EQUAL OPPORTUNITY, AFFIRMATIVE ACTION, AND THE ANTI-DISCRIMINATION PRINCIPLE: THE PHILOSOPHICAL BASIS FOR THE LEGAL PROHIBITION OF DISCRIMINATION

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INTRODUCTION: THE CASE OF JACOB'S SONS

Consider the following hypothetical.

In the early part of the twentieth century a man named Jacob lives with his wife, baby daughter, and infant son near the city of Roman on the Moldova river in Romania. Jacob and his wife are very poor, and because they are Jewish, they have been subject to government-sanctioned harassment, depredation, and oppression all their lives. Determined to ensure a better life for their children, they decide to emigrate to the United States. Because they can afford only one passage, Jacob travels to America alone in the hope of earning enough money to pay for his family's subsequent emigration.

Upon disembarking at Ellis Island, Jacob sees a man holding a sign written in Yiddish that says, "Do you come from Romania? If so, speak to the man holding this sign." Jacob approaches the man with the sign and tells him that he is from Romania. The man explains that he is a representative of the Erste Romaner Kranken Unterstutzung Verein (First Romanian Health and Support Association), a fraternal society of Romanian Jewish immigrants, and asks Jacob whether he has the $100 necessary to gain admission to the United States. When Jacob responds that he has no money, the Verein representative offers to give Jacob $100 to be returned after his interview with the immigration officials. He further offers to help Jacob, who speaks no English, find a place to live and get a job.

Jacob desperately wants to accept the offered help, but he is a proud man who has been raised to believe that accepting charity is dishonorable. Before he can respond, however, the Verein representative explains,

> You must understand that the Verein is not offering charity, but a contract. We will help you get established in America. In return, you must agree that you will help future immigrants as we are helping you. I am here today discharging my family's obligation to the Verein for the help it gave my father when he came to America. Will you make a commitment to do the same when you are able?

To this, Jacob unhesitatingly agrees.

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With the help of various members of the Verein, Jacob finds cheap lodgings and gets a job repairing sewing machines and other mechanical devices. Within two years, he saves enough money to bring his wife and children to America. Over the next several years, the couple has three more children, a girl and two boys. As his children grow up, Jacob frequently tells them of the help he received from the Verein and impresses upon them the family's obligation to pay for that help by assisting Jewish immigrants from Romania when they are financially able to do so.

Although very poor, the family saves enough money over time to slowly move into better housing and to put the oldest son through electrician school after high school. He and Jacob then start their own small business repairing electrical devices, which Jacob's other two sons join when they graduate from high school. Over the following decades, the family business evolves into a small, closely-held corporation that purchases and reconditions used motors, generators, and transformers for resale to heavy industry. Before his death in the 1950's, Jacob makes each of his sons promise that when the company is financially sound, they will use its resources to discharge his debt to the Verein. Even though the Verein itself no longer exists, his sons agree that the debt remains and must be paid.

By the 1970s, the company is a successful small business employing more than twenty people in addition to the brothers. Located on the Brooklyn waterfront next to the Brooklyn Navy Yard, the company generates part of its income by supplying the Coast Guard and Navy with motors and generators used on board ship. It draws its employees from the local neighborhood, which means that, with the exception of the brothers, almost all employees are either African-American or Hispanic. Because many of the employees perform unskilled labor, there is a high turnover rate, and as a result, the company is virtually always looking to hire new employees.

At this time, the partial thaw in U.S.-Soviet relations engineered by the Nixon administration is producing a trickle of new Eastern European immigrants into the neighborhood, including some Romanian Jews. Because the company has been returning a consistent profit for several years, the brothers agree that the time has come to pay their father's debt to the Verein. Accordingly, they make it their policy to offer employment to recently arrived Romanian Jewish immigrants, even when the immigrants may not be the most qualified candidates for the job. In fact, because the brothers consider it their duty to help the immigrants learn English and gain the job skills that could not be obtained in the old country, it would be accurate to describe them as actively seeking out the least qualified candidates.

The company is much too small to support an in-house counsel, so the brothers rely on the eldest's personal attorney to prepare their contracts and answer whatever other legal questions they have. Legally unsophisticated themselves, they have no idea that by according hiring preference to

Romanian Jews they are violating both federal and local law. In the first place, the brothers are consciously and purposely hiring less qualified Caucasian Jews of Romanian extraction rather than more qualified African-Americans and Hispanics. And precisely because this policy derives from what the brothers believe to be a moral obligation to their father and the Verein, they can offer no business-related justification for it. Therefore, their hiring practices constitute illegal discrimination on the basis of race, religion, and national origin in violation of the Civil Rights Act of 1964.

Furthermore, the brothers are completely unaware of a New York City municipal ordinance designed to counteract the effects of past discrimination by the construction industry's trade unions. Until the passage of the Civil Rights Act, many of these unions excluded African-Americans and women from membership, resulting in an extreme underrepresentation of members of both groups among the construction industry's workforce. In response, the City passed an ordinance requiring all businesses involved in or supplying equipment to the construction industry to hire one woman or African-American for every Caucasian hired until such time as the percentages of these minorities employed in the construction industry corresponds to the percentage of qualified minorities in the New York metropolitan area workforce.[1] Because the brothers supply equipment to the construction industry, they are subject to this ordinance, and because they are hiring Romanian Jews in preference to all others, their hiring practices are clearly in violation of it.

Finally, the brothers are also unaware that their contracts with the Coast Guard and Navy make them subject to a federal regulation that requires all those doing business with the federal government to hire according to an affirmative action program designed to increase the number of women and people of color in the workforce.[2] Because virtually all of the company's employees have been African-Americans or Hispanics in the past, this has never before been an issue. However, their new practice of giving hiring preference to Romanian Jews constitutes a clear violation of this regulation.

The brothers' new hiring policy is clearly illegal. Should it be?

The purpose of this article is to answer this question. To this end, I will attempt to determine both what makes discrimination morally objectionable and the circumstances under which it is appropriate for the state to suppress such morally objectionable discrimination. I propose to make these determinations by examining the nature and history of the anti-

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1. This ordinance is fictitious and is designed to raise the constitutional questions that will be discussed in the body of this article. It is loosely drawn from the "Philadelphia Plan" instituted by the Nixon Administration's Department of Labor governing federal contractors in the construction industry in Philadelphia. For an account of the Philadelphia Plan and the Labor Department's Order No. 4 extending its requirements to all federal contractors, see Hugh Davis Graham, The Civil Rights Era ch. 13 (1990).

2. Once again, this regulation is fictitious and created to present issues to be subsequently discussed. We may assume it was adopted by the Department of Labor pursuant to Executive Order 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (2000).

discrimination principle that is embodied in the Constitution and laws of the United States—specifically, in the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964.

In doing so, I will not be engaging in constitutional or statutory analysis. I possess neither the inclination nor the expertise to comment usefully on the quality of the courts' legal interpretations of the Equal Protection Clause and Civil Rights Act. I propose, rather, to undertake a purely normative analysis of each provision. Disregarding the intent of the framers, previous judicial interpretations, the constraints of *stare decisis*, and the politics of anti-discrimination law, the question I propose to answer is how each provision should be interpreted if it is to correspond to the dictates of morality. The conclusions I reach are that the Civil Rights Act should be understood as an anti-oppression principle and the Equal Protection Clause should be understood as an anti-differentiation principle.

These terms are defined in Part I of this article, in which I describe the basic nature of the anti-discrimination principle and identify the three ways that it may be understood—i.e., as an anti-differentiation principle, an anti-oppression principle, or an anti-subordination principle. In Part II, I trace the history of the judicial understanding of the anti-discrimination principle contained in the Equal Protection Clause and the Civil Rights Act from 1868 to the present. This will show that the courts originally understood the anti-discrimination principle as an anti-oppression principle, that over the first half of the twentieth century this understanding gradually evolved into that of an anti-differentiation principle, and finally, that for the past three and a half decades there has been no dominant judicial understanding of the anti-discrimination principle, but rather a fluctuating mix of the three possible interpretations. In Part III, I perform the normative analysis that leads to the conclusion that the Civil Rights Act is properly interpreted as an anti-oppression principle and the Equal Protection Clause as an anti-differentiation principle. In Part IV, I offer an explanation for the ideological strife that has beset the issue of discrimination during the last generation and draw some implications for the way both the Civil Rights Act and Equal Protection Clause should be applied. Finally, I apply the results of the analysis to the case of Jacob's sons and conclude.

I. THE ANTI-DISCRIMINATION PRINCIPLE AND THE DEFINITION OF DISCRIMINATION

The two main provisions of American law that address the problem of discrimination are the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964. As a constitutional provision, the Equal Protection Clause places restrictions on state action.[3] By enjoining government from denying any person the equal protection of

3. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

the laws, it prohibits state officials from engaging in actions that discriminate against any citizen or group of citizens. As a federal statute, the Civil Rights Act places restrictions on the behavior of the individual members of society and private, non-governmental entities. It prohibits private parties from discriminating against others with regard to employment, public accommodations, and education.[4] Both of these legal provisions are thought to embody a fundamental moral principle that prohibits discrimination: the anti-discrimination principle.[5]

The Equal Protection Clause and the Civil Rights Act reflect a profound national commitment in the United States to eradicate discrimination on the basis of race, color, religion, sex, or national origin.[6] If there is a moral position that commands anything close to universal assent in our contemporary political culture, it is the belief that it is wrong to discriminate against individuals on these bases. Yet, despite this consensus, discrimination remains the most divisive political issue facing our polity. Whether society should be structured so as to guarantee strict equality of opportunity, i.e., whether we should have a "color-blind"[7] society, or whether affirmative action or benign racial, ethnic, or sexual classifications should be permitted (or perhaps required) is a perennial source of political strife. For the past half century, the United States has been in the paradoxical situation of having simultaneously reached a national consensus on the need to incorporate the anti-discrimination principle into the law of the land and an utter lack of agreement on what it means to give this principle effect. Why is this the case? What precisely is the anti-

4. This article will focus exclusively on Titles VII and IX of the Civil Rights Act, which prohibit discrimination in employment and education respectively.

5. Terminology will be a continual problem throughout this article. Many of the terms I employ have been used by other commentators, often with a variety of distinct and sometimes incompatible meanings. For example, some commentators employ the term "anti-discrimination principle" to refer to what I call in this article the "anti-differentiation principle." *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976). Further, many commentators address some of the principles I discuss under different names. For example, what I call the "anti-subordination principle" has also been referred to as the "antisubjugation principle," *see* Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 Urban Lawyer 369 (1990), the "antihierachy" principle, *see* Nadine Taub & Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 Rutgers L. Rev. 825, 831 (1985), and the "anticaste principle," *see, e.g.*, Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994). Accordingly, I will be careful to provide a definition for each term I use as it is introduced. It should be understood that these definitions are for the purposes of this article only. I make no claim that they represent standard usage.

6. This national commitment may extend to other categories such as age or disability as well, although it does not yet extend to more controversial categories such as sexual orientation. For purposes of simplicity and expediency, I will limit my discussion to the five categories enumerated in the Civil Rights Act.

7. For purposes of this article, the term "color-blind" should be read expansively to include blindness not merely to one's color, but to one's race, religion, sex, and national origin as well. Thus, a color-blind society would be one in which none of these characteristics serve as a basis for the distribution of benefits and burdens.

discrimination principle?

We might begin to answer this question by asking what it means to say that something is a moral principle. Moral principles place restrictions on the means we may use to achieve our ends. They instruct us that regardless of the desirability of these ends, there are certain things we may not do in order to attain them. Like the foul lines on a baseball field, moral principles distinguish fair means from foul by ruling certain ways of pursuing our ends as morally out of bounds. Thus, moral principles trump efficiency concerns.[8] By forbidding the use of the most efficient means to an end when those means contravene a moral principle, moral principles impose additional costs on both the efforts of individuals to realize their personal ends and those of society to realize collective ends. This reflects the fact that moral principles protect values of exceptional moral significance—values whose preservation is important enough to justify reductions in the ability of others to satisfy their desires.[9]

By recognizing the anti-discrimination principle to be a moral principle, we are recognizing that, whatever our ends, we are morally prohibited from pursuing them by means that involve discrimination. This means that to the extent that the Equal Protection Clause embodies the anti-discrimination principle, it instructs us that the government may not pursue legitimate state interests by means that involve discrimination *even if this would be the most efficient way to realize those interests*. And to the extent that the Civil Rights Act embodies the anti-discrimination principle, it instructs us that individuals and other private entities may not pursue their legitimate personal or corporate ends by means that involve discrimination *even though it is more costly to do so by non-discriminatory means.*

Of course, at this level of generality, the anti-discrimination principle is a purely formal principle, empty of content. It tells us that we may not pursue our ends by means that involve discrimination, but it does not tell us what discrimination is. In this respect, it is much like Aristotle's definition of justice as treating equals equally and unequals unequally.[10] Although this is clearly true, it is also completely uninformative without a substantive standard of measure, without an answer to the question: equal or unequal with respect to what? Similarly, although the anti-discrimination principle's prohibition against the use of discrimination is unimpeachable, it cannot guide action until a substantive definition of discrimination has been supplied.

