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Subordination and the Fortuity of Our Circumstances

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The antisubordination principle exists at the margins of equality law. This Article seeks to revive the antisubordination principle by taking a fresh look at its structure and underlying justification. First, the Article provides an account of the harm of subordination that focuses on one's position in society, rejecting the focus on groups popular in the existing antisubordination literature. Second, it argues for a theory of state obligation that goes beyond both the existing state action doctrine of the Equal Protection Clause and the failure to protect doctrine associated with Charles Black. The Article argues instead that the antisubordination principle mandates affirmative action due solely to the existence of subordination, regardless of its causes. Third, the affirmative action required by the antisubordination principle requires preferential treatment that burdens innocent persons. Rather than defend affirmative action on past discrimination or diversity grounds, the Article argues that these sacrifices are justified given the arbitrary nature, or fortuity, of the circumstances into which we are born. Unlike John Rawls and other philosophers who have recognized this fortuity, but have argued that it only implicates what persons are entitled to, the Article instead argues that this fortuity provides the basis for a solidarity with those born into subordinated positions. Because anyone could have occupied positions of subordination but for the accident of birth, we all have reason to make reasonable sacrifices to end subordination.

INTRODUCTION

The antisubordination principle exists at the margins of equality law. The antisubordination principle, or at least the fragments of such a principle, first surfaced in the Warren Court's efforts to

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make *Brown v. Board of Education*[1] a reality.[2] The goal was to dismantle the vestiges of the Jim Crow caste system, both in public schools and in life. These efforts continued into the early years of the Burger Court[3] but remained couched in terms of discrimination.[4] The Court continued to view subordination as primarily a

1. 347 U.S. 483 (1954).

2. These efforts are too numerous to cite, so I only highlight a few examples. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (requiring local authorities to implement the principles articulated in *Brown* "with all deliberate speed"); Bolling v. Sharpe, 347 U.S. 497 (1954) (applying *Brown* to Washington, D.C. segregated schools via the Fifth Amendment); Cooper v. Aaron, 358 U.S. 1 (1958) (affirming court order enjoining Arkansas officials from undermining desegregation efforts); Green v. County Sch. Bd., 391 U.S. 430 (1968) (invalidating "freedom-of-choice" desegregation plan as inadequate under *Brown II* and suggesting a principle of creating functionally unitary school districts). Of course, the Court expressed antisubordination values in contexts outside of school desegregation. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down state laws prohibiting miscegenation). Also, some Court decisions that could only be understood as antisubordination decisions predated *Brown*, most famously *Shelley v. Kraemer*, 334 U.S. 1 (1948) (invalidating racially restrictive covenants on land). Moreover, in the years between *Cooper v. Aaron* and *Green*, Congress took action with an antisubordination cast: (1) Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (enacting antidiscrimination laws in employment and public accommodations); (2) Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (enacting measures to ensure voting rights of blacks and other minorities); (3) Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (prohibiting discrimination in the sale, rental, and financing of housing). Even the executive took a somewhat antisubordination attitude during this time. *See* Exec. Order No. 10925, 26 Fed. Reg. 1,977 (Mar. 8, 1961) (mandating that federal contractors "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin" (emphasis added)).

Of course, this history is too rich to recount in one footnote, and the literature on this era is equally voluminous. For examples of more comprehensive histories of *Brown* and subsequent civil rights activity, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363–442 (2004), HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972 (1992), and J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (1979).

3. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that district court order of forced busing to remedy past school desegregation was a permissible exercise of court's equity power); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that, under Title VII of the Civil Rights Act, employment criteria that have a racially disparate impact were only permissible if a "business necessity."); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (holding that desegregation plans could permissibly apply to areas where only de facto, and not de jure, segregation was present); Hills v. Gautreaux, 425 U.S. 284 (1976) (holding that a remedial order against Housing and Urban Development for Fifth Amendment and Civil Rights Act violations in Chicago housing can extend beyond city territorial borders).

4. *See Swann*, 402 U.S. at 22 ("The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause."); *Griggs*, 401 U.S. at 431 (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but *discriminatory* in operation." (emphasis added)); *Keyes*, 413 U.S. at 208 ("[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious."); *Gautreaux*, 425 U.S. at 291–92 (allowing a remedial order that extended beyond city

by-product of discrimination, and, consequently, focused on discrimination as the constitutional evil. When confronted with the antisubordination principle directly, in cases where either (1) subordination extended beyond discriminatory state conduct,[5] (2) subordination arose from nondiscriminatory state conduct,[6] or (3) discriminatory action, such as affirmative action, was used to alleviate non-state-caused subordination,[7] the Court rejected the antisubordination principle altogether.[8] The Court instead opted for a narrow antidiscrimination interpretation of the Equal Protection Clause.[9] Today the antisubordination principle exists almost[10] exclusively in scholarship,[11] with little hope of

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borders since "there was evidence of suburban discrimination and . . . the likelihood that there had been an 'extra-city impact' of the petitioner's 'intra-city discrimination' ").

5. *E.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (holding that remedy for intra-district school segregation cannot extend beyond district lines); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (holding that where the adoption of a desegregation plan had established a racially neutral system of student assignment, district court exceeded authority in enforcing order to remedy segregation caused by residential patterns).

6. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976) (finding that "disparate impact" rationale of *Griggs* does not apply to the Equal Protection Clause).

7. *E.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (subjecting medical school affirmative action program to strict scrutiny).

8. In fact, the *Washington v. Davis* decision came out literally weeks after the publication of the first comprehensive attempt to articulate the antisubordination principle, Owen M. Fiss's *Groups and the Equal Protection Clause*. 5 PHIL. & PUB. AFF. 107 (1976). For a discussion of the history leading to the Court rejecting the antisubordination principle, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

9. *E.g.*, *Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." (emphasis omitted)); Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (footnote and citation omitted)). For a criticism of *Feeney*'s "because of" standard, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1134–46 (1997).

10. I say "almost" because there are some aspects of statutory equality law that have antisubordination elements. Along with the civil rights statutes I discuss in note 2 above, I would also include the Americans with Disabilities Act, 42 U.S.C. §§ 12110–12213 (2000). *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397 (2000) (applying the antisubordination principle to interpretation of "disability" under Americans with Disabilities Act); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415 (2007) (applying the antisubordination principle to the disability context). Others argue that even some Equal Protection precedents contain some antisubordination elements. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–11 (2003).

11. *E.g.*, CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979) (arguing that courts should examine "whether [a] policy or practice . . . integrally contributes to the maintenance of an underclass or a deprived position because of gender status); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL

influencing the Court.[12] In fact, the Court has made clear that the antidiscrimination principle reigns supreme. The Court has moved far away from Justice Blackmun's view that "[i]n order to get beyond racism, we must first take account of race."[13] Instead, the Court has embraced the view that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[14]

This Article does not document the rise and fall of the antisubordination principle, but rather takes stock. It seeks to take a fresh look at the antisubordination principle at the level of principle, all in an attempt to clarify and re-interpret certain aspects of its underlying structure and justificatory basis. In particular, the purpose of this Article is to distinguish the antisubordination principle from the dominant antidiscrimination interpretation of the Equal Protection Clause and most equality law.

The antisubordination principle primarily differs from the antidiscrimination principle in the perspective it takes. Unlike the antidiscrimination principle, which focuses on how the state treats individuals, the antisubordination principle examines the structure of society. The antisubordination principle's primary concern is with how institutions and informal practices in society impact the various social positions persons inhabit.

This Article first argues that the antisubordination principle's structural perspective leads to a distinct theory of the harm of subordination. Subordination arises when persons are in social positions that are (1) ascriptive, (2) difficult, if not impossible, to exit, and (3) otherwise morally irrelevant to one's life prospects. In

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LAW § 16–21 (2d ed. 1988) (arguing in favor of an antisubjugation principle); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (arguing against subordination); Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1987); Fiss, *supra* note 8; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (arguing against subordination and status-race); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 461 (1997) (arguing in favor of an anti-caste principle); Siegel, *supra* note 9 (arguing against subordination and status hierarchies); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (proposing an anti-caste principle). A recent symposium held on Fiss's *Groups* article discusses the antisubordination principle in great detail. Symposium, *The Origins and Fate of Antisubordination Theory*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, http://bepress.com/ils/iss2. Finally, the antisubordination principle has broad support from critical race theorists. *See, e.g.*, Francisco Valdes et al., *Introduction* to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1–2 (Francisco Valdes et al. eds., 2002) (noting critical race theory's focus on "sociolegal webs of domination and subordination.").

12. There are pockets of hope. Justice O'Connor's opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), has antisubordination elements that the Court has not completely rejected. *See infra* Section I(B)(2)(c). More encouraging is Justice Breyer's recent dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, which provides an unabashed defense of racial integretation. *See* 127 S. Ct. 2738, 2820–24 (2007) (Breyer, J., dissenting).

13. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J.).

14. *Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2768.

providing this account of subordination, the Article develops the concept of a social position as the proper subject of the antisubordination principle. The concept of a social position shifts the focus away from the aggregative nature of groups, which is popular in the existing literature,[15] and, instead, focuses the principle on the social structure itself, in particular the positions that the social structure constructs.

The antisubordination principle's structural perspective also leads to a distinct theory of state obligation. This Article argues that under the antisubordination principle, the obligation of the state is not predicated on state wrongdoing, as the Supreme Court has insisted,[16] but on a commitment by society to eradicate all structures of subordination, regardless of the state's role in the creation or maintenance of those structures. The antisubordination principle, therefore, bases the liability of the state on the simple existence of subordination. No more is required. The principle's structural perspective, moreover, broadens the options available to the state to remedy subordination.

The antisubordination principle not only describes an ideal, but also asks individuals to make reasonable sacrifices to realize it. These sacrifices create a tension between the antisubordination principle and the antidiscrimination principle. The antisubordination principle will require affirmative action that presumptively violates the antidiscrimination principle since it gives preferential treatment to those subordinated.

In addressing this tension, the Article acknowledges but forgoes two common strategies. One strategy centers on history, and focuses on the fact that affirmative action only burdens groups that, historically and in the aggregate, are unjustly *advantaged* in society.[17] But this response ignores the particular harm the antidiscrimination principle targets. The antidiscrimination principle does not look at the historical or aggregated position of similarly classified persons in society,[18] but looks solely at the

15. The most obvious proponent, of course, is Owen Fiss. *See* Fiss, *supra* note 8, at 124–27. For a further discussion on the focus on groups in the antisubordination literature, see *infra* Section I(A)(2)(a).

16. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (1989) (discussing requirements for remedially-based affirmative action); United States v. Paradise, 480 U.S. 149 (1987) (same).

17. *See, e.g.*, STEPHANIE WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1005–23 (1989).

18. This view is most associated with Justice Brennan. *See Bakke*, 438 U.S. at 363 (Brennan, J., concurring in part and dissenting in part) ("[R]elief [from past discrimination] does not require as a predicate proof that recipients of preferential advancement have been indi-

individual discriminated against. The harm, to borrow a term from Justice O'Connor, is "personal."[19] The antidiscrimination principle powerfully asks why any person should be recognized as more or less worthy by the state on the basis of classifications like race, *even if* he or she is, on the whole, advantaged by that classification.

The Article also forgoes the strategy of looking for second-order justifications for affirmative action, such as diversity.[20] Such a strategy is not only dubious in some contexts,[21] but it also obscures the concern with subordination that motivates affirmative action. It falsely suggests that affirmative action serves a different principle altogether.

The Article argues instead that resolving the tension between the antisubordination and antidiscrimination principles requires fully developing the normative *basis* of our obligation to take affirmative action to end subordination, a basis that more clearly delineates the tension between the two principles.

The Article finally argues that the antisubordination principle is based on an acknowledgement of the fortuitous nature of the circumstances that order our life prospects and personal welfare when we are born into society. Because, but for these natural and social circumstances, any person could have occupied any place in society, persons have a reason to make sure that any person's posi-

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vidually discriminated against; *it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.*" (emphasis added)). This view is also most associated with proponents of reparations for slavery and the overt discrimination that exemplified the Jim Crow era. *See* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 284 (2003) ("The issue of race-based reparations concerns a fundamental issue of social justice . . . : the responsibility that the community as a whole shoulders for the enslavement of and continuing discrimination against *African Americans.*" (emphasis added)).

19. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (government use of race subject to strict scrutiny "to ensure that the *personal* right to equal protection of the laws has not been infringed" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))); *see also* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.").

20. This view is most associated with Justice Powell. *See Bakke*, 438 U.S. at 311–12 ("The . . . goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education."); *Grutter*, 539 U.S. at 306 (upholding *Bakke*'s diversity rationale); Gratz v. Bollinger, 539 U.S. 244, 269 (2003) (same); *see also* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1746 (1996) (arguing in favor of "the importance of democratic dialogue and diversity in public universities" that affirmative action fosters).

21. *See* Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37, 38 (1997) ("The diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably entailed in a system of preferential treatment. The rationale has little appeal once we move outside the university context, for example, to the realm of production workers or guardrail contractors.").

tion in society is not determined by aspects of the person that (1) are imposed, (2) are difficult, if not impossible, to exit or avoid, and (3) are irrelevant from a moral point of view. The fortuity of our circumstances, in other words, grounds a solidarity we have with those subordinated. It therefore provides a basis for imposing sacrifices on persons to eradicate the subordinating effects of our born-into circumstances, and furthermore explains under what circumstances these sacrifices justify state discrimination.

The Article proceeds in two Parts. The first Part discusses the structure of the antisubordination principle, in particular the principle's theory of harm and its theory of state obligation. The second Part discusses the justification of the antisubordination, in particular, how the fortuity of our circumstances provides a basis for affirmative action. The Article concludes with a brief discussion of the relationship between the antisubordination principle and welfare rights.

I. THE STRUCTURE OF THE ANTISUBORDINATION PRINCIPLE

This Part describes the structure of the antisubordination principle. In order to understand the antisubordination principle, particularly how it differs from the antidiscrimination principle, one must distinguish between two social perspectives.

The first perspective, a transactional perspective, focuses on the treatment of persons by the state. The antidiscrimination principle takes this perspective. The second perspective, a structural perspective, focuses on social conditions and how these conditions affect persons in society. The antisubordination principle takes this perspective. I refer to these perspectives as perspectives because they represent different ways of looking at social phenomena. Neither perspective defines the *only* way of looking at things, just *a* way of looking at things. Certain things emerge to the foreground while others recede to the background as one changes perspective, as if focusing a camera.[22]

22. I want to make a brief note about terminology. I borrow the term "transactional" from both legal and philosophical literature. Under a transactional perspective the focus is on "a discrete alteration of the status quo between the plaintiff and defendant, localized in time and space." Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1318 (2002); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 153 (1974) (describing his transaction-based entitlement theory as "historical; whether a distribution is just depends upon how it came about."). The term "structural," in turn, is synomomous with legal or philosophical approaches that are systematic, outcome-based, or consequentialist in nature. Whereas the transactional perspective is concerned with the historical treatment of one party by another, the structural perspective is concerned with the consequences that

The two perspectives differ subtly, sometimes insignificantly. In *Brown v. Board of Education*,[23] for example, nothing turned on whether the distinct harm to black school children under the Topeka dual school system was the process of racial assignment (transactional) or the resulting racial isolation (structural). Both were present; in fact, one (state discrimination) caused the other (state segregation).[24]

However, it is important to keep both perspectives distinct, for two reasons. First, each perspective defines a distinct theory of harm. Under a structural perspective, the general harm is a prohibited social condition, and the first Section will describe the more specific harm of the antisubordination principle as the existence of subordinated social positions. In contrast, the general harm under a transactional perspective is an unauthorized way of treating persons by the state, and I will describe the specific harm of the antidiscrimination principle in more detail in the next Part. In some instances both a transactional and structural harm can flow from the same social phenomena, as I noted in *Brown* above, but each type of harm can arise independently. State discrimination does not always entail subordination, and vice versa.

Second, each perspective defines a distinct theory of state obligation. This is not to say that the "state" is different under each perspective. The state is the state—sometimes an enemy, sometimes a friend, but always an agent of the people. Rather, each theory posits a different basis for (1) when the state should intervene and (2) the scope of that intervention. In general, the transactional perspective bases state obligation on state wrongdoing. The state should intervene when it is responsible for the underlying harm. Moreover, the transactional perspective constrains the scope of that intervention to remedying the individual victims harmed by the state's wrongdoing.

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arise from the social structure. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 5 n.8 (2002) (noting consequentialist character of their welfare economic approach); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 18 (1979) (noting that structural reform litigation like *Brown* focuses "not on particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions.").

23. 347 U.S. 483 (1954).

24. This basic point is made in Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, *in* EQUALITY AND PREFERENTIAL TREATMENT 155, 155–56 (Marshall Cohen et al. eds., 1977); *see also* Fiss, *supra* note 8, at 170–71 (distinguishing between first-order situations, where discrimination and subordination overlapped, second-order situations, which involved disparate impact cases, and third-order situations, where discrimination and subordination conflict, as in affirmative action).

Under the structural perspective, however, the state should intervene whenever a prohibited social condition exists. The goal is not to correct wrongdoing, but to reorder society, and for that reason the state's obligation to remedy subordination is fundamentally a societal, *public*, obligation to do so. In addition, as I will argue in more depth below, the expansive nature of the harm under a structural perspective frees the state to intervene in unintuitive ways. For example, to remedy subordination in one institution (employment), the antisubordination principle may require intervention in another, seemingly unrelated institution (elementary education). This intervention too is constrained, however, not by the extent of the victims' harm but by the legitimate interests affected by the intervention. The antisubordination principle will require sacrifices, but the sacrifices must be reasonable. Under the antisubordination principle, for example, employers will not be able to hire the best qualified candidate. But that intervention must be tempered by the legitimate interests employers have in maintaining their businesses.

A. *The Theory of Harm*

Advocates of the antisubordination principle often describe it as a principle against caste,[25] but the metaphor of caste and its relationship to the antisubordination principle requires clarification.

As a descriptive metaphor, "caste" does not illuminate because of the difficulty in viewing the current treatment of subordinated groups as a caste system. Unlike traditional caste structures, one's group assignment does not formally determine one's place within a rigid, publicly recognized social hierarchy, nor does this assignment imply other clearly defined rules of association. All persons can, in theory, occupy any position in society. Furthermore, persons are not limited, either in personal or intimate relationships, from interacting with members of other groups. Though historically a true caste structure may have existed for blacks during the

25. *E.g.*, Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 3 (1983) ("[E]ach person has the right to be free from the *continuing effects of caste discrimination* in the laws, programs, official decisions, government, and community affairs of these United States." (emphasis added)); Fiss, *supra* note 8, at 151 ("The redistributive strategy could give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time."); Sunstein, *supra* note 11, at 2411 (providing an account of "the anticaste principle"). There is also Justice Harlan's famous statement that, in the United States, "[t]here is no caste here." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Jim Crow era, this is not, at least formally, the case today for any group in U.S. society.

The use of "caste," however, is appropriate as a normative metaphor because it captures the general view that membership in a group should not be the basis for one's place in society. In particular, the metaphor's emphasis on one's group membership and its impact on one's place in society reflects both (1) the special claim of the persons protected by the antisubordination principle and (2) a conception of the societal treatment that the antisubordination principle targets. Rather than express, as a descriptive matter, the current state of our social structure, the caste metaphor highlights a certain way of treating persons in society that is antithetical to the commitment to equality reflected in the antisubordination principle.

This Section provides an account of the caste-like treatment that the antisubordination principle targets. The first half of the Section will be devoted to the normative significance of this treatment—why we call such treatment subordinating. The second half of the Section will be devoted to developing a concept, the idea of a social position, necessary to fully understanding the societal treatment that is the focus of the antisubordination principle.

1. The Claim of Subordination

As I noted above, the metaphor of caste reflects the special status of the classes protected by the antisubordination principle, understood as the special claim persons in those classes can express about their treatment in society. The claim can be expressed generally as the claim that one's treatment should not be based on criteria that is (1) ascribed, (2) unreasonably burdensome to exit or avoid, and (3) irrelevant, from a moral point of view, to one's place in society. Taken together, these aspects of the claim—ascription, the burdens of exit, and irrelevance—express the nature of subordination. It expresses the cruel position of persons who are subordinated and why the antisubordination principle recognizes their special status.

Whether a class of persons is protected by the antisubordination principle, therefore, will depend on whether persons in that class can make that special claim of subordination. Understanding the classes protected in this way frees the antisubordination principle to consider the treatment of groups in society that, for whatever reason, have not been protected by the Equal Protection Clause. It also explains more compellingly why these groups deserve special pro-

tection. It looks past the features common to these groups, such as, in most cases, immutable characteristics and a history of discrimination, and instead focuses on the reasons that underlie their claim for equality and why those reasons should be recognized.

a. Ascription

Ascription is understood by the antisubordination principle as (1) the societal assignment of persons to a class or group position with (2) that assignment being determinative of one's prospects in society. Like in traditional caste structures, whatever class a person is ascribed to will be important to his or her societal treatment.

