Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal

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I. INTRODUCTION

For more than a decade, the relationship between affirmative action, justice and equality has been examined extensively by both legal scholars and philosophers.[1] Elaborate arguments have been mounted in support of, as well as in opposition to, affirmative action, but no synthesis fully integrating the philosophical and constitutional dimensions of the issue appears to have emerged. Also, within the last decade, the United States Supreme Court finally has had to grapple with the vexing question of the constitutionality of affirmative action programs under the equal protection clause.[2] Predictably, however—particularly in light of the sharp political debate surrounding the issue and the failure of the equal protection clause itself to supply any self-evident constitutional standard to settle the issue—the Court has failed to adopt any definitive or clear-cut solution.[3] Actually, the Supreme Court's treatment of affirmative action raises as many questions as it answers, as few firm principles emerge from the partial and fragmented consideration a sharply divided Court has brought to bear on the issue.[4]

The debate over affirmative action has recently intensified, as the Reagan administration has undertaken a systematic effort to dismantle existing affirmative action programs.[5] The administration has taken the position that the Supreme Court's latest pronouncement on affirmative action, *Firefighters Local Union No. 1784 v. Stotts*,[6] justifies the conclusion that preferential treatment on the basis of race or sex violates equal protection.[7] Several lower federal courts, however, have not agreed

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1. For the legal scholarship on affirmative action, see generally *A Symposium: Regents of the Univ. of Cal. v. Bakke*, 67 CALIF. L. REV. 1 (1979) and *DeFunis* Symposium, 75 COLUM. L. REV. 483 (1975). For a sampling of the extensive remaining legal scholarship on the issue, see Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and The Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983); Choper, *The Constitutionality of Affirmative Action: Views From the Supreme Court*, 70 KY. L.J. 1 (1981–82); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice*, 92 HARV. L. REV. 864 (1979); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

For a sampling of the extensive philosophical literature, see R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS (1980); A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION (1979); T. NAGEL, MORTAL QUESTIONS, Ch. 7 (1979); B. GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY? (1978); R. DWORKIN, TAKING RIGHTS SERIOUSLY, 223–39 (1977); EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel and T. Scanlon eds. 1977); *Symposium on Reverse Discrimination*, 90 ETHICS 81 (1979–1980).

2. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

3. *See* Part III, *infra*.

4. *Id.*

5. On April 2, 1985, the Justice Department announced that "56 cities, counties and states must modify affirmative action plans so as to end the use of numerical goals and quotas designed to increase employment of women, blacks or Hispanic Americans." *Justice Dept. Presses Drive on Quotas*, N.Y. Times, Apr. 3, 1985, at A16, col. 1.

6. 104 S. Ct. 2576 (1984).

7. *See Justice Dept. Presses Drive on Quotas*, N.Y. Times, Apr. 3, 1985, at A16, col. 1.

with this interpretation of the Supreme Court's decision in *Stotts* and have continued to uphold the validity of various affirmative action programs.[8]

To discover the proper nexus between affirmative action, justice, and the equal protection clause, one must look to the underlying concept of equality. Indeed, since the Greeks, justice has been equated with equality,[9] while the equal protection clause "gives constitutional status to the ideal of equality."[10] If philosophy can establish that affirmative action comports with the requirements of justice, then it would probably accord with the canons of equality and with the constitutional dictates of the equal protection clause. Because of the widespread adoption of equality as a moral and political ideal, however, the prescriptive uses of the term have expanded vastly, seemingly depriving it of most of its usefulness as a descriptive term.[11] As nearly everyone joins the bandwagon of equality, the term is used to denote so many diverse—and, on occasion, even contradictory—states of affairs that it seems eviscerated of any coherent meaning.[12] It is therefore not surprising that both proponents and opponents of affirmative action can proclaim that they stand firmly on the side of equality,[13] or that the idea of equality has itself recently been attacked as being empty.[14]

The inconclusiveness of the philosophical debate over the justice of affirmative action, the uncertainty of its constitutional status, and the aura of imprecision surrounding the concept of equality all contribute to create the impression that evaluations of affirmative action cannot ultimately rise above the realm of political passion. This impression does not appear to favor either the proponents or the opponents of affirmative action. A second impression derived from the same factors, however, does seem to play directly into the hands of the opponents of affirmative action. According to this second impression, the lack of consensus concerning substantive principles of justice and equality reflects an unbridgeable gap between the principle of formal justice and principles of substantive justice.

According to the principle of formal justice, all equals must be treated equally.[15] However, since this principle does not provide any criterion for determining who is equal to whom, or in what respect one person might be equal to another, it is reducible

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8. *See, e.g.*, Hammon v. Barry, 606 F. Supp. 1083 (D.D.C. 1985); Britton v. South Bend Community School Corp., 593 F. Supp. 1223 (N.D. Ind. 1984); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194 (E.D. Mich. 1984).

9. A. Ross, On Law and Justice 268 (1959).

10. Fiss, *Groups and The Equal Protection Clause*, in Equality and Preferential Treatment 84, 85 (M. Cohen, T. Nagel & T. Scanlon eds. 1977).

11. *See* D. Rae, D. Yates, J. Hochschild, J. Morone & C. Fessler, Equalities 18 (1981) [hereinafter cited as D. Rae] ("Almost everyone seems somehow a partisan of equality.").

12. *See* A. Gutmann, Liberal Equality, at ix (1980).

13. *Compare, e.g.*, Justice Blackmun's statement in support of the affirmative action program in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978), to the effect that "in order to treat certain persons equally, we must treat them differently," *with* Justice Stewart's statement in opposition to the affirmative action program involved in Fullilove v. Klutznick, 448 U.S. 448, 526 (1980), that "nothing in [the] language [of the fourteenth amendment] singles out some 'persons' for more 'equal' treatment than others."

14. Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

15. Formal justice has been defined as "a principle of action in accordance with which beings of one and the same essential category must be treated in the same way." C. Perelman, The Idea of Justice and the Problem of Argument 16 (1963) (emphasis omitted).

to a principle of consistency.[16] Anyone can choose any criterion, no matter how arbitrary, for determining who is equal to whom with respect to what, and still comply with the principle of formal justice, provided only that the chosen criterion be applied consistently. Accordingly, the principle of formal justice is equally compatible with a criterion that treats persons as unequals because of their race or sex, and with a diametrically opposed criterion, which provides that mere differences of race or sex never justify treating persons as unequals.

The principle of formal justice may be as hospitable to the racist as to the foe of racism, but its requirement of consistency does appear to pose a major problem to any proponent of affirmative action or benign discrimination who rejects the legitimacy of original discrimination. If one denies that racial differences provide a basis upon which discrimination against blacks may be justified, consistency would seem to require that one refrain from discrimination in favor of blacks. Furthermore, the equal protection clause appears, at the very least, to elevate compliance with the principle of formal justice to a constitutional requirement.[17] One of the principal aims of the framers of the fourteenth amendment, moreover, was to invalidate racial classifications as the basis for treating blacks as inferior to whites.[18] Accordingly, the combination of the logical structure and of the intended historical purpose of the equal protection clause would, *prima facie*, appear to provide constitutional support against affirmative action. Thus, arguably, the only genuine nexus between justice, equality and equal protection is the weak principle of formal justice. Yet even this weak principle apparently furnishes a sufficient philosophical and constitutional foundation for rejecting the legitimacy of affirmative action.

Much of the force of the argument against affirmative action from the principle of formal justice stems from its simplicity, elegance, and symmetry. Equality, however, is hardly a simple concept, and the symmetry arrived at by application of the principle of formal justice may well depend for existence on the suppression of history.[19] More generally, both of the above mentioned impressions, based on the apparent vagueness of the concept of equality, might well be equally unwarranted. Indeed, they may both be the product of the same process of abstraction carried to its logical extreme. Thus, when the idea of equality is systematically abstracted from all sociopolitical contexts, it will ultimately appear as utterly devoid of any substantive content, as the arbitrary preference of a particular individual or group, or perhaps better still, as lacking any substantive content precisely *because* it merely serves to connote the arbitrary preferences of persons.

If one accepts that all claims to equality are historical and made in the context of particular sociopolitical settings, the concept of equality is likely to loom as being

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16. *See id.* at 20–21.

17. "[E]qual protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly." Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting).

18. *Id. See also* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1024, 1027–28 (1979).

19. For an excellent analysis of the great complexity surrounding the concept of equality, see D. RAE, *supra* note 11.

highly complex, always to some extent indeterminate, but hardly empty.[20] Upon closer scrutiny, moreover, it becomes apparent that there is no single standard of equality or of inequality, but rather complex sets of particular equalities standing in opposition to particular inequalities.[21] Also, the concept of justice is itself not monolithic, as it embraces such diverse notions as justice in distribution, justice in compensation and procedural justice.[22] An important consequence of the complex nature of both justice and equality is that, even in the context of affirmative action, the equal protection clause cannot be properly applied without the intervention of mediating principles.[23] Finally, inasmuch as equality and inequality stand for a multiplicity of instances of different kinds of equalities and inequalities, it becomes much more unlikely that affirmative action can be either successfully attacked or successfully defended under all circumstances.[24]

The principal aim of this Article is to define the parameters of the legitimacy of affirmative action, in relation to an adequate theory of equality, and of the nexus between equality, the multiple dimensions of justice, and the constitutional requirement of equal protection. With the aid of a proper conceptual framework, the Article will examine the scope and limitations of philosophical justifications of affirmative action, explore the philosophical presuppositions underlying the equal protection clause, and suggest parameters of constitutional legitimacy for affirmative action consistent with relevant philosophical justifications yet compatible with plausible principles of constitutional interpretation.

Part II of the Article will be devoted to establishing a proper conceptual framework. The main elements of such a framework are the articulation of a phenomenology of equality that properly accounts for the interplay of particular equalities and inequalities operating in actual sociopolitical contexts and the description of the multifaceted relationship between equality and justice. Part III will attempt to discover the philosophical presuppositions that lie behind the equal protection clause. Part IV will concentrate on the treatment of affirmative action as a constitutional issue. Finally, part V will be devoted to the presentation of a proposed philosophical and constitutional justification of affirmative action that accords with both the conceptual framework developed in part II and plausible principles of constitutional interpretation for the equal protection clause.

Based on the analysis of part V, the Article concludes that philosophical considerations of justice and constitutional considerations of equal protection, when

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20. Several scholars have recently attacked the thesis that equality is an empty idea. *See, e.g.*, Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983); D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983).

21. *See*, D. RAE, *supra* note 11, at 130 *passim*.

22. *See* Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 780–81 (1985). *See also infra* text accompanying notes 68–87.

23. The equal protection clause "gives constitutional status to the ideal of equality, but that ideal is capable of a wide range of meanings. This ambiguity has created the need for a mediating principle . . . ." Fiss, *supra* note 10, at 85.

24. Indeed, any straightforward statement that affirmative action promotes equality or inequality will have to be understood, in the last analysis, as a statement endorsing some equalities and inequalities and rejecting others. *Cf.* D. RAE, *supra* note 11, at 19 ("The question is not 'Whether equality?' but '*Which* equality?'") (emphasis in original).

set in the context of the proper conceptual framework, converge to justify the pursuit of affirmative action—even in the strong sense of preferential treatment of a minimally qualified person who is less qualified than other competing applicants for the same place or position—under the very same set of clearly defined circumstances.

II. The Conceptual Framework

A. *Equality, Equalities, and Inequalities*

In a universe where all subjects are completely alike in all respects, and where all social goods are divisible into equal lots that can be distributed to each of the subjects, so that all subjects remain completely alike in all respects after the distribution, equality would be simple, and justice reducible to equal distribution.[25] In any other universe, however, equality is inextricably linked to inequality in a dialectical process of mutual determination.[26] In a universe where subjects have different needs, for example, distribution of an equal lot to each subject would amount to an unequal treatment of subjects according to their needs, and conversely the distribution to each of a lot commensurate with his or her needs would lead to the distribution of unequal lots.[27] In any universe in which there are differences between subjects it is impossible to treat all subjects equally in all respects, and it therefore becomes necessary to choose some relevant respect(s) in relation to which subjects ought to be treated equally. Moreover, the corollary of any such selection is that there will be certain respects in which subjects are bound to be treated unequally.[28]

Not only does equality in one respect entail inequality in another, but in all but one case,[29] equal treatment in relation to some chosen relevant respect will lead to inequalities between different persons. For example, if each person is to be treated equally according to his or her merit, equality will require that those whose merits are alike be treated alike, but that those whose merits are different be treated differently. Moreover, a failure to treat those with different merit unequally would undermine the implementation of the principle: To each according to his or her merit.[30]

The dialectical relationship between equality and inequality also permeates the selection of a suitable subject of equality. The subject of equality can be the individual

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25. *See id.* at 7.

26. *Cf. id.* at 144 ("because of the antagonisms between one equality and another, *there must always be some inequalities*. For any society with structural complexity, there must be choices among equalities, hence equalities left out." (emphasis in original)).

27. For example, if A and B are both sick and in need of medicine, but A's medicine costs ten times as much as B's, then treating A and B each according to his or her respective need would require the distribution to A of a lot which is ten times greater than that distributed to B. On the other hand, if both A and B get the same lot, which is enough to cover the cost of B's medicine, but not that of A's, then A and B would be treated unequally in the sense that B's need would be satisfied, but not A's.

28. *See supra* note 26.

29. This one case is the one in which everyone is treated equally. In that case all distributions must be made in equal lots to every subject of equality.

30. This follows from the principle of formal justice. *See* Perelman, *supra* note 15. Indeed, "treating alikes alike" entails "treating unalikes unalike."

or the group.[31] Individual-regarding equality is likely to produce group-regarding inequalities.[32] Group regarding equality, on the other hand, might well produce inequalities between the individual members of various groups, and it is certainly consistent with inequalities among individuals within the same group.[33] Furthermore, when the subject of equality is defined to encompass some but not all individuals, or some but not all groups, membership in the subject class signifies an equality among members that stands in contrast with the inequality between members and nonmember individuals or groups.[34]

Another facet of the interplay between equality and inequality becomes apparent when one considers that subjects of equality and objects of distribution are always situated in a historical context.[35] If as the result of previous distributions there is an unequal division of goods at the time of a new distribution of equal lots, the equal distribution will maintain the unequal division. To eliminate the unequal division, therefore, it is necessary to distribute unequal lots.

Even this cursory review of a few of the manifold aspects of the relationship between different equalities and inequalities suffices to suggest that the concept of equality cannot by itself indicate which equalities or inequalities are morally relevant and which are not. Equality is a relation establishing an order that encompasses alikes and unalikes.[36] Equality does not specify, however, who is the subject of equality, in what respect those in the subject class are to be deemed to be equal, or what purpose is to be served by making it morally relevant for a particular subject class to be deemed to be equal in a particular respect. These matters can only be specified in the context of particular norms that are independent from the concept of equality or, more precisely, from the concept of equality taken in its descriptive dimension.

B. *The Postulate of Equality*

Since the eighteenth century, in the sociopolitical context of modern western society, a widespread consensus has developed over the normative proposition that all individuals are morally equal as individuals.[37] This proposition, to which I shall refer as "the postulate of equality," has been a centerpiece of liberal philosophy from

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31. *Cf.* D. RAE, *supra* note 11, at 20 *passim* (distinguishing between individual-regarding equalities and block-regarding equalities).

32. For example, if each individual is to receive ten units of a good and all individuals are divided into two groups, the first one being twice the size of the second, then the first group will have twice as many units as the second.

33. If the group that comprises twice as many individuals receives the same lot as the second group, then individual members of the former will receive one-half of what will be received by individual members of the latter. Furthermore, each group could receive the same number of units and decide to distribute them unequally among their respective members.

34. For example, all the citizens of a country may enjoy the same benefits that are generally denied to foreigners. The paradigm here is the right to vote granted to all adult citizens but not to foreigners.

35. *See* S. BENN & R. PETERS, PRINCIPLES OF POLITICAL THOUGHT 131–32 (1959); M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); D. RAE, *supra* note 11, at 13.

36. *See* D. RAE, *supra* note 11, at 26 ("[E]quality is a purely *relational* concept") (emphasis in original).

37. *See* A. GUTMANN, *supra* note 12, at 18 ("The belief in human equality . . . is an idea that . . . is basic to the modern doctrine of individualism, equal respect for the human dignity of all people being essential to the realization of individual autonomy, the protection of privacy, and the opportunity for self-development."). *See also* Feher & Heller, *Forms of Equality*, in JUSTICE 149, 152 (E. Kamenka & A. Erh-Soon Tay eds. 1980) (since the eighteenth century, almost all social systems regard equality as a positive value).

Locke to Kant, and from Nozick to Rawls and Dworkin.[38] The postulate of equality has also been a cornerstone of the American form of constitutional government, as evidenced by the famous dictum that "all men are created equal" contained in the United States Declaration of Independence.[39] Moreover, while there may be disagreements concerning the precise meaning of the postulate of equality, there is a widespread consensus that it means, at least, that individuals are entitled to equal autonomy[40] and equal respect,[41] as the subjects of moral choice and as being capable of devising and rationally pursuing their own respective life plans.[42]

The postulate of equality does not itself specify which equalities and inequalities are justified in particular sociopolitcal contexts. The postulate of equality, however, does represent an advance in specificity over the principle of formal justice. Thus, consistent with the postulate of equality, it is the individual who is the proper subject of equality,[43] and certain actual differences among individuals cannot constitute relevant grounds upon which unequal treatment can be morally defended. The latter proposition follows from the fact that the belief that "all men are created equal" is not based on empirical observation, but rather on a counterfactual normative axiom.[44] Moreover, by placing the postulate of equality within its proper historical perspective, one is reminded that it first emerged as a moral weapon against the privileges of status and birth characteristic of the feudal order.[45] Therefore, at the very least, the postulate of equality enjoins using differences of status or birth as the basis for treating persons unequally.

One of the important consequences of the postulate of equality's rejection of certain natural, social, and cultural differences as the basis for treating individuals unequally is that it places the burden of persuasion on the proponent of a factual difference between individuals as providing a sufficient moral justification for treating such individuals unequally. This creates a presumption of equality that stipulates that justice requires that individuals must be treated equally and that each departure from that standard must be separately justified by morally persuasive considerations.[46]

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38. *See* D. RAE, *supra* note 11, at 96. *See also* R. NOZICK, ANARCHY, STATE AND UTOPIA (1974); J. RAWLS, A THEORY OF JUSTICE (1971); Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (S. Hampshire ed. 1978).

39. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

40. *See* A. GUTMANN, *supra* note 12, at 35.

41. *See* Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 (1983).

42. *See* J. RAWLS, *supra* note 38, at 92–93: "A person's good is determined by what is for him the most rational long-term plan of life . . . . To put it briefly, the good is the satisfaction of rational desire."

43. *See* S. LUKES, INDIVIDUALISM 137 (1973).

44. *See* Williams, *The Idea of Equality*, in JUSTICE AND EQUALITY 116–37 (H. Bedau ed. 1971).

45. *See* S. BENN & R. PETERS, *supra* note 35, at 132 ("French revolutionary *'Egalité'* . . . was a specific protest against the privileges of noble birth and clerical status . . . .").

46. *But see infra* text accompanying notes 89–93. In the last analysis, in a universe devoid of domination the presumption of equality would give way to an automatic disregard of differences when they are morally irrelevant and an automatic taking into consideration of differences when they are morally relevant. From the perspective of a phenomenology of equality, however, the first moment of the encounter between the self and the other would seem to be that typified in the relationship between master and slave. The master treats the slave as inferior because the latter is different. The master wishes to suppress the slave's difference by forcing the slave's consciousness to become a mere reflection of the image of the master. *See* G. HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A.V. Miller trans. 1979). The second moment of the encounter between self and other, on the other hand, may be characterized as being analogous to the paradigmatic relationship between colonizers and the colonized. Unlike the master, the colonizer does not treat the other as inferior

The presumption of equality may well be useful as a procedural device, but it still fails to distinguish with sufficient precision between those differences that must be ignored and those that properly can be invoked to justify unequal treatment. One logical suggestion is to draw a line between immutable characteristics and actions.[47] Underlying this distinction is the notion that it is unfair to hold individuals morally accountable for characteristics over which they can exercise no control, but not for the actions over which they have control.[48] This distinction has some merit and may be invoked to place a greater burden of persuasion on any proponent of unequal treatment who relies on differences in immutable characteristics. Overall, however, this distinction leaves much to be desired, as there are immutable characteristics that appear to justify unequal treatment as well as differences that can be eliminated through the voluntary actions of individuals, but which are firmly believed not to justify unequal treatment.[49]

The aims of the postulate of equality would be completely satisfied if enough goods could be distributed for each individual to realize fully the goals of his or her own life plan. If this were possible, individuals would receive unequal lots, since not all individual life plans are likely to require the same number or the exact same kinds of goods for their fulfillment. Because each individual could satisfy his or her life plan, however, the receipt of unequal lots would create no envy or resentment. In that case, unequal distribution would merely be the means to achieve the ideal of equality posited by the postulate of equality. In other words, unequal distribution would merely represent a *marginal* inequality required to achieve the type of *global* equality contemplated by the postulate of equality.[50]

Absent the abundance required to fulfill everyone's life plan, a difficult decision must be made concerning the distribution of scarce goods. Should such distribution be in equal lots? Or should it be in proportion to the degree of satisfaction it is likely to produce in its recipient? If lot-regarding equality is chosen, the distribution will promote marginal equality at the expense of global equality. If, on the other hand, subject-regarding equality becomes the norm, then marginal inequality will serve to produce a less than perfect global equality.

If the actual value of a particular good to the pursuit of a given individual's life plan were transparent to all, then the selection of subject-regarding equality might

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because the latter is different. Instead, the colonizer treats the other as an equal, but forces the other to abandon that which makes him or her different. Thus, the Spanish conquistadors did not enslave the pre-Columbian Indians whom they colonized. They forced them to renounce their religion and to embrace Christianity. *See generally* T. TODOROV, LA CONQUÊTE DE L'AMÉRIQUE: LA QUESTION DE L'AUTRE (1982). The slave is given no choice but to remain as an inferior, while the colonized can achieve equality, but only at the price of losing his or her own distinct identity. Eliminating slavery may be a higher priority than eliminating colonialism, but the postulate of equality cannot be satisfied unless both are eradicated. The presumption of equality, in turn, is a reflection of the phenomenological priority of the need to eliminate slavery.

47. *See* Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 113 (1984).

48. *Id.*

49. Not every immutable characteristic is morally irrelevant. A blind person, for example, should not enjoy an equal right to drive a car. Perry, *supra* note 18, at 1065–66 n.220. On the other hand, while one can generally voluntarily change one's religion that does not justify unequal treatment based on differences in religious affiliation.

50. "Marginal equality is defined with respect to (often small) changes from the status quo, with the *changes* being equal in magnitude for all. Global equality is defined with respect to holdings above zero, with their *amounts* or end states being equal." D. RAE, *supra* note 11, at 51 (emphasis in original).

well be better suited to promote the aims of the postulate of equality. Since that is often not the case,[51] however, it may be better to implement the presumption of equality in favor of lot-regarding equality. The advantage of the latter arrangement lies primarily in that it places a burden of persuasion on anyone who claims that a particular departure from lot-regarding equality is justified under the postulate of equality. Ideally, an unequal distribution should be allowed only if those who clearly stand to gain the most by it are able to convince all the other individuals involved that such distribution would better serve the dictates of an accepted principle of justice.[52]

There are cases where the requirements of subject-regarding equality coincide with those of lot-regarding equality. One such case would be a situation where a group of persons is trapped inside a building that is on fire. Each individual, regardless of his or her particular life plan, presumably has an equal need to be rescued. Moreover, assuming that each of those trapped is equally unable to flee the burning building without outside assistance, then each, in order to satisfy his or her equal need to survive, must receive the same good: the services of an outside rescuer. Assuming that only firefighters would be able to perform this service, and that each firefighter could rescue only one of the individuals trapped, then justice would require that as many firefighters be sent to the rescue as there are people to be rescued inside the burning building.

So long as there is no scarcity of the good to be distributed—in a case where subject-regarding equality coincides with lot-regarding equality—there seem to be simple and straightforward means to achieve justice. Where there is a shortage of the required goods—one hundred individuals trapped inside the burning building and only fifty firefighters who can be sent to the rescue—a vexing dilemma is posed. Either all the people inside the building are treated equally, which means that none is rescued, or the fifty firefighters are sent to the rescue, and half of the people trapped in the building survive, but all have been treated unequally, and thus by definition unjustly.

One possible solution to this dilemma draws upon the distinction made by Dworkin between the right to equal treatment and the right to be treated as an equal.[53] According to Dworkin, the right to be treated as an equal is fundamental and consists of being treated with the same concern and respect as anyone else; the right to equal treatment, on the other hand, is derivative. Dworkin's distinction is consistent with the postulate of equality and the presumption of equality. The latter amounts to a presumption in favor of equal treatment, which can be overcome by a persuasive argument in favor of unequal treatment, so long as such unequal treatment does not

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51. *Cf.* Rosenfeld, *supra* note 22, at 778 ("Individual desires and individual conceptions of the good . . . are essentially irreducible, because each individual is the best, if not the sole, judge of his or her own conception of the good and of the urgency and intensity of his or her own desires."). *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1769 (1976) (Individualism considers that individual values are subjective and arbitrary).