Supplying such a definition, however, is far from an easy task. In fact, controversy over precisely this point has generated a myriad of law review

8. *See* Ronald Dworkin, *Taking Rights Seriously*, *in* Taking Rights Seriously 184 (1977).

9. The relevance of this will be made clear in Part III. *See infra* note 247 and text accompanying notes 259 and 303.

10. Aristotle, The Nichomacian Ethics, bk. 5 (David Reiss trans., Oxford Univ. Press 1998).

articles over the past few decades.[11] The Equal Protection Clause and the Civil Rights Act are intended to prohibit morally objectionable discrimination, but precisely what makes discrimination morally objectionable? In the abstract, "discrimination" is a completely neutral term referring to "perceiving, noting, or making a distinction or difference between things."[12] Few would object to discriminating between African-Americans and Caucasians for purposes of treating sickle cell anemia. Almost all would object to such discrimination for the purposes of assigning the right to vote. What, then, is the characteristic that renders an act of discrimination morally objectionable? When is discrimination invidious discrimination?

A careful survey of the legal and philosophical literature on discrimination turns up three candidates for the definition of discrimination that the anti-discrimination principle is designed to eliminate: 1) unequal treatment on the basis of irrelevant characteristics, 2) oppressive unequal treatment directed against individuals because of their membership in a minority group,[13] and 3) conduct that has the effect of subordinating or continuing the subordination of a minority group. Each of these definitions gives rise to a different interpretation of the anti-discrimination principle. If the first definition is correct, the anti-discrimination principle functions as an anti-differentiation principle.[14] If the second is correct, it functions as an anti-oppression principle. And if the third is correct, it functions as an anti-subordination principle.[15]

A. *Interpretation 1: The Anti-Discrimination Principle as an Anti-Differentiation Principle*

The first definition of discrimination identifies it as unequal treatment on the basis of irrelevant characteristics. This transforms the anti-discrimination principle into an anti-differentiation principle that prohibits classifications based on irrelevant characteristics of the people being classified. Whether a characteristic is relevant or not is determined by the context in which the anti-differentiation principle is being applied. If the

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11. *See, e.g.*, Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327 (1986); Sunstein, *supra* note 5; William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581 (1977).

12. IV Oxford English Dictionary 758 (2d ed. 1989).

13. For purposes of this article, the phrase "minority group" will be used to refer to any identifiable social subgroup other than the politically or societally dominant one, rather than merely to groups that constitute a numerical minority of the population. Thus, women can be considered a minority group despite being a numerical majority.

14. I borrow this appellation from Ruth Colker. *See* Colker, *supra* note 11, at 1005.

15. Like the anti-differentiation label, I take this designation from Colker's article. *See id.* at 1007.

context is employment discrimination, then a characteristic is irrelevant if it has no bearing on an individual's ability to do the job under consideration. If the context is education, then a characteristic is irrelevant if it has nothing to do with an individual's ability to learn or meet the academic requirements of the educational institution concerned. Under this interpretation, the anti-discrimination principle holds that it is morally impermissible to treat individuals differentially on the basis of characteristics unrelated to the tasks they will be called on to perform.

The anti-differentiation interpretation of the anti-discrimination principle is the basis of the call for a "color-blind" society. This interpretation views racial, ethnic, or sexual classification (on irrelevant grounds) as wrong *per se* and therefore would require governmental action and private employment decisions to be made completely independently of such considerations. From this perspective,

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life and practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong.[16]

The anti-differentiation interpretation of the anti-discrimination principle is most often, although not exclusively,[17] associated with a conservative ideological viewpoint. Thus, we find it supported by commentators such as Lino Graglia, "[a] racially discriminatory act is, quite simply, an action taken on the basis of race,"[18] Richard Posner, "I contend, in short, that the proper constitutional principle is . . . no use of racial or ethnic criteria to determine the distribution of government benefits and burdens,"[19] William Bradford Reynolds, "I regard government tolerance for favoring or disfavoring individuals because of their skin color, sex, religious affiliation, or ethnicity to be fundamentally at odds with this country's civil rights policies,"[20] and Edwin Meese, "if we can preserve the even-handed decisions through which the Supreme Court has moved us toward a color-blind society, then we really will have approached a new frontier in civil rights and overall prosperity."[21]

16. Van Alstyne, *supra* note 11, at 809-10.

17. *See, e.g.*, Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312 (1986).

18. Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 Harv. J.L. & Pub. Pol'y 68, 71 (1991).

19. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 25.

20. William Bradford Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. Ill. L. Rev. 1001, 1014 (1986).

21. Edwin Meese III, *Civil Rights, Economic Progress, and Common Sense*, 14 Harv. J.L. & Pub. Pol'y 150, 156 (1991); *see also* Thomas Sowell, Civil Rights: Rhetoric or

Under the anti-differentiation interpretation, the anti-discrimination principle requires a strict adherence to equality of opportunity and prohibits affirmative action.[22] By prohibiting classification on the basis of irrelevant characteristics, the anti-differentiation interpretation requires meritocratic decision-making. Differential treatment of individuals or classes of individuals must be justified by differences in the individual's or class's ability to serve the ends being sought. Thus, if the government wants to exclude a certain class of people from serving on juries, it must show that the members of that class are not capable of the type of impartial deliberation jury service requires. This can be done for children and for members of a crime victim's family. It cannot be done for African-Americans or women. Similarly, if a private employer wants to give hiring preferences to certain classes of people, he or she must show that members of those classes are better able to perform the tasks required by the job. Giving preferential treatment to those with a degree in accounting for a position as an accountant can be justified on this basis. Giving preferential treatment to members of a particular church cannot. The requirement that differential treatment be based on distinctions in merit means that all people must be accorded an equal opportunity to attain the relevant benefits, e.g., to serve on juries or be hired. Thus, the anti-differentiation interpretation requires that all individuals be evaluated by the same set of merit-based decision criteria.

This, of course, implies that affirmative action, as we are using the term, is impermissible. Affirmative action involves giving preferential treatment to members of minority groups on the basis of considerations other than the individual's ability to perform the relevant tasks. These considerations may be the desire to counteract the effect of past discrimination or unjust treatment, e.g., setting aside a certain percentage of government contracts for minority-owned businesses; to combat present or prospective prejudice, e.g., establishing hiring ratios to ensure that members of minority groups are not unfairly excluded from the workforce; to create a racially or ethnically diverse environment, e.g., giving preference in university

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Reality? 37 (1984) ("[A]ll individuals should be treated the same under the law, regardless of their race, religion, sex or other such social categories."); Terry Eastland, *The Case against Affirmative Action*, 34 Wm. & Mary L. Rev. 33, 43-44 (1992).

> Thurgood Marshall argued in the 1948 case of *Sipuel v. Board of Regents*, a forerunner to *Brown v. Board of Education*, that "[c]lassifications and distinctions based on race or color have no moral or legal validity in our society." Embedded in this statement was the moral truth that the mere race of a person tells us nothing morally important about him or her that should compel either negative or positive treatment.

Id. (alteration in original and footnotes omitted); *see also* Charles Fried, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 Harv. L. Rev. 107 (1990).

22. For purposes of this article, the phrase "affirmative action" will be used to refer to preferential treatment given to members of minority groups because of their status as minorities. Thus, in this article, affirmative action refers to more than merely outreach programs designed to encourage minorities to enter an application process in which decisions are made on an entirely meritocratic basis.

admissions to members of underrepresented groups; or merely to create what is believed to be a more just society. But in each case, preferential treatment is being accorded because of the individual's race, ethnicity, or sex, and not because of a merit-based evaluation of his or her relevant abilities. Thus, under the anti-differentiation interpretation, affirmative action is itself discrimination, so-called reverse discrimination,[23] and is forbidden.

B. *Interpretation 2: The Anti-Discrimination Principle as an Anti-Oppression Principle*

The second definition of discrimination identifies it as oppressive unequal treatment directed against individuals because of their membership in a minority group. This transforms the anti-discrimination principle into an anti-oppression principle that prohibits classificatory distinctions designed to oppress or impose disadvantages on minority groups. This interpretation focuses on the intention and motivation behind the classification. Classifications made for the purpose of degrading or dehumanizing minorities, reducing them to second-class political or social status, or otherwise exploiting them for the benefit of the dominant political or social group are prohibited. Other classifications are not. Thus, the anti-oppression interpretation of the anti-discrimination principle holds that it is morally impermissible to treat individuals oppressively because of their minority status.

The anti-oppression interpretation is concerned not so much with the inequality of the treatment as with the oppressive use to which it is put. From this perspective,

> [T]he primary evil of the various schemes of racial segregation against blacks that the courts were being called upon to assess was not that such schemes were a capricious and irrational way of allocating public benefits and burdens. . . . The primary evil of these schemes was instead that they designedly and effectively marked off all black persons as degraded, dirty, less than fully developed persons who were unfit for full membership in the political, social, and moral community.[24]

23. *See* Ken Feagins, *Affirmative Action or the Same Sin?*, 67 Denv. U. L. Rev. 421, 422 (1990) ("'Affirmative action' is the 'samesin'—the continuation and propagation of 'separate but equal' race- and sex-consciousness. It is *Plessy v. Ferguson* in reverse." (footnotes omitted)); Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 Harv. J.L. & Pub. Pol'y 627, 686 (1985) ("[I]n the impatience to complete the abolition of discrimination based on race, we must not abandon the principle of non-discrimination itself."); *see also* Robert K. Fullinwider, The Reverse Discrimination Controversy: A Moral and Legal Analysis (1980); Lisa H. Newton, *Reverse Discrimination as Unjustified*, 83 Ethics 308 (1973); George Sher, *Justifying Reverse Discrimination in Employment*, 4 Phil. & Pub. Aff. 159 (1975).

24. Wasserstrom, *supra* note 11, at 593. In another context, Wasserstrom further illustrates this point with the example of slavery.

> The primary thing that was wrong with the institution [of slavery] was not that the

Unlike the anti-differentiation interpretation, the anti-oppression interpretation does not view racial, ethnic, or sexual classification as wrong *per se*. The wrongfulness of a classification comes from its oppressive purpose rather than a failure to make all classificatory decisions strictly in accordance with merit. Therefore, the anti-oppression interpretation would require governmental actions and private employment and educational decisions to be made independently of racial, ethnic, or sexual animus, but not necessarily independently of all racial, ethnic, or sexual considerations.

The anti-oppression interpretation of the anti-discrimination principle is most often associated with a liberal ideological viewpoint. Thus, we find it supported by commentators such as Paul Brest, "[t]he heart of the anti-discrimination principle is its prohibitions of race-dependent decisions that disadvantage the members of minority groups,"[25] Laurence Tribe, "the equal protection clause asks whether the particular conditions complained of, examined in their social and historical context, are a manifestation or a legacy of official oppression,"[26] Ronald Dworkin, "[racial discrimination consists in] racial classifications that are invidious, because they reflect a desire to put one race at a disadvantage against another, or arbitrary, because they serve no legitimate purpose, or reflect favoritism, because they treat members of one race with more concern than members of another,"[27] and John Hart Ely, "the express preoccupation of the framers of the amendment was with discrimination against Blacks, that is, with making sure that Whites would not . . . continue to confine Blacks to an inferior position."[28]

> particular individuals who were assigned the place of slaves were assigned them arbitrarily because the assignment was made in virtue of an irrelevant characteristic, their race. Rather, . . . the primary thing that was and is wrong with slavery is the practice itself . . . . And the same can be said for most if not all of the other discrete practices and institutions which comprise the system of racial discrimination even after human slavery was abolished. The practices were unjustifiable—they were oppressive—and they would have been so no matter how the assignment of victims had been made.

Richard Wasserstrom, *A Defense of Programs of Preferential Treatment*, *in* Social Ethics: Morality and Social Policy 213, 215 (Thomas A. Mappes & Jane S. Zembaty eds., 3d ed. 1987).