Ascription mirrors closely a concern with status hierarchies, understood as the development of social structures that impact persons differently on the basis of their class membership.[26] It is important to note, however, that the antisubordination principle only looks at ascription in a narrow, causal sense. The antisubordination principle looks solely at *how* social structures assign persons to certain groups and the impact of that assignment. In order to state a claim of subordination, it is sufficient to say that group imposition and its consequences are caused from outside of the group, from the ways in which society is structured. Ascription, in this way, parallels traditional caste structures in that it takes structures of status hierarchy as given. It treats ascription as a natural phenomenon.

It is also important to note that ascription is not limited in any way to the nature of the traits or characteristics that define a disfavored social class. Ascription can apply equally to both natural traits, such as race and sex, and performative traits, such as sexual orientation and religious practice. What matters from the perspective of the antisubordination principle is the significance given these traits—to what extent the social position defined by the trait disadvantages one's status in society. As Jack Balkin notes, "[t]here is no necessary limitation on what characteristics can serve to distinguish status groups in a status hierarchy. They can be mutable or immutable, physical or ideological, matters of behavior or matters of appearance."[27]

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26. Jack Balkin, for example, provides a general theory of status competition to describe the subordination of groups in society. *See generally* Balkin, *supra* note 11. Reva Siegel also expresses a concern with status hierarchies, in particular how status hierarchies endure even in the face of changes in justificatory rhetoric. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996).

27. Balkin, *supra* note 11, at 2323. Balkin's view is similar to the causal interpretation of ascription offered here. He notes that "[t]he question is . . . whether society has organized itself into a system of super- and subordination based on . . . traits." *Id.* In his later discussion on

The use of the term "ascription," rather than "status hierarchies," is more appropriate because the term "ascription" emphasizes the *process* of assigning persons into group positions. This process has a normative importance under the antisubordination principle because of its fundamentally agent-independent nature. When persons are ascribed into groups, they are at the whim of social forces that are beyond their control. What sex, what race, or what stigmatic group persons occupy will depend largely on the prevailing social structure. Ascription expresses this sense of both imputation and imposition of unfair burdens onto persons in society—how such group assignments, and their subordinating effects, are *ascribed* to them. Ascription, therefore, better captures a special claim about the responsibility, or lack of responsibility, of persons for their group position in society.

Finally, the agent-independent nature of ascription shows that, from the perspective of the antisubordination principle, it will not matter whether the persons self-identify themselves with their ascribed status. I do not agree, as Owen Fiss has argued, that,

> [T]he identity and existence of the group as a discrete entity is in part determined by whether individuals identify themselves by membership in the group. If enough individuals cease to identify themselves in terms of their membership in a particular group (as occurs in the process of assimilation), then the very identity and separate existence of the group—as a distinct identity—will come to an end.[28]

Even if members of the group choose *not* to define themselves based on their ascribed status, they may *still* be subordinated insofar as society disadvantages them for their membership. If blacks are subordinated, the Black Panther and the black non-militant corporate attorney[29] will be equally subordinated.[30] In fact, the

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status competition, however, he places super- and subordination within a larger sociological account of group conflict. *See, e.g., id.* at 2328–29. Ascription, as described here, is solely concerned with the resultant subordination.

28. Fiss, *supra* note 8, at 149.

29. *See, e.g.*, Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997). For a narrative account of Mungin's life and his de-emphasis, and later embrace, of his black heritage and identity, see PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999). An older example is *Plessy v. Ferguson*, where the plaintiff, Homer Plessy, initially challenged a separate-but-equal railroad car provision by claiming that he was, in fact, white, given that he was "seventh-eighths Caucasian and one-eighth African blood." 163 U.S. at 538. In these two instances, where persons explicitly disavow their ascriptive identity, we would not, nor should not, deny them the protection of the Equal Protection Clause, because, despite their disavowal, they are still being subordinated.

30. Iris Young makes a similar point: "[w]hen a person complains of being the victim of arbitrary search because he is Black, we do not need to know very much about how this

process of assimilation represents an instance in which society (outside of the group itself) no longer sees the group as distinct, rather than, as Fiss argues, an instance in which the group no longer self-identifies itself as a group. Assimilation always moves towards some external standard.

b. Exit Constraints

The antisubordination principle also limits its scope to groups defined by class assignments that are unreasonably difficult to exit or avoid. Though ascription may attach to a wide variety of traits and actions, the antisubordination principle focuses solely on ascription that can only be avoided or mitigated at great cost.

The concern with exit constraints mirrors the prohibitive (if not permanent) nature of caste assignment in traditional caste structures, as well as current doctrine's concern with immutability.[31] As noted by Justice Brennan in *Regents of the University of California v. Bakke*, our concern for burdens placed on persons on the basis of race stems, in part, from the fact that "race, like gender and illegitimacy, is an *immutable* characteristic which its possessors are *powerless to escape or set aside.*"[32]

Caste and immutability, however, overstate the degree to which class assignment must be difficult to exit under the antisubordination principle. Unlike traditional caste assignments and immutable characteristics, the antisubordination principle protects classes that have the possibility of exit. The antisubordination principle, for example, protects classes defined by sex although sex changes are possible. What matters is not the presence or absence of these possibilities, but their burdensome nature. The antisubordination principle focuses on the *persistence* of subordination, not necessarily its permanence.[33]

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person defines his Black identity, or whether he does so at all." Iris Marion Young, *Status Inequality and Social Groups*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 9, at 6-7, http://www.bepress.com/ils/iss2/art9/.

31. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (citing Lyng v. Castillo, 477 U.S. 635, 638 (1986)) (refusing to subject statutory classifications under the Aid to Families with Dependent Children Act since, among other things, these classifications "do not exhibit obvious, immutable, or distinguishing characteristics."). For a more comprehensive discussion of the law's insistence on immutability as a predicate for heightened scrutiny, see Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 493–96 (1998).

32. 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part) (emphasis added).

33. *See* Balkin, *supra* note 11, at 2324 ("Obviously a system of subordination cannot be too stable if it is too easy to exit from the criteria of subordinate status."); *see also* Fiss, *supra*

At the same time, the antisubordination principle understands the burdens of exit more broadly than physical impossibility or difficulty, since the durability of a group assignment can operate in society in nuanced and sophisticated ways. Consider, for example, the plaintiff in *Dillon v. Frank*, a post office employee named Ernest Dillon who was "taunted, ostracized, and physically beaten by his co-workers because of their belief that he was a homosexual."[34] Dillon himself was not homosexual, but because he was not sufficiently "macho"[35] co-workers consistently questioned his sexual orientation and harassed him vehemently for it.

Despite not being homosexual at all, Dillon found it nearly impossible to avoid his homosexual designation, since his assignment as a "fag" took on a life of its own despite numerous complaints.[36] His homosexual status, though not physical or biological in nature, nevertheless had a durability that, once ascribed, was difficult if not impossible for Dillon to shake.[37]

Dillon v. Frank demonstrates that the difficulty of leaving one's group position can also have a *social* as well as physical dimension. Dillon could not shake his homosexual status because of the social rigidity of his status rather than the rigidity of any physical aspect of his person. Once he was labeled a homosexual, it stuck, and there was little, if anything, he could do to get rid of it. This social "stickiness" also applies to other sex-based classifications. The initial assignment of persons to a certain sexual orientation (as in the

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note 8, at 150 (emphasizing, in elaborating on the group-disadvantaging principle, on "the relative position of the group and the *duration* of the position" (emphasis added)).

34. No. 90-2290, 1992 WL 5436, at *1 (6th Cir. Jan. 15, 1992).

35. *Id.* at *4.

36. *Id.* at *1 ("Dillon complained to eight different supervisors, and two union representatives. Management allegedly did nothing more than admonish the harassers, and hold meetings detailing the policy against sexual harassment in place at the center. Dillon alleges that management finally threw up their hands in despair, telling Dillon not to waste their time with his complaints and to fight back when taunted.").

37. Consider, for example, Foucault's description of the birth of the homosexual:

> The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all of his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

1 MICHEL FOUCAULT, HISTORY OF SEXUALITY: AN INTRODUCTION 43 (Alan Sheridan trans., paperback ed. 1991). In this passage Foucault not only describes the ascription of homosexuals by nineteenth-century sexual discourse but also the permanence of this ascription, how once ascribed, a person's homosexual status "was everywhere present in him." *Id.*

Dillon case) or a certain gender can forever structure that person's social position, despite the person's best efforts to change that position.

Again, impossibility, even sociological impossibility, is not required under the antisubordination principle. Even if a person could "pass" sociologically as heterosexual, for example, such an act of passing can entail great costs. It can greatly restrict who one can associate with, frustrate and severely limit one's sexual activity, and can involve, fundamentally, a denial of one's own self that is both publicly and privately humiliating. As noted by Kenji Yoshino, even the process of muting identity-salient characteristics (what he calls "covering") in some instances "can also be a severe burden, not least because it can sometimes blur into passing."[38] In one example, he shows the effects of a lesbian mother's efforts to mute her orientation upon moving to a new neighborhood, out of fear of a backlash against her children (a backlash the family had experienced in the past):

> The actions she takes to mute her orientation are not attempts to recant her lesbianism, but rather attempts to dislodge it from the center of attention. At the same time, by keeping her lesbian posters in her bedroom, by being "discreet" in the neighborhood, and by preserving a "low profile," [she] is explicitly making a compromise about her identity.[39]

Yoshino also describes how a failure to cover one's homosexuality can also result in, for example, the loss of child custody rights and civil service positions.[40] These barriers to exiting one's homosexual identity can be just as constraining, and thus just as subordinating, as barriers that are impossible to overcome.

It is also important to emphasize the *generally unreasonable*, along with the *persistent*, nature of the exit constraints recognized by the antisubordination principle. The antisubordination principle only focuses on exit constraints that are objectively compelling. These constraints have an appeal that is not idiosyncratic to the persons who currently inhabit the particular group position at issue.

Suppose, for example, following *Rogers v. American Airlines, Inc.*, that an employment policy prohibits a certain hairstyle so that it

38. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 837 (2002). *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

39. Yoshino, *supra* note 38, at 838.

40. *Id.* at 849–75.

disproportionately affects one racial group over others.[41] The policy will have a detrimental impact on the status of the individuals in the disfavored racial group since it will restrict the overall employment prospects of those persons who insist on wearing the prohibited hairstyle. Furthermore, there is a cost—changing one's hairstyle—to exiting this detrimental position.

Whether the group can be considered subordinated will turn on the *nature* of this cost. For example, to insist that the burden is unreasonable because of the importance of hair as a site of personal expression may be too much to ask. Though hair and its symbolic power can be incredibly important to one's sense of self,[42] insisting on a right to express oneself borders on indulgent, especially in the workplace.

This sense of indulgence makes it unlikely that the antisubordination principle would prohibit such a hairstyle policy.[43] It may frustrate a person's personal interests, but not all frustrations of personal interests are subordinating. One is not subordinated simply because one has to wear a suit to work.

Moreover, to insist on a right to wear one's hair a certain way fails to account for the reasons the employer may have for prohibiting the hairstyle. These reasons, such as avoiding injury in the workplace, may in fact be very compelling. Though an employer's demands can be unreasonable, whether this is in fact the case depends on an adjudication of the reasons for and against the demand.

If, however, the reasons for objecting to the burden stem from reasons that persons would find *objectively* compelling, such as a medical condition that prevents compliance with the practice,[44] then the analysis changes. Under these circumstances, rather than adjudicate the employee's claim against the employer's claim, our intuition is to require the employer to *sacrifice* his or her claims. This does not mean that the employer's claims are unimportant,

41. 527 F. Supp. 229 (S.D.N.Y. 1981). *Rogers* arose in the context of Title VII of the Civil Rights Act, which regulates private employment. 42 U.S.C. § 2000e (2000).

42. For example, Paulette Caldwell, who first brought attention to *Rogers*, provides one moving account of her own relationship to her hair in Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 365–66.

43. One way in which the hairstyle policy may be prohibited under the antisubordination principle is that it may foster a bias against members of the racial group that can have subordinating consequences. Here I assume that no such bias results from the policy.

44. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795 (8th Cir. 1993) (prohibiting a "no beard" employment policy because of its disparate impact on black males, since approximately fifty percent of black males suffer from pseudofolliculitis barbae ("PFB"), a condition that prevents half of those afflicted from shaving); Richardson v. Quik Trip Corp., 591 F. Supp. 1151 (S.D. Iowa 1984) (same); EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981) (same).

but rather that they have a *diminished* status compared to the claim of the persons affected, since at stake is the livelihood of the individual and the pain or impossibility of gaining the means to secure that livelihood.

The diminished status of the employer's claim may be difficult to see in the context of grooming, but consider statutes like the Americans with Disabilities Act that require employers to "accommodate" persons with disabilities.[45] In this context, sacrifices are imposed upon employers to reasonably accommodate such persons, and these sacrifices can entail, to borrow a phrase from Christine Jolls, "real financial costs."[46]

It is important to clarify how the two examples above are analytically distinct. In the "personal expression" example, the employee and employer claims are adjudicated as competing claims. It presumes the underlying equality of the nature of the claims presented. One may be more compelling than the other, but they are qualitatively the same kind of personal claim. In contrast, in the disability example, the disability claim has a qualitative priority over the employer claim. The nature of the disability claim lessens the employer's claim.

In the disability example, the employer's claim is diminished because, unlike in the "personal expression" example, the employer *also* has a reason to help persons disadvantaged by objectively compelling burdens like disabilities, a reason that, in turn, lessens his or her own claim.[47] In other words, an employer has no reason

45. Title I of the Americans with Disabilities Act (ADA), for example, prohibits employers from "discriminat[ing]" against persons with disabilities. 42 U.S.C. § 12112(a) (2000). It defines discrimination as, among other things, the failure to make "reasonable accommodations" for persons with disabilities, unless such accommodations would place an "undue hardship" on the employer. *Id.* § 12112(b)(5)(A).

46. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686 (2001). The "disparate impact" test initially found in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and later codified in Congress's 1991 amendments to the Civil Rights Act, also expresses a policy of imposing sacrifices upon employees. If an employment policy disproportionately impacts a group, defined by an immutable characteristic (as outlined statutorily), then the policy must be prohibited unless there is a "business necessity" that justifies it, with "business necessity" defined narrowly as a necessity required for the business to function. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). As Jolls points out, the test essentially functions as an "accommodation" test, requiring the employer to incur "real financial costs" in hiring the persons affected, including the loss of customers and lower levels of productivity. Jolls, *supra*, at 686–87.

47. One way to describe the distinction between the two examples is by reference to Thomas Nagel's distinction between agent-relative reasons, that is, reasons relative to a particular agent, and agent-neutral reasons, or reasons that apply to everyone. *See* THOMAS NAGEL, THE VIEW FROM NOWHERE 152–53 (1986). The "personal expression" example involves solely agent-relative reasons—the reasons an employee may have for having cornrows are relative to the employee, and the reasons the employer may have for insisting on another hairstyle are relative to the employer. The disability example, however, triggers an

to promote his or her employee's personal interests over his or her own, but does have a reason to accommodate an employee's interests when to do otherwise would effectively mean that the employee would not have a job.[48]

This distinction is reflected in the law. Under Title VII, for example, if an employment practice has a "disparate impact" on persons on the basis of race (that is, it burdens persons on the basis of their particular race), then the employment practice is invalid unless the employer can point to a "business necessity" for the practice.[49] In other words, Title VII prohibits the employment practice *no matter how rational and innocent*, absent extraordinary justification, which amounts to an accommodation of the interests of the burdened class.

To sum up, the antisubordination principle does not require strict immutability. It can also recognize subordination caused by barriers that are (1) persistent and (2) generally unreasonable to overcome.

c. Irrelevance

Finally, the classes protected by the antisubordination principle are defined by criteria that are *irrelevant* from a moral point of view. It is important to note, however, that the antisubordination principle defines irrelevancy, like ascription, in a very specific way.

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agent-neutral reason to accommodate the disabled employee that applies equally to the employer and, in turn, diminishes whatever agent-relative reasons he or she have in not accommodating the employee.

48. I thus disagree with Kenji Yoshino when he states in the context of "double bind," or contradictory demands, that what is " 'intolerable' in these cases is not that the demands are contradictory, but rather that *either* demand is made at all." Yoshino, *supra* note 38, at 918–19 (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 235, 251 (1989)); *see also* Yoshino, *supra* note 38, at 158. In the context of *Rogers*, Yoshino states the central issue this way:

> In reading the *Rogers* case, one can hear American Airlines and the court asking Rogers: "Why is this so important to you?" To which Rogers would respond: "Why is this so important to *you*?"

YOSHINO, *supra* note 38, at 133. I do not disagree with Yoshino's attempt to question the demands placed on persons by employers. But, as noted above, some of these demands may be compelling, and the employee's demands should not have any greater presumptive weight. More importantly, employers may have reason to accommodate employee demands regardless of how compelling the employer's demands are if to do otherwise puts employees in the position of either meeting the employer demand at a debilitating cost or not having a job. Thus, in the *Rogers* example it is unclear to me whether a ban on cornrows would offend the antisubordination principle. Is it too much to ask to wear a different hairstyle?

49. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

Irrelevancy, for example, can mean that no rational basis exists for the use of the criteria in a given context. Under this contextual view, the government may not, for example, target persons of a certain race for suspected criminal activity if there is no basis for targeting that race. Persons of other races may commit crimes in equal measure. If, however, a strong correlation exists between criminal activity and a specific race, then a person's race would become relevant because race would be strongly indicative of criminal activity.[50] Under this contextual view, racial profiling is permissible insofar as evidence suggests that the use of race in this way is a rational law enforcement tool.

The antisubordination principle rejects this contextual view of moral irrelevancy. Even if the use of a group assignment like race *is* rational, the antisubordination principle would still prohibit its use if it is detrimental to one's social standing in society. This view mirrors our own reasons for rejecting traditional caste structures, since what animates our disdain is not the fact that caste is not rationally related to societal ends in certain contexts. Caste may be, and likely is, indicative of one's criminality, for example. Instead, our rejection of caste stems from a belief that one's caste assignment should not be the basis for one's overall place in society. Group assignment, in other words, should not determine one's prospects and personal welfare in society, even if it is otherwise rational in some, or even most, contexts.[51]

That is why the antisubordination principle rejects racial profiling. While racial profiling would arguably lead to increased security, it would also lead to a societal bias against persons of

50. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 137 (1997) ("Obtaining information is expensive, so we depend upon various sorts of proxies, such as educational credentials, to lessen the costs entailed in gathering the information we need to make sensible decisions. . . . [W]e look to proxies to help us calculate at less expense the risk that a given individual is likely to [act criminally]—proxies such as gender, age, clothing, posture, accent, and, yes, race."). Others have argued in favor of racial profiling precisely for this reason. *See, e.g.*, Peter H. Schuck, *Context is Everything with Racial Profiling*, L.A. TIMES, Jan. 27, 2002, at M6; Mathias Risse & Richard J. Zeckhauser, *Racial Profiling* (Kennedy Sch. of Gov't, Working Paper No. RWP03-201, 2003).

51. To see the distinction between contextual relevance and what can be called "life prospects" relevance, consider a sports example. Suppose that the Boston Red Sox want to add a starting pitcher to their roster. The Red Sox will evaluate the available candidates based on a number of metrics, such as age, past performance, and number of innings pitched, that will predict future pitching performance. Within the context of looking for a major league starting pitcher, it is rational to look at metrics that predict the best future pitching performance. But future pitching performance is *not* relevant to the minimum life prospects the pitching candidates should have. One should not have to pitch like Josh Beckett in order to have decent housing or an effective right to vote. Similarly, race may be relevant in given contexts such as racial profiling, but race is not relevant to what kind of life prospects a person should have.

statistically more criminal races than persons of other races. It would lead to members in the criminalized group, regardless of who they are or their criminal history, being treated with less respect than members of other groups. In other words, the antisubordination principle would reject racial profiling because in operation it would create a subclass of persons in society that are not afforded the dignity its members, as persons, deserve.[52]

The antisubordination principle takes a broader view of irrelevancy. It looks beyond different contexts to examine the role group assignment plays in a person's life. More specifically, the antisubordination principle looks at whether one's group assignment determines objectively important aspects of any person's life. These important aspects can include the attainment of what John Rawls has called "primary goods," such as income, primary education, and political liberties, which are important and necessary means to achieving other specific ends.[53] Objectively important aspects of a person's life can also include, as suggested by the racial profiling example above, what Owen Fiss has called "status harms"—how members of the group are respected by others in society because of their group assignment.[54] Status harms are objectively important because they can detrimentally affect how persons view themselves

52. My rejection of racial profiling on the basis of its subordinating effects does not depend on any specific conception of what actions or decisions constitute racial profiling. More specifically, I would even reject the use of race in suspect descriptions, where the use of race is more particularized and, for the most part, constitutionally permissible, if such a use of race resulted in the kind of criminality bias I describe above. *Cf.* R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004) (distinguishing between "racial profiling" and the use of race in suspect descriptions, though arguing that this distinction should not matter in evaluating the consequences of these practices).

53. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 58 (2001) [hereinafter RAWLS, FAIRNESS] (defining "primary goods" as goods persons "*need* as free and equal persons living a complete life; they are not things it is simply rational to want or desire, or to prefer or even to crave" (emphasis added)). The focus on primary goods reflects a particular conception of the good that just institutions should achieve—the good of trying to fulfill, as much as practicable, a man's rational life plans. As Rawls notes, against utilitarianism's focus on utility, "[t]he main idea is that a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances." JOHN RAWLS, A THEORY OF JUSTICE § 15, at 79 (rev. ed. 1999) [hereinafter RAWLS, THEORY]; *see also id.* § 60, at 347–55 (listing such goods).

54. *See* Fiss, *supra* note 8, at 157. This parallels Rawls's own concern with "self-respect" as a primary good. *See* RAWLS, THEORY, *supra* note 53, § 67, at 386–91. I also take the concern with such "status-harms" to be the significance of the psychological evidence presented in *Brown*. Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954); *see also id.* at 494 ("To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). Here the plaintiffs were not only invoking the material and political interests of a quality education, but also the stigmatic harm and the feeling of inferiority that comes with segregated schools. *Id.*

in relation to others in society, a harm in itself, and also limit the possibilities persons can envision for themselves.

Together, the antisubordination principle's concern with the effect of group assignment on both objectively important material and status aspects of a person's life expresses a concern with a person's *overall* place in society. These aspects represent the basis for determining whether group assignment is truly subordinating, since they determine what a person can meaningfully aspire to. It is this sense of foreclosed possibilities that the antisubordination principle targets. The antisubordination principle holds strongly that *no* group assignment should be the basis for setting a ceiling on one's prospects in society.

At the same time, the antisubordination principle allows for non-subordinating inequality, for two reasons. First, the antisubordination principle permits the differential treatment of persons because of their group membership if the group membership in question is directly related to the overall prospects of other persons in society. Persons of great intelligence, or who have important natural skills, are justifiably treated differently in society because encouraging persons in these groups to exercise their talents leads to the improvement of everyone's prospects in society. Rawls, for example, has argued that persons with these talents may need reasonable signaling incentives to exercise their talents in ways to make everyone better off.[55]

The sense of reciprocity suggested by Rawls, where preferential treatment must advantage those who are not the recipients of that treatment, is not required. This leads to the second reason for allowing non-subordinating inequality. Even if differences in treatment do not have wealth-enhancing effects, it is important to recognize that personal and societal interests in society are *plural*. We care about other things, and as long as these interests are consistent with the antisubordination principle, there is no reason why we should sacrifice them.[56] Some prefer more wealth (or watching

55. RAWLS, THEORY, *supra* note 53, § 48, at 277 ("The function of unequal distributive shares is to cover the costs of training and education, to attract individuals to places and associations where they are most needed from a social point of view, and so on.").

56. A similar point is made by Cass Sunstein:

> The point is not that human equality should be "traded off" against the seemingly sterile and abstract notion of market efficiency. I do not claim that otherwise unjustified inequality can be supported by some intrinsic good called "efficiency." Efficiency is an instrumental good, though no less important for that. I argue only that intrusions on markets may defeat valuable human goals and that this is important to keep in mind.

basketball), some do not, and the antisubordination principle has sufficient room to allow us to act on a variety of interests.

In other words, the antisubordination principle is only concerned with obtaining an objective *baseline* of material and dignitary goods. In the case of dignitary goods, as suggested by the racial profiling example, the baseline is steep: No group can have a pariah status in society. In the case of material goods, however, relative inequality can be high as long as a modicum of goods (like an adequate primary education, adequate housing, the free right to vote, etc.) is guaranteed. The antisubordination principle binds us, but it does not enslave us.

2. The Concept of a Social Position

a. Social Position Defined

The account of subordination above depends on an important concept worth clarifying—the concept of a social position.

Throughout this Article I have used the terms "class" and "group" to describe the antisubordination principle's subject of concern. Terms such as "group" and "class" have been used since the very first formulations of the antisubordination principle,[57] and they are used today.[58]

Their use, however, is somewhat inappropriate, because terms such as "class" and "group" suggest that the difference between the antisubordination principle and the antidiscrimination principle is one of aggregation. One looks at an aggregation of similarly situated persons (literally "groups") while the other looks at individuals. While some have meant to suggest a group-based approach,[59] and

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Sunstein, *supra* note 11, at 2437–38.

57. *E.g.*, Fiss, *supra* note 8, at 147–56.

58. *E.g.*, Rubenfeld, *supra* note 11, at 465–67 (moving from suspect classifications to "suspect classes").

59. *See* Fiss, *supra* note 8, at 147–56; *see also* TRIBE, *supra* note 11, § 16–21, at 1514–21 ("[S]trict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group."); Balkin, *supra* note 11, at 2315–16 (focusing on "group conflict"); Colker, *supra* note 11, at 1008 ("In contrast to the anti-differentiation approach, the anti-subordination perspective is a *group-based* perspective." (emphasis added)); Siegel, *supra* note 8, at 1472–73 (discussing historical rejection of antisubordination principle because of its group focus, defining the principle as "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups"); Young, *supra* note 30, at 4 ("A concept of status inequality *entails* a concept of social group." (emphasis added)).

others have criticized it,[60] the antisubordination principle takes a different approach.

The subject of the antisubordination principle is not groups but *social positions.* References to "groups" or "classes" in this Article are only attempts to capture the idea that:

- within society there are positions that are inhabited by individuals,
- that these positions are defined by society's structure, and
- that these positions can impact the lives of the individuals who inhabit them..

In other words, the true focus of the antisubordination principle is not on groups but on group *membership*—on what it means to be classified a certain way in society.

Group membership can be properly cognized as a position because of the way that it fixes one's place in society. This is most transparent in caste societies, where one's membership in a caste formally defines one's place within a social hierarchy. But this is also true of other forms of group membership. For example, church affiliation, family affiliation, and where one went to college *all* determine one's social status in society in one way or another.[61]

The use of the term "social position," rather than "group membership" or "group affiliation," however, is more appropriate because it shifts the focus away from the group itself to its effects

60. The biggest critic of a group-based approach is undoubtedly the Supreme Court. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (basing the decision on "the basic principle that the Fifth and Fourteenth Amendments [to the Constitution] protect *persons*, not *groups*").

61. This idea of social positions is not new, and has been used in social science literature. *See, e.g.*, IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 94 (2000) ("A social structure can be defined as a multidimensional space of differentiated *social positions* among which a population is distributed." (emphasis added) (quoting PETER BLAU, INEQUALITY AND HETEROGENEITY 4 (1977))). The idea of a social position is also suggested by John Rawls's concept of a "representative man." RAWLS, THEORY, *supra* note 53, § 16, at 81. One key difference, however, is that Rawls conceives of the "representative man" in very general terms as "the representative citizen and the representatives of those with different expectations for the unequally distributed primary goods." *Id.* at 82. Rawls, in fact, distinguishes the position of the "representative citizen" from other positions based on "fixed natural characteristics," such as sex, race, and culture, which may be relevant positions to the basic structure insofar as they are the cause of unequal rights. *Id.* at 84–85. My own view closely resembles Rawls's concern with unequal positions based on "fixed natural characteristics," though, as I have argued above, see *supra* Section I(A)(1)(b), these positions need not be founded on characteristics that are strictly fixed and natural.

on its members. The antisubordination principle is solely concerned with where group membership actually places a person in society, not the group membership itself. In particular, the antisubordination principle is concerned with social positions that *subordinate*—those social positions that are imposed on persons (ascription), that are difficult to leave (exit constraints), and which have an unjustifiably detrimental effect on that person's material and dignitary well-being (irrelevance).[62]

This is less an issue of terminology than of focus. To emphasize aggregation over social conditions obscures the structural perspective of the antisubordination principle. The antisubordination principle has the potential to affect a lot of persons, but so does the antidiscrimination principle. The antisubordination principle, however, would care about subordinated positions that had only one member, or even zero members, if there was a threat that any person would inhabit that position.[63] Its concern is the structural condition *itself*—the very fact that persons can, or could be, placed in positions of subordination. For the antisubordination principle, this concern with positions takes precedence over everything else.

b. Personal v. Representational

By focusing on group membership, the antisubordination principle focuses on *representational* harm rather than *personal* harm. The concern is less with how individuals themselves are, *in fact*, detrimentally treated and more with the subordinating nature of the social position itself.

For example, within any subordinated group there may be some members who are less disadvantaged than others. There are, in fact, both rich and poor women. Yet examples of well-off women do not undermine the fact that women occupy a subordinated so-

62. It should be noted that Iris Young develops a concept of a "structural inequality" that is similar to the subordinated social position I outline here. *See* Young, *supra* note 30, at 2 ("Diverse social structures and practices conspire to locate some people in positions where they repeatedly suffer disadvantage in access to benefits, or they are stigmatized in many situations, or they are regarded as suspect or inferior by others who are more advantaged."). Young, however, retains the concept of a group, arguing that "[a] concept of status inequality *entails* a concept of social group." *Id.* at 4 (emphasis added); *see also* YOUNG, *supra* note 61, at 97 ("In summary, a structural social group is *a collection of persons* who are similarly positioned in interactive and institutional relations that condition their opportunities and life prospects." (emphasis added)). Young retains the concept of a group as part of her larger account of identity politics. *See* YOUNG, *supra* note 61, at 92–99. My concern here is how the law should eradicate social positions regardless of the means, political or otherwise.

63. The concern with such "zero" member subordinated positions provides the basis for the antisubordination principle's concern with welfare rights. *See infra* Conclusion.

cial position in society, since a variety of other causes impact a person's life. The different economic positions of women in society may be due to factors such as one's own personal conduct, where one grew up, etc.

Nevertheless, *all* women, both rich and poor, share the disadvantage of being women in a largely patriarchal society.[64] Justice Rehnquist describes the long history (and continuance) of one particular disadvantage, employment discrimination, in his discussion of the Family Medical Leave Act ("FMLA") in *Nevada Department of Human Resources v. Hibbs*:

> The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions. For example, in *Bradwell v. State*, 16 Wall. 130 (1873) (Illinois), and *Goesaert v. Cleary*, 335 U. S. 464, 466 (1948) (Michigan), the Court upheld state laws prohibiting women from practicing law and tending bar, respectively. State laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take. In *Muller v. Oregon*, 208 U. S. 412, 419, n.1 (1908), for example, this Court approved a state law limiting the hours that women could work for wages, and observed that 19 States had such laws at the time. Such laws were based on the related beliefs that (1) woman is, and should remain, "the center of home and family life," *Hoyt v. Florida*, 368 U. S. 57, 62 (1961), and (2) "a proper discharge of [a woman's] maternal functions—having in view

64. Owen Fiss makes the same point more concisely: "Even rich blacks are blacks." Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 20, at 22, http://www.bepress.com/ils/iss2/art20/. Chris Rock puts it more humorously:

> Yeah, it's tough being a white person these days.
> But not that tough. I am absolutely certain.
> Why? Because there's not a white person reading this book who would change places with me.
> And I'm rich!

CHRIS ROCK, ROCK THIS! 31 (1997).

This suggests an independence between one's socio-economic status and, in this case, racial status. The independence between one's socio-economic status and racial status may suggest independent ways of addressing both problems. In other words, it is unclear whether so-called "socio-economic" affirmative action would alleviate subordination based on race or gender. Others disagree. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY (2002) (arguing that race distracts from the socio-economic roots of current subordination); Richard Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) (arguing in favor of socio-economic affirmative action).

> not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man," *Muller, supra*, at 422. Until our decision in *Reed v. Reed*, 404 U. S. 71 (1971), "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason'"—such as the above beliefs—"could be conceived for the discrimination." [United States v. Virginia, 518 U.S. 515, 531 (1996)] (quoting *Goesaert, supra*, at 467).
>
> [However] "[I]t can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market." *Frontiero v. Richardson*, 411 U. S. 677, 686 (1973).[65]

Justice Rehnquist's description of the employment barriers imposed against women brings to mind Justice Brennan's famous statement in *Frontiero v. Richardson*, that "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, *but in a cage.*"[66] That cage applied, and still applies, to all women regardless of their economic position. In fact, Justice Brennan's use of the term "cage" invokes the concept of a subordinated social position—that is, for whatever "romantic" reasons, the status of being a woman has *trapped* women into lesser employment opportunities.

The above example shows the need to understand what a subordinated social position means on the whole apart from the specific experiences of members in the group. Focusing on the details of the lives of individual women, rich, poor, old, young, etc., only confuses the issue, because it obscures their common position. The concern instead should be with attaining a sense of what it means to be an inhabitant of this position—of how *any* person would be affected if one were a woman.[67]

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65. 538 U.S. 721, 729–30 (2003).

66. 411 U.S. 677, 684 (1973) (emphasis added).

67. Storytelling may be important as a means to understand subordinating conditions. If used correctly, it can shed light on what it is like to inhabit subordinated positions. I take this to be the central insight of the emphasis on "storytelling" in critical race theory. *E.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988) (arguing for "counterstorytelling" by stating that "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.").

The antisubordination principle captures the structural sense of a social position by focusing on the extent to which harms inflicted on the group are *caused* by the social position, regardless of the inhabitant. The antisubordination principle does not view a collection of similar individuals differentially impacted as a subordinated position unless there is something about the position itself that makes it a disadvantaged position in society.

Finding out whether a social position disadvantages persons in society will involve (1) an analysis of whether the position is undesirable from a status point of view as well as (2) an analysis of whether occupants of the position would be treated differently because of their position from a material point of view. The concepts of status harm and material harm are so intertwined with each other that it is difficult, if not futile, to consider one without the other. Material harms may be more pronounced than stigmatic harms. This is probably the case with illegal immigrants, whose legal status and the material deprivation it entails is the source of their subordination, though stigma does play a large role. But status may trump materiality, as in the case of wealthy women. The common factor that both of these positions share is the subordination (one mainly material, the other mainly stigmatic) caused by the positions.

Moreover, the antisubordination principle does not focus on any particular cause of how subordinating social positions came about. Social positions can be legally constructed, as in the case of blacks during the Jim Crow era[68] and illegal immigrants today. Social positions also can be socially constructed, by how persons act within the existing legal structure.[69] This is especially true of the subordination of women, which is relegated to personal spheres of life.[70]

Determining the subordinating nature of a social position will require a number of analytical tools, such as statistics, social science, and ethnography.[71] I want to single out history as an

68. *See, e.g.*, Rogers M. Smith, *"Black" and "White" in* Brown*: Equal Protection and the Legal Construction of Racial Identities*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 16, at 3, http://www.bepress.com/ils/iss2/art16/ ("[T]here is no doubt that in many respects, race in America has been not just a social but a political and specifically legal construction.").

69. This is one of the great contributions of critical race theorists, though such theorists tend to focus on the processes of social group formation, whereas, like Fiss, I take an ahistorical approach, focusing solely on the resultant subordination. *See* Kathryn Abrams, *"Groups" and the Advent of Critical Race Scholarship*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 10, at 4, http://www.bepress.com/ils/iss2/art10/.

70. *E.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 146 (1989) (arguing that the subordination of women is grounded, in part, in the gender division of labor in the family.).

71. In fact, I find much of the recent social science research on race to be an examination of the subordinated status of racial social positions—in particular, whether being black

analytical tool, because it can serve an important evidentiary role. History can help determine whether a given position is subordinated by how the position has been cognized and treated by society in the past. Justice Rehnquist's history of women in employment, as quoted above, is one example, as he uses history as a guide to understanding the plight of women in employment today.

Though history can serve as a guide, one must also recognize that new subordinated social positions can develop. The antisubordination principle does not limit the class of subordinated positions to those that have surfaced in the past. For example, the antisubordination principle recognizes the subordinated status of immigrant groups just entering into the United States even though they have not been subordinated historically.[72] As Owen Fiss has noted, if we are sure that a group of persons are about to be subordinated, our concern would be the same as for those groups that have been historically subordinated.[73]

Other subordinated social positions can arise in other, more unintuitive ways. For example, blacks from urban ghettos inhabit a new, hybrid subordinated social position. William Julius Wilson has argued in his work on Chicago ghettos that the lack of employment opportunities for blacks has lead to a self-reinforcing cycle of increased criminal activity, decreased development of job-related skills, and even lower employment prospects. He writes that "[b]lacks reside in neighborhoods and are engaged in social networks and households that are less conducive to employment than those of other ethnic and racial groups in the inner city. In the eyes of employers in metropolitan Chicago, *these differences render inner-city blacks less desirable workers, and therefore many are reluctant to hire them.*"[74]

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is a disadvantaged position in society. *E.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (discussing whether blacks are disadvantaged in buying cars at car dealerships); Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, Q.J. ECON., Aug. 2004, at 767 (discussing whether distinctively black names hurt black people's employment chances); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006) (discussing whether employers have an implicit bias against black employees); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1238–41 (1995) (same).

72. *E.g.*, Plyler v. Doe, 457 U.S. 202 (1981) (concerning the elementary education of the children of illegal immigrants). For a larger discussion of *Plyler*, see *infra* Section II(B)(2)(c).

73. *See* Fiss, *supra* note 8, at 151 n.67 ("[I]f we are told that today a period of perpetual subordination is about to begin for another group, we should be as concerned with the status of that group as we are with the blacks.").

74. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 111 (1996) (emphasis added).

I understand this subordinated position as a new position because it does not affect all blacks—hence Wilson's focus on "inner-city blacks." The primary source of subordination stems not from the status of skin color (though that does play a part),[75] but from geography. Subordination is the result of living away from entry-level jobs and quality schools, a by-product of the suburbanization of America.[76] This is one instance in which one's actual location literally defines one's social position. The subordinating effect of this geography has lead Owen Fiss to call urban ghettos "a structure of subordination, which, by isolating and concentrating the most disadvantaged, creates the very dynamics that render the quality of life of those forced to live in it so miserable and their prospect of success so bleak."[77]

Finally, the goal of the antisubordination principle is to eradicate the subordinating *meaning* of a given social position, not the social position itself.

As noted by Neil Gotanda, a social position can have multiple meanings, both positive and negative. In his article *A Critique of "Our Constitution is Color-Blind"*, Gotanda argues that the concept of "race" consists, in fact, of four different concepts: formal skin color (formal-race), its historical meaning (historical-race), its subordinating effects (status-race), and its positive contributions (culture-race).[78] Gotanda makes these distinctions as a way of critiquing a "color-blind" approach to race, since to focus only on formal-race

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75. Wilson, in particular, could not find any comparable employment effect of ghettos on other minority groups. "Although empirical studies on race and employer attitudes are limited, the available research does suggest that African-Americans, *more than any other major racial or ethnic group*, face negative employer perceptions about their qualifications and their work ethic." *Id.* (emphasis added).

76. *See id.* at 37.

> The increasing suburbanization of employment has accompanied industrial restructuring and has further exacerbated the problems of inner-city joblessness and restricted access to jobs. . . .
>
> . . . [O]ne result of these changes for many urban blacks has been a growing mismatch between the suburban location of employment and minorities' residence in the inner city. Although studies based on data collected before 1970 showed no consistent or convincing effects on black employment as a consequence of this spatial mismatch, *the employment of inner-city blacks relative to suburban blacks has clearly deteriorated since then.*

Id. (emphasis added).

77. Owen Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 5 (Joshua Cohen, Jefferson Decker & Joel Rogers eds., 2003).

78. Gotanda, *supra* note 11, at 3–5.

(color blindness, or what Gotanda calls "nonrecognition")[79] ignores the truly bad aspects of race, status- and historical-race, which perpetuate racial subordination.[80] The goal instead should be to remedy status and historical race and promote the good aspects of race, namely culture-race.[81]

Gotanda's argument applies with equal force to all social positions. As with race, there are aspects of gender, disabilities, and sexuality that are empowering and a source of great pride. The antisubordination principle does not aim to disturb these aspects in any way.

B. The Theory of State Obligation

This Section describes the antisubordination principle's theory of state obligation. Currently, enforcement of the Equal Protection Clause is predicated on the existence of state action. Under the antisubordination principle, however, the existence of subordination can arise independently of any action, state or private. The predicate of state action, therefore, is unnecessary for the antisubordination principle, and the first subsection will explain why.

The second subsection will then describe the ways in which the state can act to remedy subordination. Unlike the antidiscrimination principle, which limits the state to making the victim whole, the state can take much more diverse action to eradicate subordination under the antisubordination principle. In particular, the state can:

1. act **prospectively**, rather than retrospectively, to eliminate subordination,
2. act **continuously**, without any definite deadline,
3. **target other institutions** that did not cause the underlying subordination,
4. **benefit others who are not harmed** by subordination, and, most controversially,

79. *Id.* at 16.

80. *Id.* at 36–52 (arguing against a limited understanding of race that is "unconnected" to its historical and status aspects, thereby perpetuating subordination).

81. *Id.* at 62–68 (arguing for a jurisprudential regime that fosters culture-race). Others have argued that fostering culture-race may, in fact, conflict with eradicating the subordinating character of race. Richard Thompson Ford, for example, argues that segregation to foster multiculturalism may exacerbate subordinating segregation. *See* Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1318–28 (2004).

5. **harm persons innocent** of creating the underlying subordination.

I will examine these aspects in more detail in the second subsection.

