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Visible Minorities in the Multi-Racial State: When are Preferential Policies Justifiable?

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Visible Minorities in The Multi-Racial State: When Are Preferential Policies Justifiable?

This article outlines the circumstances in which the state is justified in implementing preferential policies in favour of visible minorities and describes an approach to policy formulation. The thesis is that visible minorities warrant preferential treatment in order to rectify past injustices and to redistribute advantages to visible minorities who are chronically poor. "Supply-side" over "demand-side" policies are favoured. Supply-side policies are preferable because they support substantive equality by ensuring that individuals have a minimum level of subsistence. If the goal of achieving substantive equality is to be achieved, the poor should also be entitled to benefit under preferential policies. Thus, preferential policies should target poor people generally and visible minorities specifically.

Cet article délimite les circonstances dans lesquelles l'état est justifié d'appliquer des politiques préférentielles en faveur de minorités visibles et expose les grandes lignes d'une approche de formuler des politiques dans de tels cas. Le principal argument de cet article est que le traitement préférentiel des minorités visibles est justifié afin de rectifier des injustices passées et de redistribuer des avantages aux minorités visibles qui souffrent d'une pauvreté chronique. Cet article appuie des politiques «supply-side» au lieu du «demande-side»; celles-là sont préférables car elles s'inclinent vers l'idéal de l'indépendance en assurant que les individus ont un niveau minimum de subsistance. Cependant, si le but de réaliser une égalité matérielle est d'être pris au sérieux, les pauvres devraient avoir droit aux avantages sous ces politiques préférentielles. Ainsi, les politiques préférentielles devraient s'adresser généralement aux pauvres et spécifiquement aux minorités visibles.

Introduction

The purpose of this article is twofold: to describe the circumstances in which the state can justifiably implement preferential policies in favour of visible minorities and to outline an approach to policy formulation. These issues are of particular importance in light of current controversies in Canada and the United States over whether preferential policies are both fair and effective in addressing racial disadvantage. Critics of

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preferential policies claim that the policies constitute "reverse discrimination," violate the individual's right to equal treatment under the law and ignore the importance of individual merit. They also contend that present generations should not have to pay for the sins of their forebears. Do these views undermine the justifiability of preferential policies? How should one balance competing claims between visible minorities and minorities not identified by colour? These broad questions are the focus of the following article. Throughout this work, "preferential policies" will be defined broadly as policies which legally mandate that individuals be judged by differing criteria depending on the particular visible minority group from which they originate.[1] The term "visible minorities" refers to persons who are non-Caucasian in race or non-white in colour.[2] These persons either identify themselves or are identified by others as being members of various racial groups, including aboriginals, blacks, Chinese, Japanese, Korean, Filipino, Indo-Pakistani, West Indian and Arab, Southeast Asian, Latin Americans, Indonesian, and Pacific Islanders.[3]

This discussion focuses on preferential policies; it does not address legislation that prohibits discrimination.[4] Anti-discrimination legislation attacks discrimination that is intentional ("disparate treatment" or "direct discrimination") and actions or policies that have the effect of discriminating ("disparate impact" or "indirect discrimination"). Such legislation is justifiable because it ensures that citizens receive equal treatment in

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1. See T. Sowell, *Preferential Policies: An International Perspective* (New York: William Morrow, 1990) at 13-14.

2. This definition derives from the work completed by Statistics Canada on the issue of census data and the identification of visible minorities in Canada. See Statistics Canada, *Making the Tough Choices in Using Census Data to Count Visible Minorities In Canada* (Ottawa: Employment Equity Data Program, 1990) and *Approaches to the Collection of Data on Visible Minorities in Canada: A Review and Commentary* (Ottawa: Employment Equity Data Program, 1991). Although Statistics Canada does not classify aboriginal peoples as "visible minorities," they will be considered to be members of this group in this article. I recognize that aboriginals tend to object to being classified as visible minorities on the basis that such classifications overlook aboriginal peoples' distinct political agenda which centres on the rights to self-determination and self-government. They argue that this agenda differs from claims made by visible minorities which are primarily directed at ensuring the effective exercise of common rights of citizenship. By classifying aboriginal peoples as visible minorities in this article, I do not deny that they should be granted rights to self-determination and self-government and none of the policy initiatives proposed herein preclude the possibility of their being granted such rights.

3. This list is not exhaustive. Indeed, as the recent debate over whether to include a question with respect to race on Statistics Canada's 1996 Census Form suggests, categorizing visible minorities into particular groups is a difficult task.

4. See, e.g., *Human Rights Code*, R.S.O. 1990, c. H. 19 and the Canadian *Human Rights Act*, R.S.C. 1985, c. H-6 [hereinafter such legislation will be referred to as "anti-discrimination legislation"].

employment, residential arrangements and membership in voluntary groups. The fundamental question of this article is whether the law should go *beyond* the obligations typically contained in anti-discrimination legislation and require employers and educational institutions to give preferential treatment to visible minorities. Related questions include: what are the normative justifications for preferential policies? On what basis do visible minorities as opposed to other groups in society warrant preferential treatment? Who should bear the burden of rendering compensation to visible minorities?

Each of the first three sections below examines a normative justification for preferential policies. Section I discusses the "rectification principle," under which preferential treatment is warranted in order to correct for past wrongs. Section II focuses on the "utility maximization principle," which asserts that benefits should be granted to visible minorities to the extent that those benefits increase the welfare of society as a whole or the specific visible minority group in particular. Section III analyzes the "distributive justice principle," which holds that groups ought to receive preferential treatment in order to ensure an equitable redistribution of benefits, advantages or opportunities. Section IV addresses the criticisms of preferential policies and suggests the form that they should take. Do the policies place an undue burden on young white males to compensate visible minorities? Does merit matter? Do preferential policies constitute "reverse discrimination"? Section IV points to a means of resolving those issues by using "supply-side" over "demand-side" policies.

"Supply-side" policies commit substantial public resources to improving the quality of education (especially early education), housing, health care, transportation networks and policing in visible minority communities.[5] The costs are largely underwritten by taxing higher income members of society. Supply-side policies address problems associated with racial disadvantage early in people's lives with benefits usually manifested in the long-run.[6]

"Demand-side" policies, in contrast, impose obligations on public and private employers and educational institutions. The effects are visible in the short-run. "Positive" obligations are imposed with affirmative action or employment equity plans which use race as a criterion for hiring and admissions.

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5. M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at 207.
6. *Ibid.* at 208.

The central argument in section IV is that supply-side policies are not only fairer but also more useful in addressing the issue of racial disadvantage. Demand-side policies may result in young white males bearing a disproportionate burden of rendering compensation to visible minorities. The young white male may have to forgo employment positions or educational opportunities that he otherwise would have earned on merit so that a member of a visible minority can fill the place. Section IV argues that this burden is too onerous; we all have only one life to live and, in pursuing a goal, we expect to be judged based on our abilities. Affirmative action undermines these expectations.

Supply-side policies are appealing because they support the ideal of "substantive equality" which ensures that individuals have a minimum level of subsistence. The minimum level is a prerequisite for advancement in employment and education. Preferential policies that support substantive equality will likely also be more politically palatable to a majority of the population, some of whom may otherwise be forced to sacrifice opportunities under demand-side policies.

What are the implications of substantive equality for a racially-specific policy? The paper argues that there are reasons for providing preferential treatment to visible minorities as opposed to other groups, including the necessity of rectifying past injustices and the need to redistribute advantages to visible minorities who are chronically poor. However, as the distributive justice principle asserts, it is unjust to compensate impoverished visible minorities without compensating impoverished people generally. If the goal of substantive equality is to be reached, the poor should be entitled to benefit under preferential policies. Therefore, the policy approach favoured in section IV is one in which preferential policies target poor people generally and visible minorities specifically.

Preferential policies can be both fair and useful if they are sensitive to the realities of the communities, businesses and institutions in which they are implemented. Too often, discussions about these policies amount to little more than an exchange of slogans—such as "equality"! or "reverse discrimination"!—that ignore the complexity of real life situations and fail to balance commitments to competing values (for example, meritocracy versus compensation for past wrongs). As a result, debates tend to be extremely divisive, pitting advantaged and disadvantaged groups against each other. An aim of this article, therefore, is to inform those discussions and to suggest policies that will be acceptable to parties on all sides. Unless we are able to reach compromises in developing preferential policies, racial harmony and social justice will remain elusive goals.

I. *The Rectification Principle*

Some scholars consider preferential policies justified because the policies are necessary to correct for past injustices to visible minorities. The rectification principle looks to the past to determine whether a person or group suffered an injustice that demands compensation. However, the features of the rectification principle are controversial. What constitutes a past injustice? Who is entitled to benefit? What type of compensation is appropriate? Section I argues that the rectification principle as commonly formulated is unable to answer adequately these questions. It favours a redefinition of the principle so that preferential policies favouring a specific visible minority group (and descendants of the group) may be justified only if a law, policy or systemic practice has previously victimized the group.

1. *Two Models of the Rectification Principle*

Some theorists argue that compensation for past wrongs must be awarded on the principle that the individual who suffered a particular injustice should be restored to the position he or she occupied prior to the occurrence of the injustice.[7] This principle has been enunciated in the context of two theoretical models: the "just holdings model" and the "tort-based compensation model."

a. *The Just Holdings Model*

Nozick has enunciated a rectification principle in the context of his "entitlement theory." His central claim is that individuals have a right to dispose of their goods and services freely as long as they have justly acquired these "holdings."[8] Inherited wealth, athletic prowess or high intelligence may enable some individuals to accumulate more wealth than others. As long as the accumulation of wealth was legitimate, then no injustice has been done. However, if the initial acquisition involved the use of force, the acquisition was illegitimate and so is the current title.

If the acquisition of wealth was illegitimate, Nozick asserts that a "principle of rectification of injustice" is triggered.[9] This principle provides that a past injustice will be rectified by elevating its victims to

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7. See, *e.g.*, R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) and A. Goldman, *Justice and Reverse Discrimination* (Princeton: Princeton University Press, 1977), discussed *infra* section I.
8. Nozick, *ibid.* at 151.
9. *Ibid.* at 152-53, 230-31.

a level of well-being which is at least as high as the victims would have occupied had the injustice never occurred.[10] As Nozick states, the rectification principle

> presumably will make use of its best estimate of subjunctive information about what would have occurred . . . if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.[11]

Nozick does not completely describe the circumstances in which the principle will apply. According to him, the particular history of the society in question will determine which "operable rule of thumb" best approximates a detailed application of the principle.[12]

The just holdings model provides a justification for preferential policies in limited circumstances. Proponents of the model envision a minimal state in which individuals should be left alone to acquire and exchange goods—or "holdings"—as they see fit. Slavery, however, as well as the vast array of discriminatory policies that affected blacks after slavery was formally abolished, is viewed as an unjust form of confiscation. Hence, the rectification principle would govern. Application of the rectification principle to aboriginal peoples would likely require the state to return lands to them. Their lands were often acquired using force and would therefore constitute illegitimate holdings. In order to place aboriginal peoples in the position they would otherwise have occupied, either the lands must be returned or an alternative form of compensation must be provided.[13]

b. *The Tort-based Compensation Model*

Other formulations of the rectification principle focus on the type of compensation that individuals should receive. According to Goldman, "reverse discrimination" is justified where an individual's rights have been violated. Goldman defines "reverse discrimination" as "preferential treatment for minority-group members or women in job hiring, school admissions, or training-program policies."[14] Rather than addressing the

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10. *Ibid.* at 231. See also G.S. Kavka, "An Internal Critique of Nozick's Entitlement Theory" in A. Corlett, ed., *Equality and Liberty* (Hong Kong: Macmillan Academic and Professional, 1991) 307.
11. Nozick, *supra* note 7 at 152-53.
12. Nozick, *ibid.* at 231.
13. See D. Lyons, "The New Indian Claims and the Original Rights to Land" (1977) 4 Soc. Theory & Practice 249 for an argument that aboriginal peoples today probably do not have a right to their ancestors' land even if it had not been unjustly appropriated.
14. Nozick, *supra* note 7 at 4.