52. *Cf.* Rawls' two principles of justice, which allow only for inequalities that benefit everyone. J. RAWLS, *supra* note 38, at 14–15: "[T]he first [principle of justice] requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."

53. R. DWORKIN, *supra* note 1, at 227.

violate the fundamental principle, derived from the postulate of equality, of treating all persons as equals.

There can be little doubt in the case of the burning building that the possibility of saving fifty lives provides a persuasive argument in favor of overcoming the presumption in favor of equal treatment. The principal remaining problem—assuming that none of the one hundred needs or deserves to be rescued any more than any other one—is to find a way to provide the apparently justified unequal treatment without violating anyone's fundamental right to treatment as an equal. In other words, since there are no morally relevant differences between all those who need to be rescued, how can a plan capable of leading to the rescue of some but not all be justified morally?

C. *Equality of Result and Equality of Opportunity*

A possible solution to this problem rests on the distinction between equality of result and equality of opportunity.[54] Where equality of result morally is clearly called for—that is, where no morally relevant differences are found that would justify inequality of result—it can nevertheless be set aside if there exists a compelling reason to do so, provided that all those originally entitled to equality of result are placed in a position where they have an equal opportunity to receive the scarce goods to which they are entitled morally. In the case of the burning building, the prospect of saving fifty lives certainly seems to furnish a compelling reason for abandoning the pursuit of equality of result. Moreover, if each one of the one hundred people is given an equal opportunity to have his or her life saved, each of them will have been treated as an equal, thus satisfying the postulate of equality. If a lottery were chosen to determine the fifty persons who would be rescued, each of the one hundred would be given an equal opportunity—in the sense of an equal prospect[55]—of surviving. In that case, each one would be treated with the same concern and respect as everyone else. If the selection of those slated for rescue were made on the basis of race, however, then the postulate of equality would clearly be violated, since those who would be denied an opportunity to survive solely on the basis of their race would have been treated with less concern or respect than others.

Where equality of result would be warranted, equality of opportunity is justified only if there is a scarcity of the good that everyone wants and deserves.[56] Accordingly, in the example of the burning house, if one hundred firefighters were available,

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54. Equality of result is to be contrasted with equality of opportunity. Feher & Heller, *supra* note 37, at 149–53. *See* N. RESCHER, DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION 94 (1966) ("A distribution that does not give all equally deserving claimants an equal share must, in the interests of justice, at least preserve an 'equality of opportunity' . . . .").

Equality of opportunity, in turn, means that "[o]pportunities of power, right and acquisition are to be equal: power, right and acquisition themselves are not." D. RAE, *supra* note 11, at 64.

55. "Prospect-regarding equal opportunity" has been defined as follows: "Two persons, j and k, have equal opportunities for *X* if each has the same probability of attaining *X*." D. RAE, *supra* note 11, at 65 (footnote omitted). Moreover, it is to be distinguished from "means-regarding equality of opportunity," which has been defined as follows: "Two persons, j and k, have equal opportunities for *X* if each has the same instruments for attaining *X*." *Id.* at 66.

56. "[R]esort to the concept of 'equality of opportunity' is a *faute de mieux* procedure, a counsel of despair, as it were. It represents a means for achieving an equalization of opportunities (and risks) in cases in which a direct allocation of shares to claims is infeasible." N. RESCHER, *supra* note 54, at 94.

it would violate the postulate of equality to send only fifty to the rescue, even after having conducted a lottery giving everyone an equal opportunity to be selected to be rescued. Indeed, in that case, the pursuit of equality of result would lead to none of the negative consequences it would have in case of scarcity. The failure to pursue equality of result, by contrast, would lead to an unnecessary loss of fifty lives. Where there is no scarcity, therefore, the pursuit of equality of opportunity may well lead to a harm that could be avoided altogether by pursuit of equality of result.

The principle of careers open to talents (or to some combination of talents and effort) implies commitment to equality of opportunity.[57] Equality of opportunity to demonstrate superior talent is valued because of a scarcity of available positions, but removal of such scarcity would justify replacing equality of opportunity with equality of result. Moreover, whether equality of opportunity is understood to entail the mere uniformity of applicable rules, means-regarding equality of opportunity or prospect-regarding equality of opportunity[58] depends on particular conceptions of talent, the development of talent, and the relation between talent and effort. Thus, if one believes that each person can fully display his or her talents, provided only that no legal impediments exist, then the implementation of uniformly applicable rules that do not inhibit the display of individual talent would suffice. In that case, being treated as an equal would require only the existence of formal equality of opportunity. On the other hand, if one believes that talents are likely to remain hidden unless their possessor is provided with the means to display them, a fair assessment of the relative talents of various candidates for a position may depend on the adoption of means-regarding equality of opportunity. On yet another view, which views talents as much more a matter of effort and development than of the exercise of natural abilities, fairness might well require prospect-regarding equality of opportunity. In either of these last two cases, however, formal equality of opportunity would be insufficient and would have to give way to fair equality of opportunity—that is, an equality of opportunity that either insures that each individual possesses the means or instruments necessary to be able fully to display his or her own talents, or one that provides for the development and training of those faculties which will allow each individual to improve his or her prospects of succeeding in the competition for the best talent.[59]

Paradoxically, the success of prospect-regarding equality of opportunity leads to the elimination of the justification for holding careers open to talent. So long as prospect-regarding equality of opportunity leads merely to a relative equalization of individual talents, it can be viewed as bringing greater fairness to the competition without undermining the legitimacy of granting positions to those with the most talent. Carried to its logical conclusion, however, prospect-regarding equality of opportunity could theoretically—through such techniques as genetic engineering—

57. *See* S. BENN & R. PETERS, *supra* note 35, at 132 (idea of career open to talents originally a rejection of principle that highest position should be reserved to aristocrats; more recently the idea has been associated with equality of opportunity).

58. For the distinction between means-regarding and prospect-regarding equality of opportunity, see *supra* note 55.

59. *Cf.* J. RAWLS, *supra* note 38, at 73 (requirement of career open to talents should be supplemented by principle of fair equality of opportunity, according to which "those with similar abilities and skills should have similar life chances . . . irrespective of the income class into which they are born").

fully equalize each individual's prospects by leading to the achievement of an equal distribution of talent to each individual. When that point is reached, talent no longer provides a justifiable basis for differentiating among applicants for scarce positions.[60] Accordingly, in order to maintain respect for each individual's right to be treated as an equal, it will be necessary to rely on another mechanism, such as a lottery, to distribute available positions.

To recapitulate: one way to move from the pure abstraction of the principle of formal justice is to adopt as a normative principle the postulate of equality, and to break down the domain encompassed by equality as a descriptive concept into a complex web of mutually determining equalities and inequalities. The postulate of equality is individual-regarding, and one of its principal functions is to foreclose the use of certain actual inequalities or differences as justifications for unequal treatment. This leads to the adoption of a presumption of equality that places the burden of persuasion on the one who proposes that a given difference justifies unequal treatment. Although no iron-clad rule is possible, generally immutable differences, over which individuals have no control, are less likely to justify unequal treatment than differences arising from their voluntary actions. Because the postulate of equality commands equal respect for each individual's pursuit of his or her own life plan, moreover, subject-regarding equality seems ideally preferable to lot-regarding equality. However, since the communication of the subjective value of particular goods is often problematic, it seems better to create a rebuttable presumption in favor of lot-regarding equality. Finally, there is a dialectic which sets equality of opportunity against equality of result. When equality of result is justified and there is no scarcity of the goods to be equally distributed, there is no justification for equality of opportunity. On the other hand, in the context of such a scarcity, equality of opportunity satisfies the right of each individual to be treated as an equal while preventing the harm that would inevitably follow from the pursuit of equality of result.

D. *Allocations of Goods and the Role of Government*

Reference has been made thus far to claims for equal distribution or for equal opportunity to compete for the distribution of scarce goods without addressing the following important questions: Who is responsible for such distributions? And to what extent is anyone responsible for the allocation of all the goods that might conceivably be distributed? In order to evaluate the possible answers to these questions properly, it is useful to keep in mind the basic distinction between the agent of allocation, the domain of allocation—that is, the class of goods that are capable of distribution—over which such agent exercises control, and the domain of account—that is, the domain encompassing all the goods a claimant maintains ought to be distributed equally.[61]

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60. D. RAE, *supra* note 11, at 75.

61. This distinction between *domain of allocation* and *domain of account* is based on the one drawn by D. Rae. *See id.* at 48–49.

The agent of allocation can be the government or any of its agencies or subdivisions, a private employer with positions to fill, a public or private university with available places for students, and so forth. For purposes of the present discussion, however, the proper agent of allocation will be assumed to be the government as a generic entity, and the principal issue that will be explored will be the proper domain for the government as agent of allocation.

The range of possible domains of allocation over which a government might exercise control as an agent of allocations is very broad. Conceivably, a government may have no goods to allocate, and may have no function other than the preservation of the distributions produced through the intervention of another agent of allocation. At the other extreme, the government may preside over a domain of allocation that encompasses each and every good that might possibly be distributed. Moreover, the number and kinds of goods a government might allocate are likely to be different in different historical settings. Thus, for example, while a contemporary government can distribute a vaccination against polio to all of its citizens, this would not have been possible for any government forty years ago. Moreover, a government itself may contribute to the enlargement of its domain of allocation—when it finances research into new life saving drugs, for example—or it may merely become the agent of allocation for goods created or made possible by sources outside the government.

Unless the goods encompassed by a domain of account are within a domain of allocation, and unless the government is the proper agent of allocation over that domain, there is no point in pressing a claim against the government for the equal distribution of goods included in the domain of account. Moreover, from a normative standpoint, the critical question concerns the discovery of a proper domain of allocation that would allow the government to fulfill its legitimate function consistent with the requirements of the postulate of equality. The general answer to this question is that the proper domain of allocation is one that can maximize the opportunities for each individual to achieve his or her own life plan without infringing on any other individual's right to equal respect and equal autonomy.[62] The precise limits of such domain, however, depend on the particular social, economic, technological, and scientific potential of actual historical societies, and are therefore likely to vary from time to time and from place to place.

In considering possible domains of allocation for which government would be the legitimate agent of distribution consistent with the postulate of equality, a further distinction must be drawn between negative equal rights and positive equal rights.[63] The former are individual rights not to be interfered with that are correlative to individual duties of forbearance. Under this conception, every individual has an equal right to a zone of autonomy from which all others have a duty to stay away. The government's domain of allocation in a regime where negative rights are paramount is, in turn, very limited. It consists exclusively of those goods—police protection,

62. This formulation generally accords with Rawls' two principles of justice. *See* J. RAWLS, *supra* note 38, at 60–75.

63. For a discussion of the distinction between negative and positive rights, see Rosenfeld, *Between Rights and Consequences: A Philosophical Inquiry into the Foundations of Legal Ethics in the Changing World of Securities Regulation*, 49 GEO. WASH. L. REV. 462, 481–83 (1981).

contract enforcement, impartial judges capable of conducting fair trials, for example—necessary for the equal preservation of each individual's zone of autonomy. Furthermore, in the context of a regime of negative rights, the domain of allocation, over which the limited government legitimately presides, is sufficient only to guarantee formal equality of opportunity. Each individual's zone of autonomy is to be protected so that each one enjoys the same liberty—the same lack of interference from others—to exploit his or her own talents.

The model based on negative rights seems particularly compatible with the minimal form of government advocated by libertarian political philosophers since Locke.[64]

Another model, based on the equal distribution of positive rights, is generally associated with the welfare state.[65] Positive rights are rights to have something, and entail positive duties to do something. Thus, each citizen's positive right to receive a minimum of subsistence from the government entails a positive duty on the part of government to supply such minimum subsistence. In order to meet its positive duties, the government will need to exercise control over a larger domain of allocation. To obtain greater control, however, government will likely have to impose new positive duties on its citizens. Thus, to raise the revenue necessary to provide every citizen with a minimum of subsistence, for example, the government might well have to impose on its citizens a positive duty to pay taxes. In the last analysis, whether any particular sociopolitical arrangement based on a substantial grant of positive rights comports with the postulate of equality depends on a proper evaluation of the joint effects of its distribution of positive rights and of the positive duties to which those rights are necessarily correlated. In any event, a regime of positive rights and duties is certainly better suited to promoting fair equality of opportunity and equality of result than is one based primarily on negative rights and duties.

If government violates or actively condones the violation of certain negative rights and thus deprives the individuals whose rights have been violated of formal equality of opportunity, those individuals might be restored to the status quo ante by a simple correction of the violation. For instance, if a black person is prevented from pursuing an occupation for which he or she is qualified merely because of a government law prohibiting blacks from engaging in that occupation, repeal of that law might well be all that is needed to put such person on an equal footing with members of other races. Moreover, since repeal of a law is not likely to be costly or to require the government to enlarge its domain of allocation, formal equality of opportunity can be restored without otherwise altering the balance between rights and duties. The more difficult question in this context, however, is whether mere repeal of the law will be sufficient to restore the status quo ante; whether removing formal

64. Nozick, the chief contemporary exponent of Lockean Libertarianism has declared that "[t]he minimal state is the most extensive state that can be justified." R. NOZICK, *supra* note 38, at 149.

65. *Cf.* M. WALZER, *supra* note 35, at 74 ("The arguments for a minimal state have never recommended themselves to any significant portion of mankind . . . . The political community grows by invasion as previously excluded groups, one after another . . . demand their share of security and welfare.").

equal protection for any significant length of time makes a simple return to it insufficient to satisfy the demands of the postulate of equality.

An even more complex problem arises when a government has systematically deprived certain individuals of fair equality of opportunity or equality of result in a context where positive rights predominate.[66] In such a case, restoring the deprived rights will require the government either to enlarge its domain of allocation or to effectuate a shift in the distribution patterns of goods already within its control. In either case, the total configuration of positive rights and duties is likely to be substantially altered, with new positive duties likely to be imposed on certain individuals who took no part in any of the previous deprivations.[67] To determine whether adherence to the postulate of equality justifies undertaking these changes is a difficult task. Moreover, it is a task that one cannot hope to accomplish successfully without some insight into the relationship between distributive justice and compensatory justice.

E. *Distributive, Compensatory, and Procedural Justice*

Distributive justice and compensatory justice constitute two complementary aspects of justice.[68] In theory, the two concepts are clearly distinct: distributive justice refers to the fair division and distribution of a domain of allocation;[69] compensatory justice, to the voluntary or involuntary exchange of equivalents designed to restore the equilibrium between two agents who voluntarily or involuntarily have become engaged in some transaction.[70] In practice, however, matters of distributive justice seem to be inextricably linked to matters of compensatory justice, either in a relationship of complementarity or in one of mutual contradiction.

A sociopolitical context in which contract supplies the measure of just distributions and just compensation is a paradigmatic example of the complementarity of distributive and compensatory justice.[71] In that context, the agent of allocation is the economic marketplace and the domain of allocation is the class of goods susceptible of distribution through contractual exchanges. Moreover, contract is believed to supply the proper norm of distribution consistent with the postulate of equality, because it is believed to lead to the most efficient pattern of distribution while affording the greatest possible protection to individual autonomy. On the other hand, contract is also thought to provide the proper norm of compensation, as the

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66. An example of denial of equality of opportunity would be a situation in which a state university considers all white applicants but refuses to consider black applicants, in a state that grants its citizens a positive right to compete for a place at a state-sponsored university. An example of denial of equality of result, on the other hand, would be a situation in which the state grants each of its citizens a positive right to receive an annual payment of $1,000 but refuses to make any payment to its black citizens.

67. For example, if the state decides to compensate some of its citizens for certain injuries for which it is responsible, it might have to increase its revenue by imposing higher taxes on all its citizens.

68. The distinction between distributive and compensatory justice was originally drawn by Aristotle. *See* ARISTOTLE, NICOMACHEAN ETHICS, BK. V (D. Ross trans. 1980).

69. Distribution can be broadly used to denote both the process of distribution and the product of such distribution. *See* J. FEINBERG, SOCIAL PHILOSOPHY 107–08 (1973).

70. *See* N. RESCHER, *supra* note 54, at 5–6. Examples of compensatory justice are damages paid by tortfeasors to their victims, and by the breaching party to a contract to the other party.

71. *See* Rosenfeld, *supra* note 22, at 782–84.

values of the goods exchanged by individual contractors are deemed to be subjective. Thus, to determine equivalence between goods exchanged by contractors, or to reach an equilibrium with respect to their transaction, one must look to the bargain struck by them. Under these circumstances, the contract enforcement would satisfy the requirements of compensatory justice and contribute to achieving distributive justice.[72]

Considerations of distributive justice requiring equality of opportunity with respect to the distribution of jobs, on the other hand, provide an example of a circumstance in which the pursuits of distributive and compensatory justice seem mutually contradictory. In this case, the postulate of equality is interpreted as requiring that jobs be distributed to those who are the most qualified to hold them, and that each job applicant be given an equal opportunity to demonstrate his or her relevant qualifications. Furthermore, the justification for the distribution of jobs to those who are the most qualified to hold them is the belief that such a distribution will lead to greater efficiency, and thus make everyone better off in the long run.

The relevant domain of allocation is the class of all jobs available for distribution, while the agents of allocation are all those who have jobs to offer, with each of them exercising control over a portion of the domain. Now, let us suppose that individual A, competing for job J, was at time T the most qualified person to hold that job, but that job J was, nevertheless, awarded to B because of a violation of A's right to equal opportunity. In an ideal world, the perfect compensation for this violation of A's right would be to roll time back to T, and to give A the job J that she clearly deserved at that time. Since no such compensation can be made in the real world, however, the best available approximation, designed to put A in a position as close as possible to the one she would have been in had her rights not been violated, might well be to order the culpable agent of allocation to hire A at time T_1 for the job J_1 that most resembles J. If A is the most qualified person to hold J_1 at T_1, this solution satisfies both compensatory and distributive justice. But if A is not the most qualified person to hold J_1 at T_1, then awarding her J_1 as compensation clearly violates the demands of distributive justice.

Not only can the aims of distributive and compensatory justice be mutually contradictory, but adoption of a new principle of distributive justice is likely to create conflicts between claims under the old and new principles. These conflicts become manifest in what has been referred to as the "reformer's paradox," according to which, given an imperfect initial distribution (from the standpoint of a new principle of distributive justice), any redistribution towards a more just pattern of distribution would run headlong into already existing claims that must be recognized as legitimate.[73] Therefore, if adherence to the postulate of equality coupled with significant changes in social and historical circumstances mandate the adoption of a new

72. *Id.*

73. N. RESCHER, *supra* note 54, at 121.

principle of distributive justice, one of the most difficult problems is likely to be that of finding a proper balance between prospective claims under the new principle and already established claims under the old.

When the need for compensation arises out of a violation of a prevailing distributive norm, there is a satisfactory solution to the dilemma posed by mutually contradictory distributive and compensatory aims. This solution, proposed by Goldman, holds that compensation for past violations of the principle of distribution should take precedence over distributive considerations, even if that entails temporarily suspending application of the distributive principle.[74] Thus, for instance, violation of equal opportunity rights with respect to job distribution might well have to be compensated by awarding the victims subsequently available jobs, even at the price of suspending a non-victim's right of equal opportunity with respect to the latter job. According to Goldman, moreover, this solution is justified, for unless compensatory claims are given precedence over distributive claims, those who violated the victim's rights could undermine a legitimate distributive principle completely and with impunity.[75] To prevent this, and ultimately to preserve the integrity of a violated distributive principle, paradoxically, one may have to set the principle temporarily aside.

The dilemma created by successively applying different principles of distributive justice is more difficult to resolve. There are no violations of principles of justice, but merely a change in principles corresponding to significant changes in social and historical circumstances. The claims made under the old principle were legitimate when made, and nothing within the control of the claim-makers may have changed since the time the claim was made (or the distribution, pursuant to such claim, received). Any subsequent deprivation of a justly received distribution would tend to promote instability and to undermine respect for accepted principles of justice. On the other hand, if the patterns of distribution generated by the old principle have become so entrenched that nothing short of disregarding them would allow the new principle to become truly operative, one might wish to ignore at least some past claims in order to pursue the aims defined by the new principle. In the last analysis, conflicts among principles of distributive justice cannot be resolved in the abstract. A careful weighing of alternatives will have to be made in each particular context.

Beyond the possible conflicts between distributive and compensatory justice, the latter might seem, initially, to be straightforward and unproblematic. Indeed, the aim of compensatory justice is merely to establish an equilibrium between two agents who have dealt with one another in the course of a voluntary or involuntary transaction that extends over time. Upon closer inspection, however, once one moves away from certain paradigmatic cases, the limits of compensatory justice tend to become blurred, as the very notion of compensation seems to dissolve into that of distribution.

Under optimal conditions, compensation is a zero-sum process. The aim of compensatory justice is to complete an exchange of equivalents. The paradigmatic

74. A. GOLDMAN, *supra* note 1, at 65–67.
75. *Id.*

model for compensatory justice is that of contract, and particularly that of a contract between two parties for the one-time exchange of goods.[76] For such contract to be just, there must be an equivalence between the goods received and the goods surrendered by each party. Moreover, in the case of a breach after one party has performed, compensatory justice requires that the breaching party compensate the nonbreaching party in an amount that is equivalent to the value of the benefit received by the breaching party.

The model of compensation applicable in contract cases also extends to cases involving the wrongful misappropriation of another's property. In that case, the benefit to the wrongdoer is equivalent to the victim's loss, and compensatory justice requires that the wrongdoer transfer to the victim an amount that is equivalent both to the loss suffered by the victim and to the ill-gotten benefit obtained by the wrongdoer. By a single stroke, therefore, the compensation erases both the ill-gotten benefit and the undeserved loss. Not all situations in which compensation is deemed just lead to a zero-sum result, however.[77] For example, a victim may suffer a loss as the result of another person's negligent act, and become entitled to compensation for the loss. From the victim's standpoint, the value of what is received in compensation ought to be as nearly equivalent to the value of that which has been lost as is possible. The negligent tortfeasor who is obligated to compensate the victim, on the other hand, often does not derive any benefit—or does not derive a benefit that is commensurate with the victim's loss—from his or her negligent act.[78] From the tortfeasor's standpoint, therefore, the obligation to compensate the victim may well lead to a net loss.

Obligating a negligent tortfeasor to compensate his or her victim, and thus forcing the tortfeasor to absorb a net loss, can be justified by the moral responsibility borne by the latter for his or her negligent act.[79] This does not necessarily justify, however, the inequalities bound to arise as a consequence of making each tortfeasor liable for the *actual* losses of his or her victim. Indeed, two similarly situated tortfeasors may be equally responsible for having engaged in identical negligent conduct, but the negligence of the first one may be the cause of a slight injury, while that of the second is by chance the cause of a much more severe injury. Since the object of compensatory justice in torts is to make victims whole for their injuries,[80] the second tortfeasor will have to pay a substantially greater amount in damages than the first, although both tortfeasors bear the same degree of moral responsibility. From this, one could argue that while it seems fair to require tortfeasors to compensate their victims, there appears to be no justification for allowing the victim's actual losses to

76. *See* Rosenfeld, *supra* note 22, at 793, 845–47.

77. *See* Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 3, 10 (1983).

78. *See id.* ("[I]f a negligent motorist causes another harm, he normally secures *no additional* gain in virtue of his doing so.") (emphasis in original).

79. *But see id.* at 11 (compensatory justice alone does not justify imposing liability in damages to the victim upon a negligent tortfeasor who secures no gain from his or her tortious act).

80. *Cf. id.* at 14 (compensatory justice requires that a tort victim's loss be annulled).

supply the measure of compensation.[81] On the other hand, one could also argue that while compensation for the actual losses of victims does not promote equality among tortfeasors, it does establish some kind of equality—in the sense of an equilibrium—between each morally responsible tortfeasor and his or her innocent victim.

In strict liability cases, the nexus between the injured party's loss and the compensation owed by the party who is made legally responsible seems even more tenuous. In these cases, there seems to be no moral culpability on anyone's part, but merely a shift of the burden for bearing particular losses.[82] The shift is justified as providing an equilibrium between total benefits and total detriments. Thus, a manufacturer of mass-marketed consumer products, who is strictly liable for all injuries suffered by consumers while using the products, might appear to be unjustly treated, if one considers that a transaction on which the manufacturer earned a few cents can lead to an obligation to compensate a consumer to the tune of several thousands of dollars. If one considers, instead, the total number of sales made by the manufacturer and the total number of resulting injuries, the manufacturer might well be seen to enjoy a substantial net benefit from its business, even after discharging all its strict products liability obligations. Viewed from this overall perspective, strict products liability may seem fair, but it does not much resemble the paradigm of compensation.[83] Actually, it may be much more a vehicle to distribute equitably the losses caused by injury than a compensation mechanism. Moreover, inasmuch as the manufacturer passes along to the consumer the cost of insurance to cover its obligations under products liability, it creates a distinct distributive scheme. According to this scheme, everyone who is likely to benefit from the manufacture and consumption of the manufacturer's products is provided some distributive share of the losses attributable to the overall enterprise. In sum, it is as a matter of distributive justice, not of compensatory justice, that it is more equitable to distribute equally among all those who derive a benefit from a loss-producing activity the losses (the inevitable by-product of that activity), rather than allowing a random victim to absorb alone the catastrophic losses that have accidentally befallen him or her.[84] Hence, as one moves from tort liability predicated on fault to strict liability, the justification for imposing liability seems to shift from the realm of compensatory justice to that of distributive justice. Or, perhaps more precisely, it remains compensatory from the standpoint of the victim, but becomes distributive from everyone else's perspective.