1. State Action and Social Disaster

a. State Action and Failure to Protect

The state action requirement is a creature of the transactional perspective, in particular the perspective's theory of state obligation.

The theory is corrective: Actors are obligated to remedy their wrongdoing. The antidiscrimination principle, however, further narrows this theory by looking only at *state* wrongdoing. As noted in the *Civil Rights Cases*, the very first articulation of the modern state action requirement, "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment," rather, the Fourteenth Amendment "nullifies and makes void all state legislation, and state action of every kind, which . . . denies to any [person] the equal protection of the laws."[82]

Since the Equal Protection Clause only looks to state *wrongdoing*, it follows that it only looks at state *action*. As Justice Rehnquist writes in *United States v. Morrison*: "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only such action as may fairly be said to be that of the States.*"[83] The state action doctrine therefore serves a gatekeeping function, in that application of the Equal Protection Clause will depend on identification of some action of the state to scrutinize. Because of its gatekeeping role, much of the commentary on the state action requirement has focused on what constitute actions by the state.[84]

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82. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (limiting Congress's Section 5 powers to "*correcting* the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous" (emphasis added)).

83. United States v. Morrison, 529 U.S. 598, 621 (2000) (quoting Shelley v. Kraemer, 334 U.S. 1, 13, n.12 (1948)) (emphasis added).

84. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 71–75 (1993); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 246–66 (1985). It should be noted that I focus here on a "wrongdoing" interpretation of state action. Judicial intervention must be predicated by some finding of wrongdoing fairly attributable to the state. I do not discuss a broader, what can be called an "involvement" interpretation of state action, which finds state action so long as the state was somehow involved. Because the state is, or at least potentially, involved in everything, state action under an involvement view is everywhere. *See* SUNSTEIN, *supra*, at 72 ("If the background involvement of state officials is sufficient to produce 'state action,' the whole category would be impossibly broad."). An involvement view of state action, there-

Whether state action exists, however, turns on the underlying theory of wrongdoing. Wrongdoing can be defined as a *prohibition*, as the refraining from performing an action. Under the antidiscrimination principle, for example, wrongdoing is defined as discrimination on the basis of classifications such as race or sex. The state is prohibited from discriminating in this way.[85] Wrongdoing can also be defined, however, as a *duty*, as an affirmative obligation to perform an action when certain conditions obtain. The state can act in an otherwise permissible way and still commit wrongdoing if that otherwise permissible action failed to conform to the duty.

I emphasize this latter point to show one key flaw in current state action doctrine: the Court's erroneous construction of the state action requirement as excluding state inaction. The question of whether the state action requirement cognizes inaction (or omissions, to use a more precise term) *as* state action depends on whether the Equal Protection Clause is conceived of as a prohibition or a duty. In this way, to borrow a phrase from Laurence Tribe, the state action debate is, at bottom, "a subterfuge for substantive choices the framers did not necessarily make one way or the other."[86]

It is true that, in isolation, an action does not arise from a failure to act. A person does not do anything by not climbing Mount Everest. Since the Court always looks at the state action requirement in isolation, as a predicate to further application of the Equal Protection Clause, this may explain its hesitation to recognize omissions as state action.[87]

The Court's hesitation, however, is unwarranted, because it fails to recognize that omissions gain traction as actions once evaluated against the background of a duty. In this way the failure to act *becomes* an action that can serve as a basis of culpability.

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fore, renders incoherent any effort to define state action. *Cf.* Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) ("The state action doctrine is analytically incoherent because, as Hohfeld and Hale demonstrated, state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order.").

85. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77 (1972) (stating that the Equal Protection Clause only applies when the state "foster[s] or encourage[s] racial discrimination").

86. TRIBE, *supra* note 84, at 247.

87. Hence, the Court has stated, in the context of state regulation or oversight of private activity, that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

Consider, for example, *DeShaney v. Winnebago County Department of Social Services*.[88] In *DeShaney* the Winnebago County Department of Social Services monitored a young boy, Joshua DeShaney, suspected of being abused by his father.[89] Despite being hospitalized twice for suspicious injuries and monthly visits by the Department that raised red flags, the Department chose not to intervene.[90] Shortly after the second hospitalization, DeShaney was beaten so severely by his father that he suffered brain damage.[91] His mother initiated suit against the Department pursuant to the Due Process Clause of the Fourteenth Amendment, claiming that the Department's failure to protect constituted a deprivation of the boy's liberty.[92]

The Court rejected the claim, holding that "a State's *failure to protect* an individual against private violence simply does not constitute a violation of the Due Process Clause."[93] For the Court, the Fourteenth Amendment simply does not apply to state inaction. In the Court's words, the Fourteenth Amendment "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an *affirmative obligation* on the State to ensure that those interests do not come to harm through other means."[94]

Justices Brennan and Blackmun sharply disagreed, emphasizing that the Court took too limited a view of "state action." Justice Brennan wrote, in particular, that "[m]y disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, *that oppression can result when a State undertakes a vital duty and then ignores it.*"[95] Justice Blackmun's dissent echoes this conclusion: "As Justice Brennan demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered *a fundamental duty* to aid the boy once the State learned of the severe danger to which he was exposed."[96]

Both Brennan and Blackmun make the narrower point that the state, in monitoring DeShaney, affirmatively adopted a duty to

88. 489 U.S. 189 (1989).
89. *Id.* at 192.
90. *Id.* at 192–93.
91. *Id.* at 193.
92. *Id.* Though *DeShaney* concerned the Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause, its analysis applies equally here.
93. *Id.* at 197 (emphasis added).
94. *Id.* at 195 (emphasis added).
95. *Id.* at 212 (Brennan, J., dissenting) (emphasis added).
96. *Id.* (Blackmun, J., dissenting) (emphasis added).

protect DeShaney, and should be held accountable for it.[97] In this sense both Brennan and Blackmun are addressing the issue of whether the state can ever have a duty *at all* under the Fourteenth Amendment.[98] They at least argue that such duties arise when they are voluntarily adopted by the state, as was the case here.

But, in making this point, Brennan and Blackmun show that the Department's inaction in this case becomes radically transformed once we accept that the Department had a duty to protect DeShaney. The Department's inaction in this case, given the resounding evidence available to the state that abuse was taking place, struck both Brennan and Blackmun as a culpable act. In Brennan's words, the Court's conclusion allows the State of Wisconsin to "shrug its shoulders and turn away from the harm that it has promised to try to prevent."[99] For Blackmun, the State's inaction amounts to an abandonment, as DeShaney was "abandoned by the [Department] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, 'dutifully record[] these incidents in [their] files.'" For both Brennan and Blackmun, the acknowledgement of a duty to protect transforms the Department's inaction *into* an act of negligence, even recklessness.

Brennan and Blackmun's reasoning in *DeShaney* extends to private discrimination. Admittedly, from its inception the goal in the *Civil Rights Cases* was to restrict the Equal Protection Clause to apply solely to state discrimination, and not the discrimination of private actors. Hence its hostility toward "[i]ndividual invasion of individual rights" as "the subject-matter of the amendment."[100] But,

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97. Justice Brennan makes an even narrower argument—that the state's attempt to monitor DeShaney had the effect of "reliev[ing] ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS." *Id.* at 210 (Brennan, J., dissenting). Brennan accentuates this crowding out aspect so that the case fits more in line with cases that have suggested, though not explicitly held, that "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction." *Id.* at 207 (citing Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982)).

My analysis of the case does not depend on this crowding out effect. It is sufficient that the state undertook the duty to protect DeShaney in order to hold the state culpable for a failure to satisfy that duty, regardless of what effect it had on others to intervene.

98. Some are skeptical of this claim. *E.g.*, Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.").

99. *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting).

100. The Civil Rights Cases, 109 U.S. 3, 11 (1883). It is important to note that Justice Bradley's reasoning centered less on the underlying harm the Fourteenth Amendment was meant to protect, and more on the extent of Congressional power under the Enforcement

as *DeShaney* demonstrates, there is no reason why a duty to *protect* citizens from private discrimination should not apply. Discrimination, like private violence, is harmful, and turning a blind eye to it is no different analytically as an action from committing the discrimination itself. The distinction between state discrimination and private discrimination that Justice Bradley attempts to draw, therefore, does not rest on the state action requirement. It rests on the ultimate interpretation of what the Equal Protection Clause protects.

Consider, for example, an account of state action premised not on overt discrimination by the state, but based on a duty to protect against private discrimination. Charles Black provided such an account in his 1966 Harvard Law Review Foreword.[101] Under Black's view:

> [E]qual protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so—choosing instead to envelop and surround the discriminators with the protection and aids of law and with the assistances of communal life.[102]

Clause of the Fourteenth Amendment *vis-a-vis* state and local power. This is revealed in Justice Bradley's statement that the Fourteenth Amendment "does not authorize congress to create a code of municipal law for the regulation of private rights." *Id.*

101. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). Others have followed Black's approach. *E.g.*, Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 1–2 (2006) (arguing in favor of a principle, the Kerr Principle, that "bars the state from serving as a conduit for private parties' illegitimate preferences"); Fiss, *supra* note 64, at 11; Robin West, *Groups, Equal Protection and Law*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 8, http://www.bepress.com/ils/iss2/art8/; Kenneth Karst, *Sources of Status-harm and Group Disadvantage in Private Behavior*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 4, http://www.bepress.com/ils/iss2/art4/.

102. Black, *supra* note 101, at 108. In his *Foreword* Black actually vacillates between two interpretations of the Equal Protection Clause. Under one interpretation, the one described above, equal protection is denied when the state fails to protect against private discrimination. Professor Black, however, also provides a stronger formulation, closer to the antisubordination principle: "If one race is, identifiably as such, substantially worse off than others with respect to anything with which law commonly deals, then 'equal protection of the laws,' is not being extended to that race unless and until every prudent affirmative use of law is being made toward remedying the inequality." *Id.* at 97. Under this formulation, the state not only protects against private discrimination, but also against anything that makes persons of a certain race "substantially worse off than others with respect to anything with which law commonly deals." It is unclear whether Black prefers the first interpretation over the second, but suggests the second as a second-best formulation to effectuate the first, since "no line can warrantably be drawn at any point short of the discernment [of] racist regimes."

For Black, it is not enough that the state must not discriminate against blacks: "When a racial minority is struggling to escape drowning in the isolation and squalor of slum-ghetto residence, everywhere across the country, I do not see why the refusal to throw a life-preserver does not amount to a denial of protection."[103] For Black, "state action" includes a "refusal to throw a life-preserver." A duty to protect against private discrimination brings that omission, that "refusal," to life as state action.

Black's failure-to-protect theory of state action was informed by the social and political landscape of the late 1960s, when Black wrote his *Foreword* and when private discrimination was more rampant. It is exemplified by the subject of Black's *Foreword*, *Reitman v. Mulkey*.[104] *Reitman* involved the adoption of a California constitutional amendment, the infamous Proposition 14, which would have protected a person's "absolute discretion" to sell his or her property to whomever he or she chose.[105] In proposing Proposition 14 California homeowners obviously wanted the right to discriminate on the basis of race, since Californians proposed Proposition 14 shortly after the adoption of a state fair housing law.[106]

The Supreme Court found that the Proposition violated the Equal Protection Clause, and for Black the state action was clear:

> The state has not commanded discrimination against Negroes, but is has assured the discriminator, exactly with respect to the discrimination, of a special immunity—as complete an immunity as the state can within its constitutional forms grant—from any political assault on his practice of discrimination.[107]

In other words, in allowing passage of Proposition 14, the state ensured that it would be extremely difficult for blacks to secure good housing, since the Proposition constitutionally protected the homeowners' right to discriminate on the basis of race. And this act of allowance, according to Black, does not meaningfully differ

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Id. at 98. For an argument that Black endorsed the second, more far reaching interpretation, see Peller & Tushnet, *supra* note 84, at 781–87.

103. Black, *supra* note 101, at 73.

104. 387 U.S. 369 (1967).

105. Black, *supra* note 101, at 72 (quoting Proposition 14, which stated in relevant part that "[n]either the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.").

106. *Id.*

107. *Id.* at 79.

from "command[ing] discrimination against Negroes" given the reality of late 1960s California.[108]

Arguably the discrimination in *Reitman* was state discrimination, since the state adopted Proposition 14. But Black's concern was more with the citizen's own private discrimination—the naked attempt to use California's referendum system to limit the housing prospects of blacks. This explains Black's emphasis on the obviousness of what the people of California were trying to accomplish with Proposition 14. It also explains Black's emphasis on what he calls the "reality principle," the need to take into account "the endless variations not only of reality as presently given, but of reality as it may be manipulated and formed in the hands of people ruled by what seems to be one of the most tenacious motives in American life."[109] The "tenacious motives" referred to the overt racism prevalent in the 1960s.

The "reality principle" is normatively crucial to Black's interpretation of the Equal Protection Clause for two reasons. First, the emphasis on private discrimination gives content to the state's duty by establishing the harm that results from the state's actions (or in this case, inaction). It is the effects of this harm that the state must ultimately protect against or, if it fails to do so, to remedy.

Second, the emphasis on the obviousness of the discrimination, which represents the real bite of the "reality principle," establishes the trigger for performing the duty. The duty does not arise if it does not appear, from reality, that private discrimination is occurring. The "reality principle," in other words, establishes the foreseeability of the private discrimination that serves as the basis for the duty to protect. The obvious racial discrimination rampant in 1960s California is not unlike the obviously abusive situation in which the Winnebago County Department of Social Services placed young DeShaney by continually returning him to his father. In both situations the state action arises when the state "shrug[s] its shoulders and turn[s] away from the harm that it has promised to try to prevent."

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108. *Id.*

109. *Id.* at 90–91. Consider, for example, another case that turns on the "reality principle"—*Romer v. Evans*, 517 U.S. 620 (1996). In *Romer* the Court invalidated a Colorado state constitutional amendment that would have prevented any city or town from enacting local ordinances to protect homosexuals against discrimination. *Id.* The Court's invalidation of the amendment stemmed, in part, from the fact that the amendment reflected an obvious "bare . . . desire to harm a politically unpopular group," in this case, the animosity the amendment directed towards homosexuals in Colorado. *Id.* at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

b. Subordination as Social Disaster

The state action requirement does not preclude a conception of the Equal Protection Clause as a duty. But the antisubordination principle requires more than a broadening of the Equal Protection Clause. It requires a whole new theory of state obligation.

In order to see why, consider a case truer to Black's concerns: *Shelley v. Kraemer*.[110] *Shelley v. Kraemer* concerned land covenants that restricted homeowners from selling their homes to blacks.[111] The Supreme Court held that the enforcement of these covenants by Missouri courts was unconstitutional,[112] though the basis for this holding is a mystery, since the covenants were private restrictions that ran with the land.[113] Laurence Tribe attempts to fill in the blanks by envisioning the Missouri courts' *enforcement* as discriminatory, insofar as Missouri courts found other restrictive covenants as invalid as a restraint on alienability.[114] The Court, however, did not adopt this rationale, nor did it find such discriminatory enforcement.

The case, however, perfectly fits Black's interpretation of the Equal Protection Clause. Given 1940s America, it is clear that the restrictive covenants were enacted to prevent blacks from moving into white neighborhoods. Moreover, one could read the Missouri court's enforcement of the restrictive covenants as at least a tacit approval of this private discrimination. Though the discrimination does not amount to state discrimination so long as Missouri courts enforced other kinds of restrictive covenants equally, the court's passivity in the face of this private discrimination would result in a violation of Black's interpretation of the Equal Protection Clause.

Consider, however, a different *Shelley* scenario. Assume, instead of racially restrictive covenants, that families in Missouri had an informal practice of leaving their property to their children (or other familial heirs). In addition, assume that the purpose of the

110. 334 U.S. 1 (1948).

111. *Id.* at 4.

112. *Id.* at 23.

113. So much so that Owen Fiss has noted that "on an analytic level *Shelley v. Kraemer* is generally deemed to be an extraordinarily difficult case—the Finnegans Wake of constitutional law." Fiss, *supra* note 8, at 137 (quoting Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 148 (1964)); *see also* Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 788 (1989) (describing *Shelley v. Kraemer* as an example "that [the Court] is exempt from any requirement that its opinions make sense"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 966 (1989) ("*Shelley v Kraemer* is generally acknowledged to be the most interesting and problematic of the so-called state action cases.").

114. TRIBE, *supra* note 11, at 260.

practice was not to exclude blacks (or, more precisely, exclusively blacks). Assume instead that it reflected a desire on the part of Missouri homeowners to provide for their children and keep their estates within their families. Also assume that this does not present any housing problems for anyone in Missouri until an unforeseeable refugee group enters the state looking for housing. Because of this practice, the refugees cannot get adequate housing in the state.[115]

In this alternate *Shelley* scenario, the obvious private discrimination that animates Black's duty is not present. Though, arguably, private discrimination exists, it is not based on any animus against any particular group. It is instead based on promoting a different value: protecting one's children and preserving family ownership. Promoting this value is, in fact, a legitimate exercise of one's right of alienability—an important property right. Moreover, the practice was adopted without any knowledge of the refugee group (or any other group) entering the community. The refugee process was completely unforeseeable. It would follow that, under Black's interpretation of the Equal Protection Clause, no duty to protect was triggered. There is no "failure" to protect, and thus no state action.

This is not the case for the antisubordination principle. Since the practice subordinates the group on the basis of their status (since, as refugees, they have no familial ties to the community whatsoever) by denying housing, then the state must affirmatively enjoin the informal practice.

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115. The example may seem far-fetched, but is similar to the facts in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), where the Court held that a state law to confiscate by eminent domain land owned by a small number of landowners and redistribute it to the wider population did not run afoul of the "public use" requirement of the Takings Clause. As in the example above, the concentration in land severely restricted the availability of land. *Id.* The Court noted that "the State and Federal Governments owned almost 49% of the State's land, [and] another 47% was in the hands of only 72 private landowners." *Id.* at 232.

Consider also housing codes designed to help low-income tenants in slum housing but that have the effect of limiting the profitability of low-income housing. *See* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1160 (1971) ("[C]ode enforcement unfairly requires a relatively small landlord class—principally composed of petty bourgeois—to pay a disproportionately large share of society's debt to the poor. This argument is not without force . . . ."). As in my social practice example, the issue is burdening individuals regardless of their culpability—in Ackerman's case, landlords who provide low-income housing.

Finally, another similar case, one involving individuals in refugee-like conditions, is *Plyler v. Doe*, 457 U.S. 202 (1982), which concerned whether the children of illegal immigrants could be barred from Texas elementary schools. I address *Plyler* in more detail below. *See infra* Section II(B)(2)(c).

This result under the antisubordination principle brings to the fore the reason why the transactional perspective cannot support its requirements. At its base, the transactional perspective is concerned with the culpable consequences of an action: The duty to remedy is an expression of a general concern with how persons (and the state) should act when transacting with others. Black's interpretation of the Equal Protection Clause fits within this scheme because, even though it is cognized as a duty, it is still concerned with the culpable consequences of the state's action (or inaction)—hence the importance of the "reality" of private discrimination. The state cannot act to protect if the harmful private discrimination that triggers the duty does not foreseeably arise.

The antisubordination principle, however, concerns itself not with state action but with social conditions. It therefore does not matter what the state did or did not do to be culpable for a subordinating condition, or whether it should have recognized its duty to act or not. All that matters is the manifestation of the social condition. The state must act if a subordinating condition arises regardless of its causes.

The alternate *Shelley* example also reveals one more aspect of the antisubordination principle and its structural perspective. Unlike in *Reitman* or in *Shelley v. Kraemer*, the offending social condition in the alternative *Shelley* example did not arise from wrongdoing, either private or public. It instead arose naturally, as an unintended consequence of the exercise of the rights of Missouri's citizens. It is important to emphasize that there exists no improper discriminatory intent in the actions of the Missouri citizens. The social practice described above was assumed to be exercised in the utmost good faith with no animus at all towards the refugees.

Subordination, therefore, can arise from what can be called a "social disaster." Like a natural disaster, it can arise apart from human action altogether. This does not mean that human action cannot be a cause of subordination. In the alternative *Shelley* example, it clearly was. It means that subordination can arise not only from a lack of any culpable wrongdoing, but from the exercise of otherwise legitimate rights—in this case the basic property rights of the citizens of Missouri.

Thus, the basis for remedying such social disasters cannot be wrongdoing. Wrongdoing played no part in the alternate *Shelley* example. Our obligation to remedy the situation is instead akin to remedying the victims of natural disasters. Issues of blame, which are so crucial in the context of the transactional perspective, dis-

appear when a natural or social disaster is involved. No one can blame the weather.

I conclude by making one last and crucial point. As the alternate *Shelley* example shows, subordination can arise from the exercise of important rights, and the antisubordination principle may require frustration of these rights. In the alternate *Shelley* case, the state should not enforce the informal practice at issue. Notice, however, that the attempt to enforce the informal practice is not *wrong* because it conflicts with the antisubordination principle. In other words, failing to enforce these rights does not change the character of the right into wrongdoing. Rather, the antisubordination principle in this instance *overrides* those rights.

2. Affirmative Action

Once the duty to intervene under the antisubordination principle has been established, the state must take steps to eradicate subordination. These steps constitute affirmative action.