historical position of a particular group, reverse discrimination redresses a specific injury committed against the individual. Where an individual's rights have been infringed, the individual "should be restored by the perpetrator of the injury to the position he would have occupied, had the injury not occurred."[15] Thus, the rectification principle applies only where the harm is "direct, clear, and measurable," which, as Goldman states, is "a corollary long used in the law of torts . . . ."[16]

Under the tort-based compensation model, the rectification principle applies to groups only if three criteria are met: the group must have established practices or purposes and its members must interact; it must have suffered specific damages that cannot be assigned differentially within the group; and, it must have an official body which can receive the compensation on behalf of all its members.[17] According to Goldman, under these restricted conditions, the only visible minority group that qualifies is "the Indian tribes whose treaties were violated by the federal government."[18] Black Americans do not qualify because they do not meet the third condition, although Goldman admits that "some kind of compensation seems owed to the entire group."[19]

2. *Problems With Counterfactual Reasoning*

In many cases, it is difficult, if not impossible, to apply the rectification principle to resolve issues of racial injustice. One difficulty with the principle is that its application involves counterfactual reasoning, or reasoning about what would have been the state of affairs in the absence of the original injustice.

a. *Temporal Considerations*

The rectification principle holds that individuals should be placed in the position they would have occupied, had the injustice not occurred. Therefore, if we wish to compensate American blacks we would have to ask what their positions would have been if slavery and the Jim Crow laws in the American South had not existed. But responses to this question are indeterminate. A key issue is how far back in time it is necessary to travel in order to ensure that the original injustice has been rectified. The question is not whether we would literally return blacks to the African

15. *Ibid.* at 69.
16. *Ibid.* at 67.
17. *Ibid.* at 85.
18. *Ibid.*
19. *Ibid.*

countries in which they resided before they became slaves, but which standard of living we would use as the basis on which to rectify the injustice. Do we use the standard of living of blacks in Africa prior to their coming to America? With respect to past injustices that aboriginal peoples have suffered, would we refer to their standard of living prior to being dispossessed of their lands? The difficulty is that we cannot ascertain what the standard of living originally was for these groups and we cannot, therefore, place them in the position they would have occupied had the injustice not occurred. In addition, given the changes in living standards since the original injustice, it is conceivable that we may make some groups politically and economically worse off by returning them to their position prior to the injustice.

In order to fulfill the goals of the rectification principle, perhaps we should speculate how blacks would have fared in America if they had not been forced to endure slavery and discrimination under Jim Crow laws. Such speculation suggests that a more sophisticated version of the rectification principle is necessary. The principle would seek to restore the aggrieved parties to the standard of living they would have occupied *today*, had the original injustice not occurred. However, hypothesizing about what the group's current position would have been in the absence of the original injustice is also problematic. First, blacks were brought to America as slaves; many would not have come but for institutionalized slavery. Thus, determining what their position would be today if the injustice had not occurred may mean that they would not even be in America. Second, an issue of "infinite regress" arises; an improper act committed by group A against group B in the relatively recent past may have been preceded by an act of injustice by group B against group C in the more distant past.[20] It is difficult to assess the position the aggrieved group would have occupied today in light of the various wrongful acts that have occurred throughout history.

b. *Scope of Injury*

Another difficulty with the rectification principle involves determining the scope of the harm. It is often unclear whether the present plight of the affected group stems from the original cause alone or whether the occurrence of additional events also contributed to the injustice. An example is the severely disadvantaged position of aboriginal peoples. Is it entirely due to the fact that they were unfairly dispossessed of their

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20. Trebilock, *supra* note 5 at 193.

lands? Or does it also result from subsequent occurrences such as the fact that many aboriginal peoples were unwilling to integrate into a society led by white Europeans? In the case of American blacks, is slavery alone responsible for their disadvantage or must we attribute their difficulties partly to economic transformations such as the deindustrialization of American cities and the loss of jobs for many blacks employed in manufacturing industries?[21] There may be multiple causes of a group's current plight and one may be unable to determine precisely to what extent a group's current circumstances derive from a particular event.

c. *Who Benefits? The Resort to Tortious Principles of Compensation*

Another problem in applying the rectification principle lies in specifying the class of beneficiaries under preferential policies. While it is generally impossible to compensate the original victims of past injustices, it is possible to compensate their descendants. The categorization of descendants, however, is difficult. For example, in determining who is an aboriginal, do we count on-reserve, off-reserve, status and non-status Indians? Métis and Inuit? Must we trace the lineage of these individuals? If so, how? Do we include all blacks, regardless of their personal histories, or only the blacks whose histories can be traced to the West Coast of Africa where a majority of slaves originated?[22] Do we include more recent immigrants from the Caribbean, Africa or England? The issue is not simply who is a descendant but also whether individuals other than direct descendants should benefit.

In addition, as time passes, it becomes more likely that if the wrongful act had not occurred, individuals who claim to be beneficiaries under the rectification principle would never have been born.[23] As Davis explains,

> the principle of rectification will probably not help us if we attempt a full-scale rectification of the injustices in our society's past, for if we were to project 200 years of our country's history in a rectified movie, the cast of characters would surely differ significantly from the existing cast. Had our ancestors lived and moved in a rectified version of our history, quite likely many of us would not be alive today.[24]

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21. Such an explanation is put forth by W.J. Wilson in *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987) at 12.
22. See B. Quarles, *The Negro in the Making of America*, 3d ed. (New York: Simon & Schuster, 1996) at 22.
23. G. Sher, "Ancient Wrongs and Modern Rights" (1981) 10 Phil. & Pub. Affairs 7.
24. L. Davis, "Nozick's Entitlement Theory" in J. Paul, ed., *Reading Nozick: Essays On Anarchy, State, and Utopia* (New Jersey: Rowman & Littlefield, 1981) at 351.

This reasoning may, however, regress too far; we all might not exist but for the occurrence of all sorts of events. We may still decry an injustice despite the fact that, but for the occurrence of the injustice, we may not be alive today.

Goldman attempts to avoid difficulties in identifying beneficiaries and defining the scope of the harm by awarding compensation according to tortious principles of compensation. One must, however, question the utility of drawing an analogy to the law of torts in cases of racial discrimination. Consider that it was once a crime in the United States to provide education to slaves.[25] Even after the enactment of the Fourteenth Amendment, blacks were denied equal educational opportunities and relegated to inferior educational institutions.[26] The effects of the original policy of denying blacks an education were far-reaching and undoubtedly affected many succeeding generations. A tort-based approach would seek to assess the extent of the harm and to restore the victims to the position they occupied prior to the occurrence of the harm. However, since the original injustice had "domino" effects throughout the black community, it would be difficult to meet these requirements.

3. *A Reformulated Rectification Principle*

Despite the difficulties in applying the principle of rectification, we need not discard it altogether as a justification for compensating visible minorities. In the case of certain visible minority groups, it seems safe to assume that their current impoverishment is due in some measure, however indeterminate, to the original injustice.

a. *Group-based Approach*

An alternative conception of the rectification principle addresses wrongs committed against groups. Thus if a law, policy or social practice victimized a particular group because of a characteristic that every member of the group possessed (*i.e.*, a certain colour of skin), it is justifiable to grant compensation to members of that group. Under this conception of the rectification principle, the issue is whether an indi-

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25. See *Regents of University of California* v. *Bakke* 438 U.S. 265 (1978) at 371 [hereinafter *Bakke*], Brennan, White, Marshall and Blackmun JJ citing R. Wade, *Slavery in the Cities: The South 1820-1860* (New York: Oxford University Press, 1964) at 90-91.

26. *Ibid.* The Fourteenth Amendment prescribes that "no state shall . . . deny to a person within its jurisdiction the equal protection of the laws . . . ."

vidual possesses the characteristic that prompted victimization in the first place.[27]

The question may arise: why should every member of the group receive compensation instead of just those individuals who suffered the injustice? One reason is that the injustice was committed against the group and, therefore, some form of compensation must be made to the group. For example, in *Plessy* v. *Fergusson*, the high-water mark of the Jim Crow era, the U.S. Supreme Court upheld a Louisiana law calling for separate railroad accommodations for white and "colored" passengers.[28] Similar decisions were rendered in Canada as late as 1940. In *Christie* v. *York Corporation*,[29] a tavern operator refused to serve a black man because of his colour. The Supreme Court of Canada rejected the man's claim for damages for humiliation, holding that, "[a]ny merchant is free to deal as he may choose with any members of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either."[30]

The lives of all blacks were affected by these judgments (and by every other discriminatory law). Every black risked being denied service by a merchant, restaurant or hotel owner, or railroad company. Because the injustices were committed against blacks as a group, the remedy should also be group specific.[31] It is true that the liberty of every black was not infringed; only those blacks who requested service at taverns or who sought railroad accommodations were discriminated against. Nonetheless, each member of the group endured "psychological suffering." Visible minorities who live and have lived in constant fear of being victimized by the Ku Klux Klan or neo-Nazi groups experience harm. While most blacks did not actually have their houses burned down and did not fall victim to whipping and lynching by the Ku Klux Klan, all lived in fear. The "harm" therefore extended to every member of the targeted group whether or not every member actually experienced physical violence.

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27. See O.M. Fiss, "Groups and the Equal Protection Clause" in T. Nagel, M. Cohen & T. Scanlon, eds., *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977) at 84. Fiss proposes a doctrine of constitutional interpretation called the "group-disadvantaging principle" under which blacks *as a group* ought to be protected from hostile state action.

28. 163 U.S. 537 (1896) [hereinafter *Plessy*].

29. [1940] 1 D.L.R. 81 (S.C.C.) [hereinafter *Christie*].

30. *Ibid.* at 82.

31. One may question the *type* of redress that is owed today given the fact that the discriminatory practices have been abandoned. This section discusses the normative justification for providing compensation; section IV will discuss the type of compensation owed.

b. *Is the Rectification Principle Underinclusive?*

If one accepts that visible minorities have suffered discrimination in the work force and are entitled to preferential treatment under the rectification principle, are other disadvantaged groups—such as women, people with disabilities, homosexuals, Jews and other religious groups—able to claim that they too have been victims of past discrimination?[32] Women could argue that they have historically been treated as the property of their husbands and that, like visible minorities, they were excluded from public institutions, denied the vote and subjected to discrimination in the labour force.

Although gender discrimination existed and still exists, there is a strong case to be made for denying women and other groups preferential treatment if the effects of past discrimination are now less pervasive. Statistics confirm that the effects of discrimination against women have been alleviated to a considerable degree.[33] Women as a group may not *need* preferential treatment. The key question is: what are the effects *today* of this discrimination? If the past discrimination has been alleviated, and the victims have made advances so that the effects of the original injustice are not as severe, then preferential policies are unnecessary.

4. *Summary*

If the rectification principle is conceived in terms of the just holdings model or the tort-based compensation model, serious difficulties arise. These difficulties relate primarily to counterfactual reasoning: who benefits under the preferential policy, the scope of the injury and what constitutes a harm that warrants compensation. I argue that despite these difficulties, the rectification principle still serves as a justification for assigning benefits to visible minority groups. In particular, if the group

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32. L.E. Trakman, "Substantive Equality in Constitutional Jurisprudence: Meaning within Meaning" (1994) 7 Can. J.L. & Jur. 27 at 29. In the constitutional context, Trakman asserts that "the definition of equality should encompass the interests of each group being compared, not one above the other. Minorities and women should not be co-opted to an unidimensional conception of equality at the expense of their distinctiveness." This argument differs from but is consistent with arguments raised in this paper with respect to visible minorities.

33. Statistics Canada reports that in 1991, 5.6 million women, representing 53 percent of all women 15 and over, were employed. This was up from 41 percent in 1975. By contrast, male employment fell from 74 percent to 67 percent over the same period. The increased level of employment among women may be related to the fact that they are achieving higher levels of education. For example, in 1991, 40 percent of all women aged 15 and over had some post-secondary training, up from 25 percent in 1981. Statistics Canada, "Highlights" in *Women in the Workplace*, 2nd ed. (Ottawa: Ministry of Industry, 1993).

was targeted by a discriminatory policy, law or practice then compensation under the rectification principle is warranted. In such a case, the remedy ought to be awarded to the whole group and not to individual victims. Compensation should be based on the fact that an injustice occurred and on the fact that the effects of the injustice continue to affect the visible minority group.