Even if one settles on principles of distributive and compensatory justice, one may not be able to achieve just results unless adequate procedures are available. When procedures exist which insure achievement of the goals defined by the relevant principles of distributive or compensatory justice, there is, in Rawls' words, "perfect

81. *Cf. id.* (there is no argument from compensatory justice that the victim's loss be imposed on the negligent tortfeasor).

82. *See id.* at 29 ("Strict liability cases often involve a decision regarding who should bear a loss when neither the victim nor the injurer is at fault.").

83. *See id.* at 12 (strict liability claims are justified on efficiency or distributive grounds, not on compensatory grounds).

84. *Cf. id.* at 29 (considerations of distributive justice and efficiency justify strict liability for certain losses).

procedural justice."[85] When the available procedures are more likely than not to contribute to the achievement of these goals, but do not necessarily lead to their achievement, there is "imperfect procedural justice."[86] Finally, when there is no independent criterion of justice to determine which outcomes are just, but there is a procedure that leads to just outcomes provided it is fairly applied, there is "pure procedural justice."[87]

F. *Equality, Identity, Difference, and Inferiority*

The preceding discussion has examined many of the issues that must be faced in the course of attempting to establish the proper relationship between the postulate of equality and the complex web of mutually entailing equalities and inequalities. Although substantial progress has been made over the pure abstraction of the principle of formal justice, no procedures capable of determining which specific equalities and inequalities are compatible with the postulate of equality in a particular sociopolitical context have yet been suggested. Proposing such a procedure will complete the setting of this conceptual framework. Before attempting to describe the proposed procedure, and in order to be in a better position to evaluate the full scope of its justification, however, it is necessary to take a closer look at the postulate of equality itself.

As already pointed out, the postulate of equality mandates disregarding certain actual differences between individuals in order to embrace the normative proposition that individuals are equal to each other as individuals.[88] To grasp the full impact of this normative prescription, it is necessary to set it against the natural tendency to treat those who are different as if they were inferior.[89] Once this is taken into consideration, the moral prohibition against taking certain differences into account can be interpreted as a prohibition against using differences between individuals to brand some of them as inferior.

Just as there is a tendency to associate difference with inequality, there is a corresponding tendency to associate identity with equality.[90] Linking equality with identity is actually merely the other side of the coin that links difference with inequality.[91] To label those who are different as being unequal or inferior is also to reserve equality to those who are identical. Accordingly, a possible way to circumvent the spirit of the prohibition against taking differences into account, is by imposing one's own values on others, in an attempt to make them identical to oneself. In other words, if one cannot discriminate against others because they are different, but one still refuses to accept their differences, the most logical course of action may be to attempt to eliminate or suppress these differences by forcing others to become identical to oneself.[92] Thus, for example, in a bilingual society, the linguistic

85. J. RAWLS, *supra* note 38, at 85.
86. *Id.* An example of imperfect procedural justice is a criminal trial under the adversary system of justice.
87. *Id.* at 86. Rawls suggests that gambling provides an example of pure procedural justice.
88. *See supra* text accompanying notes 37–42.
89. *See* T. TODOROV, *supra* note 46, at 152.
90. *Id.*
91. These links are logically but not phenomenologically equivalent. *See supra* note 46.
92. *Id.*

minority's position is hardly advanced if a prohibition against treating them as inferior is coupled with a requirement that everyone be equally required to obtain an education in the dominant language.

In light of the foregoing observations, the postulate of equality should be interpreted as prohibiting reliance on differences only insofar as they are sought to be exploited for purposes of establishing or legitimizing relationships of subordination or domination. Similarly, the postulate of equality should also be interpreted as tolerating equalization and identity of treatment only so long as these are not being used to suppress genuine differences for purposes of establishing any one's own values as dominant. Ideally, therefore, the postulate of equality calls for an equality that respects all genuine differences without exploiting any.[93]

Insofar as the postulate of equality is applicable to sociopolitical contexts where limited forms of subordination must be tolerated for the common good, it is important to separate those differences which provide a legitimate basis for imposing limited and narrowly circumscribed relationships of subordination from those that do not. Conversely, it is also important not to extend a prohibition against invoking a difference for purposes of justifying a relationship of subordination to other contexts, where acknowledgment of such a difference would enhance mutual respect. Thus, for instance, one would be justified in ignoring religious differences for purposes of awarding more or less desirable positions in a professional hierarchy. On the other hand, failure to recognize religious differences in the context of social or cultural relations might deprive those who do not adhere to the majority religion of equal respect.

In order to be in a better position to ascertain when a difference ought to count, and when it ought not, or which difference ought to count and which ought not, it is useful to borrow Walzer's suggestion of dividing the universe of human relations into distinct spheres of justice.[94] Thus, in the sphere of justice that encompasses the domain of allocation of available jobs, differences of race or religion generally ought not to be counted. In the sphere that encompasses cultural manifestations and exchanges, on the other hand, differences of race, religion, and national origin generally ought to be taken into account for purposes of fostering equality in plurality and diversity.

In a sphere where a particular difference is likely to be irrelevant, the ideal with respect to that difference ought to be one of assimilation[95]—treating that difference as though it did not exist. In a sphere where assimilation seems appropriate with respect to a particular difference, there ought to be a presumption against relying on that difference for purposes of allocating the goods belonging to that sphere. This presumption can be rebutted, however, by a persuasive demonstration that the difference in question is relevant in the particular instance, and that the unequal treatment predicated on that difference will not result in treating anyone as an inferior.

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93. *See* T. TODOROV, *supra* note 46, at 253.

94. M. WALZER, *supra* note 35, at 10.

95. *Cf.* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977) (discussing racism, sexism, and preferential treatment in terms of the assimilationist ideal).

Conversely, in a sphere where ignoring a particular difference would amount to a denial of equal respect, the ideal would be one of differentiation—treating people differently depending on whether or not they are different in the relevant respect. In a sphere where differentiation concerning a particular difference seems appropriate, there ought to be a presumption in favor of relying on that difference for purposes of allocating the goods belonging to that sphere. To rebut that presumption, one would have to demonstrate that taking that difference into account would lead to the treatment of certain people as inferiors. In sum, by determining for each difference which spheres ought to be spheres of assimilation and which ought to be spheres of differentiation, one should be in a position to decide which differences ought to count, and which ought not, and when. If this process could be carried out successfully, subordination would be reduced to the minimum necessary to safeguard the common good, and equality would promote, not undermine, diversity.[96]

Having attempted to demonstrate that the postulate of equality requires the pursuit of a kind of equality that tolerates differences, and of a kind of difference that is not allowed to degenerate into a badge of inferiority; and that either an ideal of assimilation or of differentiation may promote the aims of the postulate of equality, depending on the particular difference and particular sphere of justice involved, it is now necessary to determine whether there is a procedure capable of indicating which particular equalities and inequalities are compatible with the postulate of equality and with a conception of equality that affords respect for all genuine differences.

G. *Justice as Reversibility and Equality as Differentiation*

The ideal procedure would provide for integration of all individual perspectives, without sacrificing differentiation between them. It would coordinate all individual viewpoints without blurring or ignoring the differences between them. Two criteria of justice consistent with the postulate of equality—the utilitarian and the contractarian—may seem capable of yielding the requisite procedure, but fall short. Utilitarianism counts each individual and does not count any individual for more than one. It then proceeds to aggregate the preferences of each individual without regard for the identity of the individuals whose preferences are being considered.[97] Utilitarianism sanctions as just any distribution of goods that satisfies net aggregate preferences. Moreover, it accounts for differentiation by taking all preferences into account in the course of calculating the net aggregate of preferences. Utilitarianism falls short, however, because the equality it promotes is purely formal[98] while the differentiation it provides for is too rough.[99] Thus, for example, if a destitute person's intensity of preference for home and shelter were no greater than a millionaire's preference for

96. *Cf.* M. WALZER, *supra* note 35, at 18 ("Equality is a complex relation of persons, mediated by the goods we make, share, and divide among ourselves; it is not an identity of possessions. It requires then, a diversity of distributive criteria that mirrors the diversity of social goods.").

97. *See* S. LUKES, *supra* note 43, at 48 (The main concern of utilitarianism is "to aggregate experiences of satisfaction or utility, no matter *whose* experiences they are: thus, it is committed to 'atomism' applied to the individual person and need be no 'respecter of persons' in its computation of utilities or disutilities." (emphasis in original)).

98. *Id.*

99. *See* J. RAWLS, *supra* note 38, at 27 ("[U]tilitarianism does not take seriously the distinction between persons.").

additional luxuries, utilitarianism would not dictate that the preference of the former be given priority over that of the latter. Even though it acknowledges both preferences, utilitarianism fails to provide a mechanism capable of establishing that a preference for the necessities of life ought to be given priority over an equally intense preference for luxuries.[100]

The contemporary contractarian position, as articulated by Rawls, seems to accord greater respect than does utilitarianism to the equal autonomy of each individual.[101] According to contractarianism, individuals are not merely to be counted, but their consent must be secured before they can be legitimately expected to conform to social norms. To emphasize the importance of unanimous consent, Rawls makes use of the hypothetical social contract.[102] The purpose of Rawls' hypothetical social contract is to generate principles of justice and a social charter backed by the unanimous consent of each social contractor.[103] Each contractor brings his or her perspective to the bargaining process that precedes formation of the hypothetical social contract.[104] The purpose of the bargaining process is to arrive at common principles (integration) that are compatible with each contractor's individual perspective (differentiation).[105] The operating principle leading from the multiplicity of individual perspectives to the adoption of common principles, moreover, is the norm of reciprocity, whereby each individual recognizes every other individual as having a life plan of his or her own.[106] Applying the norm of reciprocity, the contractarian expects to discover the common principles that will promote equal respect for each individual and the kind of social cooperation best suited to maximize each individual's opportunity to pursue his or her own life plan without infringing on any other individual's equal opportunity to do the same.[107]

The principal shortcoming of Rawls' contractarian approach lies in its failure to supply adequate means to satisfy the requirement of preserving the full richness of differentiation. The problem stems from Rawls' imposition of a "veil of ignorance" upon the hypothetical contractors who are placed in an original position from which they are expected to derive common principles.[108] As a consequence of operating behind a veil of ignorance, none of the social contractors knows his or her own life plan or "his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like."[109] Because of this, common principles are reached, not from a diversity

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100. *Cf.* C. FRIED, RIGHT AND WRONG 33–34 (1978) ("[U]tilitarianism . . . in its uncompromising universality deprives all individual differences, and thus the individual himself, of moral significance.").

101. *See* J. RAWLS, *supra* note 38, at 3 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.").

102. *Id.* at 11–12.

103. *Id.*

104. *Id.* at 11.

105. *Id.*

106. *Cf. id.* at 33 ("A well-ordered society is a scheme of cooperation for reciprocal advantage regulated by principles which persons would choose in an initial situation that is fair . . . .").

107. *See id.* at 94 ("Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands.").

108. *Id.* at 12.

109. *Id.*

of perspectives that incorporates the multitude of individual differences, but from the mere abstract identity that equalizes all individual perspectives after having neutralized all the possible sources of individual differences.

To overcome the shortcomings of both the utilitarian and the contractarian positions, a procedure is required that coordinates the multiplicity of individual perspectives from the standpoint of the mutual consent of all the social contractors without compromising the differentiation that separates one individual perspective from another. From the contractarian model, one ought to retain the requirement of individual consent; from the utilitarian, the requirement to take into account all the different individual preferences. The principle of justice as reversibility, formulated by Kohlberg,[110] yields a procedure that seems most likely to advance these two aims simultaneously.

The concept of reversibility encompasses that of reciprocity, but extends beyond it.[111] In the context of normative discourse, reciprocity consists of my recognizing others as equals because they possess their own individual perspective, just as I do. Reversibility, on the other hand, involves not only the recognition that others have their own perspective, but also trading positions with others to become aware of the nature and content of their perspective, each thus gaining a richer understanding of the other's objectives. In Kohlberg's terms, reversibility is a "reciprocity of perspectives."[112]

From the standpoint of fulfilling the aims of the postulate of equality, there is a clear progression from nonreciprocity to reciprocity, and from reciprocity to reversibility. The paradigm of a nonreciprocal relationship is that of master and slave, in which the master does not even acknowledge that the slave is entitled to have his or her own perspective. The master views the slave as unequal and inferior.[113] In contrast, a reciprocal relationship, as already mentioned, involves a mutual recognition between two individuals, with each acknowledging that the other has his or her own perspective.[114] In a reciprocal relationship, each individual is the equal of every other individual, possessing a separate perspective. But in a relationship that is merely reciprocal, I can apprehend the content of another's perspective only from my own perspective. Therefore, while I acknowledge the equality of the other as the *possessor* of another perspective, I can account for the manifestations of the other's perspective only from my own perspective, thus imposing the weight of my own values on the other's goals and designs. Consistent with this, mere reciprocity promotes equality of identity, but is incapable of sustaining the more desirable equality that accounts for differences. For the latter to be attained, a reciprocity of perspectives is required. Perspective reciprocity permits me to treat the content of the other's perspective as I would the content of my own perspective by switching perspectives with the other.

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110. *See* Kohlberg, *Justice as Reversibility*, in PHILOSOPHY, POLITICS AND SOCIETY 5 257 (P. Laslett & J. Fishkin eds. 1979).

111. *See id.* at 265–66. *See also* 1 L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 201–02 (1981).

112. Kohlberg, *supra* note 110, at 266.

113. *See supra* note 46.

114. *See supra* text accompanying notes 103–06.

In short, only reversibility seems to lead to the kind of equality that fully accounts for differences.[115]

Justice as reversibility requires that intersubjective conflicts be resolved by subjecting all the competing claims to each and every one of the perspectives of the individuals involved in the conflict, until only the reversible claims survive—claims that can be justified from all the relevant perspectives.[116] Justice as reversibility results from, in Kohlberg's terms, "ideal role taking" or "moral musical chairs."[117] Like the utilitarian criterion of justice, justice as reversibility counts every individual for one and no more than one, but unlike utilitarianism it does not abstract individual preferences from their owners or ignore the individual after having counted him or her. On the other hand, like the contractarian criterion of justice, justice as reversibility relies on (hypothetical) mutual consent. Unlike contractarianism, it does not depend on removing most individual differences to achieve consent.[118]

Consistent with the systematic application of justice as reversibility, there seem to be three different kinds of situations involving conflicting claims, each requiring a different kind of resolution. The first situation is one that includes certain fundamental claims, the denial of which would lead to a clear violation of the postulate of equality. An example of this is a situation in which one of the conflicting claims asserts a moral right not to be treated as a slave. Because refusal to allow such a claim to prevail would be a clear violation of the postulate of equality, this claim would have to prevail over all conflicting claims.[119] As applied to this kind of situation, therefore, justice as reversibility operates as the functional equivalent of the contractarian criterion of justice.

The second kind of situation occurs when denying any of the conflicting claims would not *prima facie* result in a violation of the postulate of equality. An example of this is a situation in which two mothers, each with a sick child, place conflicting claims to obtain a scarce medicine. Let us assume that the government as agent of allocation can provide only enough medicine to cure one of the two children. Let us assume further that one of the children has a milder case of the disease, and that she will recuperate fully but not without going through a period of pain and suffering, while the other child, who has a more severe case, is very likely to die. At the level of mere reciprocity, each mother will acknowledge the right of the other to press a

115. The movement towards reversibility is characterized by progressive differentiation coupled with progressive integration. L. KOHLBERG, *supra* note 111, at 219.

116. Kohlberg, *supra* note 110, at 262.

117. *Id.* at 267.

118. Kohlberg himself asserts that Rawls' original position behind the veil of ignorance exemplifies the "formalist idea" that moral judgments must be reversible. L. KOHLBERG, *supra* note 111, at 197. It is true that Rawls' original position represents a reversible situation, but it is reversible in a purely formal sense. The effect of the veil of ignorance is to remove from each individual that which makes his or her own perspective different from that of others. What remains is a single perspective that all individuals in the original position share. Hence, although the individual perspectives in the original position are fully reversible, because all individual differences have been purged, the presence of reversibility remains purely trivial. Indeed, reversibility, in a context where all differences have been removed, amounts to no more than an acknowledgement that others have a perspective just as I do.

119. In other words, one need not understand the particular perspective of anyone who claims a right not to be treated as a slave. It suffices to acknowledge that the claimant is entitled to have a perspective of his or her own in order to be compelled to reach the conclusion that the claim is valid.

claim for the medicine, but the mother of the child who will survive will continue to press her own claim because the pain and suffering of her own child will cause her greater pain than the prospect of the other child's death. At the level of reversibility, however, each mother can properly account for the perspective of the other by imagining that both sick children are her own. In that case, it seems clear that each mother will want the medicine for the child who is otherwise likely to die. Accordingly, justice as reversibility requires that the claim of the mother whose child is sicker be satisfied at the expense of the other mother's claim. In this kind of situation, therefore, justice as reversibility requires that certain claims be sacrificed or abandoned so that other claims may be satisfied. Such sacrifices, nonetheless, ought to be assumed voluntarily, as the individual who is called upon to sacrifice his or her claim ought to be morally *persuaded* that such sacrifice is required to further the aims of the postulate of equality.

In the third kind of situation, unlike the second, reversal of perspectives would not lead to any individual claim being clearly superior to any other claim. This kind of situation can be illustrated by the following example: A municipality has a fixed revenue surplus that everyone agrees ought to be used to provide public recreational facilities. The choice lies between building a swimming pool or tennis courts. Some citizens would prefer the swimming pool; others, the tennis courts. If each citizen switched places with every other citizen—and assuming that the swimming pool would play the same recreational role in the lives of those who prefer it as the tennis courts would in the lives of those others who prefer it—each citizen would conclude that the preferences of others are not entitled to any greater deference than his or her own preference. In this kind of situation, therefore, justice as reversibility would be satisfied if the municipality took a vote of all its citizens and built the recreational facility preferred by a majority. In a case like this, wherein even by switching perspectives no claim emerges as superior to any other, justice as reversibility operates as the functional equivalent of the utilitarian criterion of justice.

Because of its reliance on the ability to perceive claims from the perspective of others, the success of justice as reversibility depends on the possibility for intersubjective communication not only of individual claims, but also of the particular point of view that gives shape to such claims. In some cases, such as the one involving the two mothers with sick children, a high level of understanding of the perspective of another can be achieved with a minimum of communication. Since each of the mothers involved knows how it feels to be the mother of a sick child, it does not take that much for her to imagine what it would be like if she were the mother of the other woman's child. In other cases, wherein the perspectives of the conflicting claimants have much less in common to begin with, however, communication about each other's perspective is likely to be much more difficult. Thus, for example, for a white person who has never experienced racial discrimination or the life of a member of a minority group, it may be nearly impossible to understand what systematic racial discrimination means from the perspective of a black victim.

Whenever the nature of another's perspective is not readily deciphered, grasping the perspective from which another's claim is made depends on undistorted commu-

nication.[120] Communication is distorted whenever there are pressures that lead a speaker to conceal his or her perspective or to embrace a perspective that is more in accord with the life plans of others than with that of the speaker.[121] The claim-maker may distort communication to gain a strategic advantage for his or her claim by lying about the circumstances surrounding the claim or about the perspective underlying the claim.[122] The person to whom the claim is made, on the other hand, can distort communication by using his or her superior power to inhibit the claim-maker, and thus cause the latter to withdraw or water down his or her claim.[123] This could happen, for example, when an employer asks a group of employees whether they have any complaints about their work. It may well be that they do, and that they have aired them among themselves, but that they will keep them concealed from the employer for fear of losing their jobs or subjecting themselves to other forms of reprisal. Finally, there is the problem of false consciousness—a speaker who embraces the perspective of a more powerful or dominant person or group.[124] A paradigmatic example is that of a slave treated somewhat better than most other slaves who takes the point of view of the master in his or her dealings with the other slaves.[125]

The distortions discussed above are substantial and are often not easy to detect. Accordingly, distortion-free communication must remain an ideal. Nevertheless, so long as communication is possible—that is, so long as the speaker and the listener share a language in common—measures can be taken to reduce distortions sufficiently to make justice as reversibility a workable standard. Thus, the distortions produced by claim-makers may be kept in check by comparing the claims of persons who appear to be similarly situated, and by discarding those that seem to be completely out of line. Distortions resulting from the dominance or superior power of the person to whom the claim is made, on the other hand, can be minimized by imagining what the same claim-maker would say to someone who does not enjoy any superior power or right over him or her.[126] Instances of false consciousness can also be detected, and thus discounted, although what constitutes false consciousness under a particular set of circumstances may itself be a matter of controversy.[127]

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120. The concept of undistorted communication is based on Jürgen Habermas' notion of an "ideal speech situation." The aim of the "ideal speech situation" is to arrive at a rational consensus based on the force of the better argument rather than on accidental or systematic constraints on communication. *See* T. McCarthy, The Critical Theory of Jürgen Habermas 306 (1978). According to Habermas, the structure of communication is free from constraint only, as McCarthy puts it, "when for all participants there is a symmetrical distribution of chances to select and employ speech acts, when there is an effective equality of opportunity for the assumption of dialogue roles." *Id.* Moreover, the "ideal speech situation" must insure "not only unlimited discussion but discussion that is free from distorting influences, whether their sources be open domination, conscious strategic behavior, or the more subtle barriers to communication deriving from self-deception." *Id. See also* Pettit, *Habermas on Truth and Justice* in Marx and Marxisms 214 (G. Parkinson ed. 1982).

121. *See* T. McCarthy, *supra* note 120, at 306.

122. *Cf.* D. Rae, *supra* note 11, at 95 (problem of strategic manipulation by people who lie about their wants or satisfactions).

123. Undistorted communication requires that "the participants are equally free in their relations with one another to express their most intimate feelings, and that they . . . offer each other help." Pettit, *supra* note 120, at 214–15.

124. *Cf.* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) ("[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority.").

125. *Id.*

126. In other words, a claim addressed to a dominant person can be recast in terms of an "ideal speech situation."

127. Thus, for example, when a woman professes that the proper role for women is confined to being a housewife

Because undistorted communication can be pointed to only as an ideal, justice as reversibility remains an imperfect procedure. Accordingly, any result to which it leads is always subject to further revision, depending on any subsequent removal of distortion from the relevant communication context. Nevertheless, in spite of its procedural imperfection, justice as reversibility remains preferable to its alternatives because of its unique capacity to coordinate all the diverse perspectives from which moral claims can issue without purging any one of them of what differentiates it from the others. In sum, although justice as reversibility does not yield a fixed and immutable list of just equalities and inequalities, it does make for the best possible approximation under each different particular set of sociopolitical circumstances.

Having completed the sketch of this conceptual framework, this Article will now attempt to extract the philosophical presuppositions that lie behind the equal protection clause and the treatment of affirmative action as a constitutional issue.

III. Philosophical Presuppositions Behind the Equal Protection Clause

A. *Equal Protection and the Postulate of Equality*

As already pointed out, the equal protection clause gives constitutional status to the ideal of equality.[128] It does not stipulate, however, any particular conception of equality.[129] The language of the clause, namely that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[130] does not provide much guidance. It does specify that the relevant agent of allocation is the state, and that the relevant subject of equality is "any person" within that state's jurisdiction. On the other hand, the phrase "equal protection of the laws" seems inherently ambiguous. It may be taken to mean only that the law, regardless of its content, ought to be applied equally to everyone within the state's jurisdiction. Or it may be taken to mean that every law enacted by the state must protect equally every person within that state's jurisdiction. If the former were the proper interpretation, a state law providing that all whites have the status of free persons and all blacks that of slaves would be constitutionally acceptable, provided that no white individual within the state were denied the status of a free person and no black person allowed to become emancipated. At the other extreme, if only those laws providing an identical measure of protection to all persons within the jurisdiction were constitutional, then only laws such as "all persons shall receive a fixed sum of money" or "shall pay the same flat tax" would be valid. A law such as "all convicted burglars shall be imprisoned" would be unconstitutional because it singles out convicted burglars for treatment that is different from that accorded to other persons within the state's jurisdiction.

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and mother, this may be interpreted as an expression of false consciousness in a male dominated society. On the other hand, however, in the nineteenth century the role of women as mothers and wives was thought to be divinely ordained. *See* L. Tribe, American Constitutional Law 1061 (1978). Was a nineteenth century woman who agreed with this view displaying false consciousness or sincere religious conviction?

128. *See supra* text accompanying note 10.

129. *See* Fiss, *supra* note 10, at 85.