25. Brest, *supra* note 11, at 2.

26. Laurence H. Tribe, American Constitutional Law 1516 (2d ed. 1988).

27. Ronald Dworkin, A Matter of Principle 318 (1985).

28. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974); *see also* Stephen L. Carter, *When Victims Happen To Be Black*, 97 Yale L.J. 420, 433-34 (1988); Kennedy, *supra* note 11, at 1336 ("*Brown* and its progeny do not stand for the abstract principle that governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation . . . ."). Racism is the difference that the most oppressive racial categorizations make. The rationality or irrationality of a categorization has nothing to do with whether it is racially oppressive in practice. . . .

> . . . But whatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly

Under the anti-oppression interpretation, the anti-discrimination principle does not require equality of opportunity and permits affirmative action. Because this version of the principle prohibits only unequal treatment designed to oppress, it says nothing about the standards that may be used for making non-oppressive distinctions among individuals or classes of individuals. Specifically, it does not demand that all distinctions be made on the basis of merit. Although it would forbid an employer from excluding African-Americans from the workforce because of racial prejudice, it would not forbid the employer from giving hiring preference to the members of his or her soccer team. This means that the anti-oppression interpretation would permit classification on the basis of irrelevant characteristics as long as the purpose of classification was not to oppress minorities. Thus, the anti-oppression interpretation does not require a strict adherence to equality of opportunity.

This implies that affirmative action is permissible. Whether the preferential treatment given to minorities is for the purpose of counteracting the effect of past discrimination or unjust treatment, combating present or prospective prejudice, or creating a more diverse environment or more just society, it is certainly not for the purpose of oppressing them. Although affirmative action is by definition unequal treatment, it is not oppressive unequal treatment. Thus, under the anti-oppression interpretation, it does not violate the anti-discrimination principle. This also means that affirmative action is not accurately described as reverse discrimination. Because discrimination is oppressive unequal treatment and affirmative action is not oppressive, it is not discrimination, and therefore, is not reverse discrimination.

C. *Interpretation 3: The Anti-Discrimination Principle as an Anti-Subordination Principle*

The third definition of discrimination identifies it as any conduct that has the effect of subordinating or continuing the subordination of a minority group. This transforms the anti-discrimination principle into an anti-subordination principle that prohibits all actions that undermine the social or political standing of minorities. Under this interpretation, the prohibited conduct is not limited to that designed to oppress minorities. Because such

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> about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.

Id.; *see also* J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213, 220 (1980).

> Now it is agreed and solemnly enacted into law that racism—both governmental and private—is wrong, and that the government should employ its power to eradicate it. The purpose of this legislation cannot be denied: to help blacks and members of other minority groups overcome the prejudice that oppresses them.

Id.

conduct does undermine the position of minorities, it would, of course, be forbidden. However, even conduct that is not purposely directed against minorities, but which has the unintended consequence of increasing or preserving their socially disadvantaged position is proscribed. Thus, the anti-subordination interpretation of the anti-discrimination principle holds that it is morally impermissible *to do anything* that adds to or continues the social or political subordination of members of minority groups.

The anti-subordination interpretation focuses not so much on the way individuals are treated as on the consequences governmental and private actions have on the societal status of minority groups. For this reason, it functions not only negatively as a bar to oppressive action, but positively as a call for action to alleviate social subordination.

> Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.[29]

This means that under the anti-subordination interpretation, the anti-discrimination principle is viewed as a means to the social goal of creating a more egalitarian society. Accordingly, the anti-subordination interpretation would not only prohibit actions that aggravate or perpetuate subordination, but require actions to eliminate it.

The anti-subordination interpretation of the anti-discrimination principle is most often associated with a critical or radical left-wing ideological perspective. Thus, we find it supported by commentators such as Robin West, "'[e]qual protection,' for the progressive, means the eradication of social, economic, and private, as well as legal, hierarchies that damage,"[30] Cass Sunstein, "the anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systematic social disadvantage,"[31] Owen Fiss, "what is critical . . . is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group,"[32] and Dorothy Roberts, "the anti-subordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged."[33]

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29. Colker, *supra* note 11, at 1007-08 (footnote omitted).

30. Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641, 694 (1990).

31. Sunstein, *supra* note 5, at 2411.

32. Fiss, *supra* note 5, at 157.

33. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1453-54 (1991); *see also* Catherine A. MacKinnon, *Not a Moral Issue*, *in* Feminism Unmodified 146 (1987); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659; David A. Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99 (1986).

Under current social conditions, the anti-subordination interpretation of the anti-discrimination principle would prohibit equality of opportunity and require affirmative action. This is because there presently are relatively disadvantaged or subordinated groups in our society. For example, the legacy of legally-enforced slavery, Jim Crow legislation, and privately-held racial prejudice has produced a society in which African-Americans as a group have a lower socio-economic status and less political and economic power than Caucasians. This past oppression means that African-Americans come to the job market with relatively lower skills, educational attainments, and credentials than Caucasians and that there are disproportionately few African-American owned businesses. Under these circumstances, if private employment opportunities and government contracts are assigned on a purely meritocratic basis, e.g., on the basis of job qualifications and low bids respectively, African-Americans will receive a disproportionately small share of each.[34] Thus, a strict adherence to equality of opportunity would preserve their subordinated social status.[35] Because the anti-subordination interpretation prohibits conduct that preserves subordination, it therefore forbids a strict adherence to equality of opportunity. But this immediately implies that affirmative action is required. For if racially oppressive action creates subordination and neutral, "color-blind" action preserves existing subordination, then only action that reduces subordination, i.e., affirmative action, is permissible. This, of course, is equivalent to saying that such action is required.

D. *Comparing the Interpretations*

A comparison of the three interpretations shows the anti-subordination interpretation to have the broadest scope and most wide-ranging effects. By prohibiting not only oppressive, but in many cases, entirely neutral classifications, the anti-subordination interpretation places significant restrictions on the actions governments or individuals can take in pursuit of

34. An early statement of this argument was provided by Daniel Patrick Moynihan when he was an assistant secretary of labor.

> In this new period the expectations of the Negro Americans will go beyond civil rights. Being Americans, they will now expect that in the near future equal opportunities for them as a group will produce roughly equal results, as compared with other groups. This is not going to happen. . . .
>
> . . . [T]hree centuries of sometimes unimaginable mistreatment have taken their toll on the Negro people. The harsh fact is that as a group, at the present time, in terms of ability to win out in the competitions of American life, they are not equal to most of those groups with which they will be competing.

Office of Policy Planning & Research, U.S. Dep't of Labor, The Negro Family: The Case for National Action (1965) [hereinafter The Moynihan Report] (quote taken from unpaginated summary introduction).

35. Similar arguments can be made for women and other ethnic and religious minorities to the extent that social stigma and official or unofficial persecution has rendered them relatively less qualified and financially self-sufficient than the socially dominant group of Caucasian males.

their ends. Under it, governments or individuals must screen all their actions to ensure that they neither intentionally nor inadvertently add to or perpetuate the subordination of any minority group. The anti-differentiation interpretation has the second largest range of application. Although not as broad as the anti-subordination interpretation, it also places powerful restrictions on permissible governmental and individual action. By prohibiting classifications based on anything other than merit, it requires governments and individuals to screen their actions to ensure that nothing other than a person's ability to serve the ends being sought play a role in his or her classification. Not only oppressive, but all personal motivations must be excised. The anti-oppression interpretation has the narrowest scope and places the least restrictions on governmental and individual actions. It prohibits only unequal treatment designed to oppress members of minority groups. Under it, individuals are permitted to classify others on the basis of purely personal preference and governments can classify citizens on the basis of political or social interests other than merit as long as this is not done to degrade or exploit people because of their membership in a minority group.

Note that in the context of the Civil Rights Act, the anti-differentiation interpretation places much greater restraints on business behavior than does the anti-oppression interpretation. The anti-differentiation interpretation prohibits employers from considering anything other than an applicant's ability to do the job in making hiring and promotion decisions, preventing employers from acting on either their personal preferences or other business-related considerations. Under the anti-differentiation interpretation, an employer could not give preference to his or her nephew, or to an applicant with the same heritage or culture as current employees as a means of reducing governance costs[36] because neither consideration is relevant to the applicant's ability to do the relevant job. On the other hand, the anti-oppression interpretation of the Act provides business people with much more freedom of action. As long as they are not acting out of racial animus or attempting to degrade or exploit applicants because of their minority status, they are free to indulge their personal preferences, e.g., hire their nephews, or consider business effects unrelated to an applicant's abilities, e.g., his or her effect on "corporate culture."

This relationship suggests something odd about the ideological alignments behind the various interpretations of the Civil Rights Act. Conservatives, who typically oppose government regulation of business, tend to support the more regulative anti-differentiation interpretation,[37] while liberals, who typically favor government regulation of business, tend to support the less regulative anti-oppression interpretation.[38] How did this seemingly incongruous alignment come to be the case? I believe the

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36. *See* Richard Epstein, Forbidden Grounds 61-69 (1992). Considerations such as this are discussed at greater length subsequently. *See infra* text accompanying notes 260-265.

37. *See supra* text accompanying notes 18-21.

38. *See supra* text accompanying notes 25-28.

answer to this question lies in the way the legal understanding of the anti-discrimination principle changed over time in the United States.[39]

II. THE LEGAL HISTORY OF THE ANTI-DISCRIMINATION PRINCIPLE

Undertaking a review of the legal history of the anti-discrimination principle must appear a foolhardy endeavor. The meaning of the Equal Protection Clause has been a subject of scholarly debate for the entire course of the twentieth century,[40] something that was intensified by the Supreme Court's request for historical briefs in *Brown v. Board of Education*.[41] This debate has produced such a notable lack of agreement as to be described by one of the nation's leading constitutional historians as

39. I return to this question in Part IV. *See infra* text accompanying notes 329-333.

40. Early major works considering the meaning of the Fourteenth Amendment were Horace Edgar Flack, The Adoption of the Fourteenth Amendment (1908) and Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

41. 345 U.S. 972 (1953). In ordering *Brown* to be reargued, the Court stated,

> In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> *(a)* that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
>
> *(b)* that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

Id. A sampling of the scholarly literature on the original meaning of the Fourteenth Amendment since *Brown* includes, Chester James Antieau, The Original Understanding of the Fourteenth Amendment (1981); Judith A. Baer, Equality under the Constitution: Reclaiming the Fourteenth Amendment (1983); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Andrew Kull, The Color-Blind Constitution (1992); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine (1988); Michael J. Perry, We The People: The Fourteenth Amendment and the Supreme Court (1999); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich. L. Rev. 1049 (1956); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 San Diego L. Rev. 499 (1985) [hereinafter Maltz, *Concept of Equal Protection*]; Earl A. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 Ohio St. L.J. 933 (1984) [hereinafter Maltz, *Fourteenth Amendment*]; William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 Sup. Ct. Rev. 33; Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 Const. Comment. 123 (1986).

being at an impasse.[42] And although the intention of the authors and sponsors of the Civil Rights Act is considerably clearer,[43] any consensus as to how the statute should be read broke down almost immediately upon its passage.

Nevertheless, I have reason to believe that the review I propose to undertake can escape the scholarly quagmire. This is because most of the historical controversy over the Equal Protection Clause and, to a lesser extent, the Civil Rights Act arises from questions about their respective authors' intentions with regard to specific legal applications. Thus, to the extent that academic disputation has been intractable, it has usually concerned matters such as whether the Fourteenth Amendment was intended to abolish segregated public schools,[44] guarantee African-Americans the right to vote,[45] apply the Bill of Rights to the states,[46] or be restricted to state action.[47] I have no intention of addressing any such issues. Rather, I propose to examine how the legislative and judicial understanding of the moral principle at the core of the Equal Protection Clause and the Civil Rights Act has changed over time. I believe that the contemporaneous understandings of the moral ends being served by these legal provisions was, until fairly recently, considerably clearer than similar understandings of either provision's legal effects. Specifically, I will contend that at the time of the adoption of the Fourteenth Amendment, the anti-discrimination principle was understood as an anti-oppression principle, that over the ensuing century, the anti-discrimination principle gradually came to be understood as an anti-differentiation principle, and that over the past three and half decades, this understanding shattered into a confused amalgam of anti-differentiation, anti-oppression, and anti-subordination interpretations of the principle.

A. *The Original Understanding: The Thirty-ninth Congress*

Although there is serious academic disagreement about the legal consequences the Equal Protection Clause was intended to produce, I believe it is clear that the Clause was originally understood to embody an

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42. *See* Nelson, *supra* note 41, at 4 ("Historical scholarship on the adoption of the Fourteenth Amendment is now at an impasse.").

43. *See* Kull, *supra* note 41, at 182.