II. *The Utility Maximization Principle*

A second justification offered in support of preferential policies is that they can maximize social utility. Unlike the rectification principle which involves an assessment of historical events, the utility maximization principle is forward looking. It underpins policies that seek, in the future, to increase social welfare. This section addresses a number of issues relating to the concept of utility maximization. How is utility measured? What are the predictions underlying the principle? Does the principle have a moral foundation? The argument in this section is that by itself, the utility maximization principle cannot justify the implementation of preferential policies. However, aspects of the principle, particularly its focus on role models, diversity and need, are crucial in developing a normative justification for preferential policies.

1. *Two Models of Utility Maximization*

Some theorists assert that the welfare of society, or of a particular visible minority group, will be maximized if the benefits of implementing a preferential policy outweigh the costs. This assertion is made in the context of two theoretical paradigms: the "group welfare model" and the "efficiency model."

a. *Group Welfare Model*

According to the group welfare model, preferential policies will encourage integration of minorities into mainstream American or Canadian life more quickly than would otherwise be possible. Proponents of this model argue that events such as the 1992 riots in Los Angeles, after the verdict in the Rodney King case, occur because of blacks' frustration with their exclusion from the mainstream. Preferential policies are useful because they will ensure that visible minority groups become more evenly distributed among different social and economic classes.[34] This is desir-

34. See *supra* note 7 at 141-42 for a summary of this position.

able first, because it will hasten the achievement of harmony between racial groups and second, because members of minority groups will come to occupy positions of power and prestige.

Under the group welfare model, cost-benefit analyses are central. The key question is whether the benefits to the visible minority group outweigh the costs to society as a whole. Benefits are often assessed in terms of whether the preferential policy meets a specific need of the group. For instance, do preferential policies in medical or law schools address a need among disadvantaged visible minorities for persons who will provide them with legal and medical services.[35] Implicit in this approach is the view that minorities service members of their own racial groups more effectively.

Preferential policies may also increase group welfare by providing role models for younger members of the group. Role models are individuals whom students can emulate; they, therefore, motivate students to do their best work.[36] The younger members of the minority group hopefully will then move into similar positions more quickly. Over time a critical mass of group members in key positions develops and the risk of individual stereotyping decreases.[37] The benefits derived from the preferential policies thus "trickle down" from role models to other members of the group.

In addition, proponents of the group welfare model argue that preferential policies encourage racial diversity in employment and education. Racial diversity is desirable because it benefits not only the group in question but also society as a whole since it promotes a "robust exchange of ideas."[38] This robust exchange of ideas encourages understanding and is a first step towards racial harmony.

b. *Efficiency Model*

Some efficiency theorists assert that preferential policies move competitive markets more quickly towards a non-discriminatory equilibrium.[39] Becker argues that employers who have a "taste" for discrimination will

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35. T. Nagel, "Equal Treatment and Compensatory Discrimination" in Nagel, Cohen & Scanlon, *supra* note 28, 16.

36. For a full discussion of the role model argument in the university context, see A.L. Allen, "The Role Model Argument and Faculty Diversity" in S.M. Cahn, ed., *The Affirmative Action Debate* (New York: Routledge, 1995) 121.

37. See *Action Travail des Femmes* v. *C.N.R.*, [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210 [hereinafter *Action Travail*].

38. See *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

39. J.J. Donahue III, "Is Title VII Efficient?" (1986) 134 U. Pa. L. R. 1421.

forgo certain advantageous transactions (such as hiring blacks whose marginal revenue product exceeds that of at least some whites) in order to realize their preferences not to employ blacks.[40] This aversion to employing blacks imposes certain pecuniary costs on discriminatory employers. White employees earn more than blacks who are equally or more productive, since discriminatory employers do not face the same non-pecuniary costs in employing them. The demand for visible minority workers is reduced and fewer blacks are hired. Those blacks who do secure employment earn a lower wage than they would in the absence of discrimination.[41]

Building on Becker's analysis, some efficiency scholars consider preferential policies inefficient and argue that the social costs outweigh the benefits.[42] The market, not the state, should guide employers' hiring decisions. Otherwise, non-pecuniary costs such as administration costs borne by the state[43] and litigation costs borne by employers would be substantial.[44] These costs outweigh any gains to be had from lowering the costs of transactions between members of different races (white and blacks).[45] Welfare will be maximized if competitive markets operate without restraint. Some efficiency theorists further assert that preferential policies are not only costly but also, in the long-run, unnecessary. If discriminatory firms fail to maximize profits, they will, over time, be driven from the market by firms that are not motivated by animus.[46] Thus, laws forbidding purely private discrimination are unnecessary.

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40. G. Becker, *The Economics of Discrimination,* 2nd ed. (Chicago: Chicago University Press, 1971).

41. Discriminatory practices may not lead to a disequilibrium in terms of social welfare; they can be consistent with utility maximization. The non-pecuniary costs associated with bigoted preferences prevents a higher equilibrium from being achieved in terms of social welfare but allows a lower equilibrium to be sustained in the short-term. At this lower equilibrium (lower than that achievable in the absence of discriminatory preferences), employees and employers are maximizing individual utility for a given set of preferences.

42. R. A. Posner, "The Efficiency and the Efficacy of Title VII" (1987-88) 136 U. Pa. L.R. 513 at 515. Posner interprets Becker's work as suggesting that anti-discrimination legislation does not reduce the costs of discrimination. Posner states, "In Becker's analysis, the costs to whites of associating with blacks are real costs, and a law requiring such associations does not, at least in any obvious way, reduce those costs." Posner cites Becker, *supra* note 40 at 153-54. However, although Becker does examine the non-pecuniary costs associated with tastes for discrimination (and the shifts in market equilibria that result), he does not explicitly draw conclusions with respect to the benefits or necessity of anti-discrimination law *per se*.

43. Posner points specifically to the fact that "in the year ending June 30, 1986, more than 9,000 suits charging employment discrimination, the vast majority under Title VII, were brought in federal court. The aggregate costs of these cases, and the many more matters that are settled without litigation, must be considerable." Posner, *ibid.* at 514.

44. *Ibid.* at 519.

45. *Ibid.* at 514.

46. *Supra* note 5 at 198.

Despite these arguments, Donahue argues that the costs of preferential policies do not outweigh the benefits, which include both symbolic gains and actual gains.[47] Donahue agrees that in the long-term the market will eliminate bigoted employers, yet he contends that this process will occur more quickly with the assistance of preferential policies. Discriminatory employers have imperfect abilities to collect and to react to all relevant information. They may not, therefore, respond to incentives as predicted. Preferential policies serve a useful purpose in that they actually hasten the market's movement to the new, non-discriminatory equilibrium.[48]

2. *Problems with Utility Calculations*

a. *What is "Utility" and How is it Measured?*

Determining whether utility is maximized in a given instance can be difficult, if not impossible. A first obstacle lies in determining what precisely counts as "utility." Does "utility" refer to an individual's desire not to be discriminated against? To increasing an individual's self-respect regardless of one's own preferences? To the development of a society that operates efficiently? The term "utility" seems to refer to a number of factors, all of which in some way affect a person's well-being.

A further difficulty involves the question of how to measure utility. An obvious response would be that we must assess whether the costs of implementing a particular preferential policy outweigh the benefits. This comparison, however, is difficult to make. A policy decision to abolish affirmative action programs may generate gains in utility for employers who maximize profits by hiring whomever they please. But the decision generates losses for many employees, including visible minorities. How can the net effect of this policy decision on various groups be measured? As Trebilcock explains,

> impacts on individuals' utility functions are not directly observable by collective decision-makers and there is no ready way of ensuring accurate revelation by individuals of their evaluations of these impacts, thus rendering the utilities and disutilities associated with such a decision largely unmeasurable and incommensurable.[49]

Trebilcock's point is, first, that observing utilities (and disutilities) is difficult because the utility of a particular policy will differ depending on the group in question. Second, even if utilities are discoverable, there is no sure way to weigh them, one against the other.

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47. *Ibid.* at 1604.
48. *Supra* note 39 at 1421-22.
49. *Supra* note 5 at 8.

b. *Role Models*

Although it may not be possible to measure precisely the utilities and disutilities of a preferential policy, it may nevertheless be possible in some cases to assume that the benefit to the minority community will outweigh the costs to the dominant community.[50] For example, the benefits to the black community of role models, such as Thurgood Marshall on the U.S. Supreme Court, outweigh the costs to the white community of not having another white justice on the court.

This utility calculation may be unpersuasive to role models for minority communities. Some individuals may be concerned that their "job" as a role model forces them to paint a false picture of the likelihood of success for younger members of their group. Richard Delgado, a black law professor, imagines himself speaking to children in an inner-city school. He explains, "I am expected to tell the kids that if they study hard and stay out of trouble, they can be become a law professor like me. That, however, is a very big lie: a whopper."[51] Delgado asserts that if he were honest, he would advise the children to become major league baseball or basketball players since their chances of success are much better in those lines of work.[52] In terms of a utility calculation, Delgado may conclude that the benefits to the black community of telling these "lies" do not outweigh the costs to the white community of instituting these role models.

It may be argued, however, that Delgado misconceives the role of role models. Even if it is unlikely that the children will become law professors, they may be inspired to work harder and to improve their grades once they hear a law professor speak. The message that the role model sends is not that children will necessarily become law professors but that their chances for success in whatever career they choose will increase if they work harder. Rather than viewing role models as "liars," we should consider them as examples for others.

A more compelling argument against role modeling is that often those who require preferential treatment are not the true beneficiaries.[53] As Professor Carter explains, the most disadvantaged black people are not in a position to benefit from preferential treatment because "their disadvan-

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50. *Supra* note 35 at 14.
51. R. Delgado, "Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?" (1991) 89 Mich. L. Rev. 1222 at 1228.
52. *Ibid.* at 1229.
53. *Supra* note 20 at 115.

tage has taken that opportunity from them."[54] It is doubtful that the impoverished inner-city black or the native child on a reserve will benefit much from the fact that a black judge sits on the Supreme Court or a native professor has been appointed to the law faculty of a nearby university. If anyone benefits from these role models, it will be blacks or natives who have the financial resources to attend institutions where the role model is placed.

Still, while not everyone benefits from a role model, some will. Where visible minority groups have been discriminated against in the past, it is important for members to know that there is a possibility of success. In the black community, for example, politicians such as Colin Powell and Jesse Jackson, sports figures such as Michael Jordan and Tiger Woods, movie stars such as Denzel Washington and Morgan Freeman, and jazz musicians such as Oscar Peterson and Ella Fitzgerald have been significant role models for younger generations. They show that there are different paths to success and that it is possible for blacks to succeed in this society.

c. *Needs of the Community*

Some scholars argue that the utility calculation weighs in favour of preferential policies if one considers the broad needs of a particular visible minority group. Nagel supports preferential admissions policies for black medical students. He argues that there is a need for greater numbers of black doctors because otherwise the needs of the black community will go unmet. Arguments on behalf of a rejected white applicant are weak because the need for black doctors is greater than the need for white doctors. The self-esteem of whites as a group is not endangered by such a practice, "since the situation arises only because of their general social dominance, and the aim of the practice is only to benefit blacks and not to exclude whites."[55] Hence, the benefits for the more needy group outweigh the costs to members of the dominant group.

"Needs" in this context means more than the performance of routine medical procedures. "Needs" refers to a distinct level of understanding that visible minority doctors can bring to bear on delivering medical services to members of their own race. For instance, East Indians tend to suffer from higher rates of premature cardiovascular disease than other

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54. S.L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991) at 80.