130. U.S. Const. amend. XIV, § 1.

Neither of these two extreme interpretations accords with the intentions of the framers of the fourteenth amendment or with the Supreme Court's interpretation of the equal protection clause. Having rejected extreme interpretations, however, one might be inclined to agree with Justice Rehnquist, that "[t]he Equal Protection Clause is itself a classic paradox . . . . It creates a requirement of equal treatment to be applied to the process of legislation—legislation whose very purpose is to draw lines in such a way that different people are treated differently."[131]

To resolve this paradox, Justice Rehnquist suggests that one must combine the general principle of equal protection, namely "that persons similarly situated should be treated similarly,"[132] with a criterion enabling courts to determine whether persons are similarly situated with respect to the purpose of the state legislation under consideration. According to Justice Rehnquist, no such criterion can be found "in the words of the Fourteenth Amendment."[133] Nevertheless, since the fourteenth amendment was an outgrowth of the Civil War and emancipation; and since the original understanding of the equal protection clause was that it forbade the state to discriminate on the basis of race with respect to certain rights,[134] equal protection requires at the very least that race be "an invalid sorting tool where blacks [are] concerned"[135] when certain fundamental rights are involved. At a minimum, therefore, the equal protection clause requires compliance not only with the principle of formal justice, but also with a substantive normative principle providing that, for purposes of a state's distribution of certain rights, racial differences cannot constitutionally be taken into account. Moreover, since this constitutional prohibition emerged as the culmination of a struggle to abolish black slavery, it can be viewed as evidencing a commitment to a postulate of limited equality—a postulate stipulating that blacks are equal to whites as non-slaves.

The modern constitutional interpretation of equal protection has been characterized as an " 'elaboration' of [the] original understanding."[136] Since the Supreme Court's landmark decision in *Brown v. Board of Education*,[137] moral equality between the races has become firmly established as a constitutional principle.[138] Moreover, the reach of the principle of moral equality has been extended beyond race and invoked to combat subordination or exclusion based solely on gender,[139] illegitimacy,[140] or alienage.[141] This evolution toward full moral equality and extension beyond race towards other morally irrelevant differences, when coupled with the

131. Trimble v. Gordon, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting).

132. *Id.* at 780.

133. *Id.*

134. *See* Perry, *supra* note 18, at 1027.

135. Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting).

136. Perry, *supra* note 18, at 1028.

137. 347 U.S. 483 (1954).

138. Perry, *supra* note 18, at 1030.

139. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975).

140. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Trimble v. Gordon, 430 U.S. 762 (1977).

141. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Bernal v. Fainter, 104 S. Ct. 2312 (1984). *But see* Foley v. Connelie, 435 U.S. 291 (1978).

Supreme Court's specifications that the equal protection clause is designed to protect individual rights,[142] lends support to the proposition that equal protection requires that all legislation by a state be subjected to the postulate of equality. In other words, all legislative classifications that lead to unequal treatment of different classes of individuals must satisfy the requirement that they treat every individual within the relevant jurisdiction as an equal.

The equal protection clause thus mandates compliance with the principle of formal justice and with the postulate of equality. It also singles out certain differences, such as those of race or gender, as being particularly prone to misuse by establishing inequalities that cast entire classes of individuals as inferior. Although these specifications give the constitutional conception of equality some content, they fail to render the principle of equal protection determinate enough to be applied uniformly by judges to specific cases. Thus, to go beyond the mere requirement of consistency, to determine when unequal treatment is compatible with treatment of every individual as an equal, and to determine under what circumstances it is legitimate to use certain differences as the basis of unequal treatment, judges need a mediating principle of constitutional interpretation.[143]

B. *The Antidiscrimination Principle and the Presumption of Equality*

The Supreme Court has adopted the antidiscrimination principle as the mediating principle for interpreting the equal protection clause.[144] This principle focuses on the relationship between the inequalities resulting from the scheme of classification contained in a law and the state's purpose in enacting that law. The classification is viewed as "the means" through which the state seeks to achieve "the end" defined by its purpose for enacting the law. The antidiscrimination principle simply requires that there be a "fit" between means and end.[145] As such, the antidiscrimination principle very much resembles the principle of formal justice, as it requires that alikes with respect to legislative purposes be treated alike.[146] Moreover, as will be discussed shortly, the antidiscrimination principle operates as a specially calibrated version of the presumption of equality.

So much constitutional analysis of equal protection is centered on the relationship between means of legislative classification and legislative ends that there may be a tendency to neglect the constitutional limitations on the ends pursued by the state. Even where the antidiscrimination principle tolerates the loosest "fit" between means and ends, that is, in relation to general economic legislation, however, the range of permissible ends that the state may pursue constitutionally is significantly limited. Indeed, in the context of economic legislation, the antidiscrimination principle requires that the means be "rationally related" to a legitimate state purpose—a

142. Shelley v. Kraemer, 334 U.S. 1 (1948).

143. *See* Fiss, *supra* note 10, at 85.

144. *Id.*

145. *Id.* at 89–91.

146. *Cf.*, Trimble v. Gordon, 430 U.S. 762, 780 (1976) (Rehnquist, J., dissenting) (The "general principle [of equal protection] is that persons similarly situated should be treated similarly.").

purpose not otherwise prohibited by the Constitution.[147] From a global constitutional perspective, therefore, the individual right to equal protection is linked, *inter alia*, to the individual civil and political rights guaranteed by the Bill of Rights,[148] which imposes limitations on permissible legislative purposes. Accordingly, even in its weakest form, the antidiscrimination principle seems clearly consistent with the postulate of equality.[149]

In addition to the requirement it imposes in relation to economic legislation, the antidiscrimination principle has been interpreted as requiring an "intermediate" level of scrutiny of the fit between means and ends in cases involving gender classifications[150] and a "strict" level of scrutiny in connection with classifications based on race.[151] Under the intermediate level test, the state purpose must be "important" and the gender-based classification "substantially related" to the achievement of the purpose.[152] Under the strict scrutiny test, on the other hand, the classification must be "necessary" to achieve a "compelling" state purpose.[153]

Focusing on the degree of "fit" required between means and ends, the progression from a mere rational relation to a necessary link moves from a liberal toleration of underinclusiveness and overinclusiveness to a requirement for their virtual elimination.[154] What this progression indicates, moreover, is that the connection between equal treatment and treatment as an equal becomes much more stringent as one moves from those differences that elicit minimal scrutiny to those that must be subjected to strict scrutiny. Focusing, on the other hand, on the level of justification that the state purpose for the legislation must meet, one finds a progression from a legitimate purpose to an important purpose and, finally, to a compelling purpose. To that progression there corresponds an increasingly more difficult burden of justification for relying on the difference that provides the basis for the classification leading to unequal treatment. Accordingly, the antidiscrimination principle operates as a presumption of equality that becomes increasingly difficult to rebut as one progresses from the need to offer a legitimate state purpose to the need to present a compelling state purpose.

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147. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 591 (2d ed. 1983).

148. Successful invocation of the Bill of Rights to protect civil rights dates only from the 1950s. L. TRIBE, *supra* note 127, at 4 n.8.

149. *Cf.* J. RAWLS, *supra* note 38, at 61:

> The basic liberties of citizens are, roughly speaking, political liberty . . . together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are all required to be equal by the first principle [of justice], since citizens of a just society are to have the same basic rights.

The limitations imposed on legitimate government purposes by the Constitution in general and by the Bill of Rights in particular, coupled with the requirement that any legislative classification be rationally related to a legitimate state purpose, certainly seem to satisfy the requirements imposed by Rawls' first principle of justice.

150. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

151. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Palmore v. Sidoti, 466 U.S. 429 (1984).

152. Craig v. Boren, 429 U.S. 190, 199 (1976).

153. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

154. For a thorough discussion of "fit" in terms of underinclusiveness and overinclusiveness, see Tussman & tenBroek, *supra* note 39.

As a practical matter, the presumption of equality implicit in the antidiscrimination principle is nearly always successfully rebutted when the mere rationality test is applied, and almost never overcome when the strict scrutiny test is applied.[155] This may lead to the impression that the antidiscrimination principle operating in the context of constitutional equality is more determinate than the presumption of equality associated with the philosophical postulate of equality. Moreover, since the determination of a state law's legitimate purpose usually involves constitutional provisions other than the equal protection clause,[156] the role of a judge in applying the antidiscrimination principle appears to be limited to the value-neutral task of deciding whether there is a sufficient fit between legislatively chosen means and ends.

These appearances are, however, misleading. As Fiss has pointed out, value neutrality is an illusion in the context of the application of the antidiscrimination principle.[157] For one thing, the concept of fit does not have "quantitative content,"[158] so a judge cannot simply determine mechanically how overinclusive or underinclusive a classification can be and still be rationally related to the legislative end sought to be achieved. Also, there is no value-neutral way of determining what constitutes a compelling state purpose, or of defining with any precision the class of differences that ought to render a classification suspect.[159] Similarly, there is no objective standard to guide a judge in making decisions concerning the distinction between important state purposes and compelling ones, or between substantially related means and necessary ones. When added together, the lack of objective standards and the inherent imprecision of some of the key categories employed by the antidiscrimination principle leave ample room for judges to invalidate laws when they disagree with the ends sought by the legislature, based on their own conception of the public good. Thus, for instance, under the guise of finding an insufficient fit between a classification and the legitimate legislative purpose the classification is asserted to promote, a judge might well be invalidating a law because of his or her disagreement with its purpose. Moreover, by exploiting the inherent imprecision of the terms "compelling," "important," and "legitimate," a judge can lower or raise the burden necessary to overcome the presumption against using a particular difference as the basis of a constitutionally valid classification to suit his or her own vision of which equalities and inequalities are compatible with the constitutional standard of equality. From this, it becomes apparent that the antidiscrimination principle fails to promote judicial neutrality in the interpretation of the equal protection clause and that it is, in fact, no more determinate in the context of constitutional equality than is the postulate of equality in the context of the philosophical conception of equality.

In one important respect, the antidiscrimination principle is dissimilar to the philosophical presumption of equality. Although both operate in a similar manner, and both appear justified as useful procedures in the context of certain similar

155. *See* G. GUNTHER, CONSTITUTIONAL LAW 588–89 (11th ed. 1985).
156. *See supra* text accompanying notes 147–48.
157. Fiss, *supra* note 10, at 98.
158. *Id.*
159. *Id.*

sociopolitical settings—settings characterized by a struggle against the use of particular factual differences as the basis for unequal treatment that puts certain individuals in the position of inferiors—the antidiscrimination principle suffers from a key limitation not shared by the presumption of equality. Under the latter, anyone who is a subject of equality can make a claim in support of the legitimacy of a particular classification and can attempt to make a persuasive argument in support of lifting the presumption of equality in favor of the proposed classification. Under the antidiscrimination principle, by contrast, no satisfactory mechanism is provided for challenging the state when it fails to classify.[160] This is a definite shortcoming, for consistent with the conceptual framework of part II, and as Tribe points out in his equal protection clause analysis, equality—being treated as an equal—can be denied when the government fails to classify as well as when it classifies.[161] Thus, the antidiscrimination principle, even if adequate to prevent differences between individuals from being misused to treat some persons as inferiors, seems clearly inadequate to prevent reducing equality to identity.

Adopting different levels of scrutiny fails to make the antidiscrimination principle more determinate than the presumption of equality, but it does saddle the former with a burdensome liability not shared by the latter. Thus, if a difference is singled out for consideration under the strict scrutiny test, the presumption against using this difference for classification purposes is likely to become too restrictive.[162] Indeed, let us assume that the initial strict restriction against using a difference occurs in the context of a sphere of justice in which the postulate of equality requires adherence to the ideal of assimilation. As a result of this, classifications based on the difference in question are subjected to strict scrutiny. Application of such strict scrutiny to a classification based on the difference, in a context where an ideal of differentiation seems appropriate with respect to that difference, however, might well be counterproductive.[163] In that case, demanding a showing of a compelling state purpose could lead to depriving certain individuals of their right to be treated as equals in matters of legitimate or even important government concern.[164]

The antidiscrimination principle prompts consideration of classifications in the abstract and labelling classifications themselves as suspect, instead of focusing on the concrete question whether a particular classification, as applied in a particular context, treats any of the individuals affected as unequals.[165] One of the clear disadvantages of this approach is that it puts remedial schemes designed to offset past distributive injustices on the same footing with schemes designed to perpetuate invidious discrimination. Thus, for instance, it seems appropriate to require proof of

160. L. TRIBE, *supra* note 127, at 993–94.

161. *Id.* at 993.

162. *See supra* text accompanying note 155.

163. *Cf.* L. TRIBE, *supra* note 127, at 1044 ("[A] true assimilationist ideal requires that race *never* be taken into consideration.") (emphasis in original).

164. *Compare, e.g.*, Justice Powell's opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (applying strict scrutiny test to race conscious affirmative action program) *with* Justice Brennan's opinion (applying intermediate scrutiny).

165. *See* Sherry, *supra* note 47, at 105–09.

a compelling state interest and a classification necessary to achievement of that interest to justify segregation of state public facilities.[166] It does not necessarily follow, however, that the same hurdles should be placed before a state wishing to distribute certain benefits to blacks for the purpose of closing the economic gap that separates them from whites, and which is due, at least in substantial measure, to invidious past discrimination.[167] Indeed, it may be that such distribution by the state ought to be constitutionally permissible if the state can demonstrate that its objective is important, even if not compelling, and that the means employed are substantially, if not necessarily, related to that objective. In this connection, the most important point is not that a classification along racial lines is suspect. Rather, it is that while the postulate of equality may tolerate racial segregation in state public facilities only for purposes such as the preservation of human lives, it does not necessarily follow that it would not countenance a distribution of goods to blacks only for purposes of narrowing an economic gap created by past discrimination.

To summarize: the antidiscrimination principle does not make for value neutrality and it does not go beyond the presumption of equality in determining which equalities and inequalities are legitimate. Moreover, the antidiscrimination principle is an overly blunt tool. It distorts the balance between spheres of assimilation and spheres of differentiation and is prone to reducing equality to identity. It tends to abstract classifications from their proper spatio-temporal coordinates, and it blurs the relationship between marginal inequalities and global equalities. In view of this, it is necessary to look beyond the antidiscrimination principle in the hope of obtaining a firmer grasp on the kinds of equalities and inequalities that might be justified under the equal protection clause.

C. *Equal Protection and the Delimitations of the State's Domain of Allocation*

To give more concrete content to the constitutional ideal of equality, it is first necessary to determine the parameters of the possible domains of allocation for which the state could properly be the agent of allocation. As pointed out in part II, consistent with the postulate of equality, the proper domain of allocation is one that can maximize the opportunities for each individual to achieve his or her own life plan without infringing on any other individual's right to equal respect and equal autonomy.[168] This domain varies with society's resources and potential, which means that there can be no single immutable domain that is the proper domain for government allocation. Even if a particular society, at a given time, had universal agreement with respect to what the total domain of allocation ought to be, nevertheless there could still be a controversy concerning what portions of that domain ought to be placed under the control of the government.[169] Furthermore, determining the proper portion

166. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, J., concurring) (prison authorities can "take into account racial tensions in maintaining security . . . .").

167. *Cf.* Justice Brennan's opinion in *Bakke*, discussed in Part III, *infra*.

168. *See supra* text accompanying notes 106–07.

169. *Compare, e.g.*, Nozick's view that only minimal government is justified, *see* note 64, *supra*, *with* Walzer's position that most people demand a government concerned with their welfare. *See* note 65, *supra*.

of the total domain of allocation that ought to be placed in the government's control may not be merely a matter of administrative convenience. Thus, if the economic marketplace is a more efficient agent of allocation than the government for certain goods, a choice between the two is likely to affect the total configuration of goods available for distribution. Consistent with these observations, in every case where the postulate of equality is interpreted as requiring that the state exercise control over less than the total domain of allocation, a claim may well be within the legitimate domain of account but not within the domain of allocation of which the state is the agent. Under these circumstances, since the constitutional principle of equality embodied in the equal protection clause applies only where there is state action,[170] a failure to honor a claim may well be inconsistent with the dictates of the postulate of equality, but it does not thereby necessarily violate any constitutional right of the claimant.

In theory at least, applying the postulate of equality to a particular sociopolitical context might specify the proper confines of the state's domain of allocation, and accordingly determine the boundaries of the domain of account to be accorded constitutional protection under the equal protection clause. In practice, however, the nature of the state's proper domain of allocation has been the subject of sustained and heated political debate.[171] It is not surprising, therefore, that the equal protection clause has not been interpreted to require that states be made responsible for any particular domain of allocation.[172] A state can thus, consistent with its constitutional obligations, choose to adopt a minimal government approach, relying primarily on the distribution of negative rights and calling for state control over a minimal domain of allocation.[173] On the contrary, and also consistent with its constitutional obligations, a state could opt for an activist government with heavy reliance on the distribution of positive rights and the need to maintain state control over a vast domain of allocation.[174] Be that as it may, once a state exercises control over a domain of allocation, it brings that domain within the ambit of the constitutional principle of equality.[175]

There are two principal ways in which a state can affect directly the allocation process of a particular domain. The first of these occurs when the state assumes control of the domain in question and becomes responsible for distributing goods within that domain. In this case, it is clear that the equal protection clause applies to the distribution. On the other hand, the second way a state can become significantly involved with a domain of allocation is by interfering with the distribution of a

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170. State action has been interpreted broadly to include allocations by private agents of allocation who perform a "public function," *see* Marsh v. Alabama, 326 U.S. 501 (1946), or who have a significant "nexus" with the state. *See, e.g.*, Burton v. Wilmington Parking Auth. 365 U.S. 715 (1961).

171. For the contrasting views of two noted contemporary political philosophers, compare note 64, supra, with note 65, *supra*.

172. Thus, for example, the Supreme Court has held that the state has no obligation to provide welfare rights, *see* Dandridge v. Williams, 397 U.S. 471 (1970); or voting rights, *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); or for appellate review of criminal convictions, *see, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); or a free public education, *see, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

173. The Constitution does not impose on states an affirmative obligation to promote equality of result. *See infra* subpart D.

174. This would happen if, for example, the state decided to provide extensive welfare rights and free education.

175. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (If the state has undertaken to provide for a basic education, "it is a right which must be made available to all on equal terms.").

hitherto independent domain of allocation. While there is little question but that the interference triggers the application of the equal protection clause,[176] it is uncertain what the proper scope or duration of constitutional scrutiny ought to be under these circumstances.

To illustrate this problem, let us assume a society having a minimal government and relying on a free market economy as the domain of allocation of all material goods. Let us assume further that this arrangement is the most consistent with the postulate of equality, given the particular resources and potential of the society in question, which in this case include moderate scarcity and equality of opportunity for each individual—guaranteed by the self-regulating mechanism of the market—to compete for the scarce goods allocated by the market. Under these circumstances, all that the state can do to preserve equality of opportunity is refrain from intervening in the economic marketplace. Assuming further that the state enacts a law prohibiting blacks from competing for the goods allocated by the market, it is clear that that law, which interferes with the integrity of the market, can be struck down under the equal protection clause. Moreover, if the law in question is repealed or struck down as unconstitutional within a short period after its adoption, that may be sufficient to restore the integrity of the marketplace. This would justify refusing to apply the equal protection clause any further to address any of the inequalities arising as a consequence of the normal operations of the marketplace.[177]

However, if the law prohibiting blacks from competing in the marketplace is enforced for several generations, its subsequent repeal is unlikely to be sufficient to lead to the restoration of the equality of opportunity that existed prior to its enactment. In that case, because of the wrongful deprivations suffered during the course of several generations, blacks may no longer be on an equal footing with others who compete in the marketplace.[178] Thus, restoring formal equality of opportunity would not compensate blacks for their injuries or put them in the position they would have been in but for the application of the unconstitutional law against them. To remedy the situation and to restore the integrity of the marketplace, it might be necessary to give blacks a right to fair equality of opportunity or to distribute to them some other goods designed to enable them to become fully competitive again. But both the grant of fair equality of opportunity and the allocation of other goods likely to improve the relative position of blacks would require positive state action. Hence, a dilemma would arise between the need for positive state intervention—which would entail scrutiny under the equal protection clause—and the generally legitimate state pursuit of nonintervention in the self-regulating market—which would mean that the equal

176. Since the interference would either be through the enactment of discriminatory laws or through discriminatory actions taken under the color of law, there would be no difficulty in satisfying the state action requirement of the fourteenth amendment. For a judicial statement of that requirement see United States v. Cruikshank, 92 U.S. 542 (1875).

177. *Cf.* Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) ("[T]he Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'").

178. *Cf.* Maguire, *The Triumph of Unequal Justice*, 95 CHRISTIAN CENTURY 882, 883–84 (1978) (Blacks are treated as the lowest caste of society, having "never been accorded their full status of humanity.").

protection clause is not applicable to the domain of allocation generated by the market.

The constitutional dilemma posed by the apparent need to sustain and deny simultaneously an equal protection right to equality of opportunity can be resolved. The solution to this dilemma is analogous to that of the conflict between the aims of compensatory justice and those of distributive justice, in the context of violations of an accepted principle of just distribution.[179] For the same reason that Goldman has argued that a compensatory scheme ought to be given precedence over a distributive scheme—lest the distributive scheme in question be in danger of being ultimately destroyed[180]—equal protection should be extended to a domain of allocation towards which the state has a policy of nonintervention if the integrity of that domain has been jeopardized by unwarranted state interference. Otherwise, the set of circumstances that, consistent with the postulate of equality, originally justified nonintervention could not be restored, and one would be left with an illegitimate state of affairs brought about by positive legislation enacted and enforced by the state.

To summarize: two important points must be kept in mind as one seeks to discover the equalities promoted by the equal protection clause. First, it is initially up to the state to determine the domains of allocation over which it wishes to exercise control, and only once the state exercises such control does equal protection come into play. Second, the logic that links equal protection with the postulate of equality supports the argument that domains not intended to be controlled by the state, and equalities not contemplated by it, can be brought under the sweep of equal protection to restore an equilibrium upset by morally unwarranted state intervention. Once the equilibrium is restored, however, the affected domain of allocation would again be placed beyond the reach of the equal protection clause.

D. *Equal Protection and Equality of Result*

Only in very limited circumstances has the equal protection clause been interpreted to mandate the achievement of equality of result. These circumstances include basic political rights, such as voting, and fundamental personal rights, such as access to the courts in criminal proceedings. A state has no constitutional obligation to grant the franchise, but once it does,[181] each citizen is entitled to have an equal voice in the election process.[182] From the standpoint of the good distributed, namely voting, each individual is given exactly the same thing, one and no more than one vote, thus leading to equality of result. From the standpoint of the purpose for which the vote is distributed, to allow citizens to participate in the political process, however, each individual is given an equal opportunity—and in this case means-regarding and prospect-regarding equality of opportunity converge—to influence the course of political events.

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179. *See supra* text accompanying notes 74–75.

180. *See supra* note 74.

181. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

182. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

Similarly, the state has no constitutional obligation to provide for appellate review of criminal convictions, but once it does, it must promote equality of result by providing equal access to each litigant, regardless of ability to pay.[183] Unlike the political franchise situation, equality of result here is not achieved through equal treatment of all members of the relevant class. Instead, access by the indigent must be guaranteed by fee waiver[184] or by the state providing benefits free of cost, for which wealthier litigants would have to pay.[185] Thus, equality of access to rich and poor requires the state to provide marginally unequal treatment to achieve global equality. Moreover, equality of result is the goal from the standpoint of access to the courts. From the standpoint of preserving the integrity of the criminal trial process, however, equal opportunity to argue one's cause before the tribunal is paramount. In this instance, it is a means-regarding equality of opportunity that is made necessary to insure that the litigant's prospects are determined by the merits of their case rather than by their relative wealth.

It is significant that in both cases—the political franchise and equal access to the courts—equality of result is a precondition to realizing equality of opportunity, rather than an end in itself. It is also significant that efforts to invoke the equal protection clause to achieve a limited measure of equality of result in the economic sphere have not met with success. Thus, in *Dandridge v. Williams* the Supreme Court rejected the proposition that the equal protection clause requires states to provide sufficient welfare benefits to satisfy "the most basic economic needs of [the most] impoverished [people]."[186] The Court's general aversion to imposing on a state a positive obligation to make marginally unequal economic distributions in order to promote some measure of global economic equality is forcefully conveyed in the following passage from Justice Harlan's dissent in *Douglas v. California*:

> [T]he Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society.[187]

E. *Equal Protection and Equality of Opportunity*

Standing in sharp contrast to America's dislike for equality of result in the economic sphere is its widespread endorsement of the ideal of equality of opportunity.[188] This ideal underlies Jefferson's notions of a natural aristocracy of virtue and talents emerging to replace the artificial aristocracy of wealth and birth.[189] Moreover, means-regarding equality of opportunity sufficient to allow the talents of each

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183. Griffin v. Illinois, 351 U.S. 12 (1956).

184. *Id.*

185. Douglas v. California, 372 U.S. 353 (1963).

186. 397 U.S. 471, 485 (1970).

187. 372 U.S. 353, 362 (1963).

188. *See* D. RAE, *supra* note 11, at 64 (equality of opportunity is the most compelling element of our national ideology).

189. Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 985 (1975).

individual to determine the prospects of his or her own success is required for a natural aristocracy of talent to arise.