44. This is the line of disputation set off by the Supreme Court's request in *Brown*. *See supra* note 41. For a recent iteration, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) [hereinafter McConnell, *Originalism*]; Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995); and Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937 (1995).

45. *See, e.g.*, Maltz, *Concept of Equal Protection*, *supra* note 41; Maltz, *Fourteenth Amendment*, *supra* note 41; Van Alstyne, *supra* note 41.

46. *See, e.g.*, Berger, *supra* note 41; Curtis *supra* note 41.

47. *See, e.g.*, Kaczorowski, *supra* note 41; Zuckert, *supra* note 41.

anti-oppression principle.[48] Despite "the vagueness and ambiguity of section one's language and the failure of the framing generation to settle how it would apply to a variety of specific issues,"[49] there can be little doubt that the Fourteenth Amendment was designed to incorporate into the law of the land the principles for which the North had fought the Civil War.

> What was politically essential was that the North's victory in the Civil War be rendered permanent and the principles for which the war had been fought rendered secure, so that the South, upon readmission to full participation in the Union, could not undo them. The Fourteenth Amendment must be understood as the Republican party's plan for securing the fruits both of the war and of the three decades of antislavery agitation preceding it.[50]

At least one of the North's war aims was to end slavery and the oppression of the African-American race sanctioned by the southern state governments. Slavery was abolished by the Thirteenth Amendment. This left the other forms of official oppression to be addressed by the Fourteenth. Thus, the most natural reading of the Fourteenth Amendment, and hence the Equal Protection Clause, was as a constitutional anti-oppression principle designed to keep state governments out of the business of persecuting African-Americans, or more generally, any disfavored segment of their population. On the other hand, it would be quite a stretch to see the North as fighting to impose on the southern states an anti-differentiation principle that required all official classificatory decisions to be made on a purely meritocractic basis, especially since the northern states themselves did not adhere to such a standard.

This general reason for believing that the Equal Protection Clause was originally intended as an anti-oppression principle is reinforced by the precipitating event that provided the impetus for the passage of the Fourteenth Amendment, President Andrew Johnson's veto of the Civil Rights Act of 1866. The Civil Rights Act was designed to eliminate the notorious "black codes" that had been adopted in several of the southern states. These codes consisted in legislation specifically directed against the ex-slaves and designed to keep them in a subjugated state. As subsequently described by the Supreme Court, the codes

48. It is probably anachronistic to talk about the intentions of the Thirty-ninth Congress with regard to the Equal Protection Clause, rather than § 1 of the amendment as a whole. It was not until the Supreme Court interpreted the Privileges and Immunities Clause narrowly to guarantee only the rights of national citizenship in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), that the Equal Protection Clause began to be construed independently. For purposes of consistency with the following sections, however, I propose to talk in terms of the Equal Protection Clause, even though the evidence I will be examining applies to all of section 1. Because the Thirty-ninth Congress's understanding of the anti-discrimination principle contained in section 1 would be the same for any of its clauses, this should pose no problem.

49. Nelson, *supra* note 41, at 61.

50. *Id.*

> imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . .
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside upon and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case in which a white man was a party.[51]

To combat this type of oppressive state legislation, the Civil Rights Act guaranteed all persons

> the same right . . . to make and embrace contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[52]

Johnson vetoed the bill, however, on the ground that Congress lacked the constitutional authority to enact it. The Thirty-ninth Congress responded to the veto not only by overriding it, but by passing the Fourteenth Amendment to remove any doubt about its power to pass such legislation.[53]

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51. Slaughter-House Cases, 83 U.S. (16 Wall.) at 70. The black codes were typically designed to return the freedmen to a condition of servitude. Thus, provisions permitted officers to "'arrest and carry back to his or her legal employer any freedman, free negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause'" and allowed "'any freedman, free negro, or mulatto'" convicted of a misdemeanor to "'be hired out by the sheriff or other officer, at the public outcry, to any white person who will pay said fine and all costs, and take the convict for the shortest time.'" Perry, *supra* note 41, at 50 (quoting Constitutional Law: Cases and Materials 22 (William Cohen & Jonathan D. Varat, eds., 10th ed. 1997)). In addition,

> [t]he provisions to which Congress most repeatedly objected were the vagrancy laws; these laws defined "vagrant" in a way that included virtually any adult who was not gainfully employed, and provided that anyone convicted of vagrancy would be punished by up to one year of forced labor in the service of some private individual. Congress was also concerned with statutes that made it a crime to induce an employee to leave his or her present employer and that authorized forfeiture of all wages if a worker failed to complete the terms of his or her contract. All of these provisions tended to "lock" former slaves into the service of their old masters.

Eric Schnapper, *Perpetuation of Past Discrimination*, 96 Harv. L. Rev. 828, 832 (1983) (footnotes omitted).

52. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

53. *See* Perry, *supra* note 41, at 51 ("The Congress—the Thirty-ninth Congress—overrode the veto and then, leaving nothing to chance, proposed the Fourteenth Amendment, which, when ratified two years later, in 1868, not only constitutionalized the 1866 Act but also removed any doubt about congressional power to enact legislation like the 1866 Act."); *see also* McConnell, *Originalism*, *supra* note 44, at 960 ("To be sure, the principal purpose of the Fourteenth Amendment was to constitutionalize the 1866 Act . . . ."); Kull, *supra* note 41, at 68 ("Political objectives shared by all Republicans in December 1865, from the radicals to the conservatives, provided the immediate inspiration for [the Fourteenth

Thus, the reason for enacting the Fourteenth Amendment was to empower the Congress to act against oppression by state governments, rather than to require states to engage in exclusively color-blind decision-making.[54]

Furthermore, the Thirty-ninth Congress consistently rejected proposals that suggested an anti-differentiation approach. In the first place, Congress had amended the Civil Rights Act to remove a provision that suggested that all race-based classifications were prohibited.[55] In doing so, "the Thirty-ninth Congress did what it could to ensure that the Civil Rights Act of 1866 would be what the Republican leadership had represented: a measure directed primarily at the Black Codes."[56] Thus, "[w]hen the issue was joined, an unqualified rule of nondiscrimination mustered no measurable support in the Thirty-ninth Congress."[57] And in formulating the Fourteenth Amendment itself, "Congress in 1866 considered and rejected a series of proposals that would have made the Constitution explicitly color-blind."[58] Thus, the language of § 1 of the amendment was changed from initial proposals that included a broad ban on distinctions based on race[59] to the present wording suggested by Representative John Bingham, which was recognized as a more narrowly targeted ban on racially oppressive

Amendment]. Laws depriving one race of ordinary civil rights, exemplified by the 'Black Codes' enacted that year in some southern states, must be prohibited . . . .").

54. *See* Sunstein, *supra* note 5, at 2435.

> The Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy. The hierarchy was thought to be a function not of natural difference but of law, most notably the law of slavery and the various measures that grew up in the aftermath of abolition. An important purpose of the Civil War Amendments was the attack on racial caste. Thus Senator Howard explained that the purpose of the Fourteenth Amendment was to "abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another." The defining case of the Black Codes, placing special disabilities on the freedmen's legal capacities, exemplified the concern with caste legislation.

Id. (alterations in original and footnote omitted).

55. *See* Kull, *supra* note 41, at 75-76.

> It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment "constitutionalized" the Civil Rights Act of 1866. . . . For present purposes it will be sufficient to recall the single most notable incident in the legislative history of the Civil Rights Act of 1866: the amendment of the civil rights bill in the House . . . to delete from the original proposal its broad antidiscrimination provision.

Id.

56. *Id.* at 79.

57. *Id.*

58. *Id.* at 69.

59. One early proposal stated, "'All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.'" *See* Kull, *supra* note 41, at 67 (quoting Cong. Globe, 39th Cong., 1st Sess. 10 (1865)). A later proposal contained language stating, "'No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.'" *Id.* at 83 (quoting Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 85 (1914)).

measures.[60]

> For Bingham and others, a constitutional amendment guaranteeing the natural rights of citizens against infringement by the states (however such rights were identified) may conceivably have been the paramount object. The Republican consensus as a whole—the votes that carried the Fourteenth Amendment in the Thirty-ninth Congress—chose Bingham's formula as the lesser of two evils. Requiring a constitutional provision that would make Black Codes impossible, Republicans embarked on the perilous course of protecting undefined rights against state infringement, despite their fundamental disinclination to disturb the federal structure, because the straightforward alternative had consequences that were clear but unacceptable. The effective way to secure the equality of the races before the law was to impose a rule of nondiscrimination. Contemplating the consequences of such a rule in 1866, Republicans decided that what they wanted after all was only a selective and partial equality before the law. The way to achieve this, they discovered, was to guarantee "equality," leaving it to others to determine what "equality" might entail.[61]

The conclusion that the Thirty-ninth Congress saw the Equal Protection Clause as an anti-oppression rather than an anti-differentiation principle is also supported by the fact that the very same Congress enacted race-conscious legislation. During Reconstruction, Congress enacted a series of social welfare programs whose benefits were limited to African-Americans.[62] For present purposes, the most significant of these was the 1866 Freedmen's Bureau Act, "the most far-reaching, racially restricted and vigorously contested of those programs,"[63] which the Thirty-ninth Congress not only passed, but supported by a margin sufficient to override President Johnson's veto.[64] Because "Congress, fully aware of the racial limitations in the Freedmen's Bureau programs, could not have intended the [Fourteenth] amendment to forbid the adoption of such remedies by itself or the states,"[65] it could not have understood the Equal Protection Clause to embody an anti-differentiation principle.[66]

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60. *See id.* at 69 ("[T]he evidence shows that an open-ended promise of equality was added to the Constitution because to its moderate proponents it meant less, not more, than the rule of nondiscrimination that was the rejected radical alternative.").

61. *Id.* at 87.

62. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985) [hereinafter Schnapper, *Affirmative Action*].

63. *Id.* at 784.

64. Cong. Globe, 39th Cong., 1st Sess. 3842 (1866) (Senate vote); *id.* at 3850 (House vote).

65. Schnapper, *Affirmative Action*, *supra* note 62, at 785.

66. Schnapper reinforces this argument as follows:

> The terms of section 1 of the Civil Rights Act of 1866 also make clear that the race-conscious Reconstruction programs were consistent with the fourteenth amendment's guarantee of equal protection. Proponents of the fourteenth amendment repeatedly emphasized that one of its primary purposes was to place in the Constitution the principles of section 1 of the Civil Rights Act. Unlike the fourteenth amendment, section 1 of the Act contains no state action requirement,

Even those scholars who argue that the Equal Protection Clause was originally understood to be broad enough to prohibit racial segregation do so on anti-oppression rather than anti-differentiation grounds. To the generation that drafted the Fourteenth Amendment, what was objectionable about racial segregation, if anything, was its oppressive purpose, not that it drew distinctions between groups on irrelevant grounds. Thus, to support his contention that the original understanding of the Equal Protection Clause was consistent with the intention to prohibit segregation in public schools, Michael McConnell appeals to the arguments of the contemporaneous opponents of segregated schools who

> had no difficulty declaring that racial segregation was a plain effort "to defeat equal rights" to which all citizens are entitled under the Fourteenth Amendment. They professed to consider the point obvious and "self-evident." In his first major introductory speech, Sumner stated that "[i]t is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality." He recounted an "incident occurring in Washington, but which must repeat itself wherever separation is attempted," where black children living near the public school were "driven from its doors, and compelled to walk a considerable distance . . . to attend the separate school." Not only was this "superadded pedestrianism and its attendant discomfort" a "measure of inequality in one of its forms," but more importantly, "[t]he indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong. . . . This is plain oppression," Sumner declaimed, "which you, sir, would feel keenly were it directed against you or your child."[67]

> and is thus enforceable against federal officials as well as private parties. Therefore, if the Civil Rights Act had forbidden benign race-conscious programs, it would have virtually shut down the Freedmen's Bureau. For example, section 1 of the Act assured all persons the right to contract, but only blacks could contract for education by paying tuition to Bureau schools. Because Congress could not have intended the Civil Rights Act to prohibit the Bureau's activities, the amendment that constitutionalized the Act should not be construed to invalidate other race-conscious programs.

Id. at 788 (footnotes omitted); *see also* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430 (1997).

> In July 1866, the Thirty-Ninth Congress—the selfsame Congress that had just framed the Fourteenth Amendment—passed a statute appropriating money for certain poor women and children. Which ones? The act appropriated money for "the relief of destitute *colored* women and children." . . . Year after year in the Civil War period—before, during, and after ratification of the Fourteenth Amendment—Congress made special appropriations and adopted special procedures for awarding bounty and prize money to the "*colored*" soldiers and sailors of the Union Army.

