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1

Theoretical and Historical Foundations of the Right to Equal Recognition before the Law

1.1 INTRODUCTION

This chapter discusses key philosophical and legal concepts that are tied to the right to equal recognition before the law. It begins with a discussion of the role of liberal political theory in human rights law, which established a focus on individual rights. It argues that the individual right to equal recognition before the law is essential for full participation in the social contract – a liberal political concept that plays an important part in many societal structures. It then discusses the evolution of the right to equal recognition before the law in human rights law, up to its most recent emanation in the Convention on the Rights of Persons with Disabilities (CRPD). Finally, it examines the concept of equality more generally and its application to people with cognitive disability and the right to equal recognition before the law.

The CRPD is not the birthplace of these discussions. To the contrary, it is merely the manifestation of a newfound voice of people with disability. After centuries of exclusion from legal and philosophical discussions of personhood and autonomy, the drafting process of the CRPD allowed for the voice of people with cognitive disability to finally be heard.[1] The result was Article 12, a resounding cry for equal rights – particularly, the equal right to be respected as a full person under the law and as a legal agent with the same right to autonomy as those without cognitive disability.[2]

[1] For a discussion of the history of human rights for people with disability and the drafting process of the CRPD, see Rosemary Kayess and Phillip French, 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1–34. See also Michael Ashley Stein and Janet E. Lord, 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities', in Oddný Mjöll Arnardóttir and Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff Publishers, 2009), pp. 22–4.

[2] Amita Dhanda, 'Universal legal capacity as a universal human right', in Michael Dudley, Derrick Silove and Fran Gale (eds.), *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford: Oxford University Press, 2012), pp. 177–8.

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1.2 LIBERAL POLITICAL THEORY IN HUMAN RIGHTS LAW: PRIORITIZING INDIVIDUAL RIGHTS

Human rights law is largely premised on the existence of a liberal democratic society which upholds the individual as a rights holder.[3] It generally prioritizes the individual over the community and values the liberty and autonomy of the individual. Individualized rights, such as civil and political rights, are often given higher standing than more community-based rights, such as social, economic, and cultural rights. Critics have often cited this focus on the individual as the downfall of the rights framework, especially in the context of disability where community and social connectedness can play an important role. However, the line between these groups of rights is getting increasingly blurred, and the CRPD includes innovations that enduringly weave the two groups together, as discussed later in this chapter.

Social, economic, and cultural rights continue to hold a status distinct from that of civil and political rights. They are not seen as compromising or taking precedence over rights to individual liberty or autonomy.[4] The differential status of social, economic, and cultural rights can be seen in their delineation as 'second generation' rights, while civil and political rights are 'first generation' rights.[5] Civil and political rights are seen as attaching directly to the individual and being readily adjudicable.[6] Social, economic, and cultural rights are more amorphous and are not always clearly adjudicable.[7] However, there is an ongoing debate about the

[3] For a discussion, see Carol C. Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004).

[4] This is evidenced by the prevalence of the concepts of freedom and equality of opportunity throughout the ICESCR: International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

[5] For a discussion of the two sets of rights, see Henry J. Steiner and Philip Alston, 'The relationship between the two sets of rights', in *International Human Rights in Context: Law, Politics, Morals*, 2nd edn (Oxford: Oxford University Press, 2000), p. 268; Gerard Quinn and Philip Alston, 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156–229; and Asbjørn Eide, 'Economic, social, and cultural rights as human rights', in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd rev edn (Dordrecht: Martinus Nijhoff Publishers, 2001).

[6] For a discussion of the challenges and pitfalls in adjudicating social, economic, and cultural rights, see Aryeh Neier, 'Social and economic rights: a critique' (2006) 13(2) *Human Rights Brief* 1–3.