Since scarcity forecloses the possibility of achieving equality of result, we rely on equality of opportunity to provide the fundamental means to satisfy the postulate of equality. In this respect, equal opportunity to receive an education that will develop individual talents and interests and equal opportunity to compete for the positions commensurate with the applicant's talents and most likely to contribute to the realization of the applicant's life plan are paramount.[190] Furthermore, in view of the dialectical relationship between equality of opportunity and equality of result, the ideal of equality of opportunity may require equality of result with respect to certain goods, when the latter is necessary to safeguard a broader equality of opportunity and to justify some more broadly encompassing inequality of result. For example, meaningful equality of opportunity with respect to scarce positions may not be achievable unless all applicants for such positions have attained a certain educational level. In that case, the ideal of equal opportunity would mandate that each individual who wishes to become an applicant for the positions in question be given an equal right to obtain the education necessary to achieve the requisite level of proficiency.

The Supreme Court has indicated support for the ideal of equality of opportunity[191] but its overall record on this issue seems to be less than consistent. It is true, as previously noted, that formal equality of opportunity may be achieved without government intervention, particularly in the economic sphere where conceivably it could be guaranteed by the self-regulating market. In addition, there is no constitutional requirement for states to grant and sustain positive rights to education by supplying a free public school system.[192] Thus, it would be consistent for government to support equality of opportunity even when the equal protection clause did not require it, because the domains of allocation calling for equality of opportunity remain beyond the state's reach.

When a state allocates scarce jobs or provides free public school education, however, it seems clear that the equal protection clause would require that state to provide equality of opportunity or equality of result to the extent that completing a particular educational program is a prerequisite to achieving equality of opportunity with respect to scarce jobs.[193] Nevertheless, when race is not involved, the Supreme Court's decisions have not done much to promote a constitutional equality of opportunity requirement. In *Kotch v. Board of River Port Pilot Commissioners*,[194] river pilot jobs were awarded to relatives and friends of incumbents, but the Court rejected the equal protection challenge of disappointed applicants, principally because no suspect classification was involved. The dissent, however, stated that a standard of "consanguinity" was impermissible,[195] a position that is fully intelligible only in the context of adherence to the principle of equality of opportunity. In *Personnel*

190. *See id.* at 986–87.
191. *Id.* at 984.
192. *See supra* note 172.
193. *See supra* note 175.
194. 330 U.S. 552 (1947).
195. *Id.* at 565, 566 (Rutledge, J., dissenting).

Administrator of Massachusetts v. Feeney,[196] an equal protection challenge to an absolute preference for qualified veterans to fill state civil service positions was rejected by the Supreme Court. The justification for this preference was to reward veterans, to ease their transition back to civilian life, and to encourage patriotic service.[197] Although the Court found veteran hiring preferences "an awkward—and, . . . unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government,"[198] it nonetheless held the state purpose to be legitimate and thus the state's requirements under the fourteenth amendment satisfied. Because the veteran preference in *Feeney* had a significant compensatory and distributive aim, as well as a design to encourage conduct that would contribute to the public good, the Court's holding, unlike that in *Kotch*, is not necessarily inconsistent with a general principle of equality of opportunity. Indeed, compensatory and remedial concerns may well justify the temporary suspension of the principle of equality of opportunity in order to secure its long term success.

In the context of public school education, pursuit of the ideal of equality of opportunity suffered a setback when the Supreme Court refused to recognize a fundamental right to an equal education in *San Antonio Independent School District v. Rodriguez*.[199] The plaintiffs in *Rodriguez* had charged that Texas' system of financing public school education, relying heavily on local property taxes, resulted in substantial interdistrict disparities in per pupil expenditures.[200] In fact, state expenditures for the education of children living in wealthy neighborhoods were substantially higher than its expenditures for those living in poor neighborhoods.[201]

The decision in *Rodriguez* may be viewed as insensitive to the ideal of equality of opportunity. Indeed, it seems to refuse to acknowledge a right to equality of result with respect to public school education, which is arguably a prerequisite to equality of opportunity with respect to higher education and to scarce employment positions. That view, however, may not be altogether warranted. Indeed, the Court emphasized that there was no absolute deprivation of a meaningful opportunity to enjoy the benefits of a public school education. At the same time, the Court pointed out that it was a matter of dispute whether a more expensive education was a better education.[202] Furthermore, there is a key difference between voting and public school education. In the context of voting, a state's decision to grant the franchise establishes a fundamental individual right to an equal vote under the equal protection clause. Ideally, in the context of public school education, a state's decision to create and sustain a free public school system should likewise create a fundamental individual right to an equal public school education. Unlike establishing and maintaining an equal vote requirement, however, an individual's right to an equal education may not

196. 442 U.S. 256 (1979).
197. *Id.* at 265.
198. *Id.* at 280.
199. 411 U.S. 1 (1973).
200. *Id.* at 11–15.
201. *Id.*
202. *Id.* at 23–24.

be susceptible of sufficient concrete definition to be protected consistently. As stated by the Court in *Rodriguez*, because "of the infinite variables affecting the educational process, [no] system [can really] assure equal quality of education . . . ."[203] Therefore, it may be that the Supreme Court refused to proclaim a fundamental right to an equal education more because of doubts about its feasibility than because of doubts about its desirability.

When the basis for an unequal education has been race, however, the Supreme Court has unequivocally endorsed the ideal of equality of opportunity. In its landmark decision in *Brown v. Board of Education*,[204] the Court struck down, as violative of equal protection, state laws mandating or permitting the racial segregation of public schools. The Court found racially segregated educational facilities to be "inherently unequal,"[205] a particularly significant finding in light of the Court's general perception of the central role of education in shaping future opportunities. In the Court's own words:

> Today, education is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[206]

Before the Court's decision in *Rodriguez*, this broad language could be interpreted reasonably as establishing a constitutional right to equal education, predicated on the Court's belief in the paramount importance of equality of opportunity. Even after *Rodriguez*, it is still consistent to maintain that equal education and equality of opportunity are the constitutional rights of those who, like blacks, have been deprived of them as a result of having been treated as inferiors. In other words, while deviations from equality of opportunity might be tolerated when the state action giving rise to them is not morally reprehensible as was arguably the case in *Rodriguez*, such deviations cannot be permitted when they are the product of the state's policy to treat some of the persons under its jurisdiction as inferiors. Moreover, in the latter case, it is not sufficient for the state to repeal its offending law. As *Brown* and its progeny demonstrate, it is also constitutionally required that the state take the affirmative steps necessary to provide meaningful equality of opportunity to those persons who have been wrongfully cast as inferiors.[207] Hence, where equality of opportunity was purposefully undermined by state imposed segregation, the equal protection clause mandates not only repeal of segregation laws but also achieving integration, a process that often necessitates undertaking such race conscious and affirmative remedial steps

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203. *Id.* at 24.

204. 347 U.S. 483 (1954).

205. *Id.* at 495.

206. *Id.* at 493.

207. *See* Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955); Green v. County School Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

as busing.[208]

To recapitulate: the equal protection clause, as interpreted by the Supreme Court, only rarely requires equality of result, and then only as a prerequisite to achieving some broader-based equality of opportunity. Equality of opportunity, on the other hand, is a principle that is deeply rooted in the American ideology and enjoys a definite constitutional dimension. Although the contours of the constitutional principle of equality of opportunity are by no means clear, and although the principle has been applied somewhat inconsistently, it is nonetheless clearly applicable as a remedial tool in cases where morally reprehensible state action has interfered with the opportunities of those persons whom it has treated as inferiors. Finally, as we shall now see, the ideal of equality of opportunity provides the nexus between the ideal of assimilation embodied in the constitutional requirement of integration and the seemingly antagonistic requirement of differentiation associated with affirmative action.

IV. The Constitutional Dimension of Affirmative Action

A. *The Logical Progression from Segregation to Affirmative Action*

If one starts from the premise that the state has a duty to refrain from interfering with formal equality of opportunity—or, at least, from interfering with it for the morally reprehensible purpose of treating certain individuals as inferiors—then it can be shown that there is a logical progression from segregation to the repeal of segregation laws; then to the adoption of affirmative race conscious state measures, such as busing, for purpose of achieving integration; and finally to the use of affirmative action in the contexts of higher education and scarce employment opportunities.

Ideally, the spheres of education and employment are, with rare exceptions, spheres of assimilation in which the effect of race or sex differences ought to remain completely neutral.[209] Thus, in a state with no history of race or sex discrimination, equality of opportunity could be satisfied by implementing color blind and gender blind constitutional principles. Once a state has practiced official segregation, however, a mere return to color blindness may not be sufficient to lead to the path of integration. This is clearly demonstrated by the aftermath of *Brown*.[210] If merely lifting legal barriers or relying on voluntary measures does not lead towards integration, the state would appear bound to pursue integration through affirmative race conscious remedies such as race-related assignments to particular schools.[211] Without such race conscious assignments, meaningful integration could not be achieved, and blacks would continue in an inferior position. Thus, to remedy the evil caused by the

208. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (busing permissible to achieve school integration).

209. In a very limited number of cases, sex and race may be bona fide occupational qualifications. A. Goldman, *supra* note 1, at 54.

210. *See supra* note 207.

211. *See* Green v. County School Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

state's violation of the integrity of a sphere of assimilation, the state must temporarily suspend the goal of assimilation and reestablish the lost equilibrium through the conscious use of differentiation.

Deprivation of an equal elementary or secondary education because of official state segregation, furthermore, disadvantages blacks by depriving them of a meaningful equality of opportunity with respect to the competition for scarce places in institutions of higher education and for scarce employment positions.[212] Formal equality of opportunity would merely accentuate the inequalities resulting from the disparity in elementary education.[213] Even fair equality of opportunity—additional education or training, for example—may not be sufficient to offset the disparities generated by an unequal basic education.[214] Therefore, to offset the competitive advantage of the beneficiaries of unequal elementary and secondary education, it may well be necessary to grant a preference in the competitive educational and employment arena to blacks who were denied an equal elementary or secondary school education. Viewed from this perspective, affirmative action is arguably but a preference designed to offset other unjustified preferences, restoring fair competition when relevant considerations, rather than mere preferences for or against any individual or group, will determine the winners and losers. Thus, affirmative action appears designed to suspend temporarily a distorted distributive scheme to allow that distributive scheme eventually to regain its full integrity.[215]

From the overall standpoint of assuring equality of opportunity within spheres of assimilation, there may be an unbroken logical progression from segregation to affirmative action. Nonetheless, shifts in the balance of equalities and inequalities encountered along the path to full assimilation give rise to several vexing and controversial issues. Segregation permits association of inequality with inferiority.[216] It is, therefore, subject to widespread repudiation by all who adhere to the postulate of equality and who interpret it as requiring assimilation in the spheres of education and employment.[217] Repeal of state-supported segregation establishes formal equality, and if that were sufficient to eliminate inequality of opportunity, it would be a satsifactory means towards the ideal of assimilation. If that were the case, the application of "color blind" policies would seem fully justified. If, however, formal equality preserves inequality of opportunity, "color blind" policies would merely perpetuate the inequalities caused by a prolonged period of segregation.[218] Accordingly, controversy surrounding "color blind" policies may reflect a disagreement on whether the repeal of state segregation measures suffices to restore equality of

212. *See* A. GOLDMAN, *supra* note 1, at 127.

213. Indeed, a "hands-off" policy in the sphere of competition would leave the competitors with unequal means. The greater the disparity in means, the greater the likelihood of disparity in prospects.

214. Thus, for example, an adult with a family to support may not have sufficient time or resources to take advantage of a remedial program designed to make up for substantial deficiencies in elementary education. *But cf.* A.GOLDMAN, *supra* note 1, at 131 (remedial programs are generally preferable to preferential treatment).

215. *See supra* note 74.

216. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

217. *See* cases cited *supra* note 207.

218. *See* Green v. County School Bd., 391 U.S. 430 (1968) (colorblind plan insufficient to bring about school integration).

opportunity. Support for such policies may also mask a desire to continue reaping the benefits of segregation while appearing to endorse the postulate of equality.

Color-conscious policies adopted by a state to promote public school integration, on the other hand, may treat all the groups who are subject to them equally. Thus, if both black and white children are transported away from their own neighborhood in order to integrate a school system, both racial groups are treated equally. Nevertheless, if blacks seek integration and whites oppose it or are indifferent to it, equal treatment and lot-regarding equality are likely to be accompanied by subject-regarding inequality. Moreover, assuming that some but not all whites, and some but not all blacks must be transported outside of their neighborhood to achieve integration, then inequalities will arise within each group. Consistent with the goal of public school integration to provide each child with an equal education, desegregation does not exclude any child from a free public education. Furthermore, the subject-regarding inequalities arising out of differences in preferences and expectations seem to be clearly justifiable. A black person's preference for integration is a preference for not being treated as an inferior.[219] Such a preference deserves priority over a white person's preference for attending a neighborhood school.[220] Indeed, denying a white person the right to attend a neighborhood school to achieve integration does not violate that person's right to be treated as an equal. Finally, inequalities between individual members of the same racial group can be justified so long as the means of selection employed to determine particular school assignments are consistent with the postulate of equality. This follows from the fact that equal treatment of each individual within each racial group would make it impossible as a practical matter to achieve integration.

Unlike color-conscious policies used to integrate public school systems, affirmative action plans implemented to accord preferential treatment in the context of scarce places at public universities or of scarce positions in public sector employment must exclude some individuals in order to include others.[221] School integration does not violate any fundamental individual rights, because no one can make a legitimate claim of entitlement to a segregated education that treats other members of society as inferiors. Affirmative action in favor of someone on the basis of race or sex, however, means excluding someone who, but for the preferential treatment, would have won the competition for the good to be distributed. Furthermore, inasmuch as the latter person bears no responsibility for the events that presumably justify preferential treatment, affirmative action might seem bound to produce innocent victims.[222]

Another important distinction between school integration and affirmative action is that school desegregation is a direct and complete remedy for school segregation—it provides the desired integration that segregation blocks, and at the same time it eliminates the evil of school segregation—while preferential treatment often appears

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219. *Cf.* Maguire, *supra* note 178, at 883–84 (blacks in the United States have always been treated as inferior).

220. Actually, the preference for a neighborhood school may often be linked with the desire to perpetuate the inferior status of blacks. *Cf. id.*

221. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

222. *See infra* text accompanying notes 250–51.

to be incapable of providing either a direct or a complete remedy. Indeed, preferential treatment would seem to be a direct remedy only if the wrongful exclusions it seeks to offset occurred at the university admissions or job hiring levels. If the exclusions occurred at the level of elementary or secondary school, and thus resulted in deprivation of its victims of an equal opportunity to compete for places at the university or for positions of employment, however, the remedy may well be both indirect and incomplete. It is indirect if the university or employer have not themselves done anything to deny an applicant an equal opportunity,[223] and it is incomplete because it does nothing to eliminate the source of the problem, which is located at the elementary and secondary school level.

School desegregation has a clear and well-defined purpose from the standpoint of distributive justice. Every child is entitled to an equal education, and school desegregation makes this possible. Preferential treatment, on the other hand, may not seem, upon initial consideration, to serve any clear-cut or fully consistent distributive or compensatory purpose. Assuming that achieving the greatest possible efficiency in the spheres of economic production and distribution is the distributive aim of making careers open to talents, preferential treatment would seem to work against the ends of distributive justice.[224] Alternatively, if preferential treatment is sought to be justified as a compensatory device, it arguably falls short as being both overinclusive and underinclusive.[225] Indeed, insofar as preferential treatment is granted on the basis of race or sex, it is likely to be awarded to some individuals who have not been the victims of past invidious discrimination and denied to many of those who have been such victims. In addition, affirmative action singles out for preferential treatment the most qualified members of the groups designated for preference.[226] To the extent that the most qualified individuals are also the least victimized members of the group, affirmative action may seem to compensate those who deserve compensation the least at the expense of those who deserve it the most.[227] Finally, the likelihood that the institution providing preferential treatment is not the one that caused the injuries for which preferential treatment is designed to compensate seems particularly vexing from the perspective of compensatory justice.[228]

Last, but by no means least—particularly since the individual rather than the group is the proper subject of constitutional equality under the equal protection clause[229]—is the apparent difference in the way the processes of school desegregation and affirmative action, respectively, cast the relationship between the individual and the group. Both school desegregation and affirmative action must take group characteristics into account—and this makes them both susceptible to criticism from a

223. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

224. *See* Fullinwider, *On Preferential Hiring*, in FEMINISM AND PHILOSOPHY 210–25 (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977).

225. *See* A. GOLDMAN, *supra* note 1, at 76 (not all blacks or all women were unjustly denied job or education).

226. *See id.* at 226.

227. *But see* Thalberg, *Themes in the Reverse-Discrimination Debate*, 91 ETHICS 138, 143–44 (1980) (successful minorities may not be least discriminated-against but most resilient and most determined to overcome adversity).

228. *See infra* text accompanying notes 256–57.

229. Shelley v. Kraemer, 334 U.S. 1 (1948).

completely ahistorical assimilationist viewpoint.[230] Affirmative action, however, seems to invert the specific relationship between individual and group compared to the relationship found in school desegregation. In the context of school desegregation, group characteristics are invoked for purposes of facilitating the achievement of individual-regarding equality. Racial assignments are thus made, but only because they seem necessary to insure an equal education in an integrated school system for every child.[231] Affirmative action, by contrast, singles out individuals for special treatment for purposes of promoting group-regarding equality. Thus, when a less well-qualified member of one group is preferred over a better qualified member of another group, these individuals do not seem to be considered in their own right, but rather as representatives of the respective groups to which they belong. The disproportionate and hence unequal treatment of individuals in relation to their respective qualifications may well appear to be justified only in terms of the overriding purpose of equalizing the relative positions of the groups to which those individuals, respectively, belong.[232] From this, it may seem reasonable to conclude that whereas in the context of school desegregation, the group is subordinated to, and placed at the service of, the individual, in that of affirmative action, the individual, on the contrary, is subordinated to the group, and treated merely as a representative of the group.

In sum, the step from race-conscious remedies in the context of school desegregation to the race-conscious practices associated with affirmative action may well correspond to a single step in the logical progression from segregation to assimilation. Nevertheless, this single step cannot be taken without raising a number of difficult and troubling issues. Chief among these are the place of affirmative action in the context of the relation between the aims of distributive justice and those of compensatory justice, the relation between preferential treatment and the rights of innocent third parties disadvantaged by the implementation of affirmative action programs, and the justification for affirmative action consistent with constitutionally permissible parameters for the relationship between the individual and the group. With these issues firmly in mind, we now turn to an examination of the Supreme Court's equal protection analysis of the constitutionality of affirmative action programs.

B. *Equal Protection and Affirmative Action*

In view of the intense continuing debate over affirmative action, one is struck by the paucity of Supreme Court decisions squarely addressing the constitutionality of preferential treatment based on race or sex under the equal protection clause. This issue first reached the Court in the 1974 case of *DeFunis v. Odegaard*,[233] which involved a challenge to a preferential program favoring minority applicants for

230. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting) ("Our Constitution is color-blind and, neither knows nor tolerates classes among citizens . . . .") (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

231. *See* cases cited *supra* note 207.

232. *Cf.* A. GOLDMAN, *supra* note 1, at 183 (calling for proportionate representation of each group in the sphere of employment not only "lacks positive rationale but would also involve serious injustices to individuals if it were enforced.").

233. 416 U.S. 312 (1974) (per curiam).

admission at a state university law school. The Court, however, refused to hear the case on its merits on the grounds that it was moot. The issue of the constitutionality of preferential treatment was raised again in 1978, in *Regents of the University of California v. Bakke*.[234] This time the issue was addressed, but by only five of the Justices. These Justices agreed that affirmative action is constitutional under certain circumstances, but agreed on little else. Indeed, Justice Powell, who cast the pivotal vote in favor of the constitutionality of affirmative action programs, took a much narrower view of the permissible scope of such programs than did the other four Justices who addressed the issue. In Justice Brennan's view, the Court's decision "affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all."[235] As we shall see below, however, even this conclusion may be overly broad.

Two years after *Bakke*, in *Fullilove v. Klutznick*[236] the Supreme Court had to face squarely the constitutionality of affirmative action programs. In that case, six of the Justices held programs to be constitutional if they are "narrowly tailored to achieve the [programs'] objectives."[237] Moreover, some further light on the constitutional issue may be shed analogously by the Supreme Court's treatment of affirmative action programs in the context of statutory challenges under Civil Rights Act legislation.[238] Even when all these Supreme Court decisions are taken into account, though, no precise or definitive picture emerges concerning the proper constitutional scope of and limitations on affirmative action.

As early as *Bakke*, two distinct positions emerged. The first, expressed by Justice Powell, is based on the belief that equal protection requires that the same protection be given to every person regardless of race.[239] The second is succinctly expressed by Justice Blackmun's statement that "in order to treat some persons equally, we must treat them differently."[240] The first position emphasizes marginal equality, while the second stresses the importance of achieving global equality, even if that requires endorsing marginal inequalities. What follows from these respective basic positions, however, is neither clear nor simple.

C. *The* Bakke *Decision*

In *Bakke* the plaintiff challenged the University of California at Davis' medical school's special admissions program, which was designed to assure the admission of a specified number of black and other minority applicants. Under that program, sixteen of the one hundred places in the first year medical school class were set aside to be filled with minority applicants.[241] All minority and nonminority candidates

234. 438 U.S. 265 (1978).
235. *Id.* at 324.
236. 448 U.S. 448 (1980).
237. *See infra* text accompanying notes 272–86.
238. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).
239. 438 U.S. 265, 269–320 (1978).
240. *Id.* at 407.
241. *Id.* at 305.

could compete on an equal basis for the remaining eighty-four places in the entering class.[242] Alan Bakke, a white applicant to the medical school, was rejected.[243] In both 1973 and 1974, when Bakke applied, "applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than [his]."[244] Bakke alleged that the special admissions program violated his rights under the equal protection clause because he had been rejected because of his race.[245]

There were several purposes of Davis' special admissions program, some clearly distributive, others at least partially compensatory; some assimilationist, others consistent with prevailing group differentiations. One of those purposes was to integrate the medical profession,[246] a clearly distributive and assimilationist goal. A second purpose was to counter discrimination,[247] a broadly compensatory and perhaps also distributive goal. The third purpose, to increase the number of physicians willing to work in underserved areas,[248] reveals a sensitivity to cultural differences and an awareness of the reality of segregated residential patterns. Underlying this third purpose may have been a desire to equalize, for each group, the ratio between accessible physicians and the total number of individuals who belong to the group, thereby, through group-regarding equalization, producing for each individual, regardless of his or her group affiliation, equal access to a physician. The final purpose, different in kind from the others, was to "obtain the educational benefits that flow from an ethnically diverse student body."[249] It may be argued that all but the last of these purposes advance the goals of the postulate of equality. The last purpose may further educational ideals, but it does not address the equality issue at all.

Justice Powell's opinion in *Bakke* is constrained by his strict adherence to the antidiscrimination principle and his concentration on the suspect nature of racial classifications, rather than on whether Alan Bakke is a member of a disadvantaged class. Because of his race, Bakke was allowed to compete for only eighty-four of the one hundred seats in the entering class at the Davis Medical School. In Justice Powell's view, Bakke, an innocent individual, was being asked, because of his race, to bear the brunt of redressing group grievances which were not of his making.[250] Emphasizing that it is the equal protection of individuals, not groups, that is the concern of the fourteenth amendment, Justice Powell declared that Bakke could not be burdened for the benefit of a group unless this was necessary to accomplish a compelling state interest.[251] Absent prior discrimination by Davis involving some statutory or constitutional violation, Justice Powell was unwilling to find a compelling

242. *Id.* at 276, 289, 305.
243. *Id.* at 276.
244. *Id.* at 277.
245. *Id.* at 278.
246. *Id.* at 306.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 298.
251. *Id.* at 299, 309–10.

state purpose in pursuing any of the compensatory or distributive aims sought to be achieved through the special admissions program.[252]

Justice Powell's analysis, based on a mechanical application of the antidiscrimination principle and a rigid conception of the relationship between individuals and the group, is internally inconsistent in several respects. If the requirement of past discrimination is linked to a conception of constitutionally defensible group preferences as being compensatory in nature, it would be insufficient to justify such preferences. In accordance with Goldman's[253] argument, compensation justifies temporary suspension of a legitimate distribution scheme and justifies burdening an individual, such as Bakke, as a consequence of such suspension.[254] But if compensation is the goal, why should it be extended to a group rather than to the individuals who were the actual victims of the discrimination? Particularly when these victims can be identified, compensatory justice would require that compensation be reserved for them. However, if that became the case, there would be no need for preferential treatment for any group because of race.

The past discrimination requirement does not make any more sense when it is associated with the view that distributive justice provides constitutional justification for group preferences. Indeed, if a distributive concern—such as achievement of integration in the medical profession—is deemed to amount to a compelling state purpose, and if group preferences are necessary means to achieve that purpose, the requirement of past discrimination would be superfluous. On the other hand, if such distributive concern does not amount to a compelling purpose, it is difficult to understand why this should change merely because there was past discrimination.[255] Adding a past discrimination requirement does provide a superficial balance between the less than equal treatment received in the past and the more than equal treatment now being received by the previously discriminated-against, now preferred, group. However, this balance will be more apparent than real unless the detriment suffered as a result of the past discrimination is equivalent to the benefit received from the current preference. Since the benefits are measured in terms of future distributive needs and the detriments in terms of past discriminatory practices, equivalence between the two would seem purely coincidental, however, unless a causal link could be established between past discrimination and future distributive needs.