55. *Supra* note 35 at 16. This argument is similar to the holding in *Re Athabasca Tribal Council* v. *Amoco Canada*, [1981] 1 S.C.R. 699, 124 D.L.R. (3d) 1 discussed *infra*. [hereinafter *Amoco Canada* cited to D.L.R.].

racial groups.[56] An East Indian physician may be more sensitive to the unique risk factor profiles of East Indian patients and target prevention efforts accordingly.

3. *Problems with Predictions*

One difficulty with the utility maximization principle is that it makes predictions about what will be the state of affairs once a particular preferential policy is implemented. Generally, these predictions are based on assumptions that make the usefulness of the principle itself questionable.

a. *Diversity*

A popular argument in favour of preferential treatment is that it will increase diversity in education and employment. The value of this objective harks back to John Stuart Mill's view that society advances if a variety of opinions occupy the "free market of ideas."[57] The importance of diverse opinions within educational institutions was the gist of the U.S. Supreme Court's ruling in *Bakke* that "ethnic diversity . . . is . . . one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body."[58] The Court decided by a vote of five to none that the Constitution permits affirmative action plans that allow race, on a case by case basis, to be taken into account in order to achieve a more diverse student body.[59] A more ethnically diverse faculty or student body will also be a more intellectually diverse faculty or student body, both of which are crucial features in the development of academic institutions.[60] Consider, for example, "Eurocentric" accounts of North America which do not include accounts of lifestyles, experiences and mistreatment of aboriginal peoples and black slaves. Such histories are not only inaccurate but also deceiving; they paint a "rosy," "clean" and biased version of history when such a history did not occur. Increasing the number of visible minorities on faculties and in student

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56. S. Anand, H. Gerstein & S. Yousuf, "Glucose Metabolic Abnormalities in South Asians in Canada–Study of Heart Assessment and Risk in Ethnic Groups (SHARE); Pilot Study Results" (1996) 17 Eur. Heart J. (Abstract Supp.) 39.
57. J.S. Mill, *On Liberty* (Illinois: Harlan Davidson, 1947) ch. 2.
58. *Supra* note 25 at 314.
59. See R. Dworkin, "What did *Bakke* Really Decide?" in R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 305.
60. See R.L. Simon, "Affirmative Action and the University: Faculty Appointments and Preferential Treatment" in Cahn, *supra* note 36.

bodies encourages the exposition of accounts of history and politics that differ from the traditional, white manner of academic inquiry.[61] The goal is not to compel others to adopt new viewpoints but to disseminate information and to express alternative viewpoints. In so doing, theoretical debate is invigorated, truth about the lives of others is expressed and new objects of inquiry are investigated.

b. *Integration into the Mainstream*

Proponents of the group welfare model argue that preferential policies will hasten integration of visible minorities into mainstream life. This was an important argument in *Action Travail des Femmes* v. *CNR*.[62] Action Travail alleged that CN's general hiring practices for unskilled labourers discriminated against women. The Tribunal ordered that CN hire one woman in every four employees hired until it reached the goal of 13 percent representation by women in the targeted job positions. The Supreme Court affirmed this order, holding that affirmative action programs help to create a "critical mass" of the previously excluded group in the work place.[63]

Underlying this decision is the view that a critical mass of women will encourage, if not compel, integration of women in the workplace. However, in many instances, the effects of affirmative action can be divisive. For instance, on many U.S. university campuses, affirmative action policies have contributed to widespread separatism and racial tension among students and faculty alike.[64] At least two colleges, Temple University and the University of Florida, have White Student Unions which were established in opposition to perceived racial double standards in admissions and campus life.[65] At Oberlin College in Ohio, the administration has set up "special interest" dormitories for minority groups, yet college officials admit that racial hostility persists on campus.[66] University of Pennsylvania officials have agreed to fund a separate black yearbook, even though only 6 percent of students at the university are

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61. See D. D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (New York: Vintage Books, 1992) at 67.
62. *Supra* note 37. See also B. Vizkelety, "Affirmative Action, Equality and the Courts: Comparing *Action Travail des Femmes* v. *CN* and *Apsit and the Manitoba Rice Farmers Association* v. *Manitoba Human Rights Commission*" (1990) 4 C.J.W.L. 287.
63. *Supra* note 37 at 1143-44.
64. From "Diversity Project 1989" cited in D. Takagi, *The Retreat from Race* (New Brunswick: Rutgers University Press, 1992) at 110.
65. *Supra* note 61 at 49.
66. *Ibid.* at 47.

black and all other students are represented in one yearbook.[67] Duke University established a policy that required departments to establish not quotas but "incentives" for minority recruitment. The President of the university approved the policy on the ground that under a more stringent policy, a department may be pressured to hire unqualified applicants who may not be motivated to carry out the research required for tenure appointments. After intense pressure, mainly from minority students and some faculty, the Academic Council reversed its policy and imposed a minority hiring policy.[68]

Practical experiences with affirmative action demonstrate that while the objective of integration is laudable, the means chosen may be counterproductive. Rather than creating harmony among races, affirmative action often creates bitterness and resentment. We must question whether the divisive effects of certain preferential policies are worth enduring for the mere possibility of integration in the long-term.

c. *Elimination of Discriminatory Firms*

At the centre of the debate among efficiency theorists is the issue of the speed with which a non-discriminatory equilibrium will be reached and the means that should be employed. Donahue contends that preferential policies will move society towards the non-discriminatory equilibrium faster than if such policies were not implemented. Nevertheless, there are indicators in Canada that the market is moving towards the elimination of discrimination in the absence of preferential programs. In addition, some firms are voluntarily implementing preferential treatment in favour of visible minority groups.

Despite the repeal of Ontario's *Employment Equity Act*[69] in 1995, a number of companies have continued with equity initiatives. A survey of 221 employers by Omnibus Consulting Inc. of Toronto indicated that 54 percent of companies thought repealing the provincial EEA would have little effect on their equity initiatives while about 24 percent said they thought implementation of such initiatives would be delayed. Twenty-three percent of companies said they would stop all work on employment equity. If the provincial EEA were to be reformed instead of repealed, 69 percent of companies said they thought the change would have little impact on their equity initiatives, while 24 percent stated that they would

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67. *Ibid.* at 48.
68. *Ibid.* at 163-66.
69. S.O. 1993, c. 35 rep. by *Job Quotas Repeal Act*, 1995, S.O. 1995, c. 4 [hereinafter Provincial EEA].

delay implementation of their programs. Only eight percent stated that they would withdraw their initiatives completely.[70]

Voluntary actions by firms to adopt some sort of affirmative action support the argument that the market itself may eliminate racial discrimination. If so, is government intervention necessary?

4. *The Moral Basis of Utility Arguments*

a. *Efficiency Model*

In examining justifications for preferential policies, it is crucial to mention that certain aspects of the utility maximization paradigm lack moral foundations. The theory is that if society functions more efficiently, everyone is better off; thus, we should maximize efficiency. It is entirely possible, however, that an efficient society would *not* make us all better off. As discussed, employers can engage in racist hiring practices which are nevertheless efficient. Although profits would be maximized, what of employees and prospective employees? These individuals deserve equal treatment when being considered for employment or promotions, but the efficiency model disregards these interests. The model tolerates racism as long as, in the final analysis, efficiency will be maximized. The model is open to criticism because it "takes existing preferences, of whatever kind, as givens and provides no ethical criteria for disqualifying morally offensive, self-destructive, or irrational preferences unworthy of recognition."[71] If the utility maximization principle is to serve to justify preferential policies, the principle must be evaluated on the basis not only of its predictions about whether the market will eliminate discrimination but also its willingness to disregard morally reprehensible preferences *because* they are immoral.

b. *Need: The Bridge between Utility Maximization and Distributive Justice?*

While the efficiency model lacks moral foundation, another strand of the utility maximization principle does not. The group welfare model aims to reduce poverty and inequality in a particular group.[72] Welfare is defined

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70. M. Gibb-Clark, "Employers favour equity reform: Many want Ontario law changed or left alone rather than repealed as Tories have vowed" *The [Toronto] Globe and Mail* (23 June 1995) B6.

71. *Supra* note 5 at 21. Trebilcock is speaking here specifically about Pareto efficiency.

72. J. W. Nickel, "Preferential Policies in Hiring and Admissions" in B. Gross, ed., *Reverse Discrimination* (Buffalo: Prometheus Books, 1977) at 330.

not in terms of efficiency, but in terms of "need." The question asked is whether the preferential policy meets specific needs of the minority group. As noted throughout this section, the various needs to which the policy responds may include: a need for role models, a need for more expertise in the community, or a need to create a critical mass of visible minorities in the workplace.

The focus on needs in the group welfare model raises the question of whether the moral justification of the utility maximization principle is to maximize utility or whether it is to effect distributive justice. As the following discussion will show, the principle of distributive justice views preferential policies as a means of redistributing income and opportunities from advantaged to disadvantaged members of society. Groups targeted by these policies are identified primarily on the basis of whether, on average, members hold a disproportionate share of lower paying, less prestigious jobs. In other words, do members of the group *need* to be targeted by a redistributive preferential policy?

Hence, the concept of need serves as a bridge between at least one strand of the utility maximization principle—the group welfare model—and the principle of distributive justice.[73] However, on a theoretical level, the differences between the two principles are stark. As we will see in the following section, under the distributive justice principle, preferential treatment is based on an assessment of *socio-economic* need. Under the utility maximization principle, socio-economic need is not the only defining feature of utility. Indeed, "utility" may mean a number of things including diversity, political success, racial harmony and efficiency. In addition, while cost-benefit analyses are central to utility calculations, such analyses have relatively little role to play in formulating preferential policies that seek to redistribute advantages.

5. *Summary*

By itself, the utility maximization principle is insufficient as a basis for preferential policies. First, it is difficult to complete a cost-benefit assessment of a particular policy decision if utilities cannot be defined or measured. Second, visible minorities will not necessarily be integrated into the mainstream if preferential policies are implemented. Third, the efficiency model provides no basis for the moral censure of animus and thus cannot ground preferential policies. Despite these difficulties, as-

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73. See *Amoco Canada, supra* note 55. See also *Roberts* v. *Ontario* (1994), 117 D.L.R. (4th) 297 (Ont. C.A.) [hereinafter *Roberts*].

pects of the utility maximization principle—the usefulness of role models, the importance of diversity and the focus on the needs of a particular minority group—exemplify some of our deepest intuitions about race and preference. Like the other two principles that I examine in this article, the utility maximization principle constitutes one "piece of the puzzle" in developing a normative justification for preferential treatment.

III. *Distributive Justice*

Distinct from the idea that preferential policies are justifiable because they rectify past injustices or maximize social utility is the notion that these policies promote the redistribution of income and other important benefits, such as positions in employment and education. Unlike the rectification principle, which is historical, the distributive justice principle focuses on present-day socio-economic issues, particularly the plight of the chronically poor.

I argue, first, that the idea that the number of visible minorities in certain professions should be proportionate to their numbers in the population is problematic; and, second, that preferential policies should be sensitive to concerns about overinclusiveness or underinclusiveness. While the distributive justice principle isolates mainly socio-economic needs, it may appear that no moral justification exists for visible minorities—as opposed to other groups—to benefit under preferential policies. I argue, however, that it is justifiable to distribute advantages to visible minorities alone where the visible minority group is severely disadvantaged.[74]

1. *Two Models of Distributive Justice*

The principle of distributive justice requires that benefits be allocated based on the needs of the particular individual or group in question. In this context, two theoretical models warrant discussion: the "disadvantaged individual model" and the "proportional representation model."

a. *The Disadvantaged Individual Model*

Liberal theorists think that some individuals—such as visible minorities and women—fare worse than others in competitive markets because of

74. "Disadvantage" refers to positions or circumstances in which individuals have lower-income, lower education and training and less prestigious occupations than other individuals on average.

characteristics over which they have no control.[75] They argue that characteristics such as race and sex are "morally arbitrary," and that it is unjust that such individuals suffer as a result. In order to achieve equality of opportunity, the state must compensate these disadvantaged individuals. "Equality of opportunity" does not simply mean that individuals have the same legal rights of access to advantaged positions and societal resources.[76] As Rawls argues, this conception of the term is "unstable" because "distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective."[77] Rather, individuals should have the same prospects of success *regardless* of their initial place in the social system, that is, irrespective of the class into which they are born.[78]

How do we ensure that individuals will have the same prospects of success? Rawls advocates the "difference principle" which governs the distribution of economic resources. As Rawls explains, inequalities in economic wealth which result from morally arbitrary characteristics "are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society."[79] In other words, under the difference principle, individuals are entitled to a greater share of society's resources only if they can demonstrate that the "least advantaged class" benefits.[80] This class includes either individuals whose income is no greater than the average income of individuals in the lowest relevant social position, such as unskilled workers, or individuals with less than half the median income and wealth in the society.[81]

What is the position of visible minorities under the disadvantaged individual model? While proponents of the model do not disagree that visible minorities should receive benefits, they argue that visible minorities should not benefit simply because they belong to a certain race. Rather, visible minorities should benefit only if they fall within the least advantaged class. Compensation depends on income level, not on skin-colour.