[7] For a discussion of the different nature of civil and political rights as compared to social, economic, and cultural rights, as well as a discussion of the interrelatedness of the two groups of rights, see Jackbeth K. Mapulanga-Hulston, 'Examining the justiciability of economic, social and cultural rights' (2002) 6(4) *The International Journal of Human Rights* 29–48. For

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interrelated nature of all human rights.[8] In 1993, the World Conference on Human Rights Adopted the Vienna Declaration and Programme of Action, which stated that: 'All human rights are universal, indivisible and interdependent and interrelated'.[9] While there is growing evidence, such as the Vienna Declaration, that the distinction between the two groups of rights is fading, they are still treated as two distinct categories and the individual's right to liberty, equality, and autonomy is a strong theme throughout both groups of rights. This reflects the centrality of liberal political theory throughout human rights law.[10]

There are several historical reasons for the development of human rights law as primarily individual rights. The Allies' victory in World War II placed the United States and the Allies' strong foundation of individual rights at the forefront of international policy.[11] The brutality of World War II led to the abandonment of utilitarian philosophies[12] that sacrificed the rights of the individual to the achievement of the greatest happiness for all.[13] The Holocaust also demonstrated the massive failings of the Nazi positivist system of law that prioritized the law itself over a deeper moral code.[14] As a result, in addition to a turn to individual rights, there was also a return to natural law concepts that presuppose a higher moral code of rights that is supreme to man-made law.[15] Later, the move away from Marxist ideas

a discussion of the justiciability of economic, social, and cultural rights, see Michael J. Dennis and David P. Stewart, 'Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health?' (2004) 98 *The American Journal of International Law* 462–515.

[8] These issues are discussed further in Chapter 2.

[9] Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23, para. 5. See also Mapulanga-Hulston, 'Examining the justiciability of economic, social and cultural rights'.

[10] It was not until 2008, that the United Nations General Assembly adopted the Optional Protocol for the enforcement of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishing a complaints procedure, an inquiries procedure, and an inter-states procedure: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 5 March 2009, UN Doc A/RES/63/117. This was forty-two years after the United Nations General Assembly adopted a similar optional protocol for the International Covenant on Civil and Political Rights (ICCPR): Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, in force 23 March 1976, 999 UNTS 171.

[11] For a discussion of individual rights coming to the forefront in the nineteenth and twentieth centuries, see Jerome J. Shestack, 'The philosophic foundations of human rights' (1998) 20 *Human Rights Quarterly* 201–34 at 212, 215.

[12] See, for example, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London, 1789).

[13] Shestack, 'The philosophic foundations of human rights', 214–15.

[14] Ibid., 215.

[15] For example, John Locke, *Second Treatise of Government* (London, 1690).

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associated with the end of the Cold War period further secured individual rights as the predominant force of international human rights law.[16]

The content of the international bill of rights – the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – reflects these philosophical shifts. Within these instruments, human rights are conceptualized as 'inalienable' and 'universal',[17] embracing natural law theories espousing a moral code that is all-encompassing and operates on a higher plane.[18] These rights are ascribed, for the most part, to the individual – and there is little appearance of prioritizing the greater good over the individual. The liberal concept of the individual as a rights holder is, therefore, front and centre in the international bill of human rights.

1.3 EQUAL RECOGNITION BEFORE THE LAW AND THE SOCIAL CONTRACT

Equal recognition before the law is the right for an individual to be recognized by the State as a legal entity possessing personhood and agency.[19] It is, arguably, one of the most important civil and political rights. It is the foundation for most other civil and political rights. The denial of recognition before the law can preclude an individual from voting, joining associations, having standing before a court, hiring an attorney, having her decisions recognized in law, among other legal actions that are essential for inclusion in society as an equal member. Recognition before the law that is unequal between different groups creates a sub-class of citizens who are objects without power to engage in the societal structure. Achieving equality before the law could be considered the bedrock of a truly free and equal liberal democratic society.

[16] See Shestack, 'The philosophic foundations of human rights', 210–11.
[17] Universal Declaration of Human Rights, 10 December 1948, GA Res 217A (III), UN Doc A/810, preamble.
[18] For example, Immanuel Kant, *The Principles of Critical Philosophy* (London, 1797).
[19] See Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights: Legal capacity', 1–12 August 2005, UN Doc A/AC.265/2005/CRP.5, prepared for the Sixth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities; and Bernadette McSherry, 'Legal capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22–7.

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The right to equal recognition before the law has deep connections to liberal political theory. It is what allows an individual to be a participating subject of the 'social contract' – a concept central to modern liberal political theory.[20] The social contract is made up of individuals acquiescing to societal restrictions on freedom and liberty in exchange for the ability to live in society and exercise bargaining power to achieve their own 'good' life.[21] Where an individual is not recognized as a person before the law on an equal basis with others, her ability to engage in this social contract is either hampered or non-existent because she is not recognized as a legal entity capable of such bargaining and acquiescence.