Even if the requirement of past or present discrimination were not itself problematic, the further requirement that the University of California at Davis be the state entity that had engaged in the discrimination[256] would still be overly restrictive. Justice Powell is correct to focus on Davis as the state entity that controls the allocation of places at the medical school. But by refusing to look beyond Davis, Justice Powell forecloses the possibility of using preferential treatment with respect to medical school admissions as a remedy to the evils caused by discrimination

252. *Id.* at 315–20.
253. A. GOLDMAN, *supra* note 1, at 65–66.
254. *See supra* text accompanying notes 74–75.
255. *See supra* text accompanying notes 224–25.
256. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

elsewhere in the state education system. Yet, from a practical standpoint, it is precisely those applicants to Davis' medical school who have been denied an equal education at the elementary and secondary school levels, and who have thus been denied the necessary tools to achieve means-regarding equality of opportunity sufficient to compete effectively for medical school admission, who are most deserving of receiving preferential treatment.[257] The proper domain of allocation would therefore be public education as a whole and the state itself (or the state agency responsible for that state's public education system) the proper agent of allocation.

From the perspective of an innocent white male like Alan Bakke, it also does not matter whether or not the state university to which he applies is guilty of past discrimination. Either way, he would be equally injured if denied admission solely because of race. Moreover, except when such denial is made necessary by the university's duty to make direct compensation to a past applicant who was wrongfully denied admission—in which case there is, properly speaking, no preferential treatment on account of race—it ought to make no difference whether the relevant past discrimination was carried out by that university or by any other entity responsible for public education. Indeed, if the state's need is to provide a remedy for past discrimination that prevents unequal treatment of the white applicant from amounting to a violation of the latter's right to equal treatment, then, so long as there is an adequate nexus between the state discrimination and the state remedy, the precise point of the discrimination's origin seems irrelevant.

Although Justice Powell rejects state compensatory and distributive purposes as being sufficiently compelling to justify preferential treatment, he finds the university's goal of a diverse student body a compelling state purpose justifying race-conscious admissions procedures.[258] Powell's approach is surprising since the goal of student diversity will invariably clash with a policy of insuring equality of opportunity for all medical school applicants. Moreover, once race is accepted as a proper factor to consider for purposes of achieving student diversity, it is susceptible to manipulation for restricting entry by members of certain groups. Thus, for example, if a relatively high proportion of Jews would gain admission to medical school based solely on a competitive admissions process, a state university could limit the number of its Jewish medical students under the guise of pursuing a more diverse student body. In short, the goal of differentiation underlying the desire for student diversity, which Justice Powell finds compelling, not only contradicts the ideal of equality of opportunity, but also blurs the distinction between taking race into account for purposes of accepting others as fully differentiated equals and taking it into account for purposes of relegating others to a position of inferiority.[259]

Unlike Justice Powell, the four Justices who joined Justice Brennan's opinion[260] did not resort to a mechanical application of the antidiscrimination principle. Actu-

257. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 371–73 (1978) (Brennan, J., concurring in part and dissenting in part).

258. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–19 (1978).

259. *See* R. FULLINWIDER, *supra* note 1, at 82.

260. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978).

ally, although the Brennan group applied an intermediate level of scrutiny to the classification involved in *Bakke*, their adherence to the antidiscrimination principle seems to be more a matter of form than of substance.[261] The four Justices acknowledged that *Bakke* did not fit neatly into the "prior analytic framework,"[262] and concentrated their analysis on the nature of the classes affected by the special admissions program rather than on the classification involved.[263] This approach enabled them to conclude that equal protection can go beyond equal treatment and aim toward achievement of global equality.

The class disadvantaged by Davis' special admissions program was that of white applicants, like Bakke. According to the Brennan group, however, the different treatment accorded to that class did not relegate its members to the position of inferiors or saddle them with any social stigma.[264] Moreover, as Justice Brennan clearly stated, the ultimate purpose of the special admissions program was the institution of equal opportunity for all, a purpose which cannot be achieved by neutrality because of the effects of past and present discrimination.[265]

Establishing equality of opportunity is a distributive goal, but it does not by itself provide a sufficient constitutional justification for the preferential treatment accorded by Davis. According to the four Justices, it is not enough that minorities are chronically underrepresented in the medical profession—which is indicative of the fact that their prospects of becoming physicians are much lower than those of whites—such underrepresentation must be causally linked to past state discrimination. Thus, in the opinion of the four Justices, a state is constitutionally entitled to adopt a race-conscious preferential treatment program to "remove the disparate racial impact . . . [produced by] past discrimination."[266] Insofar as the constitutionality of affirmative action depends on the proof of past discrimination, it appears to require a compensatory component. However, insofar as it depends on the existence of a plan to combat present competitive disadvantage—particularly since it is permissible for such a plan to grant preferential treatment to individual members of the discriminated group who have not themselves experienced such discrimination[267]—it contains a definitive distributive component. Although, as envisaged by the Brennan group, an affirmative action plan must combine compensatory and distributive elements, such a plan is neither plainly compensatory nor plainly distributive. Indeed, such a plan does not have to provide for compensation of actual victims of discrimination, or prefer an actual victim over another member of the preferred group who has not personally been the victim of any discrimination. On the other hand, as indicated above, purely distributive plans are insufficient to pass constitutional muster.

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261. *See* Sherry, *supra* note 47, at 107 (While Justice Powell concentrates on racial classification, Justice Brennan concentrates on the disadvantaged class.).

262. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 358 (1978).

263. *See* Sherry, *supra* note 47, at 107.

264. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in part and dissenting in part).

265. *Id.* at 369.

266. *Id.*

267. *Id.* at 363.

Besides conflating distributive and compensatory concerns, Justice Brennan's opinion deflates the issue of the innocent white victim of preferential treatment. Thus, Bakke may feel that Davis' dual admission program cost him a place in the entering class at the medical school. As Justice Brennan sees it, though: "[T]here is a reasonable likelihood that, but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis' special admissions program."[268] If this argument is correct, then Bakke obviously lacks a legitimate claim, as he hardly is justified in asserting a right to maintain the ill-gotten benefits of invidious past discrimination. But since it is logically conceivable that an innocent white applicant who has been rejected under an affirmative action plan would have succeeded absent the plan *and* absent past discrimination, the issue of the innocent white victim remains genuine.

As a consequence of refusing to view Bakke as a genuine victim, the four Justices may not have believed it necessary to assess the Davis admissions program in terms of the relationship it establishes between individual-regarding concerns and group-regarding concerns. Nevertheless, certain indications of the possible constitutionally permissible relationships between group-regarding and individual-regarding concerns are implicit in their decision that such a plan is constitutional if enacted to remedy the present effects of past discrimination. Since the past discrimination component is not invoked to justify compensation to individual victims, but rather to legitimate a subsequent distributive preference to members of the discriminated-against group, it seems fair to assume that such past discrimination component evinces primarily a group-regarding concern. The distributive component, on the other hand, seems to have both group-regarding and individual-regarding features. To the extent the distributive goal is to achieve proportionate representation of the formerly discriminated group within the medical profession, that goal seems to be primarily group oriented. To the extent, however, that the distributive goal is to equalize the prospects of the individual members of each group—since discrimination has diminished the prospects of individual blacks being admitted to medical school, and preferential treatment is supposed to erase that deficit—it is primarily individual-regarding.

The interplay of equalities and inequalities surrounding a preferential treatment plan, such as Davis', that attempts to remedy the present effects of past discrimination is also highly complex. The past discrimination consisted of unequal treatment because of race; more specifically, a denial of formal equality of opportunity to blacks through the positive intervention of the state. Indeed, as Justice Brennan indicates, at one time there were penal sanctions for anyone attempting to educate blacks.[269] Such past discrimination deprived blacks of the means to compete on an equal footing with whites, and thus dramatically reduced their prospects of winning in that competition. In other words, state deprivation of their means-regarding equality of opportunity resulted in the progressive elimination of their prospect-regarding equality of oppor-

268. *Id.* at 365–66.
269. *Id.* at 371.

tunity as a group. Furthermore, prospect-regarding inequality of opportunity eventually leads to group-regarding inequality of result—that is, the proportion of blacks in competitive positions is much lower than the proportion of the black population to the total population.

Mere termination of state-sponsored discrimination restores formal (means-regarding) equality of opportunity, but tends to perpetuate prospect-regarding inequality of opportunity and group-regarding as well as individual-regarding inequalities of result. Preferential treatment, on the other hand, establishes both means-regarding and prospect-regarding inequality of opportunity for individuals. In addition, it promotes prospect-regarding equality of opportunity for groups, and group-regarding equality of result.

Unless a historical perspective is maintained and the balance of particular equalities and inequalities properly taken into account, it is not possible to assess fairly or fully the legitimacy of a preferential treatment plan. On the other hand, it should be quite apparent that by isolating particular equalities or inequalities associated with preferential treatment programs, and by presenting them out of context, one is likely to ignite heated passion and to engender controversy. Thus, for example, if one isolates the prospect-regarding inequality of opportunity accorded to individuals and the equality of result accorded to groups by preferential treatment programs a widespread outcry is likely. The reason for this is that, thus isolated, these equalities and inequalities appear to fly in the face of the ideal of equality of opportunity. Placed in their historical perspective as countermeasures against other equalities and inequalities, however, they might well prove eventually to be quite compatible with an overall scheme to reinstate genuine equality of opportunity.[270]

With this in mind, we can sum up the present assessment of the Brennan group's opinion in *Bakke* as follows: The use of preferential treatment programs to remedy the present effects of past discrimination seems compelling but a sufficiently comprehensive justification for doing so is not articulated. Nevertheless, as we shall see below, a comprehensive justification for such use can be suggested.[271] Furthermore, the opinion does not advance any satisfactory proposal for dealing with the problem of the innocent white victim or for determining the proper constitutional balance between individual-regarding and group-regarding concerns.

D. *The* Fullilove *Decision*

Unlike *Bakke*, in *Fullilove v. Klutznick*[272] the constitutionality of affirmative action programs had to be faced squarely. By a majority of six to three, the Supreme Court upheld the constitutionality of an affirmative action program enacted by Congress to remedy present inequalities arising from the continuing effects of past discrimination.[273] In addition, the Court addressed the issue left unresolved by *Bakke*:

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270. *See infra* text accompanying notes 315–25.
271. *See infra* text accompanying notes 312–25.
272. 448 U.S. 448 (1980).
273. *Id.* at 475, 477–78.

the harm preferential treatment causes to innocent nonminority competitors.[274] Finally, in upholding Congress' authority to enact affirmative action programs, the Court emphasized Congress' constitutional mandate to achieve "equality of economic opportunity."[275] Notwithstanding these developments, however, the Court fell far short of providing a full-blown picture of the constitutional dimensions of affirmative action.

Fullilove involved a challenge to the "minority set-aside" provision of the Public Works Employment Act of 1977, enacted by Congress to alleviate national unemployment.[276] The Act provided for the distribution of federal funds to state and local governments for public works projects. The minority set-aside provision declared that no grant would be made for any "local public works project" unless at least ten percent of such grant would be expended for minority business enterprises ("MBE").[277] Under this scheme, ten percent of the funds allocated for a project would have to be expended in procuring services or supplies from MBEs.[278] Moreover, within this framework, MBEs were to be awarded contracts even if their bids were not the lowest, provided that their higher bids merely reflected attempts to cover increased costs due to the present effects of past discrimination.[279] Nonminority businesses were presumably harmed by this program to the extent that they were excluded from competing for ten percent of the business generated by the federal grants made pursuant to the Act.

In assessing the burden of the set-aside on innocent nonminority businesses, Chief Justice Burger, writing for the Court, stated: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."[280] The Chief Justice went on to observe that the actual burden on innocent nonminority businesses was light as they were excluded from competing from what amounted to 0.25% of overall construction contracting opportunities.[281] In his concurring opinion, Justice Powell also emphasized the lightness of the burden on nonminorities.[282] Moreover, using a balancing test, he concluded that the government interest in enacting the set-aside provision outweighed any "marginal unfairness" to the innocent nonminority businesses.[283]

Because of the lightness of the burden on nonminority contractors, the issue of the innocent victim of preferential treatment was resolved without difficulty in *Fullilove*. This, however, leaves open the question whether a balancing test is appropriate when an innocent victim has suffered more than a marginal injury, in the

274. *Id.* at 484–85.
275. *Id.* at 490.
276. *Id.* at 456–57.
277. *Id.* at 454.
278. *Id.*
279. *Id.* at 474.
280. *Id.* at 484.
281. *Id.* at 484–85 n.72.
282. *Id.* at 514–15 (Powell, J., concurring).
283. *Id.* at 515.

context of an affirmative action program enacted for clearly distributive purposes. Moreover, the affirmative action plan in *Fullilove* was so narrowly circumscribed that its avowed distributive character looms as the functional equivalent of a compensatory scheme. Indeed, the minority set-aside provision applied only to those who were actual victims of discrimination, and the preference it granted was narrowly tailored to compensate only for those increased costs of doing business that could be attributed to the effects of past discrimination.[284] Under these circumstances, the partial setting aside of the general distributive principle of awarding contracts to the lowest bidders could be justified in terms of the need to provide compensation for past violations of distributive rights. As a consequence of this, and consistent with Goldman's argument discussed above, the innocent nonminority contractors who were affected adversely in *Fullilove* did not suffer any infringement of their right to be treated as equals.[285] This, however, does not answer the altogether different question of whether the use of a balancing test in the context of a more extensive affirmative action program, such as the one involved in *Bakke*, is likely to violate the innocent nonminority victim's right to treatment as an equal.

Because the minority set-aside provision applies only to MBEs who actually have been victims of past discrimination, *Fullilove* does not raise any genuine issues concerning the dichotomy between individual interests and group interests. Furthermore, the scope of the affirmative action program found constitutional in *Fullilove* is much narrower than the one involved in *Bakke*. Accordingly, the Court's decision in *Fullilove* does not resolve the issue whether an affirmative action program like the one in *Bakke* would pass constitutional muster, provided it had been adopted by a state entity that had engaged in past discrimination. In sum, the decision in *Fullilove* leaves many key issues unresolved and leaves the constitutional contours of affirmative action vague and uncertain.

E. *Affirmative Action, Seniority Rights, Groups, and Individuals: The* Stotts *Decision*

In perhaps no other context is the issue of the effect of affirmative action plans on the rights of innocent third parties more acute than in that of the relation between job seniority and layoffs. Indeed, in the context of competition for a position, no one has a *prima facie* right to the position. Thus, award of the position on a preferential basis amounts to no more than a deprivation of the right to receive equal consideration for the position. Once a position has been secured, however, there is a reasonable expectation of holding on to that position and a natural tendency to count on that position as a means to achieve and maintain economic security.[286] Moreover, the interest of the jobholder in his or her economic security can be given additional protection by the institution of a seniority system,[287] according to which, in case layoffs become necessary, the last hired will be the first laid off.

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284. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

285. *See supra* text accompanying notes 74–75.

286. A. GOLDMAN, *supra* note 1, at 125.

287. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2584 (1984).

Seniority rights, however, are likely to frustrate the distributive aims of affirmative action hiring plans in times of economic contraction. Since the whole point of setting hiring quotas is to raise the proportion of minority individuals in the work force, layoffs in accordance with seniority rules could completely undermine the results achieved by an affirmative action plan. Thus, seniority systems can help bring back the negative effects of past discrimination whenever the economy finds itself in a recession.

The clash between the remedial aims of affirmative action programs and the workings of the seniority system is the principal issue raised in *Fire Fighter's Local Union No. 1784 v. Stotts*.[288] In *Stotts* the issue was whether the aims of a remedial affirmative action plan could take precedence over the dictates of an established seniority system in the face of mandatory layoffs. The case arose in the context of a statutory dispute under Title VII of the Civil Rights Act of 1964[289] and of a dispute concerning the terms of a consent decree.[290] Although the constitutionality of the affirmative action plan was not at issue, the Supreme Court's decision in *Stotts* shed some interesting new light on the issue of harm to the innocent third party and on the relationship between the individual and the group. *Stotts* involved a consent decree entered into by the city of Memphis and its fire department, after the filing of a class action suit against them, alleging racial discrimination in the department's hiring and promotion practices. The consent decree provided for the implementation of an affirmative action plan that included setting hiring goals to make the proportion of blacks in the department consistent with the proportion of blacks in the total local population.[291] After the affirmative action plan went into effect, a budget deficit made it necessary for the department to lay off some of those who were employed under it.[292] In accordance with the senority system in effect, layoffs were to be made according to a "last hired, first fired" formula. Since a relatively large proportion of blacks had been recently hired,[293] the layoffs would have had the effect of undermining the goals sought to be achieved by means of the affirmative action program.

Noting that the purpose of the consent decree was to provide a remedy for the past hiring and promotion practices of the department,[294] and noting further that Title VII protects bona fide seniority systems, the court stated that it was "inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this."[295] In other words, when an affirmative action plan has a distributive purpose, the seniority rights of innocent employees take precedence over the implementation of the plan, even in the face of past discrimination. On the other hand, however, the Court went on to declare that actual victims of past discrimination "may be awarded competitive seniority and given their rightful

288. 104 S. Ct. 2576 (1984).
289. 42 U.S.C. §2000e-200e-17.
290. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2581 (1984).
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 2586.
295. *Id.*

place on the seniority roster."[296] Thus, when preferential treatment is accorded to an actual victim of past discrimination for compensatory purposes, compensation to such a victim takes precedence over the seniority rights of innocent employees. Finally, the court also emphasized that even an actual victim of past discrimination may not be entitled to be awarded a position if the only way to make such a position available were to have an innocent nonminority employee laid off.[297]

These distinctions drawn in the course of the Court's Title VII analysis could also be justified in the context of a constitutional consideration of the same issues. Indeed, it can be argued that the above mentioned distinctions articulated in *Stotts* can be justified under the equal protection clause through the application of the balancing test suggested by Justice Powell in *Fullilove*.[298] On the other hand, the mere fact that these distinctions could be justified under such a balancing test may also indicate that a balancing test is not appropriate, under the circumstances, because it does not adequately protect each individual's right to be treated as an equal. Thus, for instance, whether preferential treatment is granted as compensation to an actual victim of past discrimination or whether it is accorded to distribute a given percentage of available jobs to members of a class that is underrepresented in the workforce, its effect on an innocent nonminority employee who loses his or her seniority rights is likely to be the same. Under a balancing test, the result would seem to depend entirely on the relative weights accorded compensatory and distributive schemes, since the effect on the innocent employee is the same in both cases. Regardless of the relative weights of compensatory and distributive schemes, however, the loss of seniority rights by the innocent employee may amount to a denial of his or her right to be treated as an equal. If this were the case, a balancing approach would merely serve to obfuscate this most important issue. In short, although the distinctions drawn by the Court in *Stotts* may be both sound and constitutionally defensible, there appears, thus far at least, to be no satisfactory account of why they may be justified.

The other important issue on which *Stotts* shed some new light is that of the relation between individual-regarding and group-regarding interests. The dissenting opinion by Justice Blackmun raises this issue. The main thrust of the dissenting Justices' position is that when an affirmative action plan's purpose is to remedy the present effects of past discrimination, the remedy is provided for the group discriminated against as a whole rather than to any of its individual members.[299] This follows from the fact that the aim of such a plan is the distributive one of alleviating the classwide effects of past discrimination rather than the compensatory one of making whole any of its actual victims. Consistent with this, the distinguishing feature of the race-conscious plan setting hiring percentage goals in *Stotts* is that "no individual member of the disadvantaged class has a claim to [the relief] and individual beneficiaries of the relief need not show that they were themselves victims of the

296. *Id.* at 2588.
297. *Id.*
298. *See supra* text accompanying note 283.
299. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2605–07 (1984) (Blackmun, J., dissenting).

discrimination for which the relief was granted."[300] Moreover, carrying this analysis over to the layoff situation, the realization of an affirmative action plan implemented for distributive purposes requires that layoffs be conducted in a race-conscious manner. The important consideration is the group-regarding one of preserving the plan's contemplated proportion of blacks and whites. Therefore, no individual black employee has, according to this analysis, any right against being laid off so long as the percentage of black representation is maintained.[301]

This analysis seems to provide an accurate assessment of race-conscious affirmative action programs with a distributive purpose. From a constitutional standpoint it may seem that such programs may be defective inasmuch as they appear to exalt group interests far above individual ones. Nevertheless, before any final conclusion is drawn on this score, it should be remembered that such programs promote not only group-regarding equality of result (the number of blacks who have positions is proportionate to the black population in the same way as the number of whites who have positions is proportionate to the white population) but also individual-regarding (prospect-regarding) equality of opportunity (through implementation of the plan a black applicant's prospect for a position becomes the same as that of a white).[302]

In sum, the constitutional analysis of affirmative action remains inconclusive and incomplete. The three major issues, namely the relation between compensatory and distributive aims, the problem of the innocent nonminority person, and the proper equilibrium between group-regarding and individual-regarding interests, have found no coherent and satisfactory theoretical and practical resolution in the cases. Nevertheless, the analysis of the balance of equalities and inequalities generated by affirmative action plans suggests certain possible avenues of justification. What remains to be done, therefore, is to explore this balance more fully in light of the philosophical and constitutional insights developed in the course of this analysis.

V. An Integrated Philosophical and Constitutional Justification of Affirmative Action

A. *The Nexus Between Affirmative Action, Equality of Opportunity, and Compensatory Justice*

Affirmative action can be justified only in those sociopolitical contexts in which adherence to the postulate of equality leads to the embrace of the ideal of equality of opportunity. Where equality of result can be ultimately achieved because there is no scarcity in the goods to be allocated, on the other hand, affirmative action would either be pointless—in the sense that it would serve no legitimate purpose to prefer some over others, if all could receive the good they desire—or plainly unjust—in case it were used to support a system that artificially fostered scarcity under circumstances where abundance was plainly within reach.[303] Alternatively, under circumstances in

300. *Id.* at 2606.
301. *Id.*
302. *See supra* text accompanying notes 269–70.
303. *See supra* note 56 and accompanying text.

which neither equality of opportunity nor equality of result were thought to be justified, affirmative action would be morally indifferent. Indeed, without adherence to the postulate of equality there would be no requirement to treat individuals as equals and thus no moral constraints on preferring any individual or group over another.[304]

The most obvious link between affirmative action and the ideal of equality of opportunity is that they both make sense when there is a scarcity of the particular goods to be allocated in the context of a commitment to the postulate of equality. Beyond this, however, affirmative action may seem initially to run directly counter to equality of opportunity—an impression which undoubtedly accounts for much of the opposition against affirmative action.[305] Thus, for example, equality of opportunity may require that only talent and effort be taken into account in the allocation of scarce jobs,[306] while affirmative action may require that a factor other than talent and effort, such as race or sex, play a role, sometimes even a decisive one, in the allocation of scarce jobs.[307]

This initial impression will prove eventually to be misleading because it remains ahistorical. Nevertheless, it can serve to indicate a couple of important points. First, from the standpoint of a purely future-looking perspective grounded in the present, creating a distributive system based on the principle of equality of opportunity does not justify adopting a prospective-looking affirmative action plan. Second, such characteristics as race or gender (as opposed to abilities, talents, or professional skills) are generally not inherently relevant to the allocation of scarce goods according to the ideal of equality of opportunity. Hence, if preferential treatment because of race or gender is to be justified, such justification must be, at least in part, backward looking.

For an allocation system operating according to the principle of equality of opportunity to function properly requires the absence of affirmative action. Paradoxically, to restore the integrity of a system of allocation after substantial disruption, however, may well require temporary adoption of some form of affirmative action. Granting preferential treatment to an actual victim of past discrimination presents the clearest and least controversial example of a need for affirmative action to restore equilibrium to a distributive system based on equality of opportunity.[308] In the strongest case, a victim of past discrimination competes for a position he or she would have been successful in securing but for the discrimination. Moreover, the best way to make such a victim whole would be to accord him or her the same position or the

304. More precisely, no such moral constraints would flow from considerations based on the concept of equality. It is, of course, possible that such constraints would be required by virtue of other ethical, political or religious principles not in any way dependent on the postulate of equality. Thus, for example, in a feudal society certain normative principles that are clearly inconsistent with the postulate of equality would require that the lord of the manor be preferred over his serfs by virtue of certain differences in status.

305. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 219–55 (1979) (Rehnquist, J., dissenting) (Title VII's purpose is to promote equality of opportunity, hence it does not permit the use of racial quotas).

306. *See* A. GOLDMAN, *supra* note 1, at 26–28.

307. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 199 (1979) (racial quota providing that 50% of craft trainees have to be black).