Affirmative action has been traditionally defined as:

1. any governmental policy that
2. grants preferential treatment to persons
3. on the basis of classifications such as race and sex.

I want to emphasize two aspects of this definition. First, it highlights governmental affirmative action as constitutionally significant. Private affirmative action raises no issues under the Equal Protection Clause. Second, it highlights that the essence of affirmative action lies in its preferential treatment. It is this aspect that binds affirmative action in all of its forms, such as quotas, and "points" systems. At the same time, this aspect represents affirmative action's core constitutional deficiency. "Preferential treatment," is, at base, just a form of discrimination, and all discrimination on the basis of classifications such as race and sex are presumptive violations of the Equal Protection Clause.

I want to propose instead a slightly different definition of affirmative action, one that emphasizes its rationale rather than its flaws.

I conceive of affirmative action as:

1. any government policy that
2. eradicates social conditions that
3. subordinate social positions in society.

This definition differs slightly from the one above in one important respect.[116] In my prior definition, I listed the third prong as "classifications such as race or sex," a prong informed more by the current antidiscrimination interpretation of the Equal Protection Clause than the antisubordination principle. I have replaced this prong with the idea of subordinated social positions, which are not always "classifications such as race or sex." The other two prongs are substantially (or exactly) the same. The focus remains on governmental forms of affirmative action, and the appeal to the eradication of subordinating social conditions will necessarily require preferential treatment. Under any affirmative action measure, one group will get better treatment than others on the basis of group membership.

As now defined, affirmative action represents the remedial principle of the antisubordination principle. It defines and encompasses all specific remedial policies to combat subordination.

Given the antisubordination principle's different social perspective, it therefore follows that affirmative action differs from the remedial principle of the antidiscrimination principle and its transactional perspective. Below I will discuss five specific ways in which it differs.

Before I do, however, I want to briefly clarify one aspect of the remedial principle of the antidiscrimination principle, to further clarify affirmative action and its differences.

The remedial principle of the antidiscrimination principle is, again, corrective: It seeks to restore the particular victims of the state's wrongdoing to their previous positions before the wrongdoing occurred. Under this perspective, the remedy is context *limited.* It looks *solely* at the wrongdoing in question and the particular persons harmed by that wrongdoing. The transaction at issue represents the complete universe of the transactional principle. For the most part, no other consideration matters.[117]

In contrast, affirmative action looks to the remedying of a social condition, regardless of the context. Affirmative action, therefore, is not restricted in any way by a particular event (such as wrongdoing) or the particular persons affected in fact by the condition. It only looks to the condition itself.

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116. I will go into greater detail in the next Part.

117. I say "for the most part" because some considerations outside the transaction may be relevant. One can imagine, for example, a contract that requires as a condition the performance of some act by a third party. The point is simply that a transactional perspective takes the transaction as primary. Outside considerations are taken into account only if the transaction *itself* takes these considerations into account.

a. Prospective

In remedying a subordinating social condition, the affirmative action looks prospectively, rather than retrospectively. The goal is not to undo the past, but to remake the present, so that the subordinating social condition does not continue. The unabashed goal of affirmative action is "social engineering rather [than] a desire to implement a remedy."[118]

Because of this prospective outlook, affirmative action is less concerned with the details of the causes of the subordinating condition in question. It does not matter, for the most part, how it came about. There is no need, therefore, to find "identified discrimination" as a predicate for affirmative action.[119] A present subordinating social condition is sufficient.

b. Continuous

Since affirmative action is not compensatory, it is not time-limited. It can continue so long as the subordinating condition (the true predicate of affirmative action) persists.[120] Hence, Justice O'Connor's belief that affirmative action "must be limited in time" is mistaken.[121]

At the same time, the fact that affirmative action is not time-limited does not mean that affirmative action does not have, to use Justice O'Connor's words, a "logical end point."[122] Rather, whether affirmative action should end in any particular instance will depend on whether the subordination it is attempting to eradicate continues to persist. A measure of the situation must be taken, rather than an imposition of a sunset or deadline. When subordination ends, affirmative action must end as well.

The ending of a particular affirmative action scheme, moreover, does not foreclose the possibility of future affirmative action.

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118. *See* Hopwood v. Texas, 78 F.3d 932, 951 (5th Cir. 1996) (criticizing the University of Texas Law School's affirmative action program, stating that, since the program applies to out-of-state and private school students, the program does not address past state discrimination but instead "an inference is raised that the program was the result of racial social engineering rather [than] a desire to implement a remedy").

119. Richmond v. J.A. Croson Co., 488 U.S. 469, 526–27 (1989) (Scalia, J., concurring) (citations omitted).

120. But one can question the effectiveness of a particular affirmative action scheme if subordination continues to persist.

121. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

122. *Id.* at 342.

Subordination can resurface in unexpected ways, and there is no reason to limit the remedies necessary to combat it.

c. Inter-institutional

By focusing on the structure of society, affirmative action takes an inter-institutional perspective. Because a variety of institutions affect important goods in society, affirmative action in one institution can be used to eradicate distortions in an altogether different institution. To state the point more abstractly, it may be the case that in order to remedy subordination in institution *A*, affirmative action may have to turn not to the institution itself but to another institution, institution *B*.

This explains and justifies, for example, one of the original purposes of the affirmative action program challenged in *Regents of the University of California v. Bakke*.[123] In *Bakke* the Court struck down a two-tracked medical school admissions policy designed to set aside reserved places for minority and disadvantaged medical students so that, among other things, it could "increas[e] the number of physicians who will practice in communities currently underserved."[124] Under the Medical School's theory, providing treatment for underprivileged groups will not only require making more personnel and resources available, but also training doctors within the underprivileged group so that medical attention is more effectively administered. The admissions policy suggests that doctors from underprivileged groups may have special insights into the medical needs of the underprivileged group, and that they may employ these insights to better treat existing health problems. Moreover, doctors from underprivileged groups may also feel more motivated to serve underprivileged groups than other doctors.[125] In other words, the admissions policy in *Bakke* looks to one problem in society, the unequal distribution of quality medical treatment in society, and looks to another institution, in this case medical school admissions, as a means to eradicate that condition.

123. 438 U.S. 265 (1978).

124. *Id.* at 306, 310.

125. For example, at least one doctor who benefited from the affirmative action program, Dr. Patrick Chavis, opened an OB/GYN clinic serving the poor in Compton. *See* Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, at 36.

While Justice Powell's *Bakke* opinion rejected this rationale,[126] Justice O'Connor's *Grutter* opinion embraces it. Speaking in the law school context, Justice O'Connor writes that:

> [U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.[127]

Notice the link Justice O'Connor creates between one area of concern (the deficit of minority leaders) to another (law school admissions). Both represent two different institutional spheres—governmental offices and law school classrooms. Yet, in examining the problem of the dearth of minority political leaders, Justice O'Connor does not narrow her focus to the pool of viable candidates, shrugging her shoulders when she finds this pool wanting. She instead recognizes that to address this problem, the path that allows persons to be in a position to become political leaders, that is, the path to law school, must employ affirmative action to *enhance* the candidate pool.

Though the inter-institutionality of affirmative action frees it to consider institutions which lie outside the bounds of other subordinating institutions, it also requires an analysis of whether the proposed changes in *B* do affect *A* in the desired way. Here principles of efficiency and cost avoidance may be important—alternatives such as remaining within *A* to remedy the social condition at issue may determine whether one should resort to *B*. But this is a question of how to correct subordination efficaciously, not whether it is appropriate to pierce the boundaries of *A*.

126. *Bakke*, 438 U.S. at 306, 310. Ironically, Justice O'Connor notes this rejection, writing that "Justice Powell rejected an interest in 'increasing the number of physicians who will practice in communities currently underserved,' concluding that even if such an interest could be compelling in some circumstances the program under review was not 'geared to promote that goal.'" *Grutter*, 539 U.S. at 324. One can question whether the University of Michigan's law school admissions policy is "geared" to promote an increase in underrepresented elected officials and judges, rather than just produce more minority lawyers.

127. *Grutter*, 539 U.S. at 332.

d. Disaggregation of Victim and Beneficiary

Affirmative action disaggregates the persons who are directly victimized by the subordinating condition and those that benefit from affirmative action.

Under affirmative action, some of the persons who benefit have suffered no harm from their subordinated status. A recent immigrant, for example, may not have experienced *any* of subordination's effects, especially if the immigrant has just arrived. This also may be true for a middle to upper-class member of the subordinated group, who may have escaped contexts in which subordinating effects exist (*e.g.*, ghetto neighborhoods, poor public education, low-income jobs, etc.). While subordination may have existed within their family histories, it may have been so distant that it has no effect on their current condition. In fact, in both cases, if affirmative action is sufficiently widespread, these persons may be relatively *advantaged* because of their group membership rather than disadvantaged by it.[128]

Some have criticized affirmative action for benefiting persons like the persons described above, rather than those truly disadvantaged by subordination.[129] In the college admissions context, for example, Deborah Malamud has noted (though not criticized) the fact that race-based admission policies often follow "the principle of the top of the bottom"—"affirmative action programs tend to benefit the best-off among those who have been deemed suffi-

128. A recent study has shown, in fact, that recent immigrants constitute a substantial number of the beneficiaries of affirmative action at elite colleges and universities. *See* Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243 (2007). The authors conclude that whether such students are "worthy beneficiaries of affirmative action . . . rests largely on a moral judgment about whether the policy is a form of restitution for past racial injustice or a mechanism to ensure that selective schools continue to reflect the racial and ethnic diversity of a nation that is being transformed by immigration." *Id.* at 269. I argue below that they *are* worthy beneficiaries, but for a third rationale—the eradication of subordination.

129. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) ("[T]hose who are the most disadvantaged . . . are the least likely to receive any benefit from the special privilege."); *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 115 (1987) (stating that race- or ethnicity-based affirmative action would "enhance the opportunities of the more advantaged without addressing the problems of the truly disadvantaged"); Randall Kennedy, Commentary, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1333 (1986) (noting that "[an] objection to affirmative action is that it frequently aids those blacks who need it least and who can least plausibly claim to suffer the vestiges of past discrimination—the offspring of black middle-class parents seeking preferential treatment in admission to elite universities and black entrepreneurs seeking guaranteed set-asides for minority contractors on projects supported by the federal government," but noting that "[t]his objection too is unpersuasive" (quoting *Fullilove*, 448 U.S. at 448)).

ciently disadvantaged to be eligible for affirmative action."[130] The source of this uneasiness flows from the fact that the persons who are benefited are not affected at all by the subordinated condition, and that these benefits should be reserved for the truly disadvantaged.

This uneasiness is unjustified. Helping the "truly" disadvantaged may entail benefiting those who are not affected by the subordinating condition at all, just as helping the truly disadvantaged may entail turning to an institution that does not have any relation to the true subordinating institution. In both cases effectively ending subordination should not be limited to the particular persons or institutions that touch it. Eradicating subordination may entail employing unconventional persons as well as institutions.

Consider an example in the disability context. Suppose that a restaurant owner wants to increase access to his restaurant for the disabled. The owner decides that the best way to do so is by constructing a ramp that allows wheelchair access to the restaurant, but, due to his limitations as a carpenter, the owner is not able to build the ramp himself. The restaurant owner instead hires a contractor that builds the ramp for him who charges a fee for her services.

In this example a person wants to help a disadvantaged group, the disabled, but in doing so benefits a third party, the contractor, even though the third party is not necessarily disabled. It may be true that the fee only represents a form of compensation for the contractor's hard work and time, but it remains a benefit. The contractor receives work she would not have otherwise received and will most likely profit from it.

This "contractor" view should also apply to the recent immigrant and middle to upper-class examples above. They too are "contracted" to ameliorate the subordinated condition of persons in society, even though they themselves, like the contractor, are not necessarily affected by the condition.

But what do affirmative action "contractors" provide? In the college admissions context, for example, placing members of the subordinated group in elite institutions helps to dispel a presumption that certain employment positions or prestigious positions are closed off to the subordinated group. Justice O'Connor elaborates on this benefit in *Grutter*, in the context of the role law school plays in cultivating national leaders:

130. Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 458 (1997).

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be *visibly open* to talented and qualified individuals of every race and ethnicity. *All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.*[131]

In this brief passage Justice O'Connor emphasizes not only the openness of law school admissions, but the *appearance* of openness. The appearance of openness instills actual "confidence in the openness and integrity" of law school admissions—that is, it removes the presumption in society that such institutions are reserved for only some members of society.

This method of affirmative action does much more than promote "confidence." It also has two other important material benefits. First, it provides incentives for those in the subordinated group to strive for admission in those elite institutions, if not higher. The appearance of openness of society's most exclusive institutions broadens the horizons of even the most disadvantaged within the subordinated group. Moreover, as these members move onto other elite institutions, such as taking political and judicial office, the goals conceivable (and achievable) for the most disadvantaged further broaden. They too can, in the future, have the possibility of taking their place within these institutions. Like a ramp, these examples raise the expectations of all members of a subordinated group.

Second, the actual inclusion of members of the subordinated group (even advantaged ones) in elite institutions helps to dissolve stereotypes about members within the subordinated group and lead to better cross-group understanding.[132] This, in turn, can lead to greater incentives for society to alleviate the subordinated status of its disadvantaged members, since they will better understand, and be sympathetic to, their plight. As Justice O'Connor notes, "[t]hese benefits are substantial."[133]

There are, however, disadvantages, as the use of affirmative action may cause society to view the subordinated group even more unfavorably. As Justice Thomas points out in his concurrence in

131. *Grutter*, 539 U.S. at 332 (emphasis added).

132. Daniel Sabbagh makes a similar point. *See* Daniel Sabbagh, *Affirmative Action and the Group-Disadvantaging Principle*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 14, at 5, http://www.bepress.com/ils/iss2/art14/ ("[L]essening the correlation between race and occupational status, affirmative action might help reduce the *functionality* of such stereotypes.").

133. *Grutter*, 539 U.S. at 330.

Adarand, affirmative action programs may "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[134] The picture of stigma Justice Thomas paints is overstated, since not everyone will openly question the abilities of persons from subordinated groups. It suggests a societal mean-spiritedness that, though present, is not as pervasive as Justice Thomas suggests. But what Justice Thomas describes is substantial. Affirmative action, while conveying an appearance of openness, may further stigmatize subordinated persons by casting a cloud on their abilities.[135]

While acknowledging the disadvantages of affirmative action, it is important to weigh them against affirmative action's advantages. Though no social policy is perfect, one should not ignore the fact that these placements can, on the whole, represent real gains for the status of subordinated groups, even its most disadvantaged members.

Notice, however, that the arguments above do not narrow their focus to the direct benefits affirmative action provides to its most disadvantaged members. Rather, the focus for both Justice O'Connor and Justice Thomas is on affirmative action's effect on the subordination of blacks as a whole, as it should be.

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134. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J. concurring in part and concurring in the judgment). Justice Thomas's response to Justice O'Connor's opinion in *Grutter* focuses more narrowly on the hurt to the beneficiaries themselves:

> When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open?"

Grutter, 539 U.S. at 373 (Thomas, J.).

135. However, I am reminded of Jed Rubenfeld's response to this argument:

> To have extremely few black students at some of our most prestigious academic institutions would also promote notions of racial inferiority. There is something extremely odd going on when this fact is omitted from the analysis. It is as if one were to oppose seat belt laws on the ground that seat belts can lead to physical injury in the event of an accident—without even trying to assess whether the alternatives one supports would result in more injuries.

Rubenfeld, *supra* note 11, at 446–47.

e. Disaggregation of Injurer and Those Burdened

Affirmative action also disaggregates the persons who caused subordination and those burdened by affirmative action. In some cases affirmative action will burden persons completely innocent of existing subordination.

This is the fundamental issue in determining the permissibility of affirmative action, and a source of great concern and anguish in many affirmative action cases.[136] As Justice Powell put it in *Bakke*, "there is a measure of *inequity* in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[137] Because of this concern, the Court has consistently called attention to the innocent persons harmed by affirmative action: the innocent applicant who is denied medical school admission,[138] the innocent contractor that is denied a government contract,[139] and the young child who must be bused away from his or her neighborhood school.[140]

Despite these concerns, the fact that affirmative action burdens innocent persons poses no theoretical problem for affirmative action. While, under a transactional perspective, any obligation to remedy a situation must turn on the culpability of the parties involved, no such limitation applies to the antisubordination principle. Only the existence of a subordinating condition matters, and, though these innocent persons cannot be called "contractors" in any meaningful sense, they may have to be *commandeered* in order to eradicate subordination.

This "commandeering" aspect of affirmative action may strike one as going too far. If affirmative action can forcibly burden innocent persons to end subordination, what restrictions, if any, apply

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136. Of course, not all burdens imposed by affirmative action are compelling, and the interests that affirmative action infringe on may not be entitled to *any* legal protection. I focus here on cases in which the burdens imposed by affirmative action are significant.

137. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (emphasis added).

138. *Id.* at 310 ("[T]he purpose of helping certain groups whom the facility of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

139. *E.g.*, *Adarand*, 515 U.S. at 270 (Souter, J., dissenting) ("When the extirpation of lingering discriminatory effects is thought to require a catchup mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct.").

140. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971) ("It hardly needs stating that the limits on [school bus] time of travel will vary with many factors, but probably with none more than the age of the students.").

to affirmative action in the face of subordination? Can affirmative action do anything?

The answer is no. Affirmative action is limited by the reasonableness of the sacrifices it imposes on persons to help eliminate subordination. Some sacrifices may be unreasonable if (1) other, lesser sacrifices can be used to achieve the same (or better) results or (2) the magnitude of the sacrifice does not justify the resultant lessening of subordination. In both cases it is possible that the sacrifice may be too much to ask. In this way affirmative action can take into account the interests of innocent persons burdened by affirmative action's requirements.

The reasonableness of the sacrifice, however, is measured against what can be called a *public obligation*[141] on the part of persons to eliminate subordination, and I want to conclude this Part by briefly discussing it.

Under the transactional perspective, the state is an entity *distinct* from persons, with its own separate capacity to commit wrongdoing. Much of the Constitution reflects this view of the state, since many of the prohibitions (and duties) outlined in the Constitution are directed against the federal government and, through the Fourteenth Amendment, to state governments. This view of the state permeates decisions such as *DeShaney*. Consider Justice Rehnquist's words in *DeShaney*, discussing the Due Process Clause of the Fourteenth Amendment: "Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' *Its purpose was to protect the people from the State*, not to ensure that the State protected them from each other."[142]

The state also represents a distinct entity under a structural perspective, but plays a different role. A structural perspective looks at the state as a means by which society effectuates its obligations. It is true that the state, because its actions carry the force of law, differs fundamentally from other means of eradicating subordination. In particular, the state's actions carry a legitimacy that other private actions lack, because they purport to be authorized by the people.

141. The concept of a public obligation is analytically similar to what Cass Sunstein calls a "constitutional commitment." *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 179 (2004) (discussing the concept); *see also* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 194 (2001) ("*Brown* was rightly decided because ending segregation was a matter of living up, at long last, to the nation's constitutional commitment to end the legalized degradation of blacks.").

142. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) (citations omitted, emphasis added).

For that reason, the state is, and remains, the pre-eminent site where society expresses and acts upon its fundamental commitments.

Analytically, however, under the antisubordination principle the state is simply a means to end subordination. It is an important, primary, and preferred means. Arguably it should be the only means to eradicate subordination because of its inherent legitimacy. But it is a means nonetheless.

The subtle shift from the state as a violator to just a means under the antisubordination principle reveals that the antisubordination principle's obligation to eradicate subordination does not, in fact, rest in the state. It ultimately rests in the public itself. That is why I refer to this obligation as a *public* obligation—it is the state's obligation only insofar as it represents the public's means of achieving its obligation.

To evaluate the reasonableness of the sacrifices imposed by affirmative action is to ultimately weigh these sacrifices against this public obligation. And in order to do so, one must turn to the *normative basis* of that obligation. In other words, the reasonableness of affirmative action turns on the normative considerations that ground our public obligation, and whether those considerations sufficiently override the sacrifices imposed on the innocent individual burdened.

So far in this Article I have only described the antisubordination principle—what it means, when it applies, and how it operates. But to get at the issue of the reasonableness of the sacrifices the antisubordination principle imposes through affirmative action, we have to turn from description to justification. We need to answer *why* the public has an obligation to eradicate subordination.

This question, to borrow a phrase from Herbert Wechsler, is the "heart of the issue" of affirmative action, a "conflict in human claims of high dimension."[143] I will turn to this issue in the next Part.

II. AFFIRMATIVE ACTION AND THE FORTUITY OF OUR CIRCUMSTANCES

The antisubordination principle represents one interpretation of a commitment to equality, but it can entail great sacrifices. It asks of some members of society to contribute to the eradication of

143. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

subordination *even if* they did not contribute in any way to the existence of the condition. One should not trivialize these costs. A commitment against subordination will, in some instances, disadvantage individuals substantially.