The value and accuracy of social contract theory has been much criticized.[22] However, it nonetheless continues to play a significant role in the organization of modern society. This can be seen in legal capacity law. Where an individual's legal capacity is recognized, she is treated as a participant in the social contract, with an expectation of protection of her rights by the State and freedom to exercise her own legal agency. Where legal capacity is denied to an individual, she is not granted participation in the social contract. She is not free to exercise legal agency and does not have her rights – particularly those to autonomy – protected by the State in the same way as those to whom legal capacity is granted. As such, the social contract – and a particular group's ability to engage in it – is important to examine as a benchmark for equality.

The search for equal recognition before the law is not a new endeavour. Women,[23] religious minorities, ethnic groups, excluded social castes, among others, have fought for centuries for the right to be people before the law.[24]

[20] See generally Thomas Hobbes, *Leviathan: A Critical Introduction*, 2 vols., Karl Shuhmann and G.A.J. Rogers eds. (Bristol: Thoemmes Continuum, 2003, first published 1651); John Locke, *Two Treatises of Government* (London, 1713); and Jean-Jacques Rousseau, *The Social Contract*, Charles Frankel ed. (New York: Hafner, 1949, first published 1762).

[21] For a discussion of the social contract, see John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 2005).

[22] Feminist and critical race theorists have made significant arguments criticizing social contract theory. See, for example, Carole Pateman, *The Sexual Contract* (Stanford, Calif.: Stanford University Press, 2006); Virginia Held, *Feminist Morality: Transforming Culture, Society, and Politics* (Chicago: University of Chicago Press, 1993); and Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997).

[23] Women were denied full legal personhood in many jurisdictions up until the twentieth century: Eilionóir Flynn and Anna Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81–104 at 81, citing Marsha A. Freeman, 'Measuring equality: a comparative perspective on women's legal capacity and constitutional rights in five Commonwealth countries' (1989–1990) 5 *Berkeley Women's Law Journal* 110–38 at 112.

[24] Dhanda notes that Article 16 of the International Covenant on Civil and Political Rights was included to ensure the right to equal recognition before the law to colonized people: Dhanda, 'Universal legal capacity as a universal human right', p. 179.

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They fight for legal agency and status equal to those of privileged groups whose legal personhood and agency is fully recognized and assumed. Where this is achieved, the State would restrict the liberty of all individuals on the same basis, not based on the individual's membership in a specific group. Any restrictions on an individual's liberty would apply to all individuals and would not have an unjustified disproportionate effect on any group over another. This recognition before the law would allow all individuals to enter the social contract as equals. The centrality of liberal theory in human rights, and the importance of equal recognition before the law for participation in the social contract, make it natural that the right to equal recognition before the law has a long history in human rights law.

1.4 THE EVOLUTION OF THE RIGHT TO EQUAL RECOGNITION BEFORE THE LAW

The first mention of equal recognition before the law in a United Nations (UN) human rights instrument was in Article 6 of the Universal Declaration of Human Rights (UDHR). Preliminary drafts of the article included language that permitted derogation for age, mental condition, or commission of a crime. It read, 'Everyone has the right to a legal personality. No person shall be restricted in the exercise of his civil rights except under general law based on reasons of age or mental incompetence, or as punishment for a criminal offence, or as otherwise permitted in this bill.'[25] In a subsequent draft, the text was changed to include a global element and redact the language permitting derogation; it read, 'Everyone has the right everywhere in the world to recognition as a person before the law and to the enjoyment of fundamental civil rights.'[26] The final draft of the text was agreed as, 'Everyone has the right to recognition everywhere as a person before the law.'[27] This final text reflects the most expansive version, creating a right for 'everyone' that has no specified limitations.

[25] United Nations Economic and Social Council, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, First Session Report, 1 July 1947, UN Doc E/CN.4/21, p. 43. United Nations Economic and Social Council, Commission on Human Rights, Draft of a Resolution for the General Assembly Submitted by the Representative of India, 31 January 1947, UN Doc E/CN.4/11.

[26] United Nations Economic and Social Council, Report of the Commission on Human Rights, 17 December 1947, UN Doc E/600, p. 18. United Nations Economic and Social Council, Commission on Human Rights, Report of the Drafting Committee to the Commission on Human Rights, 21 May 1948, UN Doc E/CN.4/95.

[27] Universal Declaration of Human Rights, Art. 6.