Id. at 430-31 (footnote omitted).

67. McConnell, *Originalism*, *supra* note 44, at 997 (alterations in original and footnotes omitted).

It is also clear that the Equal Protection Clause was not originally intended as an anti-subordination principle. Being designed to ensure that Congress had the power to eliminate the black codes, it was intended as a restriction on state legislative power,[68] not as a mandate that either the state or federal governments act to advance the social, economic, or political prospects of the newly freed slaves. Such a mandate would have been inconceivable in 1866.

> But the Civil War Amendments were targeted at caste *legislation*, that is, at specific laws that embodied discrimination and in this way helped to create caste. . . . There was no general understanding that these amendments imposed on government a general duty to remove caste status or banned nondiscriminatory laws that contributed to caste status—even if it was understood that Congress would have the power to counteract the legacy of slavery with affirmative legislation.[69]

Thus, whatever disagreements there may be about the original meaning of the Equal Protection Clause, there is consensus that the anti-discrimination principle it embodied was understood as an anti-oppression principle and that the discrimination it was intended to prohibit was understood as the oppressive unequal treatment of African-Americans (or, more generally, the members of any minority group) intended to degrade, subjugate, or exploit them.[70]

> [T]he history of the Fourteenth Amendment makes it clear that section one was at least partly an antidiscrimination provision—that whatever else section one was meant to do, it was meant to achieve and protect, against the states, a fuller measure of equality for a particular group of Americans, a group that had long been regarded and treated as less than truly, fully human.[71]

At the time the Fourteenth Amendment was drafted, the stronger, more restrictive anti-differentiation interpretation was simply not in contemplation.

> The available historical evidence fails to support the proposition that the generation of "We the people" that made the Fourteenth Amendment a part of the Constitution understood the Amendment to ban laws (or other governmental actions) based on race without regard to whether the laws

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68. This is indicated by the expression of section 1 of the Amendment as a negative injunction: *"[n]o state shall . . . deny* to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added).

69. Sunstein, *supra* note 5, at 2436.

70. *See* Perry, *supra* note 41, at 75.

> What discrimination—what discriminatory laws—did they ban? It captures at least a part of what they were getting at—indeed, the central part—to say that they banned any discriminatory law based on the view that those against whom the discrimination operates are "innately" or "inherently" or "by nature" degraded or defective human beings, if human beings at all.

Id.

71. *Id.* at 84.

were racist.[72]

Thus, we can conclude, with Cass Sunstein, that "[o]riginally the Fourteenth Amendment to the Constitution was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race."[73]

B. *Early Judicial Understanding: The* Slaughter-House Cases *to* Plessy

Throughout the remainder of the nineteenth century, the courts interpreted the anti-discrimination principle contained in the Equal Protection Clause precisely as its drafters intended, as an anti-oppression principle. Although, as the notorious case of *Plessy v. Feguson*[74] makes clear, there might be judicial disagreement about whether or not legislation should be regarded as oppressive, there was consensus that the legislation that the Equal Protection Clause barred was legislation that was intended to oppress. There is almost no instance of a court interpreting the Equal Protection Clause as containing an anti-differentiation principle banning non-oppressive classifications based on race.

> During the thirty years that separated the drafting of the Fourteenth Amendment from Justice Harlan's opinion in *Plessy v. Ferguson*, state and lower federal courts were repeatedly called upon to determine whether the amendment embodied [an anti-differentiation principle]; quite naturally, from a lawyer's point of view, they found that it did not. . . .
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> . . . The framers of the Fourteenth Amendment had declined to write the [anti-differentiation] principle into the Constitution, and the first generation of judges to construe the amendment declined to read what had not been written.[75]

The Supreme Court first construed the Fourteenth Amendment in the *Slaughter-House Cases*,[76] in which butchers challenged a Louisiana law that favored certain business interests with the grant of a monopoly on the operation of livestock yards and slaughterhouses in the vicinity of New Orleans. Although the *Slaughter-House Cases* did not involve racial discrimination and are remembered more for the narrow construction the Court gave to the Privileges and Immunities Clause than for its treatment of the Equal Protection Clause, the Court began its analysis by explicitly characterizing the Fourteenth Amendment as a measure directed against oppressive action by the state governments. After recounting the depredations imposed on the freed slaves by the black codes,[77] the Court

72. *Id.* at 100.
73. Sunstein, *supra* note 5, at 2439.
74. 163 U.S. 537 (1896).
75. Kull, *supra* note 41, at 88-89.
76. 83 U.S. (16 Wall.) 36 (1872).
77. *See supra* text accompanying note 51.

went on to identify the purpose of the amendment as the alleviation of this type of oppression.

> These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment . . . .
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> . . . .
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> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[78]

Interpreting the Equal Protection Clause in light of this purpose, the Court clearly regarded the Clause as embodying an anti-oppression principle.

> In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to [the Equal Protection Clause]. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.[79]

Indeed, the Court went even further to describe the Equal Protection Clause as an anti-oppression principle *created specifically for the benefit of African-Americans.*

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.[80]

This race conscious formulation of the purpose of the Equal Protection

78. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 70-71.
79. *Id.* at 81.
80. *Id.*

Clause is the clearest possible indication that the Court could not have seen it as an anti-differentiation principle.[81]

The Court reconfirmed its view of the Equal Protection Clause as an anti-oppression principle seven years later in *Strauder v. West Virginia*,[82] which involved a West Virginia statute that barred African-Americans from serving on juries. As in the *Slaughter-House Cases*, the Court began by characterizing the purpose of the Fourteenth Amendment as the elimination of state government oppression.

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. . . . They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.[83]

The Court then condemned the West Virginia statute as precisely the type of oppressive legislation the amendment was intended to eradicate, characterizing it as: "unfriendly legislation against [African-Americans] distinctively as colored, . . . implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and [imposing] discriminations which are steps towards reducing them to the condition of a subject race."[84]

Admittedly, *Strauder* contains language that frequently has been offered as evidence that the Court viewed the Equal Protection Clause as

81. Furthermore, by characterizing the purpose of the Equal Protection Clause as the elimination of oppressive state legislation, the Court made it clear that it did not conceive of the Clause as an anti-subordination principle mandating action to eliminate social inequality, something the Court made explicit in the *Civil Rights Cases*, 109 U.S. 3 (1883). *See infra* text accompanying notes 93-97.

82. 100 U.S. 303 (1879).

83. *Id.* at 306.

84. *Id.* at 308.

embodying an anti-differentiation principle,[85] specifically,

> [The Fourteenth Amendment] ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?[86]

This interpretation is sustainable, however, only by taking these sentences completely out of context and ignoring the immediately following language quoted above[87] that makes it clear that what was objectionable about the statute was its assumption of African-American inferiority, not that it made a distinction on the basis of race. The Court's apparent endorsement of an anti-differentiation approach is easily explained in the context of jury service since it is only by forbidding distinctions on the basis of race that rules governing the selection of jurors can be purged of their oppressive character. The Court makes it evident that this, rather than an anti-differentiation interpretation of the Equal Protection Clause, is the basis for its decision when it states,

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[88]

Additional evidence of the Court's anti-oppression interpretation came

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85. *See* Kull, *supra* note 41, at 93.

86. *Strauder*, 100 U.S. at 307.

87. *See supra* text accompanying note 84.

88. *Strauder*, 100 U.S. at 308. The anti-oppression interpretation of the Equal Protection Clause was reinforced in *Ex Parte Virginia*, 100 U.S. 339 (1880), a companion case to *Strauder*, in which the Court again declared that the

> [o]ne great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.

Id. at 344-45. This was something with which even the dissenting Justices agreed.

> To remove the cause of them; to obviate objections to the validity of legislation similar to that contained in the first section of the Civil Rights Act; to prevent the possibility of hostile and discriminating legislation in future by a State against any citizen of the United States, and the enforcement of any such legislation already had; and to secure to all persons within the jurisdiction of the States the equal protection of the laws,—the first section of the Fourteenth Amendment was adopted.

Id. at 364-65 (Field, J., dissenting).

three years later in *Pace v. Alabama*,[89] in which the Court upheld the constitutionality of a statute that increased the penalties for adultery and fornication when the participants were of different races. As in the previous cases, the Court described the purpose of the Equal Protection Clause in anti-oppression terms, stating,

> The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment.[90]

The Court found that the Alabama statute did not run afoul of this prohibition because it applied the same penalty to the members of all races:

> The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person.... [T]he offense... cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.[91]

This constitutes a clear, if implicit, rejection of an anti-differentiation interpretation of the Equal Protection Clause. Such an interpretation would prohibit legislation involving racial distinctions not relevant to the end to be achieved. Because race is clearly irrelevant to the goal of discouraging adultery and fornication, an anti-differentiation interpretation of the Equal Protection Clause would require the Court to invalidate the Alabama statute. By not doing so, the Court made it clear that it was not irrelevant racial classification *per se* that violates the Clause, but racial classification designed to oppress.[92]

That same year, the Court made it equally clear that it did not view the

89. 106 U.S. 583 (1883).
90. *Id.* at 584.
91. *Id.* at 585.
92. Of course, the statute in question was surely designed to oppress African-Americans. By punishing more harshly intercourse between the races, it was designed to discourage such intercourse, and was part of a larger scheme of legislation intended to isolate and marginalize the African-American minority. The Court's failure to recognize this greatly curtailed the effectiveness of the Equal Protection Clause as an anti-oppression principle, something that is discussed subsequently. *See infra* text accompanying notes 105-107. This, however, only reinforces the observation that the Court could not have seen the Equal Protection Clause as embodying the even more stringent anti-differentiation principle.

Equal Protection Clause as an anti-subordination principle in the *Civil Rights Cases*.[93] The Civil Rights Act of 1875 contained provisions prohibiting private individuals from discriminating against African-Americans in the furnishing of transportation or public accommodations.[94] In the *Civil Rights Cases*, the Court invalidated these provisions on the grounds that they exceeded the power conferred on Congress by the Fourteenth Amendment. In doing so, the Court construed the Equal Protection Clause as applying exclusively to state action—as denying states the power to act oppressively toward minorities, rather than as empowering Congress to act directly to remedy social subordination.

> [The Fourteenth Amendment] nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.[95]

Far from interpreting the Equal Protection Clause as an anti-subordination principle that mandated federal action to remedy the subordination of African-Americans, the Court held that it did not even permit Congress to take such action, declaring it "absurd to affirm that . . . because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection."[96] Although the Court clearly saw the Clause as prohibiting

93. 109 U.S. 3 (1883).
94. *Id.* at 9-10.
95. *Id.* at 11-12.
96. *Id.* at 13.

official oppression, it just as clearly rejected the notion that the Clause conferred the power to enact egalitarian legislation.

> The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound.[97]

Three years later, the Court amplified and extended its anti-oppression interpretation of the Equal Protection Clause in *Yick Wo v. Hopkins*,[98] a case involving a San Francisco ordinance that prohibited the operation of laundries in wooden buildings without the consent of a board of supervisors. The ordinance had been applied so as to deny consent to Chinese launderers while granting it to all others. The Court overturned the ordinance on the ground that the Equal Protection Clause prohibited not just explicitly oppressive legislation, but the oppressive enforcement of putatively neutral legislation as well. In doing so, the Court made it clear that it is the oppressive nature of state action rather than its form that constitutes a violation of the Equal Protection Clause.

> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[99]

The most notorious case of this era is *Plessy v. Ferguson*,[100] decided in 1896. *Plessy* involved a challenge to a Louisiana statute requiring railway companies to provide equal but separate accommodations for Caucasian and African-American passengers. In upholding the constitutionality of the statute, the Court limited the application of the Equal Protection Clause to state actions intended to degrade or subjugate African-Americans, i.e., those

97. *Id.* at 14-15.
98. 118 U.S. 356 (1886).
99. *Id.* at 373-74.
100. 163 U.S. 537 (1896).

that "necessarily imply . . . inferiority,"[101] explicitly rejecting both an anti-differentiation and anti-subordination interpretation.