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75. J. Rawls, *A Theory of Justice* (London: Oxford University Press, 1971). R. Dworkin, "What is Equality? Part I: Equality of Welfare; Part II: Equality of Resources" (1981) 10 Phil. & Pub. Affairs 185, 283 and "What is Equality? Part III: The Place of Liberty" (1987) 73 Iowa L.R. 1.
76. Dworkin, "What is Equality? Part I," *ibid.* at 207.
77. Rawls, *supra* note 75 at 74.
78. *Ibid.* at 73.
79. *Ibid.* at 75.
80. See R. Martin, *Rawls and Rights* (Lawrence: University Press of Kansas, 1985) ch. 5, which discusses various interpretations of the difference principle.
81. Rawls, *supra* note 75 at 98.

b. *The Proportional Representation Model*

Whereas the disadvantaged individual model focuses on the income level of individuals, the proportional representation model is group-oriented. The model focuses on the low percentages of visible minorities, or sub-groups of visible minorities, in various sectors of the labour force. It asserts that these low percentages are evidence of discrimination against visible minorities and that in a society without discrimination, the numbers of visible minorities in various professions would be proportionate to their presence in the population at large. Because the number of visible minorities is disproportionate to their presence in society, it is necessary to allot employment positions on a group percentage basis under a quota system or set-aside program. Devising such a policy necessitates an examination of which groups have been kept out of certain positions.

The proportional representation model seeks "equality of result," whereby each group ends up with an equal share of the particular good being allocated.[82] Ensuring equal outcomes is necessary in order to increase the level of participation of various groups in the labour force or the presence of these groups in the student body.

2. *Problems with Proportional Representation*

The proportional representation model draws heavily on statistical data concerning the percentages of visible minorities in various professions. For instance: blacks in the United Stated today constitute only 5 percent of university faculty, 3 percent of financial managers, 3 percent of physicians, 2 percent of lawyers and judges, and 1 percent of architects.[83] These percentages are lower than the percentages of visible minority groups in society as a whole. Proponents of the representation model argue that visible minorities are underrepresented in various professions because they have experienced discrimination. Preferential policies, particularly quotas and set-asides, are justified in order to even out racial imbalances in the labour force.

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82. See Rosenfeld, *supra* note 11 at 23.

83. U.S. Bureau of the Census, *Statistical Abstract of the United States 1994* (Washington, D.C.: G.P.O., 1994) at 407 cited in D. D'Souza, *The End of Racism: Principles for a Multiracial Society* (New York: Free Press, 1995) at 443.

a. *Failure to Take into Account Cultural Traits, Choices and Preferences*

The proportional representation model assumes that discrimination is the source of minority underrepresentation. However, there may be reasons *other than* discrimination that cause the underrepresentation of visible minorities in a certain field. As Devine-Wolf states with respect to university faculty appointments:

> . . . there is no prima facie reason to suppose that members of different racial and ethnic minorities would be equally likely to want to go into the professoriate and, on the contrary, many reasons to expect that they would not . . . . [M]embers of one community will value different sorts of character traits, encourage the acquisition of different skills, and have different ideas about what sorts of jobs carry the most prestige.[84]

While some cultures respect medical doctors and engineers, others may respect artists and musicians. For instance the predominance of South Asians in medicine as opposed to law cannot be attributed simply to racial discrimination. The South Asian preference for the sciences is also evident among the Asian population at large. As Hsia explains, "[t]he fields of science, mathematics, and engineering, and premedical programs have increasingly been the top choice of Asian Americans."[85]

Cultural traits give rise to differences in individual preferences and choices. Why are there so few blacks in symphony orchestras relative to the number of whites and Asians? Why are there so few blacks and Asians in the National Hockey League? Why do a majority of black doctorates obtain their Ph.D.'s in education, social work and sociology and not in algebra, German, classics and cell biology?[86] It seems reasonable to conclude that members of different racial groups have different career preferences for which the proportional representation model does not account. As D'Souza remarks, "[p]roportional representation fails to consider differences in talents, culture, interests, and preferences that partly explain the current dispersion of groups in the work force."[87]

b. *Failure to Consider History*

The proportional representation model asserts that if there is a low number of individuals from one racial group in a certain profession,

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84. C. Wolf-Devine, "Proportional Representation of Women and Minorities" in Cahn, *supra* note 36, 224.
85. J. Hsia, *Asian Americans in Higher Education and at Work* (New Jersey: Lawrence Erlbaum Associates, 1988) at 128.
86. D'Souza, *supra* note 83 at 304.
87. *Ibid.* at 300.

preferential policies are justified in order to even out the imbalance. Carried to its logical conclusion, proportional representation could necessitate preferential policies for activities where whites are underrepresented, such as the fields of jazz and rap, and sports such as football, basketball and track and field.[88] This logic is fallacious because it does not examine history, or the root of the injustice. We can be fairly certain that whites do not suffer discrimination in professional sports today. They had their own formal systems of discrimination in sports in the past which have only recently been dismantled. The proportional representation model is inadequate as a basis for preferential policies because it overlooks historical patterns of discrimination and, instead, concentrates on numbers and percentages. These figures tell us very little about whether a particular group has actually experienced discrimination and would, therefore, benefit under preferential policies.

3. *Problems with Inclusion*

One of the more compelling features of the disadvantaged individual model is that it advocates redistribution of benefits to the chronically poor. Some proponents of the model object to preferential policies as being either "overinclusive," in that they provide preferential treatment to visible minorities who do not require such treatment, or "underinclusive," in that they fail to provide preferential treatment to nonvisible minorities who require such treatment.[89]

a. *Overinclusiveness*

The disadvantaged individual model argues that by focusing on visible minorities alone, preferential policies are too broad, since they give benefits to some individuals who do not need them. This argument is persuasive. Many members of visible minorities have high academic grades and financial resources that enable them to attend university. In its 1991 census, Statistics Canada reported that 22.8 percent of Japanese and 26.9 percent of Koreans living in Canada had university degrees com-

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88. *Ibid.* at 441.

89. This argument is evident throughout Alan Goldman's *Justice and Reverse Discrimination*, *supra* note 7. See also Trakman, *supra* note 32 and Fiss, *supra* note 27 at 84. Fiss proposes a doctrine of constitutional interpretation called the "group-disadvantaging principle" under which blacks *as a group* ought to be protected from hostile state action. Fiss recognizes that the group-disadvantaging principle may be viewed to be overinclusive, but contends that this criticism should not preclude application of the principle (*supra* note 27 at 139-40).

pared with 11.4 percent for the total population. In the week prior to the 1991 census, 6.3 percent of Japanese and 8.1 percent of Koreans in Canada were unemployed compared with 10.2 percent of the total population. Finally, 18.7 percent of the Japanese-Canadian work force population was concentrated in the professional sector compared to 12.9 percent for the total population.[90]

Japanese- and Korean-Canadians are examples of visible minority groups who seem to do better than the rest of the Canadian population. Such groups should not be targeted by preferential policies because, unlike the chronically poor, they are not disadvantaged.[91]

b. *Underinclusiveness*

Advocates of the disadvantaged individual model further criticize preferential policies for excluding individuals who require assistance. In light of the growing number of poor people in Canada and the United States, the argument in favour of redistribution to poor people generally is persuasive. In the United States in 1960, the percentage of central city households with incomes below the poverty line was 13.7. In 1980, it was 14.0 and in 1987, it was 15.4.[92] The probability that a child under the age of eighteen would be living in a poor family increased from 15 to 20 percent between 1970 and 1986. Between 1970 and 1987, the percentage of female-headed families increased rapidly among all racial and occupational groups. The percentage among whites increased from 8 to 13 percent and among blacks from 28 to 42 percent.[93] As I will discuss in section IV, unless preferential policies redistribute advantages to poor people without regard to skin colour, a whole sector of the population that requires assistance is left uncompensated.

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90. Statistics Canada, "A Profile of Japanese in Canada" and "A Profile of Koreans in Canada" in *Fact Sheets on the Employment Equity Designated Groups, 1991* (Ottawa: Ministry of Industry, 1995). With respect to arguments relating to Japanese Canadians, one may assert that the Canadian government's internment of the Japanese during the Second World War warrants preferential treatment in favour of this group. However, such an argument would be based on the rectification principle more than the distributive justice principle.

91. See R. L. Simon, "Affirmative Action and the University" in Cahn, *supra* note 36, at 63.

92. U.S. Bureau of the Census, *supra* note 83, cited in Paul E. Peterson, "Urban Underclass and the Poverty Paradox" in C. Jencks & P.E. Peterson, eds., *The Urban Underclass* (Washington: Brookings Institution, 1991) 3 at 7.

93. *Ibid.* at 8.

c. *Why Race as Such Matters*

Given the persuasiveness of arguments relating to overinclusion and underinclusion, is there anything about race *per se* that justifies designing preferential policies? Section I argued that if a group were discriminated against in the past, it was morally justifiable to target that group under a preferential policy, provided that the group continues to suffer the effects of past discrimination today. In order to determine whether a visible minority group meets this condition, we must examine certain phenomena that are significant from the standpoint of distributive justice, such as the poverty, education and crime levels of particular visible minority groups in society.

In Canada, aboriginals are extremely disadvantaged. Consider the Métis. In 1991, almost two-thirds (63.2 percent) of the Métis population aged 15 and over had not completed high school, 8.8 percent had attained a high school diploma and 1.8 percent had a university degree. In the week prior to the 1991 Census, a higher percentage of the Métis population was unemployed (25.5 percent), compared with the total population (10.2 percent) and the total aboriginal population (19.4 percent).[94]

The evidence that certain visible minority groups are severely and chronically disadvantaged supports the argument that these groups need the benefits of preferential policies. As will be suggested in section IV, it is consistent with the distributive justice principle for the state to adopt a policy under which poor people receive preferential treatment and poor visible minorities also receive such treatment. As Wolf-Devine states,

> [p]rograms targeted at the economically disadvantaged should . . . be supplemented by special compensatory programs aimed at blacks and Native Americans.[95]

Thus, in accordance with principle of distributive justice, it is morally justifiable to assist visible minorities using preferential policies as long as those visible minorities fall within the class of economically disadvantaged people generally.

4. *Summary*

It is justifiable to provide preferential treatment to visible minorities in order to rectify past wrongs from which they currently suffer. However, in order to assess whether the group currently suffers from a past wrong,

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94. Statistics Canada, "A Profile of Persons with Métis Origin in Canada" in *Fact Sheets on the Employment Equity Designated Groups, 1991* (Ottawa: Ministry of Industry, 1995) 1.
95. C. Wolf-Devine, "Proportional Representation of Women and Minorities" in Cahn, *supra* note 36 at 227.

we must examine the group's socio-economic circumstances. Such an examination raises issues of distributive justice—the level of poverty, income and education of the particular visible minority group relative to other groups in society. An examination of these issues leads to the conclusion that, contrary to the underlying rationale of the disadvantaged individual model, there are certain visible minority groups whose poverty is so severe and self-perpetuating that they ought to be targeted by preferential policies designed specifically for them. In Section IV I examine the form that such policies may take.