The sacrifices entailed in a commitment against subordination, however, are particularly problematic because they not only burden persons in society, but they presumptively violate another important conception of equality, a commitment against discrimination. The antisubordination principle both promotes and frustrates equality. What is needed, therefore, is an appropriate basis for understanding the normative importance of the antisubordination principle, a basis that allows us to adjudicate between the antisubordination principle and the antidiscrimination principle, as well as adjudicate between the requirements of the antisubordination principle and other important interests.

In what follows I will attempt to root this basis in a special fact about our social circumstances, namely the fact that our prospects as persons in society are based on the fortuitous nature of the circumstances into which we are born. This fact, I will argue, not only situates our equality concerns but also gives us a way to adjudicate between our commitment against subordination and other substantive ends in society.

A. The Antidiscrimination Principle

1. The Theory of Harm

The antidiscrimination principle has been traditionally defined as a principle that prohibits the differential treatment of persons on the basis of race or ethnic origin.[144] It is rooted in our experience with slavery and Jim Crow laws, and therefore reflects a concern with our most egregious violations of the principle.[145]

144. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) ("The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin."); *see also* Paul Brest, *Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 1 (1976).

145. My discussion of the antidiscrimination principle is distinct from current doctrine, which takes an anticlassificationist cast. Under current Supreme Court scrutiny, *all* racial classifications are presumptively invalid unless their use satisfies strict scrutiny, which means they are only permissible if their use is "narrowly tailored to further compelling governmental interests." *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see also* Johnson v. California, 543 U.S. 499, 505–06 (2005). The Court has only identified three governmental interests sufficient to justify racial classification: (1) national security, *see* Korematsu v. United States,

The antidiscrimination principle prohibits the differential treatment of persons on the basis of classifications that are both (1) ascriptive and (2) irrelevant as a basis for treatment. It represents a special claim about the equal status of persons before the state.

To understand this claim one must keep in mind the antidiscrimination principle's transactional perspective. The antidiscrimination principle's primary subject is a discrete interaction between the state and an individual. It looks specifically at the reasons that underlie state transactions with individuals; in other words, in how the state justifies its treatment of individuals that are affected by its actions. In this way the antidiscrimination principle concerns itself, to borrow Owen Fiss's terms, with "means-ends rationality."[146]

Moreover, the antidiscrimination principle's transactional perspective shifts the focus away from a societal condition to the person affected. In particular, it looks to how the person himself is affected by the state action in question and whether the person, in fact, suffers injury from the actions of the state. It therefore does not, as in the antisubordination principle, look at the potential harms produced by the persistence of subordination. The antidiscrimination principle actually calculates, as much as practicable, the individual harms that flow from the state's discriminatory actions.

It follows from its transactional perspective that the antidiscrimination principle defines (1) ascription and (2) irrelevance differently than does the antisubordination principle.

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323 U.S. 214 (1944); (2) to remedy past discrimination, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989); and (3) diversity in higher education, *see* Grutter v. Bollinger, 539 U.S. 306, 328 (2003). The Court has rejected the following governmental interests: (1) the best interests of the child, *see* Palmore v. Sidoti, 466 U.S. 429, 433 (1984); (2) diversity of faculty and the promotion of minority role models, *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275–76 (1986); and (3) perhaps more distressingly, racial integration in elementary education, *see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007). *But see id.* at 2791 (Kennedy, J., concurring) ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion.").

A flat presumptive ban on racial classifications admittedly may vindicate the antisubordination principle as well as the antidiscrimination principle. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 11, at 3, http://www.bepress.com/ils/iss2/art11/. Banning racial classifications may make it harder for race to gain a foothold as a device for subordination. But the purpose of this Section is to take the antidiscrimination principle as it is apart from doctrine or whatever instrumental role it can play for the antisubordination principle.

146. Fiss, *supra* note 8, at 143.

a. Ascription

The antidiscrimination principle defines ascription to mean classifications that are based on aspects of the person that are completely independent of the affected person. This is often represented as classifications that are beyond the control of the individual.[147]

Control, however, fails to fully capture the sense of ascription that animates the antidiscrimination principle's concern with it. In some instances, such as gender, one has some control of their classification.

Instead, the metaphor of "control" captures the sense in which these classifications are not chosen or otherwise flow from the actions or beliefs of the person. They instead attach *in spite of* the reasons a person may (or may not) have to be classified in that way. As Justice Stewart writes in *Fullilove v. Klutznick* in the context of race and alienage: "The color of a person's skin and the country of his origin are immutable facts that *bear no relation* to ability, advantage, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government."[148]

As Justice Stewart notes, immutable characteristics like race have this quality, but other characteristics do as well, such as religious affiliation in some cases, where the individual is born into the classification. Thus, like in structural ascription, the concern with ascription by the antidiscrimination principle is a concern with its agent-independent nature.

The antidiscrimination principle, however, makes a slightly different responsibility claim than the antisubordination principle. Under the antisubordination principle, the agent is not held responsible for creating a societal condition that made membership in a group a disadvantaged position. The antisubordination principle looks to how institutions and practices advantage or disadvantage group membership, and looks to whether the individuals disadvantaged could be held responsible for creating this subordinating effect.

147. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (noting that illegitimacy is considered a suspect classification because, in part, "illegitimacy is beyond the individual's control").

148. 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) (emphasis added); *see also* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175 (1972)) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'").

In contrast, the antidiscrimination principle focuses on whether the individual's classification is based on characteristics that can be attributable to the individual. The focus shifts from the *significance* of the classification to its *acquisition*—whether the individual gained the classification based on his or her actions. For example, a person may not be responsible for the significance that a religion may have in society, but he may be responsible for becoming a member of a religion, insofar as he decides to adhere to it.[149] The opposite is also true, as when racists emphasize race as having social significance when no person has any control in its acquisition.

b. Irrelevance

The antidiscrimination principle also understands irrelevance differently, in terms of *contextual rationality* rather than *individual welfare.* It looks to see if, within the given context of a transaction, the classification presents a rational basis for the differential treatment. The emphasis on contextual rationality does not mean that the use of the classification of the person must be perfectly rational. As long as there is a reason, within a given context, to see the classification as important to treating persons differently, then it is relevant. Irrelevance under the antidiscrimination principle, therefore, has the flexibility to embrace the complexity of different contexts, since what may not be relevant in one context may be relevant in another.[150] The antidiscrimination principle can tell the difference between a pat on the back and an assault.

To understand the difference between contextual rationality and structural rationality, consider again the racial profiling example. Earlier I argued that racial profiling should be prohibited because it created a social condition in which persons were considered unjustifiably dangerous because of their race. The antisubordination principle considered the condition unjustified because one's race should not determine their social standing in society, even if racial profiling was rational as a crime prevention tool.

The antidiscrimination principle, however, would permit rational racial profiling. Even if the basis for the profiling were an

149. Note, however, that persons may not be responsible in this sense if they are born into the religion, if religion is considered a quasi-ethnic group (*e.g.*, Judaism and most Christian sects have this quality). However, if a person continues to follow a born-into religion, then responsibility for choosing that religion can attach.

150. *See, e.g.*, Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 13–17 (2002) (describing importance of context); *see also Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

ascriptive classification of the person, the antidiscrimination principle would allow the practice if it was, in fact, based on evidence that persons of certain races were more likely to commit crimes.[151]

Though such a conclusion may conflict with one's stance towards racial profiling, analytically the practice does not differ from other examples of rational targeting based on ascriptive classifications. From the perspective of the antidiscrimination principle, racial profiling does not differ from finding the best students in a university based on raw intelligence, or finding athletes based on physical dimensions. Each use ascriptive classifications (race, intelligence, athleticism) that are rationally related to a given end (finding criminals, finding the best students, finding the best athletes).

c. The Dignity of the Individual

The antidiscrimination principle's concern with ascription and irrelevance expresses a concern with the equal dignity of persons. By prohibiting state action on the basis of arbitrary and irrational classifications, the antidiscrimination principle expresses the idea that persons should solely be judged *as* persons. In other words, the state should treat persons equally unless there are good reasons not to.

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151. That is why scholars that have criticized racial profiling have focused on its subordinating effects rather than on its rationality. *E.g.*, KENNEDY, *supra* note 50, at 157 ("Race-dependent policing erodes the difficult-to-maintain habit of individualizing persons and strengthens the reflex of lumping people together according to gross racial categories. This reflex has had many disastrous consequences."); David A. Strauss, *"Group Rights" and the Problem of Statistical Discrimination*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 17, at 7, http://www.bepress.com/ils/iss2/art17/ (arguing that the "anti-subordination principle at least begins to explain this intuition" of the harmfulness of racial profiling). For the same reason, many commentators have focused on the subordinating effects of racially conscious decision-making *in general*. *See* Sabbagh, *supra* note 132, at 6 ("Indeed, although Fiss does not link his 'group-disadvantaging principle' to a defense of color-blindness as a social ideal, insofar as *racial identification itself* remains inextricably bound up with a constellation of inegalitarian assumptions, it may be argued that the two should go hand in hand."); Peter H. Schuck, *Groups in a Diverse, Dynamic, Competitive, and Liberal Society: Comments on Owen Fiss's "Groups and the Equal Protection Clause"*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 15, at 9, http://www.bepress.com/ils/iss2/art15/ ("At the risk of belaboring the obvious, racial categories in law have played an utterly pernicious and destructive role throughout human history."); Richard Thompson Ford, *Unnatural Groups: A Reaction to Owen Fiss's "Groups and the Equal Protection Clause"*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 12, at 4, http://www.bepress.com/ils/iss2/art12/ ("But as we implement such remedies, we face a double bind: the recognition of group difference for remedial purposes always threatens to reproduce the harm of the *production* of group difference we set out to remedy in the first place.").

The antidiscrimination principle, however, represents more than just a requirement that the state act rationally. Rather, to discriminate on the basis of irrelevant *and* ascriptive classifications is, in effect, to see certain persons in society as somehow *less than persons*—to see them, in other words, as not worthy, because of their classification, of the justified action that is accorded other persons in society. As the Court put it, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[152]

This is an important equality concern, a concern that is steeped in our constitutional tradition.[153] It is found throughout the Rehnquist Court's Equal Protection cases—the idea, quoting, ironically, *Shelley v. Kraemer*, that the Equal Protection Clause is a personal right.[154] It also forms the basis of Justice Scalia's statement that "[i]n the eyes of government, we are just one race here. It is American."[155] Justice Scalia's statement does not express an ignorance of the reality of classifications such as race of sex. Instead, his statement expresses an aspiration that, "in the eyes of the government," a person's treatment by the state will not depend on such classifications.[156]

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152. Rice v. Cayetano, 528 U.S. 495, 517 (2000). Justice Kennedy, in fact, cites *Rice* for this proposition in his concurrence in *Parents Involved*. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2767 (2007) (Kennedy, J., concurring).

153. *See, e.g.*, Balkin, *supra* note 11, at 2346–53; Sunstein, *supra* note 11, at 2428–29.

154. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948)); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224–25 (1995) (same).

155. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment).

156. One last point about the antidiscrimination principle: it follows from the antidiscrimination principle's focus on the basis of governmental action that it targets *intentional* governmental action. In order to discriminate, the state has to draw lines, and it is this act of line drawing that the antidiscrimination principle scrutinizes. Fiss, *supra* note 8, at 109 ("[T]he word 'to discriminate,' once divested of its emotional connotation, simply means to distinguish or to draw a line."). It further follows that the antidiscrimination principle does not look at unconscious discrimination, because unconscious discrimination is not discrimination at all. State action that differentially affects persons on the basis of ascriptive and morally irrelevant characteristics, without more, is *not* an instance of discrimination—the state does no prohibited line drawing in these instances. Hence Justice White's statement that, because the "central purpose" of the Fourteenth Amendment is racial discrimination by the State, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." Washington v. Davis, 426 U.S. 229, 239 (1976). This is not to say that unintentional discrimination is not harmful. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV.

2. Discrimination and Affirmative Action

Affirmative action, by definition, almost always presumptively conflicts with the antidiscrimination principle. This is because affirmative action represents a governmental policy of providing preferential treatment to persons on the basis of classifications such as race or sex. Such discrimination on the basis of classifications such as race or sex, without more, violates the antidiscrimination principle.[157]

In order to understand why affirmative action presumptively violates the antidiscrimination principle, one must turn to the antidiscrimination principle's transactional perspective and, in particular, to the transactional perspective's remedial principle.

Again, the antidiscrimination principle's remedial principle is corrective. It restores the individual harmed by state wrongdoing to the position he or she occupied before the discrimination. The transactional perspective considers wrongful discrimination, like all personal injuries, a tort. And, like all torts, wrongful discrimination requires a remedy that puts the victim in the place which the victim occupied before he or she was injured.[158]

Under the transactional perspective, the harm that results from state wrongdoing is a *personal* harm. It is felt only by the specific individuals wronged, which, in the case of the antidiscrimination principle, are the persons discriminated against. It follows that the persons who are wronged by the state are the only persons who should receive remedial benefits for their injury. Since the harm is a personal one, they have special reasons, as the persons who are *in fact* injured, to receive compensatory benefits for suffering the wrong.[159]

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317 (1987). It certainly is, and is a chief concern of the antisubordination principle. But if the state did not *intend* the discriminatory consequences, then no discrimination takes place.

157. Not all affirmative action, however, presumptively violates the antidiscrimination principle. This is because affirmative action may target classifications that are not protected by the antidiscrimination principle. Affirmative action based on religious affiliation may be one theoretical example, since one's religious affiliation may be freely chosen yet subordinating. I say "theoretical" because it is difficult to determine a real world example of affirmative action on the basis of religious affiliation, given current Free Exercise Clause jurisprudence. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (rejecting religious accommodation interpretation of the Free Exercise Clause of the First Amendment, overruling Sherbert v. Verner, 374 U.S. 398 (1963)).

158. *See* SUNSTEIN, *supra* note 84, at 319–20, 328–32 (noting, and criticizing, compensatory focus of Equal Protection doctrine in the context of race).

159. In contrast, again under affirmative action there is no limit to the range of persons or institutions it can employ to eradicate subordinating conditions. As noted above, whether individuals are benefited or burdened will depend solely on their effect on subordination. *See supra* Section I(B)(2).

Moreover, the corrective principle also requires that the state, as the injurer, be the party responsible for restoring the victim to that prior position. The state has a special reason to atone for its wrongdoing because, in committing the wrongdoing, it is responsible for its resulting harm. Thus, the state's role in creating the discriminatory harm gives the state a special reason to correct the situation.[160]

The corrective principle, therefore, makes a claim about (1) the persons worthy of remedies and (2) the persons who are responsible for providing those remedies. In both cases, the corrective principle limits them to those persons involved in the transaction in question, specifically (1) the persons harmed and (2) the injurers.[161]

The corrective principle's emphasis on (1) injurer specificity and (2) victim specificity dooms any attempt to reconcile affirmative action with the antidiscrimination principle. Consider, for example, two general strategies that attempt to do so.

a. Aggregation

One can argue that affirmative action is justified because the persons disadvantaged inhabit social positions that are, *in the aggregate,* advantaged in society. For example, even if some important governmental benefits are distributed on the basis of race, this distribution is benign because, on the whole, the dominant race will be better situated than the subordinated race.[162]

While it is true that members of an advantaged group are, as a whole, advantaged by their situation, this fact does not justify denying individuals that are members of the dominant group governmental benefits because of their classification as members of that group. Under the antidiscrimination principle, one cannot justify denying benefits to one person on the basis of their classifications just because other persons, similarly classified, are advantaged. To do so would not take the distinctiveness of persons seriously, and would result in the classification swallowing the individual.

160. Notice, as noted above, that the state can claim an excuse if the reason behind its actions are not for discriminatory purposes. *See supra* Section II(A)(1)(b).

161. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices,* 103 COLUM. L. REV. 689, 699 (2003) (noting, in discussing various reparations initiatives, that "[c]ompensatory justice requires a relationship of identity between the wrongdoer and payer and a relationship of identity between the victim and claimant").

162. *See generally* STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

One should not ignore this important point. Cognizing the harm of the antidiscrimination principle as a case of a dominant group losing some relative ground ignores the fact that, in most cases, an individual person is being significantly disadvantaged. Affirmative action sometimes entails the loss of a low-income job,[163] a place at a state university,[164] or the busing of small school children to non-neighborhood schools.[165] We should not take these sacrifices lightly, even though the persons harmed belong to an advantaged group. One's classification should not determine how the government treats you in society. That is the very evil that the antidiscrimination principle combats.

One can argue that the sacrifices imposed by affirmative action are justified because the advantaged person is *complicit* in the wrongdoing that created subordination, but this response is similarly flawed.[166] First, as noted above, subordination is not necessarily caused by wrongdoing. It can arise naturally, in which case there is no "wrongdoing" in which to be complicit.

Second, even if wrongdoing is the cause of the subordination at issue, the person burdened by affirmative action may not be the wrongdoer. If so, to impose the burdens of affirmative action on such an innocent individual would be unfair. Again, the antidiscrimination principle limits the remedy imposed to the injurer because the injurer is responsible for the discrimination. To attach culpability to a person because he or she happened to be of the same race as the actual wrongdoer would be arbitrary and would represent the very harm the antidiscrimination principle seeks to combat.

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163. *E.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

164. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003).

165. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

166. *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 74 (1997) ("[T]hose Americans who benefit from white privilege can continue to reap the benefits of that privilege while denying any moral responsibility for the suffering of others."); Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1005–23 (1989) (arguing against rhetoric of the "innocent victim"); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("[T]he rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways.").

To be fair, Professor Ross argues against the rhetoric of innocence in order to get beyond it. In his words, "[t]he choice for us is not whether we shall make innocent people suffer or not; the question is how do we get to a world where good people, white and of color, no longer suffer because of the accidental circumstances of their race." Ross, *supra*, at 316. I am quite sympathetic with this notion, especially, as I will argue below, given the fortuity of our circumstances. But I do not want to discount the burdens imposed on persons who otherwise have no responsibility for subordination. I do not dismiss "innocence" as rhetoric. It is something that needs to be addressed in order to be overcome.

b. History

One can also argue that, because persons have benefited *historically* from their position in an advantaged group, denials of benefits because of affirmative action are benign. This is because, again, on the whole the individuals similarly classified have been advantaged by their position in society. Moreover, the historical argument avoids the fatal error of the aggregate argument by limiting its focus to the individual person. Instead of lumping the sacrifices of the individual with the group, it aggregates the sacrifices of the person with the advantages the person has enjoyed over time due to his or her advantaged status.

Though it may be the case that, in general, persons classified a certain way may have been advantaged by their classifications, this does not provide a justifiable basis for affirmative action, for two reasons. First, in some cases the persons burdened may *not* have individually been advantaged by their classifications. For example, small children who are bused out of their neighborhood school for purposes of integrating school systems may not have had the opportunity to benefit from their classification at all.

Second, and more importantly, the response fails to take into account the importance of the transaction at issue. In particular, in most, though not all cases, past history is completely irrelevant. Under a transactional perspective what matters are the considerations that govern a specific transaction, and not other things that lie outside of the transactional frame.[167] For example, one cannot

167. Daryl Levinson suggests, however, that transactional frames can be manipulated so as to capture such benefits and burdens, and that such framing is fundamentally arbitrary. Levinson, *supra* note 22. According to Levinson, "[t]he bottom line is that constitutional and statutory regulations of government transactions, unlike legal regimes affecting only private parties, *always* have the option of aggregating costs and benefits over time, scope, or group instead of focusing on discrete, individualized interactions. Transactional frames in public law are always up for grabs." *Id.* at 1333. Levinson further argues that "[j]ust focusing on affirmative action, it is always possible to manipulate transactional frames in order to redescribe race-based benefits as compensatory, at the individual or group level, for race-based harm." *Id.* at 1381.

I disagree. Public law framing, like private law framing, is limited to when aggregation is contractually or otherwise consensually based. In relational contracts, for example, the union members *agree* to aggregate costs and benefits over time. I do not agree, as Levinson suggests, that persons have a continual relationship with the state that is similar to such a marriage or union relationship. *Id.* at 1321–29. Past treatment may offset benefits and burdens in, for example, a marriage (a purchased car may mitigate, for example, a forgotten anniversary) but I do not think this occurs when the individual confronts the state. Think of the strangeness, for example, of the state justifying a denial of welfare benefits based on past preferential treatment in voter registration, or vice-versa. Moreover, consider the perverse conclusions this would imply—would the state be *entitled* to screw you over if you disproportionately benefited in the past?

justify denying a person a government job based on his race solely because, in the past, he had an easier time registering to vote. To do so would be arbitrary, because the only considerations relevant to whether the person should receive the job are dictated by the context of the job opening—in this case, the qualifications of the candidate compared to the others applying for the job. From a transactional perspective such historical "benefits" are just as irrelevant as the color of a person's skin. This is the sense of Justice Scalia's statement that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either *a creditor or a debtor race.*"[168]

This response purposefully ignores social reality—that is, the history and social circumstances that have given classifications such as race the subordinating meaning that they have. The antidiscrimination principle has been criticized for the narrowness of its perspective,[169] but the criticisms fails to appreciate the nature of the antidiscrimination principle's transactional perspective and, because of this, fails to express the appropriate concern for the sacrificed individual.