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Article 16 of the International Covenant on Civil and Political Rights (ICCPR) mimics the UDHR article almost in its entirety and states simply, '[e]veryone shall have the right to recognition everywhere as a person before the law'. Both the UDHR and the ICCPR fail to provide any additional explanatory text in the Articles themselves. The Human Rights Committee, the monitoring body for the ICCPR, has provided little help with interpretation because they have not published a general comment on the Article nor has there been any significant use of Article 16 in the Human Rights Committee case law under the first Optional Protocol to the ICCPR.[28] An examination of the negotiations around the drafting of Article 16 ICCPR indicates that the Article was only intended to guarantee the right to legal personhood – or legal standing – but not the right to legal agency or the ability to be an actor before the law.[29] The preliminary drafting of Article 16 explicitly stated that the State *is* permitted to limit the civil rights of minors, people of 'unsound mind', and people convicted of crimes. Agreement could not be reached on this provision and it was therefore taken out.[30] It is interesting that this dispute occurred in both the draft of Article 6 of the UDHR and Article 16 of the ICCPR. At the least, it indicates a hesitance to restrict the right.

The next iteration of the right to equal recognition before the law was in the Convention on the Elimination of Discrimination against Women (CEDAW). It provided more depth to the right, attaching both standing and agency. The UN General Assembly adopted CEDAW in 1979 – 13 years after the ICCPR was adopted. Article 15 CEDAW guarantees equality before the law for women, requiring the granting of legal capacity to women on an equal basis with men and the 'same opportunities to exercise that capacity'. It also describes the rights to equality in contracting, administering property, and judicial procedures. It clearly guarantees not only the right to be a person before the law but also to exercise legal capacity on an equal basis. Twenty-eight years later, with the adoption of the Convention on the Rights of Persons with Disabilities (CRPD), Article 12 provided yet more detail to the right to equal recognition before the law. It embraced CEDAW's interpretation by including in the right to legal capacity both the ability to hold rights and to act

[28] OHCHR, Background conference document on legal capacity, para. 8. For a discussion of the case law of the Human Rights Commission, see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn (Oxford: Oxford University Press, 2005).

[29] OHCHR, Background conference document on legal capacity, paras. 9–15; and see also Marc J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987), pp. 335–6.

[30] OHCHR, Background conference document on legal capacity, para. 13.

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under the law. It also places an obligation on States to provide access to support for the exercise of legal capacity, which had never before been enumerated in an international human rights instrument.

Article 12 of the CRPD encompasses an acceptance of both the liberal political emphasis on individual rights and a more expansive community-based construction of rights. It reflects an acceptance of the individualistic human rights model because it includes an individual right to equal recognition before the law – allowing the individual an equal right to be a participant in the social contract. However, it also embraces a different notion of the 'human'. It accepts the reality of the human condition and the need for human rights law to conform to that reality.[31] It acknowledges differing abilities of different individuals by creating a State obligation to ensure the realization of the right via support. It recognizes that people are due individual rights, but the exercise and realization of those rights does not occur in a vacuum – it requires the recognition that social connectedness is essential for everyone and everyone operates in relation to each other.[32] This acknowledges utilitarian and Marxist conceptions that recognize the importance of the individual in relation to the larger society, but maintains the primacy of the individual's rights.

1.5 EQUALITY AND NON-DISCRIMINATION: THE APPLICATION TO COGNITIVE DISABILITY

1.5.1 *Defining Equality and Non-discrimination*

Equality has long been fraught with conflicting conceptions of its nature and application. Depending on how it is framed, it can bestow positive or negative outcomes on minority groups. A minority group is any group that is marginalized and is less privileged than the dominant group.[33] If equality is conceptualized as only requiring the State to act similarly towards all individuals or

[31] Dhanda, 'Universal legal capacity as a universal human right', pp. 178–9.

[32] See Gerard Quinn, 'Rethinking personhood: new directions in legal capacity law and policy', Ideas Paper, University of British Columbia (29 April 2011).

[33] This is the sociological definition of the term 'minority', which includes a group of people who are experiencing marginalization or oppression from a more powerful, dominant group. This is not the colloquial usage of the term which implies a connection to numerical qualities. For example, the small percentage of people who are extremely wealthy are not a 'minority group' according to the sociological definition, because they do not experience oppression or marginalization. See, for example, Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor: The University of Michigan Press, 2003), p. 27.