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, *it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either*. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[102]

The Court specifically held that benign racial distinctions, those "enacted in good faith for the promotion for [sic] the public good"[103] were permissible. The Equal Protection Clause banned only those distinctions made "for the annoyance or oppression of a particular class."[104]

Plessy is held in opprobrium not for the Court's endorsement of an anti-oppression interpretation of the Equal Protection Clause, but for its characterization of the Louisiana statute as benign rather than as one designed to oppress. The patent implication of legally enforcing a separation between a disfavored minority and a politically dominant majority is that the minority is an inferior caste with whom contact would be repugnant. The Court turned a blind eye to this implication, declaring,

> the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.[105]

By ruling that legislation requiring separate but equal accommodations for Caucasians and African-Americans did not entail the inferiority of African-Americans, the Court permitted thinly-disguised oppressive legislation to survive constitutional scrutiny, greatly undermining the Equal Protection Clause's effectiveness as an anti-oppression principle. Thus, after expressly declaring the purpose of the Equal Protection Clause to be the protection of African-Americans or other minorities against oppressive state action, the Court applied the Clause in a way that ensured that this

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101. *Id.* at 544.
102. *Id.* (emphasis added).
103. *Id.* at 550.
104. *Id.*
105. *Id.* at 551.

purpose would not be achieved.

It is this inconsistency between end and means that Justice Harlan excoriated in his famous dissent, not the failure to interpret the Equal Protection Clause as an anti-differentiation principle. Harlan's oft-quoted declaration that "[o]ur constitution is color-blind" is embedded in language that makes it clear that what the Equal Protection Clause forbids is efforts to reduce African-Americans to a state of second class citizenship, not racial classification *per se*:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. *In respect of civil rights*, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color *when his civil rights as guaranteed by the supreme law of the land are involved*.[106]

Harlan was furious with the majority for its interpretation of the purpose of the statute, not its interpretation of the Equal Protection Clause. Thus, he declared:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. . . .
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> . . . .
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> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.[107]

In *Plessy*, the majority upheld the statute on the ground that, although it separated the races, it did not degrade or oppress African-Americans. Harlan disagreed, arguing that the statute was unconstitutional precisely because its purpose was to denigrate African-Americans. The Court, however, was unanimous that the purpose of the Equal Protection Clause

106. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).
107. *Id.* at 560-62 (Harlan, J., dissenting).

was to prevent the state governments from creating second-class citizens or otherwise degrading or oppressing African-Americans or other disfavored groups; in other words, that it embodied an anti-oppression principle.

C. *The Transition Period:* Plessy *to* Brown

In the decades following *Plessy*, the judicial interpretation of the anti-discrimination principle contained in the Equal Protection Clause underwent a gradual transformation from an anti-oppression principle to an anti-differentiation principle. As noted by Cass Sunstein,

> At some stage in the twentieth century, there was a dramatic change in the legal culture's understanding of the notion of equality under the Constitution. The anticaste principle was transformed into an antidifferentiation principle. No longer was the issue the elimination of second-class citizenship. The focus shifted instead to the entirely different question whether people who were similarly situated had been treated similarly—a fundamental change.[108]

The reason for this transformation, I contend, is the incongruity between end and means that cases such as *Pace*[109] and *Plessy* introduced into Equal Protection jurisprudence. By allowing statutes that contained technically neutral but nevertheless oppressive racial classifications[110] to survive constitutional scrutiny, the Court guaranteed that an anti-oppression interpretation of the Equal Protection Clause could not fulfill its purpose of preventing oppressive discriminatory legislation. If stigmatizing Jim Crow legislation was regarded as unexceptionable, then the only way to prevent the oppressive unequal treatment of African-Americans would be to prevent the state from engaging in racial differentiation at all. By blocking the effectiveness of the anti-oppression interpretation of the Equal Protection Clause, cases like *Pace* and *Plessy* created the impetus for the Clause's re-interpretation as an anti-differentiation principle.

Ironically, it was the very doctrine of separate but equal announced in *Plessy* that served as the vehicle for this transformation. For, although in the years following *Plessy* state-mandated segregation survived a variety of constitutional challenges,[111] it almost never survived a challenge based directly on the allegation that the segregated facilities were not equal.[112]

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108. Sunstein, *supra* note 5, at 2439-40 (footnote omitted).

109. *See supra* note 92.

110. The statutes equally prohibited Caucasians and African-Americans from intermarrying or riding together in rail cars. *See supra* text accompanying notes 89, 100.

111. *See, e.g.*, S. Covington & Cincinnati St. Ry. Co. v. Kentucky, 252 U.S. 399 (1920) (upholding a statute requiring segregated railway cars against a challenge that it violated the Commerce Clause); Berea Coll. v. Kentucky, 211 U.S. 45 (1908) (upholding a statute requiring segregated schools on the ground that a state has authority to define the powers of domestic corporations).

112. The single exception may be *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899) (upholding the Board of Education's use of funds to maintain a high school for Caucasian children without providing a similar school for African-American children). *But see*, Kull, *supra* note 41, at 129 ("[P]laintiffs went out of their way to disclaim

By continually piercing the illusion that segregated facilities were equal, the Court transformed the doctrine of separate but equal from a bulwark supporting state-mandated segregation into the most powerful weapon against it.[113] The process of methodically establishing that each individual instance of Jim Crow legislation constituted unequal treatment gradually but inexorably led the Court to the conclusion that all instances of legislative racial classification were unconstitutional, covertly[114] but effectively converting the Equal Protection Clause into an anti-differentiation principle.

This process began with the case of *McCabe v. Atchison, Topeka & Santa Fe Railway*,[115] in which five African-American citizens of Oklahoma challenged an Oklahoma statute that required the equal provision of segregated railway cars, but allowed Pullman and dining cars to be provided on the basis of demand. Because few African-Americans could afford such accommodations, this meant that the statute permitted railway companies to provide Pullman and dining cars for the exclusive use of Caucasians without providing similar cars for African-Americans. Although the Court ultimately dismissed the challenge on procedural grounds,[116] it went out of its way to note that the statute violated the Equal Protection Clause before doing so. Because the statute required the segregation of the races without ensuring that equal levels of accommodations would be open to members of both races, the Court found that it failed to satisfy the equality requirement of the separate but equal doctrine announced in *Plessy*.

> Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he

any objection to Richmond County's separate and unequal 'primary, intermediate and grammar schools system.' *Cumming* presented for decision neither the issue of segregation nor a well-founded challenge to unequal treatment on racial lines . . . .").

113. Andrew Kull has described this as "a judicial method by which a rule of 'separate but equal' might be turned against itself, and the legal shield of segregation made the chief weapon against it." Kull, *supra* note 41, at 150.

114. The Court never explicitly renounced any of its early anti-oppression language nor recognized any change in its interpretation of the Equal Protection Clause. Over the period from *Plessy* to *Brown*, the Court simply ceased to articulate the meaning of the Clause in anti-oppression terms while becoming increasingly willing to strike down legislation that classified citizens by race.

115. 235 U.S. 151 (1914).

116. *See id.* at 162-63.

> may properly complain that his constitutional privilege has been invaded.[117]

This reasoning represents a break with that employed in cases such as *Pace* and *Plessy*. Those cases rested on the assumption that legislation requiring the separation of the races affected both races equally and therefore could not be oppressive. However, under that assumption, there would be nothing objectionable about allowing railway companies to supply its segregated cars in proportion to customer demand. This would simply be a reasonable way of adapting neutral legislation to the empirical situation.[118] By characterizing the right to the equal protection of the laws as an individual right that is denied whenever any member of a minority group does not have access to the same accommodations as the majority regardless of whether that disparity arises from a reasonable exercise of legislative discretion,[119] the Court was subjecting Jim Crow legislation to a more stringent level of review than it applied to other types of legislation. In thus looking askance at legislation that classified citizens on the basis of race, the Court took its first step toward interpreting the Equal Protection Clause as an anti-differentiation principle.[120]

The next step was taken in the case of *Buchanan v. Warley*,[121] which directly limited the range of application of the doctrine of separate but equal. *Buchanan* involved a challenge to a municipal ordinance that prohibited both African-Americans and Caucasians from residing on a city block where most of the occupants were members of the other race. As a straightforward segregation measure that applied equally to both races, the ordinance appeared to fit squarely within the safe harbor of *Plessy*'s doctrine of separate but equal. Nevertheless, the Court struck it down,

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117. *Id.* at 161-62.

118. Michael Klarman has pointed out that *Plessy* "apparently contemplated that unequal segregated facilities *would be* subject to justification just like any other sort of inequality. . . . Racial classifications . . . were subjected to the same general rationality test which had come to govern equal protection review of economic regulation." Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 229-30 (1991).

119. *See* Kull, *supra* note 41, at 137.

> The opinion is written within a legal regime, established by *Plessy*, in which Jim Crow laws were supposedly unobjectionable per se. . . . Yet [this] conclusion makes sense only if laws imposing segregation are in fact disfavored. How else could an "argument with respect to volume of traffic" possibly be "without merit," when the issue is the reasonableness of a regulation specifying services to be provided by common carriers?

Id.; *see also* Klarman, *supra* note 118, at 228-31.

120. *See* Kull, *supra* note 41, at 138.

> Read closely, *McCabe* necessarily implied that laws requiring segregation were constitutionally disfavored. If so, then the antidiscrimination content of the Fourteenth Amendment included something more than those minimum elements that the Court had previously acknowledged . . . . To some greater but unspecified degree, the antidiscrimination principle was already part of our constitutional law by 1914 . . . .

Id.

121. 245 U.S. 60 (1917).

stating,

> As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.[122]

This decision makes sense only if the Equal Protection Clause is being read as consisting at least in part in an anti-differentiation principle. Because *Plessy*'s doctrine of separate but equal implied that state-mandated segregation was not inherently oppressive, such legislation could "exceed[ ] the restraints of the Constitution" when applied equally to both races only if it was the racial classification itself that was objectionable. Thus, *Buchanan* implies that, at least in the context of residential housing and perhaps in all contexts other than those of public conveyances and public schools, the Equal Protection Clause prohibits legislation that differentiates between the races on grounds not relevant to a legitimate, i.e., non-oppressive, legislative end.

The trend toward reading the Equal Protection Clause as an anti-differentiation principle continued in the case of *Missouri ex rel. Gaines v. Canada*,[123] in which an African-American applicant was denied admission to the law school at the University of Missouri because of his race. Under Missouri's segregated system of higher education, the University of Missouri was reserved for Caucasian students and Lincoln University for African-Americans. Although Lincoln University had no law school, the state was willing to organize a law school as soon as an African-American applied to study law and would provide the applicant with a tuition grant to allow him or her to attend an out of state law school in the meantime. Because the case dealt with publicly funded education, it fit squarely within what *Buchanan* recognized as the realm of separate but equal. Further, Missouri had gone as far as was possible toward providing equal facilities for African-Americans short of maintaining a law school that had no students. Despite this, the Court held that Missouri's arrangement violated the Equal Protection Clause.[124]

In doing so, the Court completely disregarded the question of the reasonableness of the state's efforts to provide equal facilities for African-Americans, requiring an absolute equality of accommodations for state-mandated segregation to pass muster. Dismissing the adequacy of the

122. *Id.* at 81.
123. 305 U.S. 337 (1938).
124. *Id.* at 352.

state's alternative arrangements as "beside the point,"[125] the Court stated,

> The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.[126]

In other words, when applying the doctrine of separate but equal, separate but "reasonably" equal will not do.

In *Gaines*, the Court not only adopted the reasoning of *McCabe* as the basis of its decision, but extended it to require the strictest degree of equality for Jim Crow legislation to meet the constitutional standard. By doing so, it completed the conversion of the doctrine of separate but equal from Jim Crow's shield to a sword at his throat. But this conversion could only be effected by reading the Equal Protection Clause as mandating the highest degree of skepticism toward racially differentiating legislation—that is, as containing a fairly strong anti-differentiation principle.[127]

Following *Gaines*, language suggesting an anti-differentiation interpretation of the Equal Protection Clause began to appear regularly in the Court's opinions. For example, in *Hirabayashi v. United States*,[128] the Court upheld a wartime curfew imposed exclusively on those of Japanese ancestry against a challenge on equal protection grounds. However, in doing so, the Court stated,

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of

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125. *Id.* at 349.

126. *Id.* at 349-50.

127. Support for this conclusion can also be found in Klarman, *supra* note 118, where the author recognizes that *McCabe* and *Gaines* implied that "inequality was conclusively (not even presumptively) objectionable with regard to racial classifications, when it was not as to any others," *id.* at 228, and hence that "[i]n the twentieth century . . . the separate-but-equal doctrine was rapidly detached from the reasonableness requirement that had informed its inception." *Id.* at 230. From this, he concludes that "by constitutionally requiring racially segregated facilities to provide equal treatment to individuals of different races vis-a-vis each other rather than vis-a-vis their racial group, the Justices laid the doctrinal groundwork for the demise of segregation," *id.* at 231, that is, for the Equal Protection Clause to be read as containing an anti-differentiation principle.