IV. *Who Should Pay?*

Even if one agrees that preferential policies are morally justified, a number of questions still arise. Who bears the burden of compensation? Does society at large owe a duty to compensate or only specific individuals? What form should the compensation take? Such questions have become particularly prominent because of intense criticisms of demand-side policies, such as affirmative action, from those who view young white males as suffering unfairly.[96] This section examines three arguments against affirmative action: first, the claim that affirmative action policies constitute reverse discrimination because they do not treat all individuals equally; second, that these policies force young white males to bear a disproportionate burden in rendering compensation to visible minorities; and third, that these policies overlook the importance of merit in decisions with respect to hiring and university admissions.

I consider the reverse discrimination argument weak, since it is based on a notion of equality that ignores substantive differences, such as socio-economic disadvantages, among individuals. I agree, however, that if we adopt a conception of liberty based on "equal concern and respect," it is unfair, first, to place the burden of compensation on the shoulders of a disproportionate few and second, to prevent individuals from advancing in employment or education on the basis of merit. Preferential policies should distribute the burden or compensation among members of the society as a whole. Consequently, demand-side policies should be discarded in favour of supply-side policies, such as those outlined at the end of this section.

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96. See H. E. Jones, "On the Justifiability of Reverse Discrimination" in Gross, *supra* note 72, 355.

1. *Reverse Discrimination*

a. *The Argument*

Section 15(1) of the *Canadian Charter of Rights and Freedoms* reads:

> [e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour . . . .[97]

Similarly, the Fourteenth Amendment of the U.S. Constitution states that, "no state shall . . . . deny to a person within its jurisdiction the equal protection of the laws . . . ."[98] Arguments against reverse discrimination derive from these provisions. Each individual is equal before the law. Therefore, it is unconstitutional to accord preferential treatment to individuals on the basis of their colour since doing so would mean that other individuals do not receive equal treatment.

The argument with respect to reverse discrimination in the Canadian context differs from the American since section 15(2) of the *Charter* explicitly sanctions affirmative action programs. Section 15(2) states,

> [s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race . . . .[99]

However, the decision in *Apsit v. Manitoba Human Rights Commission*[100] undermines section 15(2). *Apsit* involved a challenge by non-native wild rice farmers to a policy giving preference to certain aboriginals in the issuing of wild rice licenses. Despite section 15(2), the trial court struck down the program as discriminatory against non-natives. According to Simonsen J., "a special law or program which is put forward under s. 15(2) cannot be justified if it unnecessarily denies the existing rights of the non-target group."[101]

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97. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982 c.11 [hereinafter the *Charter*]. For a discussion of meaning of "equality" in s. 15(1) see *Andrews* v. *Law Society (B.C.)*, [1989] 1 S.C.R. 143. See also the pre-*Charter* case *Bloedel* v. *University of Calgary* (1980), 1 C.H.R.R. D/25 [hereinafter *Bloedel*], in which a non-native woman challenged a program aimed at redressing the social disadvantages experienced by First Nations Peoples. The Alberta Board of Inquiry held that the program violated the anti-discrimination provisions of Alberta's human rights legislation. See also *Amoco Canada, supra* note 55.

98. U.S. Cons. amend. XIV§ I [hereinafter the Fourteenth Amendment].

99. Section 15(2), *Charter, Supra* note 97.

100. (1988), 9 C.H.R.R. D/4457 (Man. Q.B.), rev'd on other grounds (1989), 10 C.H.R.R. D/5633 (C.A.) [hereinafter *Apsit*].

101. *Ibid.*

The reverse discrimination argument is founded on what is referred to in Canadian jurisprudence as "formal equality."[102] According to this conception, "all individuals are to be treated alike regardless of histories of exclusion, denials of resources and opportunities."[103] Formal equality calls for like treatment regardless of race, sex, disability. It holds that from the standpoint of admissions policies and hiring decisions, these characteristics should be irrelevant. As Bickel states, "a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."[104]

b. *Difficulties with Formal Equality*

Historical Disadvantage

The conception of formal equality, and the reverse discrimination argument to which it gives rise, ignores the fact that, in the United States and Canada, the right to equal treatment was violated for years by racist exclusions. As I discussed in section I, various visible minority groups—such as blacks and aboriginals—were historically subjected to discriminatory laws, policies and systemic practices. White males argue, however, that they are not responsible today for the sins that their forebears may have committed. Rather, as citizens in present-day society, they have the right to expect that equal protection laws will apply to them just as they will apply to everyone else, regardless of colour. White males do not deny that past discrimination occurred. Rather, they contend that they have an inalienable right to equal protection, where "equal" in fact means "like".

Some critical race scholars answer that because whites historically violated the rights of visible minorities, it is legitimate to impose similar sacrifices on whites themselves. As Delgado states,

> for more than 200 years, white males benefited from their own program of affirmative action, through unjustified preferences in jobs and education resulting from old-boy networks and official laws that lessened the competition. Today's affirmative action critics never characterize that scheme as affirmative action, which of course it was.[105]

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102. See *Action Travail, supra* note 37 and *Roberts, supra* note 73, Weiler J.A.

103. C. Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality*, (Toronto: Ontario Law Reform Commission, 1993) at 4. See also Vizkelety, *supra* note 62.

104. A. M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) at133.

105. Delgado, *supra* note 51. In this article, Delgado actually argues against affirmative action.

This statement raises two separate issues. First, whether affirmative action for white males existed and second, if it did exist, whether white males should be compelled to render compensation today.

It seems likely that some form of preferential treatment in favour of white males did, indeed, exist under which both visible minorities and women were excluded from positions in the labour force. However, I argue that imposing the burden of compensation for historical injustices on white males today is unjust because it forces one class of individuals to make reparations when an entirely different class of individuals perpetrated the injustice. The responsibility of compensation should be spread more evenly throughout society.

Current Disadvantage

Formal equality also fails to recognize the persistent patterns of disadvantage among certain groups in society.[106] The argument in section III was that certain groups are, on a socio-economic level, more chronically disadvantaged than others. Academic debates with respect to chronic disadvantage focus on *causes* of disadvantage.[107] Regardless, few would agree that these problems can be eradicated by resorting to the conception of formal equality. Indeed, it seems to be commonplace that the vast socio-economic differences between racial groups renders "equality before the law" an academic turn of phrase which carries little practical significance in terms of alleviating racial disadvantage.

c. *Substantive Equality*

Past injustices and current disadvantages render preferential policies morally justifiable. Formal equality, however, is insufficient. Thus our conception of equality must be reformulated to support preferential policies.

Unlike formal equality, the ideal of substantive equality examines "the social and economic patterns which affect disadvantaged groups, such as high levels of unemployment, low educational backgrounds, and pervasive poverty . . . ."[108] Substantive equality aims to reduce existing disadvantages and to allow individuals to compete on a level playing

106. Vizkelety, *supra* note 62.
107. See, *e.g.*, *supra* note 21; see also C. Jencks, *Rethinking Social Policy: Race, Poverty and the Underclass* (New York: Harper Collins, 1992), ch. 4.
108. Vizkelety, *supra* note 62 at 291.

field.[109] In order to achieve this goal, we must look at the actual social and economic conditions of the individuals or groups in question.

One may argue that support for this conception of equality necessitates support for affirmative action programs, since these policies acknowledge and seek to remedy the disadvantaged position of various groups in society.[110] On the contrary, endorsing the notion of substantive equality at this stage simply implies that the reverse discrimination argument, and the conception of equality on which it is based, are not decisive, since they fail to account for historical and current disadvantages faced by visible minority groups.

2. *Disproportionate Burden*

a. *The Argument*

One may also consider affirmative action policies unfair because they compel a small portion of the population—typically comprising young white males—to bear the burden of compensation to visible minorities.[111] Even though affirmative action policies may be justified under the conception of substantive equality, this disproportionate burden weighs against the adoption of these policies.

b. *Direct and Indirect Beneficiaries*

Some white males argue that the burden placed on them to compensate visible minorities is unfair since not every white benefited from slavery and discrimination.[112] Consider recent white immigrants. If I am a white male and I recently immigrated from Norway, why should I have to participate in the system of compensation? Neither I nor my ancestors had anything to do with the despicable system of slavery. In addition, what of whites who actually opposed slavery? Why should their descendants owe a duty? The burden placed upon white males is disproportionate because it makes an entire class pay for the injustices committed by persons to whom members of the class may bear no direct relation.

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109. See A.F. Bayefsky, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt: Carswell, 1985) at 21.

110. An example of such an affirmation program is contained in Canada's *Employment Equity Act*, R.S.C. 1985 (2nd Supp.), c. 23 as rep. by *Employment Equity Act*, S.C. 1995, c. 44. The Act focuses on visible minorities, the disabled, aboriginal peoples and women.

111. H. Jones, "On the Justifiability of Reverse Discrimination" in Gross, *supra* note 72, 355.

112. T. Nagel, "Introduction" in Nagel, Cohen & Scanlon, *supra* note 27, x.

One response to this argument is that it is necessary to draw a distinction between direct and indirect beneficiaries. Although the Norwegian immigrant or the descendant of those opposed to slavery may not have directly benefited from unjust historical practices, they are nevertheless indirect beneficiaries. White males, by virtue of their colour and gender, benefit from a social atmosphere in which that is the best thing to be.[113] In the absence of affirmative action, white males (including the Norwegian immigrant) will continue to benefit from the effects of the original discrimination.[114] Hence, the burden imposed upon them is not disproportionate to the benefits that they derive from the original injustice.

While white males may benefit more than others from the sins of their ancestors, is it fair to weigh the effects of past injustices in this manner? Many visible minorities may not require the benefits of affirmative action. Further, many white males may come from poor socio-economic backgrounds. If either of these cases persist, colour seems to be an arbitrary characteristic on which to base preferential policies. Therefore, regardless of such historical injustices as those perpetrated by slave owners and white entrepreneurs under the Jim Crow system, white males alone ought not to be forced to bear the burden of reparation to the exclusion of other groups in the society.

c. *Liberty and Self-respect*

At the core of the disadvantaged individual model is the belief, held by egalitarian liberals, that each individual is entitled to "equal concern and respect."[115] This phrase means that everyone has the liberty, first, to pursue his or her own conception of the good; and second, to revise that conception if necessary. Yet, as the disadvantaged individual model acknowledges, not all individuals have the same natural abilities or social status to participate in the economic system from "an equal starting point." Hence, egalitarian liberals advocate an economic system which seeks to maximize the scope for individual choice while compensating individuals who suffer from disadvantages over which they have no control. Dworkin describes this objective as one which is "ambition-sensitive" but "endowment-insensitive."[116] That is, it accepts as legiti-

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113. *Ibid.*
114. G. Sher, "Reverse Discrimination in Employment" in Nagel, Cohen & Scanlon, *supra* note 27, 54.
115. Dworkin, *supra* note 76.
116. *Ibid.*

mate inequalities that derive from differences in ambition and effort since these are differences for which a person may be held morally responsible. Yet, at the same time, it corrects for differences that are morally arbitrary, such as race and gender which give rise to inequalities. In order to compensate individuals for being penalized as a result of undeserved inequalities, egalitarian liberals argue that "background institutions"[117] that ensure the transfer and distribution of wealth are necessary.

In considering preferential policies, the conception of an ambition-sensitive, endowment-insensitive distribution matters. Affirmative action attempts to place visible minorities in positions where others will be insensitive to their race (*i.e.*, they will not take race into account) but where visible minorities can still pursue their individual ambitions. However, affirmative action programs are not ambition-sensitive vis-à-vis white males since they may prevent white males from obtaining jobs which they would otherwise earn on merit. Under these policies, therefore, it appears that the life aspirations of the white male do not matter equally.