The antidiscrimination principle looks not to societal conditions or historical forces, but to the person standing before the state. Its sole concern is making sure that the individual's treatment before the state is justified.

For that reason, the antidiscrimination principle sees what adherents of the antisubordination principle can sometimes fail to see—that just as the persons within subordinated groups are not responsible for their social situation, in the absence of wrongdoing, the persons in non-subordinated groups are *also* not responsible for their social situation. They too inherited historical and social circumstances that were not of their own making. Therefore, it would be unjust, without more, to impose great sacrifices on them solely because others are relatively worse off.

In fairness, Levinson rejects the kind of fluid transactional framing that he argues is otherwise limitless, based upon the substantive norms that apply in each case. *See id.* at 1376 ("Thicker accounts of the goals and mechanisms of constitutional norms may provide the substantive traction necessary to develop sensible approaches to framing.").

168. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added).

169. *See, e.g.*, Gotanda, *supra* note 11, at 40–46.

B. The Basis of Obligation

1. Non-Subordination Bases

The equal dignity of persons that underlies the antidiscrimination principle is a compelling vision of equality. It provides an important limitation on how the state can treat persons. But, as described above, it presumptively prohibits how one can address subordination that is not the result of discrimination, because it prohibits the preferential treatment necessary to address subordination.

Proponents of affirmative action have generally relied on two general strategies to address this tension. Both strategies, while successful in some instances, are insufficient.

a. Past Discrimination

The first strategy is to presume *all* subordination is the product of past discrimination. This presumption makes it appropriate to remedy the subordinated status of individuals because they are all victims of this "societal" discrimination.[170] Furthermore, the use of the term "societal" implies that the focus should shift away from pure state action. It suggests that, insofar as persons act *through* the state, the real injurer at issue is society itself. "Societal" pierces the veil of the state.

The concept of "societal discrimination" reflects the normative importance some scholars have placed on history in subordination, since in some cases there is a tendency to leverage this causal connection normatively to explain why affirmative action is needed.[171]

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170. Justice Brennan takes this view. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 363 (1978) (Brennan, J., concurring in judgment in part and dissenting in part) ("[R]elief [from past discrimination] does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; *it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.*" (emphasis added)).

I want to leave to one side the issue of reparations, because the precise claim in the reparations context rests not on subordination but mostly on corrective terms. The idea is to repay a "debt" for the past enslavement and segregation of blacks in the United States. *See, e.g.*, RANDALL ROBINSON, THE DEBT: WHAT AMERICANS OWE TO BLACKS (2000). The call for reparations strains the transactional focus of the antidiscrimination principle, in that it aggregates all victims into one gigantic class and all wrongdoers into one gigantic class. For a comprehensive discussion of the difficulties regarding reparations, see Posner & Vermuele, *supra* note 161.

171. *See, e.g.*, Dana R. Wagner, *Facially Neutral Employment Criteria and Title VII: Competing Frameworks and Notions of Harm*, 30 UWLA L. REV. 94, 110–11 (1999) ("[I]f such imbalances manifest themselves, it is natural to suspect that some form of injustice (i.e., some violation

We want subordination to be the result of wrongdoing because it makes justifying the burdens of its remedy easier.[172]

Relying on societal discrimination as a basis of affirmative action, furthermore, has two other advantages. First, persons have a *continuing obligation* to help those that have been discriminated against, allowing affirmative action to apply well past the actual act of discrimination. In *Gaston County v. United States*,[173] for example, the Court held that a facially neutral and fairly administered literacy test for purposes of voter eligibility was invalid because it disproportionately impacted blacks who were the victims of the County's dual school system.[174] The Court's injunction against Gaston County's literacy test was not based on wrongdoing on the part of state election officials *at all*. The Court accepted as given that the test was impartially and fairly administered.[175] Rather, the Court argued that "we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. 'Impartial' administration of the literacy test today would serve only *to perpetuate these inequities in a different form.*"[176]

What motivates the Court in *Gaston County* is the fact that those voters harmed by Gaston County's prior dual school system were not fully remedied. The dual school system ensured that each individual's literacy level would be significantly lower than a similarly situated white person. According to the Court, this harm not only entails that the injurers who inflicted the harm must remedy this specific injury, but that otherwise perfectly permissible action may

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of the antidiscrimination principle) has brought them about. . . . Thus, a caste-based objection to an employment pattern is only valid to the extent that it can be translated into a disparate treatment argument. If an employment pattern is neither the product of nor a vehicle for disparate treatment, caste theories provide no independent normative basis for legal intervention."); *cf.* Ford, *supra* note 151, at 2 (equating the antisubordination principle with the antidiscrimination principle, since "arguably the core inquiry remains the same: is the challenged practice a proxy for or an extension of illegitimate *discrimination*?").

172. Consider, for example, Judith Jarvis Thompson's argument in favor of compensatory affirmative action. Thompson argues that because everyone commonly owns the state, when persons are discriminated against by state, then the persons responsible for that discrimination are the persons who own the state, namely us. Since they are (or more appropriately "we are"), in common, owners of societal goods we are also liable, in common, for any wrongdoing in the allocation of these goods. *See* Judith Jarvis Thompson, *Preferential Hiring*, *in* EQUALITY AND PREFERENTIAL TREATMENT 19 (Marshall Cohen et al. eds., 1977).

173. 395 U.S. 285 (1968).

174. The action was brought pursuant to provisions of the Voting Rights Act of 1965 which suspended "the use of any test or device as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presidential election." *Id.* at 286–87.

175. *Id.* at 296.

176. *Id.* at 296–97 (emphasis added).

be prohibited if it exacerbates the injury. The Court is quite explicit that there is a general reason not to "perpetuate these inequities in a different form."[177]

Second, though the injurer may have a special reason to remedy his or her wrongdoing, there also exists a general reason on the part of society to remedy the injured. This allows affirmative action to get around the injurer specificity requirement of the antidiscrimination principle by relying on this more generalized concern. In *Franks v. Bowman Transportation Corp.*,[178] for example, the Court upheld an award of retroactive seniority status to black workers who had previously been discriminated against by their employer and unions' hiring, transfer, and discharge policies, in violation of Title VII of the Civil Rights Act of 1964.[179] The Court affirmed the district court's order of retroactive seniority despite the fact that the award would be detrimental to otherwise innocent white workers. Under the award, some workers would have to be subordinated in seniority to the plaintiffs.

Justice Brennan, writing for the Court, stated:

> The dissent criticizes the Court's result as not sufficiently cognizant that it will "directly implicate the rights and expectations of perfectly innocent employees." We are of the view, however, that the result which we reach today—which, standing alone, *establishes that a sharing of the burden of the past discrimination is presumptively necessary*—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "*[a]ttainment of a great national policy* . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[180]

Notice that the burden of remedying those discriminated need not fall *solely* on those that committed the wrongdoing. As Justice Brennan notes, there can also be a "sharing of the burden of past

177. *Id.* at 297. For a more comprehensive analysis of *Gaston County*, see Owen M. Fiss, Gaston County v. United States: *Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379.

178. 424 U.S. 747 (1976).

179. *Id.* at 750–51.

180. *Id.* at 777–78 (emphasis added, citations omitted). Justice Brennan also attempts, though not very convincingly, to downplay the sacrifices of the innocent workers, stating that "the relief which petitioners seek is only seniority status retroactive to the date of individual application, rather than some form of arguably more complete relief," and that "[c]ertainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract." *Id.* at 776, 778.

discrimination" if necessary to remedy those discriminated.[181] In other words, society *itself* has a reason to remedy those harmed; hence Justice Brennan's reference to "[a]ttainment of a great national policy."[182] Facially he is referring to the "make whole" provision of Title VII, but he is also making reference to the significance of that Act, that it represents a societal commitment to fully remedy those discriminated against.[183]

Despite the advantages of relying on societal discrimination as a basis for affirmative action, in particular, (1) its imposition of a continuing obligation to remedy that (2) applies generally to all of society, we should refrain from finding societal discrimination as the basis for affirmative action, for two reasons.

First, despite relaxing the injurer specificity requirement, societal discrimination does not relax the *victim* specificity requirement of the antidiscrimination principle. The necessary predicate of the principle, even when applied generally to society, is *wrongdoing*—even though the principle, like affirmative action, imposes obligations on innocent parties, it only does so if unremedied wrongdoing exists. In both *Gaston County* and *Franks* there were identifiable victims of clear wrongs.

Affirmative action, in contrast, applies in contexts even where there is no wrongdoing at all to remedy. Not all members of the group may have suffered direct discrimination, or even the effects of direct discrimination. There may exist, for example, individuals who are members of the group that are not subordinated at all by the effects of the discrimination (*e.g.*, middle to upper-class blacks). There may also exist, as in the case of widespread affirmative action, persons who are actually advantaged on the whole by it (*e.g.*, recent immigrants).

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181. *Id.*

182. *Id.*

183. *Franks*, in fact, expresses the central deficiency of *United States v. Morrison*, 529 U.S. 598 (2000). *Morrison* concerned Section 13981 of the Violence Against Women Act ("VAWA") that allowed women to bring civil suits in federal court for damages caused by acts of violence. Chief Justice Rehnquist, writing for the Court, analogized the case to the *Civil Rights Cases*, 109 U.S. 3 (1883). Since the federal remedy outlined in VAWA only applies to violence acts against women by *private individuals*, it does not address state action, even though the real purpose of VAWA was to address gender-based disparate treatment by state authorities. *Morrison*, 529 U.S. at 624. As Justice Rehnquist writes, "Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." *Id.* at 626. Rehnquist ignored the implied principle of *Franks*, which permits the sharing of burdens to effectuate a national policy—in *Morrison*'s case, private violence against women. In fact, the burden sharing is easier because, unlike in *Franks*, the third parties burdened are not innocent *at all*.

Second, proponents of the "societal discrimination" view suffer from a larger deficiency—contemporary reality does not support the presumption that all subordination is caused by past discrimination. While this may have been the case in the not-too-distant past with certain groups, today subordination, can, and often does, come from innocuous (from the point of view of the antidiscrimination principle) sources. It may come from facially and impartially administered measures such as efficient employment criteria[184] or stricter police enforcement.[185]

In the above examples it is difficult to say that these policies or their administrators are racist (or sexist, or other group-ist). There may exist individual racists implementing these government measures, but, on the whole, such policies are enacted primarily for other important and justifiable interests. In the employment context, for example, when an employer uses a hiring practice that differentially impacts blacks (like a test), one cannot charge that practice with being racist per se. The employer may in fact be trying to find the best employees, and one must own up to that fact. The reality of our current situation is that subordination may be, in a transactional sense, innocent. This does not mitigate the claim of subordination—it instead forces one to confront subordination directly.

b. Second Order Justifications

The second strategy looks past state wrongdoing and instead tries to develop a basis for why the classifications that are important under affirmative action are relevant. Unlike the past discrimination strategy, which looks to the reasons persons have to remedy victims of wrongdoing, this strategy looks to sufficiently general and universally applicable reasons for imposing the sacrifices that affirmative action entails. The hope is to identify those "second-

184. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidating aptitude tests that had a disparate impact upon blacks not shown to be significantly related to successful job performance).

185. *But see* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (permitting stops at permanent checkpoint of drivers based on their "apparent Mexican ancestry"). I hesitate to discuss the crack/cocaine distinction (where crack penalties are 100 times greater than those for powder cocaine), because, at least arguably, the persons burdened by this distinction (blacks) are also those that are benefited by this distinction (blacks). Whether the advantages outweigh the disadvantages is largely an empirical matter, and I do not want to speculate on the answer here. *See, e.g.*, KENNEDY, *supra* note 50, at 375 ("After all, it could be that increasing the punishment of crack offenders correspondingly benefits those who obtain relief when those offenders are incarcerated.").

order justifications" that both (1) provide a normative basis for the discrimination in question and, more importantly, (2) provide a reason why the persons discriminated against should be unevenly burdened in the way that they are.

This is the strategy that Justice Powell employs in *Bakke*. In *Bakke* Justice Powell answers the charge of reverse discrimination by appealing to a value of great charisma, the First Amendment and its concern with a diversity of viewpoints, to show why the use of the classification is morally relevant in a medical school context. He writes that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as *a special concern of the First Amendment.* The freedom of a university to make its own judgments as to education includes the selection of its student body."[186] Such universities must be "accorded the right to select those students who will contribute the most to the 'robust exchange of ideas.'"[187]

Other scholars in favor of affirmative action have used such values as ensuring democratic ideals of equal participation and citizenship,[188] ensuring social stability,[189] or maintaining and enriching individual self-actualization,[190] among other things.

It may be the case that, as noted by Owen Fiss, such second-order justifications are "irreducible," that our best attempt at justifying affirmative action may be to find as many interests it instrumentally realizes as possible.[191]

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186. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (emphasis added).

187. *Id.*

188. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 83 (2005) (discussing *Grutter*, noting that "[w]hen faced with one interpretation of the Equal Protection Clause that, . . . through perceived exclusion, might impede the functioning of that democracy, is it surprising that the Court majority chose the former?"); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) ("The substantive core of the amendment, and of the Equal Protection Clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."); Robert Post, *Introduction: After* Bakke, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 13, 23 (Robert Post & Michael Rogin eds., 1998) (arguing that affirmative action in higher education is necessary to promote the "health of public culture," since a healthy public culture is a prerequisite to democratic legitimacy); *see also* Amar & Katyal, *supra* note 20, at 1746 (arguing in favor of "the importance of democratic dialogue and diversity in public universities" that affirmative action fosters).

189. Fiss, *supra* note 8, at 151.

190. *Id.*

191. Fiss notes:

> What, it might be asked, is the justification for [the antisubordination principle]? I am not certain whether it is appropriate to ask this question, to push the inquiry a step further and search for the justification of that ethic; visions about how society

But I think we should resist this strategy for two main reasons. First, it would be difficult to find instrumental reasons sufficiently compelling to justify all of the different burdens affirmative action entails. To borrow a Fiss example, the diversity rationale carries little to no weight when denying a guardrail worker a low-income job.[192] While it is true that a guardrail worker has no right to a job, and that the deprivation is really only an increase in the risk of not getting the job, this risk is an objectively important risk—it is a lesser chance of obtaining the very means to live for some low-skilled workers. Asking these persons to incur this risk in the service of diversity in the workplace, however worthy, strikes me as too much to ask, even offensive.

Second, and more importantly, looking at the antisubordination principle in such an instrumental way fails to recognize the sense of equality that the antisubordination principle implicates. It too expresses an important equality concern, a concern that, at least vaguely, seems just as important, if not more important, than the equality concerns of the persons burdened.

There is, therefore, not only justificatory force at issue but also frankness. We are not really concerned with diversity, or democratic participation, when we impose the sacrifices of affirmative action—we are primarily concerned with the plight of the subordinated. In other words, we feel, and should feel, that what is at stake when we deny a person a place at a university is not just diversity or democracy or social stability, but the lives and aspirations of the persons subordinated.

This insight, however, requires careful elaboration, because it has to be more than just enhancing the position of one group at the expense of another group. Again, the principal evil the antidis-

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should be structured may be as irreducible as visions about how individuals should be treated—for example, with dignity. But if this second order inquiry is appropriate, a variety of justifications can be offered and they need not incorporate the notion of compensation. Changes in the hierarchical structure of society—the elimination of caste—might be justified as a means of (a) preserving social peace; (b) maintaining the community as a community, that is, as one cohesive whole; or (c) permitting the fullest development of the individual members of the subordinated group who otherwise might look upon the low status of the group as placing a ceiling on their aspirations and achievements.

Id. at 151. Others have taken Fiss to task for failing to provide a sufficient normative basis for the antisubordination principle. *See, e.g.*, Lawrence A. Alexander, *Equal Protection and the Irrelevance of "Groups"*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 1, at 4–5, http://www.bepress.com/ils/iss2/art1/.

192. Fiss, *supra* note 21, at 38 ("The diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably entailed in a system of preferential treatment. The rationale has little appeal once we move outside the university context, for example, to the realm of production workers or guardrail contractors.").

crimination principle targets is that one's benefits or burdens cannot be based on ascriptive and irrelevant considerations, since to do so would violate the equal dignity of individuals. But the above insight is not wholly impermissible—it just requires a foundation that allows us to see why persons have a reason to take seriously the plight of subordinated individuals.

What is needed, in other words, is a normative basis that fully captures why we should care about the subordinated status of individuals in society, even though we may not be subordinated ourselves and even if we may not have any other reason or obligation (stemming either from wrongdoing or any other duty) to help their condition.

2. The Fortuity of Our Circumstances

a. Solidarity Defined

Our concern with the subordination of social positions arises from an appreciation of the fortuity of our born-into circumstances. When we are born into society, our social position is randomly assigned to us. Whatever native endowments and social status we attain at birth are arbitrary, neither just nor unjust. This is a fact of our existence, what John Rawls calls a "moral truism."[193]

I view the fortuity of our circumstances as the basis of a *solidarity* we have with each other. This solidarity springs not only from the fact that our born-into circumstances are arbitrary, but that this "lottery"[194] applies to everyone. No person can evade it.

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193. RAWLS, FAIRNESS, *supra* note 53, at 74.

194. Rawls uses the term "lottery" in criticizing a principle of liberal equality, or a principle of distribution based on talent:

> [E]ven if it works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents. Within the limits allowed by the background arrangements, distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune.

RAWLS, THEORY, *supra* note 53, § 12, at 64; *id.* § 17, at 87; *see also* RAWLS, FAIRNESS, *supra* note 53, § 21, at 74–77 (discussing "native endowments as a common asset"). In Rawls' view, persons are entitled to their personal endowments, *see* RAWLS, FAIRNESS, *supra* note 53, § 21, at 75, but the differences among persons should be viewed as a collective asset, to be used to the benefit of the whole. Such differences allow persons to "share in the greater social and economic benefits made possible by the complimentaries of this distribution." RAWLS, THEORY, *supra* note 53, § 17, at 87. In this way, to use Rawls' words, "a principle [of] justice as

The (1) arbitrariness and (2) universality of the fortuity of our born-into circumstances leads to two further conclusions. First, by acknowledging this shared fate, each person develops an appreciation of the contingency of his or her own circumstances, since so much depends on our initial starting place. But for this "lottery," we could have occupied any other initial starting position in society. Second, and at the same time, the fortuity of our circumstances gives us a strong reason to care about the circumstances of those less fortunate. The less fortunate, through no fault of their own, are made less well-off while others reap a windfall. The only difference is chance—the less fortunate could have occupied a greater position, and vice versa.

Taken together, each person, in acknowledging (1) his own contingent situation and (2) the unfortunate circumstances of others, has a reason to ensure that initial social positions do not foreclose a person's opportunities to lead a decent life. In other words, there is a shared concern for others, a *solidarity* that arises from the consequences of our born-into circumstances, to make sure that our social structure does not make these initial social positions subordinating. The deck should not be stacked against anyone at the outset.

The solidarity we feel for persons who have lost out in this lottery is analogous to the solidarity we feel for others who suffer from other arbitrary, universal, and unfortunate events. We care about the victims of natural disasters, or persons with disabilities, because we know that, but for our circumstances, we could have occupied those positions. Because of the inherent (though non-blameworthy) unfairness of these situations, we try to structure society to remove it. The same sense of counteracting misfortune also applies to the damage (in particular, the subordination) caused by the fortuity of our circumstances.

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fairness does the work of political philosophy as reconciliation." RAWLS, FAIRNESS, *supra* note 53, § 21, at 76. For a similar discussion of the significance of the moral lottery to Rawls's theory of justice, see Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003).

Rawls's broader concern is the justification of principles of justice that apply to the basic structure of society. *See* RAWLS, THEORY, *supra* note 53, § 3, at 10. His invocation of the moral lottery is used to justify one such principle, the difference principle, by diminishing the strong moral *entitlement* to one's natural endowments implied by the principle of liberal equality.

In contrast, my project is to define a principle, the antisubordination principle, which addresses a specific unjust social condition. My account does not attempt to justify broader principles of justice. *See infra* Conclusion. My account, in fact, is agnostic as to whether Rawls' principles of justice, or any other principle of justice (even a principle of liberal equality), should apply. Moreover, my invocation of the moral lottery plays a different role; it does not diminish one's *entitlement* to his or her natural endowments but serves as a basis for *solidarity* with others. *See infra* note 195 and accompanying text (distinguishing my view of solidarity from entitlement views). It shows our connection to each other.

A solidarity interpretation of the fortuity of our circumstances does not concern the extent to which persons are *entitled* to their initial starting places.[195] Instead, the analysis shifts to ensuring that any initial starting places are not subordinating ones. This shift, in other words, is from the distribution of goods to the eradication of subordinating social positions. The eradication of subordinating social positions may entail the redistribution of certain goods, but that redistribution does not result in a judgment that the persons who lose out do not properly deserve what they previously had. They may, in fact, legitimately deserve what they had. Instead, a solidarity interpretation of the fortuity of our circumstances appeals to our common situation, and ask us to consider those disadvantaged by the fortuity of our circumstances. Even if one has legitimate entitlements to what he or she has, for whatever reason, that person still has reason to sacrifice those entitlements.