128. 320 U.S. 81 (1943).

equal protection.[129]

This sounds very much like a declaration that it is racial differentiation itself that violates the Equal Protection Clause. Furthermore, even in upholding the curfew, the Court appears to be reading the Equal Protection Clause as an anti-differentiation principle since it justifies the measure on the ground that the distinction it draws *is relevant* to the legitimate legislative end of protecting the country in time of war.

> Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. . . . The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.[130]

This certainly seems to imply that all irrelevant racial distinctions would violate the Fourteenth Amendment.

The suggestion that the Equal Protection Clause contained an anti-differentiation principle was echoed the following year in *Korematsu v. United States*,[131] in which the court upheld an exclusion order again directed against those of Japanese ancestry. Stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must be subject "to the most rigid scrutiny," the Court suggested that legislation that treated the races differentially could be justified only by matters of "[p]ressing public necessity."[132] This is quite a strong formulation indeed because, taken literally, it suggests that racially differentiating legislation was constitutional not when relevant, but only when necessary, to a legitimate legislative end.

The transformation of the Equal Protection Clause from an anti-oppression principle to an anti-differentiation principle was rendered virtually complete by the trio of successor cases to *Gaines* challenging state-mandated segregation in higher education: *Sipuel v. Board of Regents*,[133] *Sweatt v. Painter*,[134] and *McLaurin v. Oklahoma State*

129. *Id.* at 100.
130. *Id.* at 100-01.
131. 323 U.S. 214 (1944).
132. *Id.* at 216.
133. 332 U.S. 631 (1948).
134. 339 U.S. 629 (1950).

Regents.[135] In *Sipuel*, the Court issued a *per curiam* opinion reconfirming *Gaines* in holding that state-mandated segregation was barred by the Equal Protection Clause unless there was a strict equality of treatment between African-Americans and Caucasians.[136] *Sweatt* and *McLaurin* then demonstrated that the requisite equality was so exacting as to be practically impossible to attain.

Sweatt involved an African-American who was denied admission to the University of Texas Law School because of his race. During the course of the litigation, Mr. Sweatt was offered admission to a law school for African-Americans that the state court found to offer "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas."[137] The Court held that even this did not satisfy the equality arm of the separate but equal doctrine because the University of Texas was a better law school than the one open to African-Americans.

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[138]

Clearly, if states were required to offer African-Americans an equal opportunity not just to attend law school, but to attend a law school comparable in both tangible and *intangible* respects to that supplied to Caucasians, no state would ever as a matter of fact meet this standard. However, the Court went even further finding that the exclusion of Caucasians itself was sufficient to render the law schools unequal.

> The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that

135. 339 U.S. 637 (1950).
136. *Sipuel*, 332 U.S. at 632-33.
137. *Sweatt*, 339 U.S. at 632 (quoting the lower court).
138. *Id.* at 633-34.

> which he would receive if admitted to the University of Texas Law School.[139]

But if excluding Caucasians rendered separate educational institutions unequal, then segregated institutions could never be equal, making the class of educational institutions that could satisfy the standard of separate but equal look very much like the null set.

McLaurin took this even a step further, driving the penultimate nail into the coffin of state-mandated segregation. In that case, an African-American graduate student had been admitted to the University of Oklahoma, which had formerly been restricted to Caucasians, but was required to receive his education on a segregated basis. The segregation consisted only in McLaurin being required to sit alone in a row reserved for African-Americans in class and at special tables in the library and cafeteria. The Court found that even this arrangement did not meet the equality requirement because as a result of being set apart, "appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[140]

The Court had now ruled that not only requiring separate institutions, but separating the races within the same institution meant that the state was treating the members of the two races unequally. This made it clear that no arrangement could ever satisfy the requirements of the doctrine of separate but equal and reduced the Court's continued adherence to it to mere lip service. With *McLaurin*, the Court had arrived at a point at which differential treatment itself was a violation of the Equal Protection Clause, something the Court recognized by declaring, "We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race."[141] Having thus effectively transformed the Equal Protection Clause into an anti-differentiation principle, all that remained was for the Court to announce this result explicitly, which it famously did in *Brown* by declaring that "[s]eparate educational facilities are inherently unequal."[142]

D. *The Anti-differentiation Period:* Brown *to* Griggs

1. The Equal Protection Clause

Much is often made of the fact that *Brown* did not overrule *Plessy* or declare racial segregation to be unconstitutional *per se*. By holding that "in the field of public education, the doctrine of 'separate but equal' has no

139. *Id.* at 634.
140. *McLaurin*, 339 U.S. at 641.
141. *Id.* at 642.
142. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

place,"[143] the Court ostensibly did no more than move public education into the same category as residential housing to which, as the Court recognized in *Buchanan*, the doctrine of separate but equal did not apply.[144] However, despite the court's moderate characterization of its ruling, the practical effect of *Brown* was to complete the transformation of the Equal Protection Clause into an anti-differentiation principle that would strike down all racial classifications that were not necessary to attain a legitimate legislative end.

The Equal Protection Clause was clearly originally intended as an anti-oppression principle designed to prohibit not all racial differentiation, but only that designed to oppress African-Americans or other minorities. However, with the acquiescence of the Court in cases like *Pace* and *Plessy*, the states quickly learned how to continue racially oppressive policies by disguising them as neutral measures that affected both races equally. This meant that the only way to truly prevent oppressive state discrimination was to prohibit states from drawing racial distinctions at all. Thus, to realize the original anti-oppression end of the Equal Protection Clause, the Court had to abandon its original anti-oppression interpretation of the Clause in favor of the stronger anti-differentiation interpretation. Accordingly, beginning with *Brown* and without any explicit repudiation of its earlier anti-oppression language, the Court simply applied the Equal Protection Clause as though it contained an anti-differentiation principle.[145]

Brown may have struck down state-mandated segregation in public schools on the ground that segregated schools were inherently unequal, but in *Brown*'s companion case of *Bolling v. Sharpe*,[146] the Court made its anti-differentiation orientation explicit by declaring that the District of Columbia's segregated public schools violated the Fifth Amendment's Due Process Clause because "[s]egregation in public education is not reasonably related to any proper governmental objective."[147] The Court then issued a series of memorandum opinions striking down state-mandated segregation in almost all contexts with no additional explanation. The Court simply held it to be a violation of the Equal Protection Clause for states to mandate or maintain segregated parks,[148] beaches and bathhouses,[149] golf courses,[150]

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143. *Id.*

144. *See supra* text accompanying note 79; *see also* Klarman, *supra* note 118, at 251 (arguing that "*Brown* represented no significant advance in equal protection thought—that is, the Court simply added education to the panoply of rights that the Fourteenth Amendment insulated from racial discrimination").

145. Indeed, the Court's abandonment of the original understanding of the Fourteenth Amendment in *Brown* is often remarked. *See, e.g.*, Klarman, *supra* note 118, at 251 ("From a doctrinal, as opposed to a social, perspective, *Brown*'s principal historical significance may have been its cavalier disregard of the original understanding of the Fourteenth Amendment."); *see also* Berger, *supra* note 41, at 241-45; Richard Kluger, Simple Justice 634 (1976); Bickel, *supra* note 41.

146. 347 U.S. 497 (1954).

147. *Id.* at 500.

148. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954).

149. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

150. Holmes v. City of Atlanta, 350 U.S. 879 (1955).

buses,[151] airport restaurants,[152] courtroom seating,[153] and auditoriums.[154] Only the hypothesis that the Equal Protection Clause was now functioning as an anti-differentiation principle and that "the entire separate but equal doctrine was invalidated, requiring that classifications be subject to 'strict scrutiny' and prohibited,"[155] could explain these results. The Court implicitly confirmed this inference in 1959 by upholding without comment a decision enjoining the enforcement of a Louisiana statute prohibiting interracial prize fighting on the ground that, in *Brown*, "the Supreme Court held that classification based on race is inherently discriminatory and violative of the Equal Protection Clause of the Fourteenth Amendment."[156]

It was not long before the Court rendered this implication explicit. It did so first in 1963 in the case of *Goss v. Board of Education*,[157] in which the Court struck down a school transfer program designed to defeat desegregation efforts by allowing parents to voluntarily transfer their children to schools in which they would be in the racial majority. In doing so, the Court declared that "[c]lassifications based on race for purposes of transfers between public schools . . . violate the Equal Protection Clause of the Fourteenth Amendment [because] racial classifications are 'obviously irrelevant and invidious.'"[158] It reconfirmed its anti-differentiation interpretation of the Equal Protection Clause the following year in *Anderson v. Martin*[159] by striking down a statute requiring a candidate's race to be noted on election ballots on the ground that the racial differentiation could not "be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates [because there was] no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office."[160] The Court's shift to an anti-differentiation interpretation was underscored by its observation that

> [I]n a State or voting district where Negroes predominate, that race is

151. Gayle v. Browder, 352 U.S. 903 (1956).
152. Turner v. City of Memphis, 369 U.S. 350 (1962).
153. Johnson v. Virginia, 373 U.S. 61 (1963).
154. Schiro v. Bynum, 375 U.S. 395 (1964).
155. John E. Nowak & Ronald D. Rotunda, Constitutional Law § 14.8(d)(2), at 704 (6th ed. 2000).
156. Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 151 (E.D. La. 1958), *aff'd mem.*, 359 U.S. 533 (1959). Similarly, in *Tancil v. Woolls*, 379 U.S. 19 (1964), the Court upheld without comment a District Court decision invalidating state statutes requiring that official records be maintained separately for African-Americans and Caucasians on the ground that the post-*Brown* line of Supreme Court decisions "has made it axiomatic that no state can directly dictate or causally promote a distinction in the treatment of persons solely on the basis of their color." Hamm v. Va. State Bd. of Elections, 230 F. Supp. 156, 157 (E.D. Va. 1964).
157. 373 U.S. 683 (1963).
158. *Id.* at 687 (quoting Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944)).
159. 375 U.S. 399 (1964).
160. *Id.* at 403.

> likely to be favored by a racial designation on the ballot, while in those communities where other races are in the majority, they may be preferred. The vice lies not in the resulting injury but in placing the power of the State behind a racial classification that induces racial prejudice at the polls.[161]

The clear implication of the Court's locating the "vice" of the statute not in the "injury" it did to African-Americans, but in the irrational racial classification itself was that the anti-oppression interpretation of the Equal Protection Clause had given way to an anti-differentiation interpretation.[162]

The shift to an anti-differentiation interpretation had been stimulated by the dislocation between end and means introduced into equal protection jurisprudence by *Plessy* and *Pace.* With *Brown* and its successors, the Court had interred *Plessy*. In *McLaughlin v. Florida*[163] and *Loving v. Virginia*,[164] the Court interred *Pace.* *McLaughlin* involved a statute that made interracial cohabitation a criminal offense. Because the statute visited equal punishment on both the African-American and Caucasian offender, *Pace* implied that the statute was constitutional—an implication that the Court now flatly rejected. In holding that the statute violated the Equal Protection Clause because it contained an irrelevant racial classification, the Court identified the constitutional standard being applied as follows:

> Our inquiry . . . is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in § 798.05 is reduced to an invidious discrimination forbidden by the Equal Protection Clause.[165]

Loving involved a challenge to Virginia's anti-miscegenation statute criminalizing interracial marriages. Explicitly rejecting *Pace*'s "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's

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161. *Id.* at 402.

162. The statute in question in *Anderson,* unlike those previously addressed by the Court, did not mandate racial segregation. Andrew Kull points out that not only did it not "subject any person to distinctive treatment because of his race," it fostered "an informed electorate by providing an identification that some voters presumably considered as significant to their choice as the other information commonly printed on the ballot, the candidates' names and political affiliation." Kull, *supra* note 41, at 165. As he observes,

> That such a statute is politically offensive is not difficult to see. To find it unconstitutional as well—for reasons independent of the disapprobation of judges—implied a Constitution profoundly color-blind, to the point that the government was not only forbidden to treat one citizen differently from another because of his race . . . , but was moreover forbidden to suggest, directly or indirectly, that racial distinctions could be relevant to the citizen's own choices in matters of public importance.

Id.

163. 379 U.S. 184 (1964).

164. 388 U.S. 1 (1967).

165. *McLaughlin*, 379 U.S. at 192-93.

proscription of all invidious racial discriminations,"[166] the Court gave the strongest possible endorsement to an anti-differentiation interpretation of the Equal Protection Clause:

> At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[167]

With *McLaughlin* and *Loving*, there remained no doubt that the Court was reading the Equal Protection Clause as a prohibition on all irrelevant racial classification.[168]

2. The Civil Rights Act

There can be little doubt that the Civil Rights Act of 1964 was originally intended to embody an anti-differentiation principle. At the time of its introduction into Congress, no other interpretation of the anti-discrimination principle was conceivable. Only an anti-differentiation principle was consistent with the position being advanced by the civil rights movement and only an anti-differentiation principle stood a chance of being passed by Congress.