308. Goldman, who generally rejects the moral justification of affirmative action plans based on race or sex, approves of it in the case of its use to make a compensation in kind to an actual victim. A. GOLDMAN, *supra* note 1, at 93, 120.

most nearly equivalent position available.[309] In this strongest of cases, therefore, affirmative action is used for purely compensatory purposes, in a situation where the aims of compensatory justice take clear precedence over the procedures established to promote the aims of distributive justice. Indeed, this case provides the clearest instance of the need for temporarily suspending application of distributive justice criteria for the purpose of insuring long-term realization of distributive justice.[310]

Using affirmative action for the purely compensatory purpose of making actual victims of past discrimination whole has been approved by all nine Justices of the *Fullilove* Court.[311] Although affirmative action to provide compensation in kind for actual victims of past discrimination has been characterized as involving a preference because of race,[312] this is not, strictly speaking, accurate. It is not *because* an actual victim of past discrimination is black that he or she is entitled to compensation in kind. Rather, it is because he or she was wrongfully victimized, and compensation in kind is the best means available to put such a victim, as nearly as possible, in the position in which he or she would have been but for the discrimination.

From the perspective of a victim discriminated against at the job search level, affirmative action in this narrow sense provides the best possible measure of compensation. For other victims of past discrimination, however, such a narrowly circumscribed form of affirmative action is of little help. Thus, for example, a black person who received an inferior public school education because of racial discrimination is likely to suffer a significant handicap in the competition for scarce positions awarded on the basis of superior skills developed, at least in part, in the course of the applicant's elementary and secondary school education. In this case, compensation in kind, namely a superior public school education or its equivalent, may be inadequate. This would be particularly true if it would require several years of study and the job applicant were an adult who needs to earn a living in order to support a family.[313] On the other hand, simply awarding this person the position he or she seeks, on a preferential basis, may seem inappropriate because, unlike the case of the person discriminated-against at the job seeking level, in this case there is no reasonable assurance that the victim of past discrimination (at the public school level) would have secured the job but for the discrimination.[314]

Pervasive discrimination at the educational level deprives some members of society of important tools needed in the competition for jobs, and thus, like discrimination at the job seeking level, undermines the integrity of any distributive scheme relying on equality of opportunity for its justification. Moreover, such integrity is undermined both because of a loss in legitimacy, stemming from the denial

309. *See supra* text accompanying notes 72–75.

310. *Id.*

311. *Cf.* 448 U.S. 448, 525 n.4 (1980) (Stewart, J., joined by Rehnquist, J., dissenting) ("A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of law prohibiting discrimination on the basis of race.").

312. *Id.*

313. *See* A. GOLDMAN, *supra* note 1, at 127–28 (time lapse between discrimination in education and job application makes the problem very complex).

314. *Id.* at 130.

of an equal opportunity to certain members of society, and of a loss in efficiency, due to the displacement or removal of certain talented individuals from the marketplace for jobs because of a lack of adequate tools. In the case of a qualified job applicant who was denied the job because of discrimination, giving that individual the job (or a similar job) in compensation is unlikely to disrupt seriously the efficiency of the system of distribution, even if it does have a negative impact on it. In the case of those who were denied tools necessary to compete successfully for jobs because of discrimination, however, granting them jobs in compensation would probably have a serious impact on the efficiency of the system of distribution and is therefore likely to worsen significantly the already partially impaired functioning of that system.[315]

From the standpoint of the distributive system's efficiency, it might seem preferable to foreclose compensating victims of past educational discrimination with jobs for which there are other persons who are much more qualified. From the standpoint of that system's legitimacy, however, it may well be inadequate to rely entirely on some other form of compensation such as monetary damages. Indeed, the award of such damages, even if coupled with better educational programs for subsequent generations, may relegate too many members of the discriminated-against group for too long to subordinate positions, and thus fail to ameliorate their sense of self-respect or to increase their confidence in the system.[316] What is needed is a way to reintegrate the victims of past discrimination into the mainstream of society—which entails receiving a share of the jobs allocated by society—without having to grant to individual victims jobs that they would not have obtained even if they had never experienced any discrimination.

One of the principal evils of invidious discrimination in education is that it deprives its victims of the means to compete on an equal footing with others for scarce jobs.[317] Because of their lack of equal means, the victims of past discrimination in education enjoy sharply diminished prospects of attaining those goods—material goods, power, prestige—that society distributes to those who hold decent jobs. In other words, the means-regarding inequality of opportunity brought about by a segregated—and thus inferior—public school education results in the institution of a prospect-regarding inequality of opportunity in the marketplace for jobs. The present injury stemming from past discrimination is *the diminished prospect of getting a competitive position*. Accordingly, the best way of presently making these victims of past discrimination whole is increasing their prospects for obtaining competitive positions to the point where their prospects would have been, absent any past discrimination. Moreover, since there is no reason to assume that, absent past discrimination, blacks, as a group, would not succeed in the competitive job market as well as whites do as a group, the most sensible approach is to equalize the prospects

315. *See id.* (affirmative action results in loss in efficiency and utility to the public).

316. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J.):

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

317. *See id.* at 394–96.

of the two groups by insuring that the proportion of blacks in the workforce is equivalent to the proportion of blacks in the general population.

Consistent with this analysis, affirmative action to remedy the present effects of past discrimination is ultimately compensatory rather than distributive. Since the injury sought to be compensated is the individual's diminished prospects in the distributive arena, the compensation operates on, and therefore has a direct effect on, the sphere of distribution.[318] Nevertheless, such affirmative action remains primarily compensatory in kind, as is further evidenced by its temporary nature. Once prospects have been equalized through affirmative action and through elimination of discrimination in the public education system, compensation will have been completed and no further injuries requiring this kind of compensation will take place. At that point, all affirmative action programs would lack justification and would have to be scrapped.

While affirmative action serves the aims of compensatory justice, it is an imperfect procedure,[319] in that it can equalize the prospects only of those who possess the minimal qualifications necessary to perform satisfactorily on the job.[320] Those whom past discrimination has left without minimal qualifications cannot benefit from affirmative action. All others, however, benefit from it by making up for the deficit in their prospects caused by the past discrimination. On the other hand, as pointed out, affirmative action does have an effect on the sphere of distribution. By preferring less qualified blacks over more qualified whites, it presumably has an adverse effect on the overall efficiency of the system of distribution. By preferring the most qualified blacks over less qualified blacks, however, affirmative action is only likely to have a limited adverse effect on the efficiency of the distributive sphere. Thus, affirmative action serves to reintegrate members of a discriminated-against group within the mainstream of society without unduly interfering with the efficient functioning of the sphere of distribution.

Under this analysis, one of the most frequent criticisms levelled against affirmative action can be shown to be misplaced. The criticism is that affirmative action benefits the best qualified members of the discriminated-against group, who presumably need help the least, at the expense of its least qualified members, who are presumably in the greatest need of assistance. Conversely, according to this criticism, affirmative action is unjust to those who are not members of the discriminated-against group, in that it is likely to hurt the least advantaged among them far more than the most advantaged.[321]

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318. In other words, although affirmative action has a distributive effect on society at large, it remains compensatory from the perspective of its beneficiaries.

319. *See supra* text accompanying notes 85–86.

320. Affirmative action programs that would give preferences to those who are not minimally qualified would not only be completely inefficient, they would also be self-defeating. Indeed, awarding positions to those who are incompetent to handle them does not seem likely to contribute to reintegrating victims of past discrimination into the mainstream of society.

321. *See, e.g.*, A. GOLDMAN, *supra* note 1, at 90–91. Goldman considers this criticism to be perhaps the most important point of his book. *Id.* at 90. *See also* B. GROSS, *supra* note 1, at 112–13.

This criticism misses its mark because it fails to take into consideration that to be legitimate, affirmative action must be parasitic on a distribution system based on the grant of individual rights to equality of opportunity rather than to equality of result. It may well be that differences in talents ought to be morally irrelevant, as individuals can be said to be no more responsible for the talents they possess than for the color of their skin.[322] But if that is true, it is distributive systems relying on the ideal of equality of opportunity which are themselves unjust, not affirmative action programs used as instruments of compensation in the context of such systems. Equality of opportunity favors more talented and more qualified individuals at the expense of less qualified and less talented ones, and so does affirmative action. As a matter of fact, when equality of opportunity is the norm, discrimination causes proportionately greater harm to its more talented victims, and, conversely, it has the effect of bestowing proportionately greater undeserved benefits on the least qualified members of the groups not subject to discrimination. In accordance with this, affirmative action tends to take away undeserved benefits from those who would not have received them absent discrimination even as it tends to increase the prospects for receiving benefits of those who would have been the most likely to receive them had they not been the victims of discrimination.

As already pointed out, affirmative action promotes prospect-regarding inequality of opportunity for individuals, while establishing prospect-regarding equality of opportunity for groups[323]—that is, individual members of one group have the same prospects as individual members of another group to receive a scarce good distributed by an agent of allocation, but within a single group, each individual may have a different prospect of receiving that good than any other member of that group. It is now possible to add that affirmative action, by promoting prospect-regarding inequality of opportunity for individuals and prospect-regarding equality of opportunity for groups, is part of a single overall project designed to eliminate the distorting effects on individual prospects brought about by discrimination, and to restore the measure of prospect-regarding inequality of opportunity for individuals that is a necessary by-product of the principle of equality of opportunity.[324] Viewed in this light, it becomes apparent that equality of opportunity for groups is not an end in itself. Instead, its pursuit is subordinated to the goal of restoring individuals' prospects to what they would have been had no discrimination taken place. Hence, notwithstanding any initial impression to the contrary, affirmative action does not ultimately subordinate individual concerns for purposes of establishing group-regarding equality.[325] On the contrary, it merely uses group-regarding equality as a means to restore (means-regarding) equality of opportunity for the individual.

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322. *Cf.* T. NAGEL, *supra* note 1, at 95, 97 (abilities irrelevant from the standpoint of justice).

323. *See supra* text accompanying notes 269–70.

324. The prospect-regarding inequality of opportunity that is the necessary byproduct of the application of the principle of equality of opportunity is reducible to the differences in talents and abilities among those who compete for scarce positions. To the extent that discrimination deprives some of the means to compete, it creates a change in the configuration of prospect-regarding inequalities that no longer corresponds to a mere differential in talents and abilities.

325. *See supra* text accompanying notes 229–32.

To recapitulate: Affirmative action to remedy the present effects of past discrimination, as endorsed by the four Supreme Court Justices who joined Justice Brennan's opinion in *Bakke*, is justified under the equal opportunity ideal as a means to achieve compensatory justice. Its main mission is to eliminate the distortions that discrimination has imposed on individual prospects. It addresses group-regarding equalities, but only for the ultimate purpose of re-establishing individual-regarding equality of opportunity.

B. *Affirmative Action and the Relationship Between the Individual and the Group*

Even if one agrees that affirmative action subordinates group-regarding concerns to individual-regarding ones, one might still object that granting preferential treatment to an entire group, such as blacks or women, unduly exalts the group at the expense of the individual. Not all blacks or all women have personally experienced discrimination and there are non-blacks and non-women who have been personally victimized by discrimination.[326] Accordingly, it has been argued that preferential treatment should be limited to blacks and women who were actual victims of discrimination, and extended to those non-blacks and men who were actual victims of discrimination.[327] To determine whether this argument is sound, it is necessary to take a somewhat closer look at the relationship between the individual and the group.

While extreme individualists may view the group as the individual's principal antagonist, standing as an obstacle to the individual's pursuit of self-interest, the apparent dichotomy between individual and group has been overdrawn.[328] In fact, there are no individuals who are completely independent from groups, and there can be no individual rights except in the context of organized groups, such as political communities.[329] An individual's pursuit of his or her own life plan is as likely to involve voluntary association with groups as it is to produce confrontation with group-regarding aims. The important question, however, is to what extent group affiliation and group-regarding concerns can be taken into account consistent with a constitutional equal protection principle that runs to the individual rather than to the group.

As a general principle, consistent with the postulate of equality, voluntary group affiliation should be taken into account in spheres of reality governed by the ideal of differentiation, while involuntary group affiliation[330] should generally not be taken into account in spheres of reality governed by the ideal of assimilation. Thus, for instance, someone's membership in a club should be taken into account for purposes of extending membership privileges, while a person's skin color should not be taken

326. *See* A. GOLDMAN, *supra* note 1, at 76–77, 191–92 (the chronically poor are in greatest need of affirmative action).

327. *Id.* at 191–92, 197–98.

328. *See* M. FISK, ETHICS AND SOCIETY: A MARXIST INTERPRETATION OF VALUE 9–10, 15–17, 24 (1980).

329. *Cf.* M. WALZER, *supra* note 35, at 28–29 (community is the most important good that gets distributed) and 32 (membership in community is distributed by members to outsiders).

330. By "involuntary group affiliation" I mean, roughly, immutable characteristics. Nevertheless, "voluntary" group affiliations such as religious affiliation would be encompassed within the class of differences which ought not to be considered in the context of spheres of assimilation. *See supra* note 49 and accompanying text.

into account for purposes of allocating civil and political rights. Since we assume that a person's race or sex is not a group characteristic that ought to be considered in allocating basic education or a scarce job,[331] the question becomes whether past denial of a basic education or of a scarce job on the basis of race or sex justifies present or future compensation on the same basis.

To consider this question properly, it is important to draw a distinction between compensation to a group and compensation to an individual because of his or her membership in a group. Compensation to a group is possible only if the group has some separate existence over and above that of its individual members.[332] Thus, for instance, compensation can be made to a country, to a religious organization or to a corporation.[333] By the same token, however, it cannot be made to all blacks or all women, because they are not organized into any cohesive group that has an organization or a personality that is distinct from that of its individual members.[334] Moreover, while there are organizations that purport to represent the interests of blacks or of women, none of these are sufficiently representative of all women or all blacks so that reparations to the organization could be deemed reasonably to constitute compensation to women or blacks as a group.

Compensation to the individual because of his or her membership in a group, on the other hand, ultimately compensates the individual, not the group. A class action lawsuit is the paradigmatic example of this principle. A group of individuals sharing a common characteristic, such as having purchased the same defective product from the same manufacturer, join forces and seek compensation for all their injuries in a single lawsuit.[335] Although the defendant makes compensation to the class as a whole, that compensation ultimately is owed to individual members of the class. It will eventually have to be divided so that each individual member can receive his or her own distributive share of the total.[336] Furthermore, the individuals comprising the class will not be identifiable as a group until the events that give rise to the claim for compensation take place. Finally, once class members have been individually compensated, the class will likely dissolve.[337]

Ideally, blacks and women ought not be considered members of a group for purposes of allocating a basic education or scarce job. Consequently, it becomes necessary to determine what common characteristic underlies their formation as a

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331. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Mississippi Univ. For Women v. Hogan, 458 U.S. 718 (1982) (single-sex admissions policy of school of nursing violates equal protection clause).

332. *See* A. GOLDMAN, *supra* note 1, at 82–86.

333. *Id.* at 84.

334. *Id.* at 85–86.

335. *See, e.g.*, FED. R. CIV. P. 23(B)(3) (class action can be maintained when, *inter alia*, questions of law or fact common to the members of the class predominate over those affecting only individual members).

336. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (if ascertainable class exists, action can proceed even if individual members not identified; however, no one is entitled to a distributive share of damages unless he or she identifies himself or herself).

337. In *Daar*, for example, the class consisted of those who used defendant's taxi cabs in the city of Los Angeles for a four-year period during which defendant had illegally overcharged its customers. It is obvious that the only common characteristics unifying the collection of individuals who used the cabs into a class are those which gave each member of the class a claim in the class action lawsuit against the cab company. Moreover, after each individual receives his or her distributive share of the damages, the class is dissolved. *Id.* at 699, 433 P.2d at 736, 63 Cal. Rptr. at 728.

group that seeks compensation on behalf of its individual members. That characteristic cannot be blackness or femaleness *per se*, as those characteristics bear a neutral moral value in integration spheres. Moreover, that characteristic cannot merely be having been personally discriminated against with respect to a basic education or jobs, because that would make compensation limited to blacks or women both underinclusive and overinclusive.[338] This notwithstanding, however, being black or a woman can be made *derivatively* morally relevant by racism or sexism.[339] The racist, for instance, by labelling blacks inferior, transforms a morally neutral predicate, namely being black, into an unmistakable characteristic justifying inferior treatment. Therefore, in due course, being black can become a characteristic associated with a need for compensation. Indeed, when racism is as prevalent and as pervasive as it has been in the United States, and when it informs or underlies government policy, as it has for much of the history of the United States, it seems fair to assume that all blacks have to one degree or another been the victims of it.[340]

If one accepts that being black is synonymous with belonging to a class whose members have been treated as inferiors, then compensation extending to all blacks would not be overinclusive. Nevertheless, it might still be objected that such criterion for compensation would be underinclusive inasmuch as it would not apply to all the actual victims of discrimination. What this objection overlooks, however, is that racism discriminates in particular ways that may be different from the ways in which other kinds of negative group stereotyping might discriminate. Thus, the racist may assert that blacks are lazy and unreliable,[341] while the anti-Semite may claim that Jews are cunning and dishonest. Although both the racist and the anti-Semite engage in group libel that is likely to cause injury to individual members of the vilified group, they each cast their target group in a different light, and are therefore likely to cause different kinds of injuries. Following this line of argument, it seems reasonable to conclude that blacks as the victims of slavery, pervasive racism, school segregation, and systematic exclusion from positions of power within society have suffered special injuries not suffered by members of any other group.[342] More particularly, it seems reasonable to assume that the pattern of past discrimination against blacks has left them with diminished prospects of obtaining access to higher education and to jobs.[343] In view of this, blacks may well deserve to receive a different kind of compensation than other victims of discrimination, and affirmative action plans restricted to blacks would seem to be neither significantly underinclusive nor significantly overinclusive.

The proposition that, for purposes of compensatory justice, it is the racist who frames race as a morally relevant characteristic, finds constitutional support in the

338. *See supra* text accompanying note 326.

339. *See* Bayles, *Reparations to Wronged Groups*, in REVERSE DISCRIMINATION 305 (B. Gross ed. 1977).

340. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part and dissenting in part).

341. Bayles, *supra* note 339, at 304.

342. *See* Maguire, *supra* note 178, at 883–84.

343. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part and dissenting in part).

Supreme Court's decision in *United Jewish Organizations v. Carey*.[344] In that case, arising under Section 5 of the Voting Rights Act of 1965,[345] the Court held that the Constitution permits states to reapportion voting districts so that the percentage of districts with a non-white majority approximates the percentage of non-whites in the county.[346]

The right to vote is a paradigmatic individual right. Each individual has only one vote, and absent any discrimination or unfair procedures, no group of voters has a right to complain that its candidate lost.[347] Voting is by its very nature a majoritarian process. However, when large numbers of voters vote on the basis of race, and when the state reapportions voting districts with the aim of diluting the impact of non-white voters and thus reducing the probability that non-white candidates will be elected, the voting process becomes unfairly loaded against non-whites. Moreover, when non-whites have been framed in this way as a group for purposes of having the aggregate impact of their votes diluted, each individual non-white voter suffers an injury. Indeed, because of discrimination, the prospect that a non-white person's vote will contribute to the election of the candidates of his or her choice is unfairly diminished. As a consequence of this, a need for compensation arises, and, as the court in *Carey* made clear, a state is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."[348]

An apparent irony of *Carey* is that New York's redistricting plan designed "to alleviate the consequences of racial voting . . . and to achieve a fair allocation of political power between white and nonwhite voters . . . ."[349] had the consequence of substantially diluting the voting power of Hasidic Jews, a small and insular group.[350] Upon first impression, it may seem inconsistent to remedy the unfair dilution of non-white voting power by diluting the voting power of an innocent insular minority like the Hasidim. Consistent with the proposition that it is discrimination that causes group affiliation to acquire moral relevance within a sphere of assimilation, however, since the Hasidim were not discriminated against as voters prior to the redistricting, and since the redistricting was not undertaken to discriminate against them, their group affiliation remained morally irrelevant for voting purposes.[351] In view of this, there is nothing inconsistent, in the context of *Carey*, about taking the group affiliations of non-whites into account while at the same time ignoring those of individual Hasidic voters.

Thus far, the relationship between the individual and the group has been examined in relation to the recipients of compensation under a scheme of compensatory justice. The individual-group relationship issue also arises in relation to those persons who are likely to bear the adverse consequences of a particular scheme of

344. 430 U.S. 144 (1977).
345. 79 Stat. 439, as amended, 42 U.S.C. §1973c.
346. United Jewish Orgs. v. Carey, 430 U.S. 144, 163–64 (1977).
347. *Id.* at 166–67.
348. *Id.* at 167.
349. *Id.*
350. *Id.* at 174–75.
351. *Id.* at 178.

compensation. Since it is the state itself, or one of its subdivisions, that must play the role of allocator in the context of a constitutional challenge to an affirmative action plan, the dichotomy between individual and group does not pose any major problems in relation to the allocation. On the other hand, however, since affirmative action does deprive a class of innocent persons of benefits they would have otherwise been able to enjoy, it raises the issue whether these persons should bear, because of their group affiliation, the brunt of the compensatory program's adverse effects.

Implementing an affirmative action program is likely to involve two kinds of costs: administrative costs incurred in running the program, and the presumable loss of efficiency in state services attributable to the state's departure from the policy of hiring the most qualified applicant for each government position. Inasmuch as all costs incurred by the state are ultimately distributed among all its citizens, implementation of an affirmative action program is likely to have a small adverse distributive impact on each individual within the state. Because of the widespread distribution of the cost of compensation among a large number of individuals, however, the distributive effects of a state's affirmative action program are not likely to be significantly more burdensome than the distributive effects of a manufacturer passing on to its consumers the costs of strict product liability compensation.[352] Given this very attenuated distributive impact, it would seem unreasonable to object to affirmative action on this score.

C. *Justice as Reversibility and the Problem of the "Innocent White Male"*

A much more difficult issue is posed, however, by the plight of the innocent person who is deprived of a higher education or of a particular job because an affirmative action plan has been implemented. The strongest claim an innocent person can present is that by being singled out because of his or her group affiliation to bear the principal cost of affirmative action, he or she is being deprived of his or her right to be treated as an equal. Whites as a group may bear the responsibility for the racially discriminating government policies of the past, but the innocent white male, who has never been personally guilty of race discrimination, undoubtedly feels that he should not be singled out to assume the burden of compensation. Moreover, while a certain measure of underinclusion and overinclusion may be tolerable in connection with the distribution of benefits to the members of a discriminated-against group, the innocent white male may well argue that nothing short of proof of responsibility for the harm sought to be compensated by preferential treatment can justify imposing on him the brunt of the burden of the compensation.

Attempts to use some theory of group liability to justify the burden on innocent persons seem bound to fail.[353] Indeed, passive receipt of certain benefits flowing from past discrimination, which are thrust upon him by society, hardly suffices to justify imposing upon an innocent white male a distributive share of collective guilt.[354] All

352. *See supra* text accompanying notes 82–84.
353. *See* A. GOLDMAN, *supra* note 1, at 103–11.
354. *Id.* at 103.

that an innocent white male may have done to benefit from discrimination is to have attended (because he had no other choice) a segregated public school that provided him with an education superior to that available to his black contemporaries. Whether or not that is sufficient for such a white man to share in the collective responsibility for the effects of racism, it certainly does not appear to justify singling him out to bear a highly disproportionate distributive share of such responsibility.

However, there is a way to justify the affirmative action burden on innocent white males that does not rely on the concept of group liability. It relies, instead, on the principle of justice as reversibility.[355] It indicates, by coordinating all the different perspectives involved, that affirmative action does not violate the innocent white male's right to be treated as an equal.

To understand how justice as reversibility can justify affirmative action, it is necessary first to grasp clearly the legitimate interests of innocent white males likely to be affected by affirmative action. Given the operation of the principle of equality of opportunity, applicants for scarce places in higher education and scarce public employment positions have no right to any particular place or position. What they do have is a right to an equal opportunity to compete for such places and positions. Even if all applicants were to enjoy perfect means-regarding equality of opportunity, however, because of the inevitable placement of different individuals in different applicant pools, the prospects of an individual applicant would vary according to the pool in which he or she is placed.[356] Thus, for example, if two equally qualified applicants were to apply to a state law school in different years, the prospects of the first applicant could be much lower than those of the second, if the former belonged to a "baby boom" generation, and the latter to a "baby bust" generation. Unequal prospects arising merely as a consequence of belonging to different applicant pools do not amount to an injustice and do not violate the postulate of equality.

Although it arises from a different cause, the disadvantage experienced by a white applicant in the context of an admissions quota such as the one involved in *Bakke* is substantially similar to the disadvantage of belonging to a larger than average applicant pool. Alan Bakke was not excluded from the competition for places in the entering class at Davis' medical school. He was given a full and fair opportunity to compete for one of the eighty-four places open to white applicants, and there is no indication that his application was not given full consideration. The fact that Bakke was not allowed to compete for the remaining sixteen places in the entering class at the medical school did decrease his prospects of being admitted, but so would have the fact of belonging to a substantially larger applicant pool.

The important difference between someone like Bakke and someone who finds himself in a very large applicant pool rests upon the nature of the interest that is affected adversely. The applicant in the large applicant pool has been given all the opportunity he or she is entitled to by being allowed to be a full participant in the competition for every place available for distribution. Bakke and others like him, on

355. *See supra* Part I, Sec. G.