A solidarity interpretation of the fortuity of our circumstances also differs from social insurance theory. Social insurance also involves arbitrary consequences that can affect us all, such as accidents or catastrophic illness. Social insurance, however, is an ex ante measure, since it serves as a method to deal with risks that could affect each person in the future. Under any given social insurance scheme, persons pool their resources so that the costs of these risks do not disproportionately fall only on one or a few persons.[196]

For this reason, the normative basis of social insurance is *prudential*, since no person would have any reason to be involved in a social insurance scheme unless there is a risk that any of the outcomes protected by the social insurance scheme could actually

195. Ronald Dworkin takes such an entitlement view, arguing for a theory of "equality of resources" in which the only justified inequalities are those based upon life-style choices. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 76–83, 92–99 (2000). This entitlement view of the fortuity of our circumstances is also associated with proponents of a view of "luck egalitarianism," who believe that goods should not be distributed based upon brute luck. *See, e.g.*, SUSAN L. HURLEY, JUSTICE, LUCK AND KNOWLEDGE (2003); Richard Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989). For a critique of luck egalitarianism, see Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); Samuel Scheffler, *Choice, Circumstance, and the Value of Equality*, 4 POL. PHIL. & ECON. 5 (2005); Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003). Interestingly enough, Dworkin disputes being categorized as a luck egalitarian, though he does share the core insight that justification of inequalities rests on choice, not on luck, the very essence of what I call the entitlement view. *See* Ronald M. Dworkin, *Equality, Luck, and Hierarchy*, 31 PHIL. & PUB. AFF. 190 (2003).

196. This is distinct from Ronald Dworkin's conception of a "hypothetical insurance market," which attempts to impose an "ex ante" perspective on an (necessarily) ex post situation. *See, e.g.*, DWORKIN, *supra* note 195, 76–83, 92–99. I am concerned here with *actual* social insurance schemes, and how they are different from the solidarity I am outlining here.

affect that person. To use a private insurance example, there is no reason to purchase auto liability insurance if one does not own or drive a car. Social insurance programs thus tend to apply only to those consequences that affect everyone. Social Security's popularity can be explained, in part, by the fact that everyone suffers a risk of poverty as they become more elderly.

A solidarity interpretation of the fortuity of our circumstances, however, differs because it relies on an ex post judgment. The lottery has already happened, and there is nothing we can do, ex ante, to mitigate its risks. Moreover, for some subordinated social positions, most notably race, persons have no risk whatsoever of occupying them.[197]

The normative basis, in other words, is *fraternal*, not prudential. It is borne out of our regard for others, rather than an individualistic regard for one's own welfare. This regard, in turn, arises from an understanding and appreciation of our common fate. Since we are all subject to the social and natural forces that assign each of us to our initial starting places, which are all beyond our individual control, we realize the role chance plays in our lives. This appreciation, coming after the fact, gives us reason to mitigate the damage—to both alleviate the damage caused to those born to subordinated social positions, and to ensure that the damage does not occur again. Hence the solidarity I am describing represents an appropriate basis for a public obligation. It reflects a deep concern *for* everyone in society *by* everyone in society.

Consider again, by analogy, the concern we feel for persons who have suffered from natural disasters. As in the fortuity of our born-into circumstances, our reasons to help are ex post—we cannot create a scheme to prevent a natural disaster that has already happened. In addition, the reasons for helping are not self-regarding. While some people may help out of a desire to ensure that others will do the same for them in the future, I do not think that accurately reflects the reason why many do, in fact, help out. Rather, the reason lies in a need to mitigate the damage done by nature to others. It is strictly other-regarding. Consider, for example, the spontaneous outpouring for the victims of Hurricane Katrina. To say that persons feel this concern out of a self-regarding, rational

197. This explains the differences in treatment between subordinated groups on the basis of race or sex and those based upon a disability. Our concern with the disabled stems both from the kind of solidarity considerations I outline above and the prudential reasons that underlie social insurance. As Owen Fiss noted, "[t]he Americans with Disabilities Act sailed through Congress, with little or no resistance, perhaps because the disadvantaged group is, unlike blacks or women, one of which anyone might have become a member." Fiss, *supra* note 64, at 14.

desire to ensure equal treatment strikes me as both far-fetched and offensive.

Social disasters, of which subordination is one of them, deserve the same response. It too, like natural disasters, should evoke our concern for the damage they cause. No one deserves to be hit by an earthquake or a hurricane. It just happens. No one is to blame. Similarly, no one deserves to suffer the subordinating effects of being black or a woman. For the most part, it just happens. No one is to blame. We therefore have a reason to mitigate these consequences, no matter if they are natural or social in origin.

b. The Sacrifices of Those Burdened

The fortuity of our circumstances cuts both ways. It provides a basis to remedy the situation of those subordinated, but it also requires us to temper the sacrifices taken to end that subordination. In almost all cases, those burdened, like those subordinated, had no role in the resultant subordination, and for that reason can claim an arbitrariness to the sacrifices imposed. Why me, instead of someone else?

This question does not foreclose measures like affirmative action, but sets in motion a conversation between those burdened and those subordinated. At this level of discussion, one cannot say much about the outcomes of these conversations, since the particularities of each situation will play a determinative role. But a few general principles will guide the outcome.

First, preference should be given to sacrifices that can be dispersed as widely as possible. Since subordination is a public concern, the price to pay should not, if practicable, fall on only one or a few individuals. This suggests a slight preference for affirmative action that does not single out a few individuals, such as increased recruitment efforts, which disperse its costs along an institution or the public, over strict quotas, which tend to single out a small group of individuals.

Dispersal, however, should not override a second principle, one of efficacy. Consider, for example, appeals to increased funding of elementary education as a preferred method to deal with "pool" problems, that is, the lack of qualified minority candidates for certain positions of power.[198] This form of affirmative action has an

198. *E.g.*, Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1768, 1770, 1814 n.296 (1989) (arguing for attacking the underlying social conditions, particularly the class stratification, that reduce the pool of minority applicants).

appeal that derives not only from its dispersed nature but from its suggestion that it is targeting a "root cause" of the pool problem.[199] Fixing the pool problem, however, may require more than just throwing money at the "root cause." In fact, studies have suggested that increased funding of inner-city schools has had little effect.[200]

Efficacy may demand, instead, hiring preferences for qualified minority candidates to address a different dimension that funding does not reach—increasing the perceived possibilities of the minority group. Members of the group may not have the self-regard necessary to do the further work (often considerable) to be a part of most pools. This is one of the central insights of Justice O'Connor's opinion in *Grutter*, where, as I noted earlier, Justice O'Connor stresses the importance that positions of power "be *visibly open* to talented and qualified individuals of every race and ethnicity."[201]

Third, one must acknowledge the sacrifices imposed, especially when they are severe, and employ countermeasures to ensure that the sacrifices remain reasonable. In the employment context, for example, hiring preferences given to those subordinated can be tied to more robust anti-poverty measures for those burdened, such as increased unemployment insurance.[202] Again, as I noted above, the inter-institutional perspective of affirmative action allows for this, only this time in the service of those sacrificed.

c. Plyler v. Doe

It may seem odd to base the antisubordination principle and, in turn, affirmative action on such a highly abstract social fact as the fortuity of our circumstances. But it not only provides a normative basis for taking seriously the social position of others, but also provides an explanation for why we do care, in some cases, so strongly

199. *See, e.g.*, Rubenfeld, *supra* note 11, at 471 ("If I had to choose, I would probably vote to scrap the entire patchwork of affirmative action measures in this country in favor of a massive capital infusion into inner-city day care and educational facilities."); Schuck, *supra* note 150, at 82–83 (discussing such "root cause" measures, and concluding that "[t]o the extent that the academic performance of low-income children can be improved by remediation and educational reform, this is clearly the road that we should travel—and hopefully *are* traveling—even as we search for other ways to improve their life prospects").

200. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 286–95 (1999) (citing studies that note the inefficacy of increased expenditures on segregated schools).

201. Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (emphasis added).

202. A similar situation arises in takings situations, where the property interests of the few are sacrificed for a public purpose, though under takings law the public purpose does not have to be a subordination purpose.

for them. Consider, for example, *Plyler v. Doe*,[203] where the Court enjoined the state of Texas from denying elementary education to illegal immigrant children. After concluding that the children were "persons" under the Equal Protection Clause, Justice Brennan concludes that the state should be enjoined, despite the fact that the children are illegally in the United States, because:

> Sheer incapability or lax enforcement of the laws barring entry into this country . . . raises the specter of a permanent caste of undocumented aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.
>
> . . .
>
> The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. . . . But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice. . . .
>
> . . .
>
> Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But [the statute in question] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these

203. Plyler v. Doe, 457 U.S. 202 (1981).

> children for their presence within the United States. Yet that appears to be precisely the effect of [the statute].[204]

In this remarkable passage Justice Brennan expresses two different concerns. The first is a claim that the children are improperly discriminated against, despite their unlawful entry into the country, because the status of the children burdened is, like race, ascriptive and irrelevant. The children's status is ascriptive because "the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status,'" even though one's illegal status is not purely immutable.[205]

Justice Brennan furthermore argues, though implausibly, that the classification is morally irrelevant, that it is "difficult to conceive of a rational justification for penalizing these children for their presence within the United States."[206] As Justice Burger's dissent points out, restricting education in this way "serves to prevent undue depletion of its limited revenues available for education,"[207] since at stake is the educational interests of children who are here legally. Justice Burger's point is that if state agencies must take into account the children of other countries who do not contribute resources (in the form of property taxes) for education, then it makes every child worst off educationally. The State of Texas cannot educate the world. It has to make distinctions. And it can rationally prefer the children of parents who pay taxes to fund that education.[208] Justice Brennan's discrimination argument in favor of the children, therefore, seems misplaced.[209]

But a second concern lurks within this passage—the subordinated condition of *the parents*. Brennan recognizes that there exists an appropriate basis for denying the parents state benefits since their status is based on their own illegal conduct. As Brennan notes, "[p]ersuasive arguments support the view that a State may withhold its beneficence."[210] Despite these arguments, however, Jus-

204. *Id.* at 218–20 (citations omitted).

205. *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

206. *Id.*

207. *Id.* at 249 (Burger, J., dissenting).

208. Moreover, "the Texas law could not be invalidated under the antidiscrimination principle because it could be rationally justified as a means to serve a legitimate social purpose, specifically, to discourage the influx of illegal immigrants . . . ." Owen M. Fiss, *The Immigrant as Pariah*, *in* A COMMUNITY OF EQUALS 3, 11 (Joshua Cohen & Joel Rogers eds., 1999).

209. To be fair, Justice Brennan also identifies the children's plight as an antisubordination concern, particularly in his concern with the Texas law creating a "subclass of illiterates." *Plyler*, 457 U.S. at 230. Fiss also notes this antisubordination strand of Justice Brennan's opinion. *See* Fiss, *supra* note 208, at 12.

210. *Plyler*, 457 U.S. at 219.

tice Brennan still takes their plight seriously. Implicit in Brennan's recognition of the parents' need to find work in the U.S. is an acknowledgment that the social position of illegal immigrants places them in a difficult position. They must either live in poverty in their home country *or* risk illegal action as a means of supporting themselves and their families. They represent, for Justice Brennan, the possibility of a "permanent caste of undocumented workers" forced in this position but societally ignored, with the children themselves "special members of [an] underclass."[211]

Justice Brennan's use of the term "caste" is significant because it shows that he recognizes the parents' peculiarly subordinated condition. They are ascribed into a status of undocumented workers (they, of course, did not pick the country they were born into), they risk either starvation or illegal sanction, and their status as undocumented workers does not seem to be relevant, from a moral point of view, to their overall welfare. Hence Justice Brennan's observation that they are, as cheap labor, "encouraged by some to remain . . . but nevertheless denied the benefits that our society makes available to citizens and lawful residents."[212]

I therefore believe that Justice Brennan is just as touched by the fact that the parents are forced to resort to illegal action for themselves and their children as the plight of the children themselves. I also believe, given the facts, that our own feelings point, and should point, in the same direction. These feelings flow from an appreciation that we are lucky not to occupy such a situation, born into a country that cannot provide for us and rejected by another that can. Though Equal Protection doctrine prevented Justice Brennan from addressing the parents' claims directly, he does his best to help them by ensuring their children have access to a decent education.

Recognition of the fortuity of our circumstances applies powerfully not only to the "perpetual underclass" of illegal immigrants, but to a vast number of contexts where, because of subordinating conditions, persons are disadvantaged in society. It applies equally to persons born with the wrong skin, wrong gender, or born in the wrong neighborhood. When we care about the plight of disadvantaged groups in society, the basic concern of affirmative action, I think this thought process applies. In most, if not all, cases we are not remedying wrongful acts, we are caring about a status they have in society that was imposed on them, and how, we too, could have

211. *Id.* at 218–19.
212. *Id.* at 219.

suffered the same indignity but for the fortuity of our circumstances.

CONCLUSION

I want to conclude by briefly discussing the relationship of the antisubordination principle to welfare rights.

Extending the antisubordination principle to encompass welfare rights implicates one of principle's most stringent demands, what Owen Fiss calls "interdependence."[213] Earlier, in discussing the requirement of ascription, I had argued in favor of interdependence, that the claim of subordination must be caused by one's social position. This insistence on interdependence makes it difficult to conceive of the poor as a protected class under the antisubordination principle. This is because, in most cases, the status of the poor as disadvantaged in society does not depend on a process of ascription but on other factors, such as one's life choices and conduct.

One cannot say that one's poor status is ascribed if, for example, one's status depended on going to law school rather than business school, because there is not the sense that one's status was imposed based on one's membership in a disfavored group. This is not to say that poverty cannot be an ascribed class,[214] but that an inquiry into whether poverty is ascriptive will depend on whether poverty *itself* plays a role in one's place in society.[215]

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213. Fiss, *supra* note 64, at 20–21 ("The most important criterion for the social groups on which I focused is interdependence, by which I meant that the status of individuals is inextricably linked to the status of groups with which they are identified.").

214. In historically aristocratic societies where one's social class largely determined one's prospects in society, class formed a caste system. For an account of such a society in the context of early American history, see generally GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

215. *See, e.g.*, Sabbagh, *supra* note 132, at 4 ("To take but one example, in the United States, while poverty surely curtails an individual's life prospects to a considerable extent, the matrix of such disadvantage lies in the very fact of being poor—not in the fact of being perceived as belonging to the group of 'the poor.'"); Young, *supra* note 30, at 3 ("It is conceivable for persons to be poor in economic terms and still have stature and dignity in their communities; many a Horatio Alger story invokes the image of such persons.").

Although this should be the subject of its own article, I believe that there is something to the notion that poverty *itself* constitutes a form of subordination, given the increase in inequality in the United States and the prevalence of income volatility. Much of the work of Lani Guinier, for example, has been to provide an argument in favor of poverty as a form of subordination, a subordination that race actually blinds us to by dividing poor blacks and poor and working-class whites. Guinier argues that we should recognize that "racialized hierarchies mirror the distribution of power and resources in the society more generally." Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004); *see also* GUINIER & TORRES, *supra* note 64. My only narrow point here is that to the extent poverty is a subordinated position will

A move towards welfare rights suggests a relaxation of the necessity of this requirement, as welfare rights are not predicated on one's subordinated position. Even under means-tested schemes, all one has to show is that one meets the eligibility requirements, namely that one is (for the moment) poor.

Owen Fiss welcomes this relaxation of the interdependence requirement. For Fiss the interdependence requirement suggests an individualist telos to the antisubordination principle: "In protecting groups we protect individuals, and often we must protect groups in order to protect individuals."[216] Fiss, however, shifts his focus to an independent, communal value. We care about subordination not only because it disadvantages individuals, but because "[i]t disfigures society."[217]

I have much sympathy for Fiss's appeal to community, and the theory of solidarity I derive from the fortuity of our circumstances is my own attempt to develop the content of such a communal, public value. I, however, do not favor a relaxation of the interdependence requirement, for three reasons.

First, the interdependence requirement plays an important role in understanding the structural nature of the claim of subordination. Interdependence distinguishes subordination from the mere fact of being poor or otherwise disadvantaged. The disadvantage under subordination is the disadvantage of a social position that keeps one nearly *permanently* disadvantaged, with little to no options for escape.[218] It triggers the structural perspective that the antisubordination principle takes, looking beyond the current circumstances of a given individual to see if there is something about the *social structure* that is causing the individual's circumstances. To relax the interdependence requirement leaves the antisubordination principle unmoored to social structure and leaves its structural perspective unjustified.

Second, the interdependence requirement is important normatively because it helps to delineate the *urgency* of those subordinated. Those subordinated not only have it worse off, but they are consigned to be worse off, probably forever. The urgency presented by subordination, moreover, entails priority. Those subordinated should have a preferred place in society over those merely disad-

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depend on its effects independent of other causes that might have led someone into poverty.

216. Fiss, *supra* note 64, at 20.

217. *Id.*

218. This sense of structural disadvantage is what Fiss had in mind when he distinguished the disadvantage of blacks from those of the poor generally, since, "[i]n a sense, they are America's perpetual underclass." Fiss, *supra* note 8, at 150.

vantaged, since, by definition, those subordinated have little in the mode of self-help. Hence the interdependence requirement serves as an important signaling function, as it allows us (along with the other elements of subordination I outline above) to identify those in most need of assistance.

Third, and perhaps most importantly, the urgency of subordination combines the public with the individual. As I noted above, our public, communal concern for subordination derives from a solidarity we have with those subordinated, based upon our own recognition of the fortuity of our born-into circumstances. But for our good fortune, we ourselves could have been subordinated, and vice versa. Therefore, the communal value in ending subordination derives precisely from its effects on individuals. There is no need to distinguish the two, as one, in fact, flows from the other.[219]

It is this concern with the individualist consequences of subordination that can provide a basis for the antisubordination principle's concern with welfare rights. The antisubordination principle not only directs us to do more than end existing subordination. It also gives us reason to act more *proactively*, by taking a forward-looking approach to subordination without waiting for subordination to emerge. For example, many laws are designed to avoid concentrations in wealth that could lead to future subordination. Many of the restrictions in alienability in property law, for example, can be understood as attempts to prevent the kind of concentration in land ownership that resulted in earlier feudal societies.[220] Likewise, many anti-poverty welfare rights, such as food stamps or the Earned Income Tax Credit, can be understood to have a structural dimension. Such rights are designed to prevent the emergence of an underclass, regardless of its eventual shape or form.[221] Rather than wait for subordination to happen, we can set up the law in a way that makes it difficult for subordination to take root. Here our concern with welfare rights remains just as strong without any need to diffuse the concept of subordination.[222]

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219. *Cf.* Fiss, *supra* note 64, at 22–23.

220. *See* Joseph William Singer, *Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. (forthcoming 2008); *cf.* Jedediah Purdy, *A Freedom-Promoting Approach to Property*, 72 U. CHI. L. REV. 1237, 1243 (2005) (conceptualizing property as a device to promote human freedom).

221. Anti-poverty measures can also be understood as a form of affirmative action insofar as they eradicate the subordination of existing subordinated positions.

222. For example, why not give each child born in America $100,000? For a more thorough treatment of a similar policy proposal, see BRUCE ACKERMAN & ANN ALSTOTT, THE STAKEHOLDER SOCIETY (2000), which argues for a one time grant of $80,000 to each child

Admittedly, this forward-looking view of the antisubordination principle will result, in contrast to Mark Tushnet, in making welfare rights "peripheral" to the antisubordination principle.[223] It will have an obvious importance to the goal of ending subordination, but it will not directly address the principle's most urgent concerns. Welfare rights are prophylactic, no more. Tushnet, and possibly Fiss, probably would not accept such a secondary view of welfare rights to the antisubordination principle.

But why? Does the antisubordination principle have to justify everything? Broader principles of justice can provide sufficient grounding for welfare rights. Moreover, the solidarity I derive from the fortuity of our born-into circumstances need not limit itself to subordination. It gives us reason to care more broadly about the welfare of society, regardless of the structural nature of that disadvantage. The content of these principles of justice will require far more extensive treatment than I can provide here, but the elaboration of these principles need not come at the expense of the antisubordination principle.[224]

Throughout this Article I have talked about the antisubordination principle largely in the abstract, without directly addressing issues of implementation and, ultimately, interpretation, since my ultimate goal is to enshrine the antisubordination principle within the Equal Protection Clause. It is an Article in ideal theory. For now I offer my thoughts on the antisubordination principle as a further way station, bringing us closer to the goal of a robust antisubordination doctrine. Now, compared to a generation ago, we are profoundly aware of the interconnectedness of our circumstances and the power we can wield in changing the structure of our society. The only humble thought I offer is that, when we reflect on our place in society and the plight of others, what animates us is the thought that "there, but for the grace of God, go I."

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with a high school diploma on his or her twenty-first birthday. I thank Randall Kennedy for this suggestion.

223. Mark V. Tushnet, *The Return of the Repressed: Groups, Social Welfare Rights, and the Equal Protection Clause*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 7, at 6, http://www.bepress.com/ils/iss2/art7/.

224. *See, e.g.*, Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (examining constitutional welfare rights in light of John Rawls's theory of justice).