle of human concern to implode, destroying public and private space and bringing society down with it.

Today, the incarcerated and formerly incarcerated may inhabit a similar space. The Supreme Court has upheld voting restrictions on convicted felons,[61] and in 2012, all but two states imposed some type of voting restriction on felons.[62] In terms of private space, ex-offenders and other parolees experience legal discrimination in employment. A criminal record imposes many limitations in obtaining jobs, professional licenses, public housing, and other benefits and opportunities. Many employment applications ask prospective candidates if they have ever been convicted of a crime. These forms are often used to screen applicants. Individuals who

58. powell & Menendian, *supra* note 10, at 92–97.

59. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

60. powell, *supra* note 38; powell, *supra* note 49.

61. Richardson v. Ramirez, 418 U.S. 24 (1974).

62. *See State Felon Voting Laws*, PROCON.ORG, http://felonvoting.procon.org/view.resource.php?resourceID=286 (last visited Sept. 21, 2012).

check the box are in some cases automatically rejected. Other groups, such as undocumented immigrants, the homeless, and the extreme poor, inhabit this space. They have a difficult time organizing and having their voices heard, and this group lacks a private place to retreat free from surveillance and regulation.[63]

The fourth category is corporate.[64] The historical role of the corporation is far different than the corporate form today. The Founders would not only fail to recognize the modern corporation, but it would have caused them great alarm. Corporate space cannot be conflated with a simplistic understanding of private space. In their incipient forms, corporations were both public and private institutions, with elements of both within them. The revolution of corporations came during the *Lochner* and Jim Crow Eras, which misread and distorted the Constitution in profound ways, expanding corporate prerogatives. The *Lochner* Court read the Fourteenth Amendment to clothe corporations in personal and individual rights as a shield against governmental interference and regulation, just as corporations were being freed from the reins of state control.[65]

Expanding the circle of human concern to include corporations does not generate more freedom, but less. It dilutes the meaning of personhood, membership, and citizenship in which each status means less, leaving the wealthy and the powerful as more equal than others.

How might we expand the circle of human concern to encompass the truly disadvantaged in our society? How might our constitutionalism and jurisprudence better account for the needs of members in our society in service-structural transformations that reduce marginalization and engender inclusivity and belonging? How do we negotiate and advocate for a democratic arrangement that will sustain all of our people?

There is more than one way to approach this set of questions—philosophically, psychologically, economically, and of course, legally and constitutionally. As we have seen, the various legal answers may converge in important ways. Justice Harlan's constitutional vision resonates with the

63. In terms of welfare benefits and the Fourth Amendment, Professor Julie Nice noted there are no Fourth Amendment benefits or rights attached to this population; therefore, it creates a discrete and insular minority. Julie A. Nice, *Wither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1032–33 (2012).

64. powell & Menendian, *supra* note 10, at 97–104.

65. *See id.* at 65.

spirit of footnote four and the special role for protection of both discrete and insular minorities and the democratic processes. Reviving these submerged constitutional practices and understandings is a step in the right direction. However, it is a very different question as to whether the current Court would be open to it.[66] The reactionary composition of the current Court may portend a difficult path to a reinvigorated jurisprudence, but I would caution against pessimism or a view that moves the center of energy away from the courts entirely.[67] Rather, what is needed is both a more proactive sense of responsibility to enforce the rights of national citizenship under Section Five of the Fourteenth Amendment, among other provisions, and a more aggressive strategy for accessing the courts. Court-oriented advocacy is not a panacea or silver bullet, but it is a necessary part of a broader strategy. Courts provide a framework that is very important, and not just in important cases such as *Dandridge* or *Citizens United*.[68]

Our jurisprudence today makes the mistake of narrowly defining race, only to dismiss it. It perceives race only as black or Latino and phenotype on the one hand, and invidious racial animus on the other. Instead, race and structural racialization[69] is about institutions, structures, and the meaning generated by these arrangements that infiltrate our culture. The flip side of this narrow understanding of race is the broad, sweeping understanding of corporate personhood, which inappropriately brings powerful corporate actors inside the circle of human concern. We must find ways of pushing corporations out of the circle and bringing in the marginalized and most vulnerable in our society.

Imagine an attempt to integrate a swimming pool today, met with the response to close the public swimming pool to avoid coerced association

66. I should also note that simply reviving these submerged constitutional commitments does not automatically entail enlargement of the circle of human concern to the marginalized in the nonpublic/nonprivate sphere. Many conservatives, for example, would agree that the *Slaughterhouse* decision, and perhaps even the *Civil Rights Cases*, were wrongly decided. That does not mean they would embrace Justice Harlan's constitutional vision. Yet, Mr. Shapiro and others intimated that *Slaughterhouse* might be a vehicle for reviving *Lochner.*

67. For an argument of courts taking a less active role, see, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–94 (1999).

68. *See* john a. powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035 (2010).

69. I prefer the term "structural racialization" over "structural racism," because the former denotes the process of making race and generating racial meanings. *See* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 4 (2012).

and affiliation. This is exactly what happened in the 1960s, and yet, something very similar is happening today. Instead of shuttering public spaces, we are shrinking public space and creating exclusive and exclusionary private spaces. Instead of trying to keep out blacks or Latinos, the goal is to also keep out the poor and the extreme poor, often in the name of maintaining property values. Yet, this is neo-*Dred Scott*. Both hostile privatism and defensive localism are premised on the claim that others do not belong and can be justifiably excluded. This is not simply a distortion of our Constitution; it is a distortion of our democracy.

People outside of the circle of human concern are the most vulnerable in our society, and as public space collapses, so will this circle. The result is not a robust private space, but an anemic public space, weakened private space, and an expanded nonpublic/nonprivate and corporate sphere. That is not democratic, nor, do I believe, constitutional.