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classes of individuals,[34] minority groups are often left at a disadvantage because they may be in need of additional State action in order to counteract deeply embedded social barriers hoisted upon minority groups.[35] In this way, equality can be used as a smokescreen for not allocating resources to social programs and rights protection for minority groups. Conversely, equality can be conceptualized as requiring that States do more to ensure that members of minority groups have equal opportunities or outcomes as members of the majority group. This may require bestowing resources upon minority groups or engaging in some type of 'positive discrimination'. This entails treating individuals or classes of individuals differently in order to combat existing social barriers and to thereby provide equality of opportunity to members of the minority group.

These issues are articulated in work on substantive versus formal equality. Formal equality embraces minimal State interaction with the individual. It merely requires the State to eliminate barriers to equality. Substantive equality, however, acknowledges inequality created by social conditions.[36] It requires the State to take positive action to ensure that equality is achieved not only in form, but also in substance – filling the gaps left by historical and ongoing marginalization and prejudice.

In the area of disability, the trend has been towards an acceptance that equality sometimes requires positive action – often amounting to differential treatment for the minority group of people with disabilities. For example, reasonable accommodation laws around the world require State and private actors to use resources to make adjustments for people with disability, which they are not required to make for people without disability.[37] This is an example of individuals being treated differently in the name of substantive equality.

[34] The concept of 'similarly situated' persons being due similar treatment in accordance with non-discrimination law has been developed through case law in the United States. For a discussion, see Giovanna Shay, 'Similarly situated' (2011) 18 *George Mason Law Review* 581–624.

[35] The United States Supreme Court has issued decisions that tend towards this direction. See, for example, Supreme Court of the United States, *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. *Ct* 1623 (2014).

[36] Michel Rosenfeld, 'Substantive equality and equal opportunity: a jurisprudential appraisal' (1986) 74 *California Law Review* 1687–1712 at 1697. For a discussion of inequality and discrimination, see Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005).

[37] See, for example, Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990), codified at 42 USC §§ 12101 et seq. (1990) §§ 12111–12; and for a discussion, see Pamela S. Karlan and George Rutherglen, 'Disabilities, discrimination, and reasonable accommodation' (1996) 46 *Duke Law Journal* 1–41.

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As is evident, equality and discrimination can be conceived of in different ways. Various courts have defined it differently in distinct contexts and in relation to diverse minority groups. International human rights law has generally accepted that substantive equality is required. In particular, the CRPD makes it clear that both the removal of barriers and the provision of State services will be required to reach equality for people with disabilities. It incorporates reasonable accommodation into non-discrimination, and includes positive State obligations to provide resources and services to people with disabilities in combination with negative obligations to refrain from creating and maintaining barriers to rights.[38]

UN monitoring committees have been inconsistent in their definition and application of principles of equality and non-discrimination.[39] However, all committees have recognized that legislation and refraining from discrimination is not enough to achieve equality. They agree that positive measures by States are required.[40]

1.5.2 *Equality and Cognitive Disability*

Cognitive disability is established as a protected class under the umbrella of persons with disability.[41] If disability is a protected class similar to gender and race, then the question should not be, 'why' are people with disability due equal civil rights – such as equal recognition before the law – but 'how' can it be achieved. We do not question why racial minorities are due equal civil rights. It has become a socially accepted moral imperative. Similarly, equality for people with disability – including cognitive disability – should be accepted as a moral imperative.

[38] Article 12 of the CRPD is a prime example of this. It requires States to refrain from denying equal recognition before the law and legal capacity on an equal basis to people with disabilities. It also requires States to provide access to support for the exercise of legal capacity: Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 3 May 2008, 2515 UNTS 3 (CRPD).

[39] For a discussion of inequality and discrimination, see Vandenhole, *Non-Discrimination and Equality*, p. 289.

[40] Ibid., p. 290.

[41] Different jurisdictions have applied different levels of scrutiny to different protected classes of people. This book does not have space to explore this issue, but welcomes further research into domestic laws and the level of scrutiny applied to the protected class of people with disability. For a discussion on the diminishing power of the concept of a 'protected class' in the United States, see David S. Schwartz, 'The case of the vanishing protected class: reflections on reverse discrimination, affirmative action, and racial balancing' (2000) (3) *Wisconsin Law Review* 657–90; and Steven S. Locke, 'The incredible shrinking protected class: redefining the scope of disability under the Americans with Disabilities Act' (1997) 68 *University of Colorado Law Review* 107–46.

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