Why, one may ask, does it matter if the *white male's* life plans do not matter equally—his needs are often not nearly as great as those of poor visible minorities. The aspirations of the white male matter equally for the same reason that it matters whether a black woman's aspirations matter equally: unless each individual is able to lead his or her life from the inside—to develop and pursue his or her own conception of the good—he or she may lose, or never attain, self-respect. Without self-respect, one's life has little meaning.[118]

d. *Supply-side Policies*

It may appear that the importance of compensating visible minorities for having to endure past injustices has been disregarded. On the contrary, the

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117. For example, the background institutions that Rawls proposes include: a just constitution; fair equality of opportunity; equality of opportunity in economic activities and in the free choice of occupation; and, a "social minimum" or minimum standard of living. *Supra* note 76 at 271.

118. Jones, *supra* note 111 at 355. I do not mean to suggest that preferential policies are necessary in order for one to pursue one's own conception of the good. Indeed, neither Rawls nor Dworkin argues that preferential policies are necessary for one to realize one's own life plan. Liberalism seeks to refrain from privileging one conception of the good over another. I am referring to the notion of "conception of the good" in terms of removing barriers in order to achieve political equality. However, these differing understandings of "conception of the good" dovetail. One's ability to pursue one's own conception of the good relies on the expectation that one will be treated equally with other individuals in applying for positions in employment and education.

argument above relates to demand-side policies only.[119] It is only under policies such as affirmative action that the white male stands to bear a *disproportionate* share of the burden of compensation. Unlike demand-side policies, supply-side policies tend to distribute the burden of compensation more widely. As Trebilcock states, "supply-side policies are attractive because the costs of these programmes would be largely underwritten by better-endowed members of the community and in turn would be designed to benefit a wide cross-section of members of disadvantaged groups."[120] For instance, the Canadian government provides welfare services to the aboriginal community. These services include programs for Indian children and adults and are intended first, to protect Indians against domestic violence and abuse and second, to enable adults with physical or mental disabilities to maintain their independence. Funding for this program is provided by the federal government; thus the cost of compensation is spread evenly among taxpayers. No particular group in the society is forced to render more compensation than any other.

3. *Merit*

a. *The Argument*

A third objection to affirmative action policies is that they prevent individuals from obtaining positions on the basis of merit.[121] "Merit" is evidenced primarily by credentials that are visible on paper—such as university grades, previous work experience and test scores. Proponents of merit consider departures from the principle unjust because the departures lead to a decrease in overall social welfare and undermine one's legitimate expectations with respect to the criteria for achievement. Still, there are aspects of the merit principle, particularly its view of what constitutes an individual's qualifications for the job, that require reformulation.

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119. The terms "supply-side" and "demand-side" are defined in the Introduction, *supra*. An extensive discussion of specific supply-side policies appears *infra* in this section.

120. *Supra* note 5 at 208.

121. See A.W. MacKay & P. Rubin, *Study Paper on Psychological Testing and Human Rights in Education and Employment* (Toronto: Ontario Law Reform Commission, 1996) and A.H. Goldman, "Justice and Hiring by Competence" (1977) 14 Amer. Phil. Q. 17.

b. *Why Merit Matters*

The Welfare Argument

Some individuals assert that unless traditional standards of hiring are retained, social welfare will decrease. In the context of this argument, weak-form affirmative action, where a visible minority who is equally qualified obtains the position, is usually considered less objectionable than strong-form affirmative action, in which a lesser qualified visible minority obtains a position at the expense of a more qualified candidate.

Strong-form affirmative action appears especially undesirable because of the benefits derived from having the most qualified individuals in all key positions.[122] If the merit principle is discarded, the public will have less confidence in service providers and might hesitate to use their services. Alternatively, citizens may have no choice but to use the services of the less competent and will run the risk of harm. Thus, employers argue that retaining the merit principle not only ensures utility maximization across society but also a *Pareto* improvement since there will be gains to all members of society in overall goods, services and quality of life.[123]

One response to this argument is that it perpetuates the disadvantage of visible minorities. The consequence of having the most qualified candidate in key positions may be that visible minorities are kept out of these positions since they tend to be the lesser qualified applicants. Visible minorities are relegated to lower paying "bluecollar" jobs and, as a result, they have less disposable income to improve their standard of living. Thus, "social" welfare does not increase for everybody, it increases only for those in the higher paying positions. This is the case even if hiring the most competent individuals results in a higher total aggregate of goods and services produced.[124]

In order to evaluate these arguments, it is useful to distinguish between supply-side and demand-side policies. It seems important to ensure that those responsible for providing goods and services in society are the best qualified. Yet, if the effect of this policy choice is to exclude a whole sector of society from obtaining these positions, then it is necessary to propose additional policies.

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122. Goldman, *ibid.* at 20.
123. *Ibid.*
124. *Ibid.* at 23.

Supply-side Policies

Some supply-side policies, particularly early education programs, develop an individual's cognitive and analytical skills. The long-term effect of these programs is that participants are more likely to be considered "meritorious." Prime examples of such policies are education and job training programs. For instance, Project Head Start is a preschool Program which serves children and families who have incomes below the poverty line.[125] A 1969 evaluation of the impact of Head Start concluded that Head Start children "were not appreciably different from their non-Head Start peers in most aspects of cognitive and affective development."[126] However, studies since 1969 demonstrate that Head Start has produced measurable results. In 1982, the first Head Start group was of high school age. A comparison with a control group of non-Head Start youngsters with comparable backgrounds shows significant differences:

> Headstart graduates who are now high school sophomores score one grade level higher in reading and mathematics. Only 19 percent of the Headstart group are in classes for slow learners, compared with 39 percent in the non-Headstart group. The $6,000 per child invested in Headstart . . . may be saving $15,000 per child in subsequent remedial services.[127]

In addition, in the mid-1980's, the Head Start Synthesis Project reviewed all published and unpublished research with respect to Head Start. The Project concluded that: Head Start has immediate positive effects on children's cognitive ability; Head Start appears to affect the long-term school achievement of participants in terms of being held back a grade or being assigned to special education classes; Head Start generates immediate gains in the areas of selfesteem, motivation and social behaviour; and Head Start improves child health, motor development, nutrition and dental care.

Programs such as Head Start benefit both the participants and society as a whole; a larger portion of the population becomes better educated and, over the long-term, standards of living increase. Demand-side policies, on the other hand, especially strong-form affirmative action plans, do not focus on improving the qualifications of the targets of the program. Rather, they seek equality of result, which overlooks an individual's

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125. V. Washington & U.J.O. Bailey, *Project Head Start: Models and Strategies for the Twenty-First Century* (New York: Garland Publishing, 1995) at 36.

126. *Ibid.* at 126. Washington and Bailey refer specifically to the 1969 Report prepared by the Westinghouse Learning Corporation.

127. F.M. Hechinger, "About Education; Schools' Improvement Goes Unrewarded" *The New York Times* (28 December 1982) C1.

legitimate expectation that he or she will be considered for positions in employment and university on the basis of merit.

The Meritocracy Argument

The meritocracy argument holds that all positions should be obtained on the basis of competence. The argument derives from the libertarian position that "freedoms, including those of disbursing property and associating with those of one's choice, may only be limited to prevent harm."[128] As the "just holdings model" discussed in section I asserts, individuals should be free to enter into any contracts they wish on any terms that they wish. Therefore, if an employer considers a white male to be the most qualified applicant for a position, the employer ought to be able to hire that individual. The implication of the meritocracy argument is that one ends up where one deserves to be.

This view of liberty is unpalatable for at least three reasons. First, traits such as intelligence are arbitrarily acquired and it is thus unfair to allow individuals to benefit from such characteristics without offering some compensation to individuals who are not as well-endowed. Secondly, freedom is meaningless unless one has the necessities, such as literacy, clothing, food and shelter, within which this freedom can be exercised. Thirdly, the ideal of substantive equality requires that persons have a minimum level of subsistence so they can compete for scarce resources on a more equal footing.

It may appear that my argument against libertarianism and in favour of the redistribution of advantages means that I advocate strong-form affirmative action and that I must also oppose hiring on the basis of merit. I do not, however, for the following reasons.

Society and other institutions have established certain qualifications for employment. Individuals in the community rely on these rules. If the criteria for success suddenly change, then legitimate expectations are undermined. The effects of such changes may be psychologically devastating.

Since the early 1970's many universities in the United States, and later Canada, have had to deal with affirmative action in faculty hirings.[129] For

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128. Goldman, *supra* note 122 at 20.

129. See T. Sowell, "'Affirmative Action' Reconsidered" in Gross, *supra* note 72, 113. Though no particular law in Canada has forced universities to adopt an affirmative action program, faculties in Canadian universities have addressed these issues on a less formal level. See, for example, *Bloedel, supra* note 97.

example, consider a white male who works for years to complete a Ph.D. but is refused the one position in his area of specialization, not because he has not published enough or because his academic record is weak, but because his skin is not a certain colour. His self-worth and dignity are jeopardized and his life-plan is undermined. Is it fair to deny him this position?

One may argue that there are no guarantees that the rules of the game will not change. Sometimes, in order to ensure that long-term redistributive goals are met, unfair practices in the shortterm must be tolerated. As Sandalow explains, "it may be, as some have suggested, that, 'we can have a colour-blind society in the long run only if we refuse to be colour-blind in the short run.'"[130] Some theorists therefore argue that affirmative action policies should be "sunsetted" or time limited, so that policy makers can "avoid stretching the fragile social consensus supporting such programs beyond the breaking point."[131]

It may be useful to note, first, that this white male may have encountered as many obstacles in working to achieve his qualifications as any visible minority, though admittedly they were likely not related to his race. Second, one's expectations about the conditions for success in life are much more fundamental than expectations about the price of goods or the weather on a particular day. Like all individuals, this white male has only one life to live. To deny a career to *him* in particular seems grossly unfair, especially if he is to be accorded equal concern and respect. Indeed, the white male may argue that compensation to visible minorities is a worthy objective but he may believe, nevertheless, that he ought not to be compelled to make so large a personal sacrifice. Third, the "legitimate expectations" argument is tied tightly to the notion of self-respect, which is derived largely from one's sense of having accomplished particular goals through effort, and not by chance, luck or handouts.[132] This seems true for all individuals—for visible minorities and white males alike.[133]

The response to these arguments is also compelling. Just like the white male, visible minorities have only one life to live. It seems unfair to support an economic and social system in which many fail to achieve their life objectives for reasons beyond their control, such as their skin colour. Certainly, one's self-respect is undermined if one is not judged for

130. T. Sandalow, "Racial Preferences in Higher Education" in Gross, *ibid.*, 259.
131. *Supra* note 5 at 211.
132. *Supra* note 7 at 26.
133. Carter, *supra* note 54 at 62.

positions in employment and education on the same criteria as everybody else. In addition, it is necessary also to consider the self-respect of poor visible minorities who may not have the opportunities to be educated at America's top universities.

Supply-side Policies

In response to this debate, it is useful again to draw the distinction between supply- and demand-side policies. Demand-side policies do not support the libertarian vision of freedom in which employers enter into contracts on the terms that they wish, and they reduce the importance of merit in hiring and admissions decisions. Supply-side policies are preferable because they are sensitive to the socio-economic needs of both visible minorities and employers. One benefit of supply-side policies is that many of the problems that give rise to disadvantages later in life, such as a lack of education, are effectively attacked at an early stage. A prime example is the Head Start Program discussed above. In contrast, demand-side policies appear more reactive than preventative in that they attack the problem of disadvantage at the "back-end" after members of disadvantaged groups have lived through their formative years in circumstances of deprivation. Attempting to redress the consequences at later stages in life is almost certain to be less effective than attacking the problem closer to its source.[134]

c. *Why the Merit Standard Needs to be Reformed*

The concept of "merit" is not immune from criticism. Commonly adopted conceptions of merit tend to incorporate professional biases which are based on white male standards of trainability and competence.[135] For instance, many fire departments and police forces have been under pressure to hire more visible minorities on their respective forces.[136] Visible minorities (particularly those from Asia) and women, who tend on average to be shorter than white males, are often rejected on the grounds that they do not have the physical capacities to perform the job in question.

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134. *Supra* note 5 at 212.

135. I. Thalberg, "Reverse Discrimination and the Future" in C.C. Gould & M.W. Wartofsky, eds., *Women and Philosophy* (New York: Capricorn Books, 1976) 305.