356. M. WALZER, *supra* note 35, at 144.

the other hand, are denied an opportunity to compete for some places that are available for distribution to other applicants, and thus possibly may suffer an injury to their fundamental interest in being treated as an equal.[357] Not winning a competition can be viewed as a purely individual concern. Not being able to enter a competition, however, arguably threatens the integrity of any system of distribution based on equality of opportunity.

In order to understand why the application of the principle of justice as reversibility would lead an innocent white male to accept affirmative action without feeling any abridgement of his right to treatment as an equal, it is helpful to imagine a hypothetical social contract, or, more precisely, a renegotiation of a social contract. Unlike in Rawls'[358] version of the hypothetical social contract, in the present version there is no veil of ignorance. Each contractor knows that he or she lives in a sociopolitical context marked by adherence to the postulate of equality, the principle of equality of opportunity, and the belief that the spheres of higher education and public employment are spheres of assimilation. Each contractor also knows that, pursuant to a social contract concluded in the past, it was agreed that allocation of education and employment positions would be made exclusively under the principle of equality of opportunity. The past social contract was substantially breached, however, because morally irrelevant group characteristics were made the basis for discriminating against the members of certain groups. Because of that discrimination, several members of those groups were excluded from places and positions they otherwise would have secured. Furthermore, the cumulative effects of that discrimination must be assumed to have resulted in a severe underrepresentation of the discriminated-against groups in universities and in competitive jobs, as well as in the erosion of the discriminated-against individual's ability to compete on equal terms.[359]

Tired of having been victimized, the members of the discriminated-against groups (who, for the sake of simplicity, will be henceforth considered as forming one single group) have issued an ultimatum to the members of the group engaged in discrimination—a group consisting both of individuals who have actively engaged in discrimination and of other individuals who have never discriminated against anyone and who have never consciously benefited from any such discrimination. According to the ultimatum, either the social contract is renegotiated in such a way that a remedy is provided for the present effects of past discrimination, or the discriminated-against group shall cease to abide by the social contract and shall withdraw from the polity. Moreover, the proposed terms for the renegotiated contract are the same as those of the original social contract, with the addition of a requirement to implement affirmative action programs until discrimination is eradicated and underrepresentation of its victims in higher education and competitive jobs is eliminated. Finally, assuming the veil of ignorance has been lifted, each party to the renegotiation knows everything

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357. *Cf.* A. GOLDMAN, *supra* note 1, at 163 (The most fundamental right is that of having one's interest considered equally. This right implies a right to an equal opportunity to satisfy one's interest.).

358. J. RAWLS, *supra* note 38, at 12; *see supra* text accompanying notes 108–09.

359. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part and dissenting in part) (blacks are grossly underrepresented in universities and the professions because of systematic discrimination).

about himself or herself, including his or her race and sex, whether or not he or she is employed and the level of education he or she has reached. The one thing the contractors do not know is who shall win future admission to university programs and who shall be awarded particular competitive positions.[360] Thus, each contractor can calculate the effect particular affirmative action programs will have on his or her odds of obtaining a particular place or position. Also, each contractor has a rough idea of where his or her qualifications place him or her within the relevant applicant pool. No contractor, however, can be certain whether the implementation of affirmative action programs will deprive him or her of a place or position which he or she would have otherwise obtained. For purposes of clarity and simplicity, we shall assume that there are two groups of individuals who are engaged in the social contract renegotiation—a white majority, and a black minority that has been the subject of past discrimination and that has requested the renegotiation.[361]

Upon renegotiation, at the very least, whites will recognize that henceforth blacks should be entitled to equality of opportunity, and that the societally imposed barriers that have prevented this in the past ought to be lifted. This conclusion can be reached from a position of mere reciprocity, which acknowledges that others, as equals, have, and are entitled to pursue, their own interests.[362] From a higher stage of reciprocity, one that allows me to consider the interests of others from my own perspective, whites would acknowledge that blacks are entitled to compensation in kind for specific violations of their rights in connection with actual denials of places or positions they would have obtained but for discrimination. This follows both from applying the general principle that violations of distributive rights, acquired in accordance with the accepted principles of distributive justice, ought to be compensated even if compensation would require the temporary suspension of relevant distributive rules,[363] and from the capacity of a white person to perceive that if he or she had been denied unjustly a place or position after having done everything to win the competition for it, he or she would feel outraged and would want those who had denied the place or position unjustly to be forced to award it to him or her. At this higher stage of reciprocity, a white person can project his or her own perspective onto a black person and understand that the latter would reach the same conclusion as he or she would under the same circumstances.

From the vantage point of a white person functioning at this stage of reciprocity, however, affirmative action would not be justified. Indeed, if such a white person had

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360. This lack of knowledge is not due to any kind of veil of ignorance. It merely reflects the fact that, in real life, applicants do not know the fate of their applications in advance, although they might have a fairly accurate picture of their prospects.

361. Because of the history of slavery and of the pervasive discrimination against blacks in the United States, it may well be that the strongest case for affirmative action can be made on behalf of blacks. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part and dissenting in part). Nevertheless, a strong case could also be mounted on behalf of other groups, such as women. *See, e.g.*, Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (D. Kairys ed. 1982) ("[T]hroughout this country's history, women have been denied the most basic rights of citizenship, allowed only limited participation in the marketplace, and otherwise denied access to power, dignity and respect.").

362. *See* A. GOLDMAN, *supra* note 1, at 28.

363. *See supra* text accompanying notes 74–75.

been discriminated against in the past, an end to discrimination coupled with compensation in kind would seem amply sufficient to restore his or her equality of access to higher education and jobs. From the perspective of such a white person, once formal barriers are removed, there is no reason why he or she should not succeed. And if he or she can succeed, so can a black person. In other words, from his or her own perspective the white person can appreciate that discrimination had prevented blacks from competing on equal terms, but he or she fails to grasp the effects of discrimination on a black person's ability to compete, or on the latter's own perspective.

Upon reaching the final stage, full reversibility, both whites and blacks can view the issues from each other's perspective as well as from their own.[364] At this stage, whites can understand that from the perspective of blacks, equality of opportunity cannot be restored until the present effects of past discrimination have been removed. Whites can also understand the feelings of degradation and humiliation experienced by the victims of racism and the extent to which blacks may have internalized certain aspects of the racist's message.[365] In addition, whites can comprehend any competitive handicap acquired by blacks because of discrimination and develop a sense of the alienation from the competitive system experienced by blacks because of their systematic exclusion from its rewards.

Blacks, on the other hand, can fully appreciate the innocent white person's feelings that he or she is not responsible for past discrimination and therefore should not be made to bear the brunt of the compensatory burden for such discrimination. Also, blacks can understand the whites' desire to maintain the status quo and their aversion to racial turmoil and political disruption.

At this stage of full reversibility, blacks and whites can attempt to renegotiate the social contract through good faith bargaining based on undistorted communication.[366] Both blacks and whites are likely to agree that no successful renegotiation is possible unless blacks can feel that they can achieve a fair equality of opportunity. From their reversible perspective, whites will understand that the mere restoration of formal equality of opportunity would result in the perpetuation of the inequalities created by discrimination. They would, therefore, be willing to guarantee fair equality of opportunity, and the principal remaining question would be the best means to achieve this. From the black perspective, remedial programs such as increased education and job training are unlikely to be sufficient because of the disproportionately low percentage of blacks in the existing educational and professional hierarchy. Instead, an equalization of prospects would be required. This would make up for the effects of past discrimination and also contribute to establishing the kind of racial equilibrium that would have prevailed in the sphere of distribution absent discrimination. Whites would find this position perfectly understandable, but, from their own perspective, would worry about the disruptions massive changes in the professional hierarchy would provoke. Blacks, in turn, would realize that forcing innocent people to resign

364. *See supra* text accompanying notes 111–18.

365. *See supra* notes 124 and 340.

366. *See supra* notes 120–27 and accompanying text.

from positions they held for years, and replacing them with inexperienced substitutes would be both unjust and inefficient. Blacks might also be concerned that if they urge a plan that is too onerous or disruptive from the white perspective, whites could simply walk away from the renegotiation.

From the black perspective, affirmative action offers a reasonable middle course. While affirmative action would pave a more gradual path toward the distributive equilibrium that would have existed absent discrimination, it would also be less disruptive (insofar as it would not require anyone holding an existing place or position to give it up) and less inefficient. Affirmative action would equalize the prospects of the present and future generations of black applicants to universities and for jobs without seeking reparations for injuries to past generations. With respect to present and future generations, proponents of affirmative action would regard the history of past discrimination as a history of the violation of the same distributive principle they now seek to restore. With respect to past generations, by contrast, such proponents are willing to treat the history of past discrimination as if it arose under a different principle of distributive justice.[367] Thus, to improve the chances that the renegotiation will be successful, blacks would be willing to abandon claims of compensation for injuries to past generations in exchange for the possibility of becoming integrated into the mainstream of society as promptly as possible without causing undue disruption or inefficiency.

From the perspective of whites who have insight into the perspective of blacks, affirmative action would seem like a fair and reasonable proposition, striking a middle course between an inflexible demand for total compensation—which would most likely lead to a dissolution of society[368]—and resignation to mere formal equality, which would tend to perpetuate existing inequalities. The main concern affirmative action would raise for whites, however, would be its effect on the class of current and future generation whites whom its application will deprive of a place or position. It is therefore by coordinating the latter class' perspective with that of blacks that one can, in the last analysis, determine whether affirmative action violates any individual's right to be treated as an equal.

It seems quite obvious that whites who will have to compete for places at a university and for jobs would prefer that no affirmative action were implemented. Affirmative action diminishes their chances of success, and failure is always a painful experience. That preference, however, has to be considered alongside the view that affirmative action guarantees the minimum integration into the mainstream compatible with abolition of the position of blacks as inferiors. Since official racism has cast blacks as an inferior group, to regain a full measure of dignity and participation blacks must have access to the professional hierarchy and the power structure of society. The white applicant who does not succeed, on the other hand, does not thereby become the subject of negative group stereotypes, and is not perceived by society as an

367. *See supra* text accompanying notes 75–76.

368. It is assumed throughout this discussion that neither whites nor blacks wish to form different communities. Of course, if they did decide to go their separate ways and form two different political communities, there would be no reason for affirmative action. *Cf.* M. WALZER, *supra* note 35, at 33 (a community has very limited duties to strangers).

inferior.[369] Indeed, while society may, on the basis of prejudices nurtured by racism, brand a black person as an inferior because of his or her failure to win the competition for a scarce position, the same is certainly not likely to be true with respect to a similarly situated white person.[370]

As painful as it is to fail to obtain a position for which one has applied, the possibility of this pain is voluntarily accepted by anyone who agrees to live under a distributive system governed by the principle of equality of opportunity. Moreover, to the extent government-sponsored affirmative action discriminates against certain whites, it discriminates against them for purposes of compensating blacks and reintegrating them into the mainstream of society. Unlike first order discrimination, which is intended to degrade and demean its victims, reverse discrimination treats whites unequally but is not intended to deprive them of equal respect.[371]

By successively intuiting what a white person competing for a position would experience in the context of an affirmative action plan and what a black person would experience in the event nothing were done to remedy the present effects of past discrimination, one can realize that those two experiences are not the same. A white who is serious about renegotiating the social contract—because he or she prefers an integrated society to the dissolution of the existing social order—and who acknowledges that from a black perspective a just scheme of integration requires the use of affirmative action, would conclude that justice as reversibility supports affirmative action. Indeed, from a reciprocity of perspectives, the black quest for affirmative action to carry out the transition between inferiority and equality is more compelling than the white fear of failing in the competition for a scarce position. In the context of undistorted communication and fair bargaining, which surround the renegotiation of the social contract, a white person interested in preserving society's basic structure and integrating all members of society into a single system of production and distribution would agree to the institution of temporary affirmative action programs, even though they would decrease his or her own prospects of obtaining scarce positions.

As previously suggested, a renegotiated social contract based on the principle of justice as reversibility would adopt affirmative action, but would reject the more radical proposal that some whites be deprived of positions they already hold to expedite the remedy for past discrimination. Implicit in that choice is a recognition that an individual's interest in a position he or she already holds is stronger than an applicant's interest in a position for which he or she competes. A job holder has an expectation of keeping the job, provided his or her performance is satisfactory. As Goldman points out, once a person is awarded a position, that person usually keeps the job even if someone with somewhat better qualifications becomes available.[372] Thus, once a position is awarded to someone, although the competition for

369. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357–58 (1978) (Brennan, J., concurring in part and dissenting in part) (whites are not stigmatized by preferential minority admissions program).

370. *See infra* note 375.

371. *Id.*

372. A. GOLDMAN, *supra* note 1, at 125.

that position may not altogether cease, it nevertheless diminishes to the point that there seems to be a strong presumption that the one holding the position will continue to do so indefinitely.[373] On the other hand, a person competing for a position is not entitled to count on being awarded the position; affirmative action merely alters the odds of winning.

The job seniority issue, in connection with affirmative action plans in times of economic contraction, is a vexing one. If seniority is viewed merely as extending job security in times of economic trouble, it might seem that affirmative action goals should not be permitted to upset the seniority system. If, on the other hand, the seniority system is viewed primarily as a means to allocate differing prospects with respect to certain inevitable employee dismissals or layoffs, one might conclude that allowing an affirmative action plan to override a seniority system would be justified. Indeed, under the latter view, affirmative action would merely alter the odds of being laid off, not take away something the present holder is entitled to keep.

From the standpoint of social contractors operating according to the principle of justice as reversibility, there is sufficient justification for allowing an affirmative action plan to suspend a seniority system. From a black perspective, layoffs decided in accordance with existing seniority rules would simply undo, in bad economic times, what the affirmative action plan sought to achieve over a substantial time period.[374] Since affirmative action is the minimum acceptable remedy, its potential undermining through seniority rule layoffs is highly objectionable. From a white perspective, on the other hand, seniority is viewed as part of job security. The possibility of layoffs during a recession must be considered an inherent risk in a system based on equality of opportunity. Accordingly, suspending seniority rules during layoffs has the effect of increasing the white employee's prospects of being laid off.

Coordinating these two perspectives yields the following: applying seniority rules frustrates affirmative action, while suspending seniority rules increases the prospects of losing one's job. Job loss through layoff, however, is not equivalent to taking away a position from someone who has a reasonable expectation, under the circumstances, to continue holding onto it. Therefore, it seems probable that the contractors would agree that affirmative action takes precedence over seniority rules.

To summarize: Although it operates on the sphere of distribution, affirmative action is ultimately compensatory in nature. Moreover, although it accords moral relevance to groups that have been cast as inferior, affirmative action, in the last analysis, subordinates group affiliation to the individual's need for rehabilitation as an equal. Finally, although affirmative action programs adversely affect innocent members of the group responsible for discrimination, this latter group ought to become morally persuaded that affirmative action programs are just from the standpoint of a full reciprocity of perspectives. Affirmative action, therefore, does not

373. *Id.*

374. *Cf.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2603 (1984) (Blackmun, J., dissenting) (layoffs according to seniority system "would adversely affect blacks significantly out of proportion to their representation").

deprive any individual of his or her right to be treated as an equal.[375]

D. *The Constitutional Justification of Affirmative Action*

In light of the foregoing analysis, the position of the four Justices who joined Justice Brennan's opinion in *Bakke*, that affirmative action is constitutional under the equal protection clause in order to remedy the present effects of past discrimination,[376] seems to be fully justified. While those justices used an intermediate scrutiny test of constitutionality,[377] the preceding analysis indicates that the affirmative action concept could withstand the more stringent strict scrutiny test. Indeed, it is an accepted constitutional proposition that compensation for past invidious discrimination is a compelling state purpose.[378] Moreover, examining the issue from the perspective of justice as reversibility has revealed that affirmative action is necessary to restore the sphere of distribution to the position it would have occupied absent discrimination. Also, a conclusion that affirmative action is ultimately individual-regarding rather than group-regarding accords well with the constitutional requirement of equal protection for individuals. Finally, examining coordinated perspectives under the justice as reversibility principle revealed that affirmative action does not violate the rights of even the innocent person harmed by it to be treated as an equal, and that the latter's burden is outweighed by the benefits of affirmative action. Thus, a broad affirmative action plan involving sex- or race-based preferential treatment can meet the balancing test requirements set by Justice Powell in *Fullilove*.[379]

Although affirmative action appears to satisfy the antidiscrimination principle, this should not be allowed to obscure the fact that this analysis has sought to justify affirmative action from the standpoint of a substantive theory of equal protection based on the postulate of equality.

As pointed out earlier, the antidiscrimination principle not only fails to be value-neutral, but its application unduly favors equal treatment and marginal equality

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375. *See* R. DWORKIN, *supra* note 1, Ch. 9. Unlike Dworkin, however, the conclusion reached from the perspective of justice as reversibility treats the innocent white person with all due respect. "Dworkin's perspective in discussing the *DeFunis* and *Bakke* cases, is indeed that of the utilitarian legislator." Simon, *Individual Rights and 'Benign' Discrimination*, 90 ETHICS 88, 92 (1979). In other words, under Dworkin's analysis, the innocent white male is counted as one and his preferences are duly registered. In addition, Dworkin's distinction between *personal* and *external* preferences purports to assure that the innocent white male applicant is not excluded because of ill will against him. *See* R. DWORKIN, *supra* note 1, at 234–35. By contrast, the argument under justice as reversibility assumes that the innocent white male applicant would himself embrace affirmative action in an ideal situation in which he could fully intuit the perspective of victimized black persons. Accordingly, the innocent white male is, under justice as reversibility, in a position similar to the mother of the sick child who becomes *persuaded* that the mother of the sicker child has a stronger moral claim to a scarce medicine. *See supra* text accompanying notes 119–20. In the last analysis, a Bakke or a DeFunis, who can be assumed to find a decent job even if he does not fulfill his wish to become a physician or an attorney, can be assumed to prefer the advantages of the status quo to the uncertainties of the dissolution of the polity. If, on top of this, he fully comprehends the need for compensation experienced by the minority victims of discrimination, it seems fair to bet that he would become *persuaded* that affirmative action might be in the best interests of all. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 375 (Brennan, J., concurring in part and dissenting in part) (Bakke's rejection from medical school will not "affect him throughout his life in the same way as the segregation of the Negro school children in *Brown I* would have affected them." Bakke will not be treated as a second class citizen because of his color.).

376. *See supra* text accompanying note 266.

377. *See supra* text accompanying note 261.

378. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980).

379. *See supra* text accompanying notes 282–83.

in disregard of the proper equilibrium of equalities and inequalities required by the postulate of equality.[380] However, by adopting a substantive mediating principle based on the postulate of equality, one can avoid the pitfalls of the antidiscrimination principle and develop an analytic framework equipped to account for the complex balance of equalities and inequalities called for in each of the situations in which there is a dispute about equal protection.

In the context of a challenge to the constitutionality of an affirmative action plan under the equal protection clause, the relevant judicial inquiry should begin by determining the state's role as an agent of allocation. If the state or any of its agents or subdivisions is the agent of allocation, then all persons competing for the scarce good being allocated would have, pursuant to the postulate of equality, a constitutional right to be given an equal opportunity to compete for the good. Furthermore, if the state decides to distribute the means necessary to compete on equal terms for a particular good to be allocated, then each person who may qualify to compete for that good should have a constitutional right to receive those means. Thus, for example, because a basic education provides the means necessary to compete for scarce places in universities, if the state decides to provide a free basic education, it must provide it equally to all children.[381] If the state is not the agent of allocation, but has interfered with the distributions of an independent domain of allocation, it would have a constitutional responsibility to restore whatever equality of opportunity existed prior to its interference. That responsibility may be satisfied by a mere cessation of state interference; in some cases, though, it may require positive state intervention. For instance, if basic education is left entirely in private hands, but the state passes a law prohibiting the education of black children, then equal protection would require, at the very least, the repeal of such a law.[382] If that were not sufficient to put blacks in the position they would have been in absent that law, however, equal protection would sanction remedial preferential state action to eradicate the adverse effects caused by the discriminatory law. In other words, if merely repealing a law is not sufficient to restore a former equality, the state may have to resort to unequal treatment until the former equality is reinstated.

When the state is the proper agent of allocation of a good in relation to which there ought to be a constitutional right to equality of opportunity, the constitutionality of an affirmative action program should depend on the following six factors: 1) a class of individuals who, through state action, have been deprived of equality of opportunity on the basis of a morally irrelevant characteristic shared by all the members of the class; 2) adverse present effects traceable to such past deprivation; 3) the class, taken as a whole, is substantially disadvantaged in the competition for the scarce good that is the subject matter of the affirmative action program—evidence of substantially lower prospects of success for members of the disadvantaged class than for the rest

380. *See supra* Part II, sec. B.

381. *See supra* text accompanying note 206.

382. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 371 (1978) (Brennan, J., concurring in part and dissenting in part) (segregation enforced by criminal penalties against private colleges).

of the population, constituting proof of such disadvantage;[383] 4) the affirmative action program is reasonably calculated to equalize the prospects of the members of the disadvantaged class with those of the members of the general population, and this equalization of prospects is reasonably likely to bring about an equalization of means; 5) no alternative remedy, not relying on preferential treatment, is likely to bring about equalization of prospects within the same time frame as would the affirmative action program; and 6) the burden on an innocent member of any group not singled out for preference is limited to a decrease in the prospects of obtaining the good subject to the affirmative action plan or an increase in the prospects of losing that good, in the event of adverse economic conditions causing that good to become more scarce.

Judicial application of this six-pronged test to determine the constitutionality of an affirmative action plan cannot be either merely neutral or purely mechanical. Indeed, determining whether there was a past deprivation of equal opportunity and what is required to equalize the prospects of a member of a disadvantaged group with those of a member of the dominant group requires substantive analysis and evaluation. Complex webs of equalities and inequalities must be disentangled, with the postulate of equality serving as a mediating principle. As shown throughout the previous analysis, although application of the postulate of equality can lead to the formation of a fairly concrete conception of equality, at the edges that conception is bound to remain imprecise. Equality is by no means empty, but its great complexity condemns it to remain somewhat indeterminate. As a result, judges will enjoy significant discretion in carving the constitutional path of equal protection and affirmative action.

Substantive equal protection models have been criticized as failing to set limits on judicial activism, thus encouraging judges to invade the province of the legislator.[384] While any general refutation of this criticism is beyond the scope of this Article, it clearly seems possible to have a substantive equal protection concept while maintaining a clear demarcation between the respective provinces of the judge and the legislator.

As it will be remembered, there are three different kinds of situations to which justice as reversibility can be applied.[385] Applied to the first of these, justice as reversibility operates as the functional equivalent of the contractarian criterion of justice; applied to the second, it remains *sui generis*; and applied to the third, it operates as the functional equivalent of the utilitarian criterion of justice.[386] Now, of these three kinds of situations, the third is the kind that ought to be left exclusively to the province of the legislator. Indeed, in this kind of situation, all that the postulate of equality requires is that each person's preference be counted once and no more than once. Therefore, in this kind of situation, decisions are to be made according to the will of the majority, and no room for substantive disagreements with the outcome of the majoritarian process is left to the judiciary. The justification for affirmative action,

383. *Cf.* A. GOLDMAN, *supra* note 1, at 187 (marked statistical differences between groups is strong evidence of discrimination and of present lack of equality of opportunity).

384. *See* Sherry, *supra* note 47, at 98.

385. *See supra* notes 117–19 and accompanying text.

386. *See supra* text accompanying notes 118–20.

on the other hand, depends, ultimately, on the coordination of various antagonistic perspectives. As a consequence of this, it involves the second kind of situation and requires the application of justice as reversibility proper. Moreover, to a significant extent the role of the judge in the adversary system of justice is to coordinate the various perspectives of the litigants before him or her in order to determine who shall prevail.[387] Accordingly, since affirmative action issues must be resolved according to the criterion of justice as reversibility, they are substantive issues that seem particularly appropriate for judges to decide.

VI. CONCLUSION

When the complexities that surround the concept of equality are properly taken into account, both philosophy and the equal protection clause justify the use of affirmative action—in the strong sense of preferential treatment for a less qualified applicant for a position—to remedy systematic government deprivations of equality of opportunity. Affirmative action is controversial because it seeks to remedy the effects of the unequal treatment it condemns with further unequal treatment. Nevertheless, the only way unequals can be made equal is by being treated unequally. Furthermore, affirmative action may seem radical because it apparently departs from the widely accepted ideal of equality of opportunity. Strictly speaking, however, affirmative action is conservative as it seeks to preserve the structual integrity of the prevailing system of production and distribution.[388] To remedy the injustices of the past, it reshuffles some individuals. By the same token, however, it keeps existing power structures and professional hierarchies intact. Affirmative action is a necessary remedy to insure the fair and prompt restoration of a system based on genuine equality of opportunity. Ironically, the sooner it is allowed to complete its mission, the sooner the need for it will disappear.

387. *Cf.* G. HAZZARD, ETHICS IN THE PRACTICE OF LAW 121 (1978) (adversary system is superior because "it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand").

388. *See* M. WALZER, *supra* note 35, at 153–54.