136. One rationale for these initiatives is that public servants should reflect the racial composition of the community they serve. See B. Hargrove, "Confronting the Backlash: The Merits of Employment Equity" (1993) 12(2) *Our Times* 19.

Traditional conceptions of merit may also fail to acknowledge that one's race (and/or sex) may be a qualification in itself. Physical characteristics, such as a particular minimum height, often are not indispensable to the tasks that police officers and fire-fighters perform.[137] First, there are criteria of physical strength other than height, such as an ability to lift heavy objects. Secondly, qualities other than physical strength, such as the ability to relate to drug offenders or juvenile delinquents, to speak the language of the community being served, to conciliate domestic disputes and to relate to other minorities may actually enhance job performance. Our ideas of "merit" for a particular job ought to be expanded to include all of the various tasks that the job entails. Perhaps then individuals other than white males would be considered appropriately qualified.

The particular perspective that a visible minority brings to the job may also make him or her better qualified.[138] Visible minorities can offer alternative viewpoints on a wide variety of subjects including history, politics, philosophy and literature. As Matsuda states, "[t]he outsiders' different knowledge of discrimination . . . is concrete and personal."[139] In other words, because the "outsider" has actually experienced racial discrimination, he or she will have an insight into this issue that the white male lacks. When considering who is meritorious, one ought to consider the purpose that the individual in the position is intended to serve and to recognize the value in having an alternative "voice." This does not mean that we must abandon the merit principle altogether, only that we should expand our understanding of what merit means.

4. *Supply-side Policies*

The discussion above highlights the advantages of supply-side policies over demand-side policies. Outlined below are some supply-side policies that would be useful in addressing issues of disadvantage among the poor generally and poor visible minorities in particular. The discussion focuses on education and community-based programs. The first entails supply-side policies that have no racial component—they target the poor generally. The second may be tailored to visible minority communities specifically.

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137. *Supra* note 5 at 205.
138. M. Matsuda, "Affirmative Action and Legal Knowledge: Planting Seeds in Ploughed Up Ground" (1988) 11 Harv. Women's L. J. 1 at 8-9.
139. *Ibid.*

The approach favoured here is one in which supply-side policies should, first, target the poor generally and second, target poor visible minorities specifically. This approach takes into account that certain visible minorities—such as inner-city blacks and aboriginals—are extremely impoverished.[140] Admittedly, it will often be the case that poor visible minorities will be the primary beneficiaries of supply-side policies directed at the poor generally, as is the case with Head Start.[141] However, the option of targeting certain extremely impoverished visible minority groups remains important since policies directed at the poor generally may not be sufficient to address the specific needs of a visible minority group. This approach is appealing because it addresses concerns with respect to underinclusiveness; the general policy approach is to favour the chronically poor as a group. The approach also addresses concerns that preferential policies are overinclusive since the wealthy (whether they are visible minorities or not) are not permitted to benefit.

a. *Education*

An underlying theme of the insightful book *Within Our Reach: Breaking the Cycle of Disadvantage* is that pre-school programs "have succeeded in directly reducing or ameliorating the effects of risk factors such as early school difficulties, failure to acquire basic skills (reading, writing, arithmetic), low self-esteem, alimentation, a weak sense of efficacy, and chronic truancy."[142] Good pre-school programs positively affect parents' lives and expectations and children's dispositions to learn. These effects can actually start an upward spiral of motivation.[143] While some scholars question the usefulness of pre-school programs,[144] the approach here adheres to "the common wisdom that improvements in educational achievement and in the amounts of schooling will help poor children."[145]

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140. Throughout this section, I refer to both inner-city blacks and aboriginal peoples as visible minority groups that are particularly disadvantaged. In identifying these groups, I do not mean to exclude other disadvantaged visible minorities, such as blacks living in rural regions in the U.S. (e.g. Mississippi) from qualifying as "disadvantaged."

141. In 1992, the racial composition of Head Start children was as follows: blacks (37percent), whites (33 percent), Hispanics (23 percent), American Indians (4 percent) and Asians (3 percent). See *supra* note 125 at 37.

142. L.B. Schorr & D. Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* (United States: Anchor Press, 1988) at 183.

143. *Ibid.*

144. These are noted in N. Glazer, "Education and Training Programs and Poverty" in S.H. Danziger & D.H. Weinberg, eds., *Fighting Poverty: What Works and What Doesn't* (Cambridge: Harvard University Press, 1986) at 152.

145. Glazer, *ibid.* at 154.

A first set of supply-side policies should concentrate on public education programs for disadvantaged individuals.[146] As discussed above, Project Head Start is an excellent example of an education policy that addresses the educational needs of poor children. However, educational programs should not be limited to children. Job-training programs for new entrants into the work force who perhaps could not afford the costs of university or college admission are crucial in building an all-inclusive labour force. One successful example of such a program in the U.S. and Canada is English as a Second Language (ESL) which is offered to immigrants and citizens whose integration into competitive markets would be immeasurably facilitated were they able to speak English.[147] In the U.S., ESL programs are often established in conjunction with "bilingual education" programs which serve students whose native language is not English. These programs have proven to be extremely effective because students are given continued education in content areas along with structured instruction in English.[148]

b. *Community-based Programs*

A second type of strategy for attacking disadvantage falls under the more general category of "community-based programs" which vary depending on the specific community being targeted. For instance, the needs of aboriginal communities (which include on- and off-reserve Indians and the Inuit) may differ from the needs of the poor population living in metropolitan centres. Programs such as ESL may not be useful for individuals who live outside of the cities and who have no intention of leaving their community to integrate into society at large. In addition, some individuals within these communities may wish to enter the work force but may not be equipped with the necessary skills. Thus the programs must be tailored to specific needs of the particular community[149] which may be composed exclusively of poor visible minorities.

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146. See R.F. Devlin & A.W. MacKay, "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1991) 14 Dal. L.J. 296.
147. See S. Nieto, *Affirming Diversity: The Sociopolitical Context of Multicultural Education* (New York: Longman Publishing Group, 1992) at 156, 16061. See also R. F. Devlin, "Towards Another Legal Education: Some Critical and Tentative Proposals to Confront the Racism of Modern Legal Education" (1989) 38 U.N.B.L.J. 89.
148. *Ibid.* at 161.
149. Of course, the formulation of policy may occur following consultation with representatives of the community and may take place in conjunction with these representatives. Community-based groups may in fact make these decisions themselves and lobby the state for funding.

For example, the number of children on First Nations reserves in Ontario is growing rapidly and there is a need for schools. Hence, in 1995, the Canadian government through the Department of Indian and Northern Development has provided funding and in the fall of 1995, five First Nations all opened new facilities.[150] In addition, to address the pressing issue of domestic violence on First Nations' reserves, the Canada Mortgage and Housing Corporation developed a women's shelter at Big Trout Lake in the Province of Ontario where victims of domestic violence receive emergency shelter, interim housing, counselling and support in dealing with problems of family abuse and violence.[151]

Visible minority communities within metropolitan centres may also require assistance under supplyside policies specifically targeted to them. For instance, certain Canadian cities have established "Program without Walls" which provides inhome support to parents, educational programs for parents and children and community food and nutrition programs. In North York, Program without Walls operates under the aegis of nine agencies, one of which is the Somali Immigrant Aid Organization (SIAO). SIAO holds workshops and seminars to educate the community about nutrition, gardens and inexpensive ways of purchasing food. Ostensibly, SIAO offers its services to the community at large. In practice, however, it serves the Somali community almost exclusively.

5. *Summary*

As a demand-side policy, affirmative action is unfair. It compels white males to bear a disproportionate share of the burden of compensating visible minorities and overlooks the importance of merit as a criterion for hiring and admissions. Supply-side policies are preferable, first because they spread the costs of compensation more widely and second, because they seek to intercept cycles of deprivation at an early stage in order to address problems that in the long-term exacerbate disadvantage. By discarding affirmative action and by retaining supply-side policies we can accommodate two conceptions of liberty—the libertarian's view that

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150. Department of Indian and Northern Development, *Pride in Partnership* (Ottawa: The Department, 1996). The First Nations which benefited under this policy included Grassy Narrows, Sandy Lake, Six Nations of the Grand River, Chippewas of Kettle and Stony Point and Weenusk First Nations.

151. *Ibid.* The shelter, called the Kitchenuhmaykoosib Equaygamik Women's Shelter, was developed under Canada Mortgage and Housing Corporation's (CMHC) "Project Haven/Next Step Program."

employers should be able to hire individuals based on criteria of their choosing (within the confines of anti-discrimination legislation) and the egalitarian's belief that liberty is dependent on a minimum level of social and economic well-being.

Conclusion

In both Canada and the United States, preferential policies are under attack. Although employment equity legislation exists at the federal level in Canada, similar legislation has recently been repealed at the provincial level in Ontario. In the U.S., affirmative action was a central issue in the last presidential election. President Clinton endorsed weak-form affirmative action in which qualified visible minorities are accorded preferential treatment if they meet employer standards with respect to qualifications. Nevertheless, he initiated a review of all affirmative action programs at the federal level and, "is expected to conclude that at least some of them must go."[152] Without question, the future of preferential policies is in jeopardy. Will they be abolished? If not, what form will they take?

In the context of these political debates, this article offers a different approach to the formulation of preferential policies and provides normative justifications for them. Preferential policies are justifiable in order to rectify past injustices committed against a visible minority group. However the criterion for awarding compensation is not merely the characteristic of race *per se:* if the group no longer experiences present effects of past discrimination, no compensation under the rectification principle is owed.

A useful indicator as to whether the group currently suffers the effects of past discrimination is the group's socio-economic status. Referring to socio-economic factors triggers concerns related to the principle of distributive justice, which focuses on the socio-economic position of one group relative to other groups in society. Thus, justifying preferential policies under the rectification principle involves application of the distributive justice principle. Together, these principles warrant the provision of preferential treatment to poor visible minorities and screens out visible minorities who, from a financial perspective, do not require benefits granted under preferential policies.

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152. J. Birnbaum, "The government's affirmative-action programs are under scrutiny and not likely to survive intact" (1996) Politics 1.

Although preferential policies in favour of visible minorities are justifiable in specific circumstances, certain types of preferential policies—particularly demand-side policies such as affirmative action—have triggered disapproval from certain sectors of the population. Critics argue that under affirmative action programs, young white males bear a disproportionate burden of compensation since, in large measure, it is they who are denied positions in employment and education in favour of visible minorities. This argument becomes more forceful if we adopt a conception of liberty based on the notion of "equal concern and respect." Under affirmative action plans, the life plans of a white male seem to matter less than those of visible minorities since his merit is often overlooked and his legitimate expectations of being hired are undermined.

These criticisms compel us to balance the interests of visible minorities in receiving preferential treatment with the interests of those who object to having to bear the costs of this compensation. Preferential treatment in favour of visible minorities should take the form of supply-side policies. Supply-side policies, such as early education programs, not only spread the costs of preferential policies more equitably but also enable the merit principle to govern decisions with respect to hiring and admissions. At the same time, supply-side policies address issues of socio-economic disadvantage that are largely responsible for precluding visible minorities from acceding to positions of wealth, power and prestige in society. In this way, supply-side policies underpin a notion of equality—substantive equality—according to which all individuals must attain a certain minimum standard of living. Substantive equality is possible only if there is a redistribution of advantages in society not only to visible minorities but also to the class of poor people generally.

With the survival of preferential policies in jeopardy, it is crucial for individuals on all sides of the political spectrum to recognize the sound normative justifications for these policies as well as the alternative approach to policy formulation. It is only with this recognition that we will be able to attain our ideals without entrenching animosity between advantaged and disadvantaged groups. The success of preferential policies in Canada and the United States depends upon their ability to account for a plurality of factors such as the need to rectify past injustices, to account for marked differences in socio-economic status and to enable each individual to attain an acceptable level of self-worth. While our experiences with preferential policies have demonstrated that the development of these policies will be difficult, it is both possible and vital.