Consider the position of the civil rights movement first. For the preceding decade and a half, the leaders of the struggle against Jim Crow had been arguing that legislation allowing the states to draw distinctions among citizens on the basis of race were unconstitutional violations of the Equal Protection Clause. Beginning with Thurgood Marshall's brief in *Sipuel*, civil rights advocates had asserted that "[c]lassifications and distinctions based on race and color have no moral or legal validity in our society. They are contrary to our constitution and laws . . . ."[169] Liberal

166. *Loving*, 388 U.S. at 8.

167. *Id.* at 11 (citation omitted).

168. Klarman identifies the decisions in *McLaughlin* and *Loving* as marking the Court's adoption of a racial classification rule:

> While individual Justices may have arrived there earlier, the full Court first stated a presumptive rule against racial classifications in *McLaughlin v. Florida*, where it struck down on equal protection grounds a state law criminalizing cohabitation by unmarried interracial couples. For the first time the Court in *McLaughlin* both articulated *and* applied a more rigorous review standard to racial classifications, requiring as justification an "overriding" state purpose as well as a showing that the classification was "necessary," rather than just rationally related, to the proffered governmental interest. This racial classification rule subsequently was reaffirmed in *Loving v. Virginia*, where the Court finally resolved the miscegenation issue that it had so unglamorously ducked in *Naim* and evaded in *McLaughlin*.

Klarman, *supra* note 118, at 255 (footnotes omitted).

169. Brief for Petitioner at 27, Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (No. 369).

academic opinion was in agreement as indicated by the amicus brief submitted by a committee of law professors in *Sweatt*, arguing, "Laws which give equal protection are those which make no *discrimination* because of race in the sense that they make no *distinction* because of race. As soon as laws make a right or responsibility dependent solely on race, they violate the 14th Amendment."[170] In *Brown*, the NAACP Legal Defense Fund stated as its first point that "Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment," and argued that "[t]his Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power."[171] The Legal Defense Fund continued to argue that the Equal Protection Clause be read as an anti-differentiation principle in the post-*Brown* series of cases, submitting its brief in *Anderson v. Martin* that argued that a statute requiring a candidate's race to be noted on election ballots was "[c]ontrary to the equal protection clause of the Fourteenth Amendment, [because it] on its face classifies persons according to race"[172] in August of 1963 while the Congressional debate on the Civil Rights Act was already ongoing. After fifteen years of contending that the Constitution prohibited both state and federal[173] legislation that classified citizens on the basis of race, the civil rights community could not then turn around and advocate federal legislation that allowed such classification. The idea of the Civil Rights Act as either an anti-oppression or anti-subordination principle was simply not within the contemplation of the civil rights movement in 1964.

Now consider the Congressional debate. In both the House and the Senate, one of the main strategies of the opponents of the Civil Rights Act was to portray Title VII as containing an anti-subordination principle. The Act's critics charged that Title VII's ban on discrimination would empower the new Equal Employment Opportunity Commission to order employers to hire according to race in order to achieve a proper racial balance in the workforce. Because it was clear that no bill containing an anti-subordination principle could possibly pass, the supporters of the Act had to continually reiterate that Title VII was an anti-differentiation principle that prohibited all consideration of race in employment decisions.

In the House, the Act's opponents on the Judiciary Committee issued a minority report claiming that under the Civil Rights Act, an employer "*may*

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170. Motion and Brief of Amicus Curiae Committee of Law Teachers against Segregation in Legal Education in Support of Petition for Certiorari at 8-9, Sweatt v. Painter, 339 U.S. 629 (1950) (No. 44).

171. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 16, 21, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8); *see also* Brief for Petitioners at 11, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 8) ("One of the constitutional guarantees, which petitioners may not lawfully be deprived of the benefit of, is that as citizens no distinctions be made between them and other citizens because of race or color alone." (emphasis omitted)).

172. Brief for Appellants at 7, Anderson v. Martin, 375 U.S. 399 (1964) (No. 51).

173. *See* Brief for Petitioners, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 8).

be forced to hire according to race, to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law"[174] and concluding "[t]hat this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied."[175] To combat this, the proponents of the Act had to reassure the House that the Act's "primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification"[176] and that

> Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. . . .
>
> . . . .
>
> . . . The bill would do no more than prevent . . . employers[ ] from discriminating against or in favor of workers because of their race, religion, or national origin.
>
> It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion.[177]

Thus, the Act's supporters made it as clear as was possible that the Act was intended to work as an anti-differentiation principle.

This scenario was repeated even more vociferously in the Senate debate. Southern Senators continued to oppose the Act on the ground that it would require race-conscious employment practices to achieve and maintain a racially balanced workforce,[178] a charge that was given added force by a contemporaneous decision by the Illinois Fair Employment Practices Commission ordering Motorola to hire an African-American applicant who

174. H.R. Rep. No. 88-914, pt 1, at 69 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2431, 2438.

175. H.R. Rep. No. 88-914, pt 1, at 73 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2431, 2441.

176. H.R. Rep. No. 88-914, pt 2, at 29 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2431, 2516.

177. 110 Cong. Rec. 1518 (1964).

178. For example, Senator Robertson charged that

> It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20 colored employees, he would have to fire 10 of them in order to rectify the situation. Of course, this works the other way around where whites would be fired.

110 Cong. Rec. 5092 (1964).

had failed an employment test.[179] To combat this, all of the principal sponsors of the Act repeatedly went on record arguing that this was impossible because as an anti-differentiation principle, the Act prohibited all consideration of race in employment decisions and required them to be made on the basis of ability and qualifications. Hubert Humphrey, the majority whip and one of the two bipartisan floor managers of the bill explicitly defined discrimination in anti-differentiation terms, stating "the meaning of racial or religious discrimination is perfectly clear. . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin."[180] He then went on to declare that

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance. . . .
>
> . . . In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.[181]

Thomas Kuchel, the minority whip and other floor manager, underscored this by stating that "[e]mployers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind."[182] The bipartisan captains for Title VII, Joseph Clark and Clifford Chase, filed a joint memorandum explaining that because "[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin,"[183] it followed that

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179. Myart v. Motorola Inc., Illinois Fair Employment Practices Comm'n, Charge No. 63C-127 (Feb. 26, 1964) (Decision and Order of Hearing Examiner), *reprinted in* 110 Cong. Rec. 5662 (1964).

180. 110 Cong. Rec. 5423 (1964).

181. *Id.* at 6549. Later in the debate, Humphrey reiterated these points, stating,

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

Id. at 11,848. At one point Humphrey became so exasperated with the charge that Title VII could function as an anti-subordination principle that he famously declared, "[i]f the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there." *Id.* at 7420.

182. *Id.* at 6564.

183. *Id.* at 7213.

> any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.[184]

Finally, in order to end debate and secure the Act's passage, a bipartisan coalition of Senate and House leaders and representatives of the Johnson administration agreed to a set of amendments, several of which were designed to guarantee that the Act could not be interpreted as an anti-subordination, and perhaps not even as an anti-oppression, principle. Thus, the final bill contained section 703(h) which was designed to ensure that the Act would not interfere with merit-based hiring practices by guaranteeing employers the right "to give and to act upon the results of any professionally developed ability test [that was not] designed, intended or used to discriminate because of race, color, religion, sex or national origin"[185] and section 703(j) which was designed to ensure that the government would not engage in direct anti-subordination efforts by stating "[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of"[186] racial imbalance in the work force. It would be difficult to imagine what could constitute stronger evidence that the Act was understood as an anti-differentiation principle.

With the passage of the Civil Rights Act in 1964 and the Supreme Court's decision in *Loving* in 1967, it was clearly established that within the American legal system, the anti-discrimination principle was to be understood as an anti-differentiation principle. This understanding survived a mere four years until the Court decided the case of *Griggs v. Duke Power Co*.[187]

E. *The Period of Confusion:* Griggs *to the Present*

1. The Civil Rights Act

If it was ironic that the doctrine of separate but equal was to prove the downfall of Jim Crow, it is equally ironic that the passage of the Civil Rights Act was to prove the downfall of the anti-differentiation interpretation of the anti-discrimination principle. As clear as it is that the Act was intended as an anti-differentiation principle, it is equally clear that the purpose of the Act was to improve the economic condition of African-Americans. But after decades of public school segregation and oppressive

184. *Id.*
185. 42 U.S.C. § 2000e-2(h) (1994).
186. *Id.* § 2000e-2(j).
187. 401 U.S. 424 (1971).

Jim Crow legislation had left African-Americans with less educational attainment, fewer job skills, and less experience than Caucasians, requiring all educational and employment decisions to be made on a purely meritocratic basis was obviously a poor way to achieve this purpose. This reality undermined the mid-1960's consensus in support of the anti-differentiation interpretation of the anti-discrimination principle extremely rapidly;[188] so rapidly, in fact, that by the time the Court decided *Griggs* in 1971, it was able to construe the Civil Rights Act as containing an anti-subordination principle.

Griggs involved a challenge to Duke Power Company's policy of requiring either a high school education or a passing score on an intelligence test for employment in or transfer to more favorable jobs at its plant. Duke Power's African-American employees claimed that because these requirements disqualified African-American applicants at a substantially higher rate than Caucasians, they constituted a violation of Title VII of the Civil Rights Act. Given the legislative history of the Civil Rights Act, both the District Court and Court of Appeals quite naturally interpreted Title VII as an anti-differentiation principle prohibiting the differential *treatment* of job applicants and employees on the basis of their race. This meant that a violation consisted in an act that was intended to either advance or retard any individual's employment opportunities because of his or her race. Under this interpretation, intent was a necessary element of a violation, and because Title VII banned all differential treatment, a complainant's status as a member of a minority or dominant group was irrelevant. Accordingly, the lower courts held that a violation required proof of a discriminatory intent or purpose and paid no attention to the effect of the challenged practices on African-Americans as a group.

The Supreme Court rejected this interpretation of the statute wholesale. It ruled both that proof of an intent to discriminate was unnecessary and that the effect of an employment practice on minority groups had to be taken into account.

> The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or *absence of discriminatory intent* does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" *for*

188. For example, by 1969, the Department of Labor's Office of Federal Contract Compliance Programs' "Philadelphia Plan" imposed proportional hiring requirements on construction companies in Philadelphia that did business with the Federal government, something that was extended to all federal contractors in the Department of Labor's Revised Order No. 4 in 1970. *See* Graham, *supra* note 1, at 326-29, 340-45. Further, the Equal Opportunity Employment Commission had consciously adopted an anti-subordination definition of discrimination as "all conduct which adversely affects minority group employment opportunities," Alfred W. Blumrosen, Black Employment and the Law vii-viii (1971), during the Johnson administration. *See* Graham, *supra* note 1, at 247-51.

> *minority groups* and are unrelated to measuring job capability.[189]

According to the Court, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,"[190] and thus, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[191] In other words, employment practices that have the effect of continuing the subordination of minorities violate Title VII. In thus establishing what became known as the disparate impact theory of discrimination, the *Griggs* Court was clearly reading the Civil Rights Act as an anti-subordination principle.

Two years later, the Court was called upon to decide what was required for a complainant to establish that he or she had been subject to an adverse employment decision because of his or her membership in one of the Act's five protected classes. With the passage of the Act, any employer wishing to engage in discriminatory employment practices knew enough not to do so openly. Such an employer would always give a neutral reason for any employment decision adverse to a member of a protected class. How could one who was a victim of such covert discrimination prove this in court?

The Court answered this question in *McDonnell Douglas Corp. v. Green*[192] by creating a rebuttable presumption that when an adverse employment decision is taken against a qualified minority it is for a discriminatory reason. In *McDonnell Douglas*, the complainant was an African-American who applied for a job for which he was qualified but was not hired. He claimed he was not hired because of his race; the company claimed it was because he had engaged in unlawful protest activities against it. To resolve such evidentiary conflicts, the Court established a three-step process for proving the existence of a discriminatory motive. First, the complainant must establish a *prima facie* case, which may be done by showing,

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[193]

If the complainant meets this burden, the second step requires "the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[194] If the employer can do so, then the third step

189. *Griggs*, 401 U.S. at 432 (emphasis added and citation omitted).
190. *Id.*
191. *Id.* at 430.
192. 411 U.S. 792 (1973).
193. *Id.* at 802.
194. *Id.*

requires that the complainant "be afforded a fair opportunity to show that [the employer's] stated reason for [the complainant's] rejection was in fact pretext."[195] By thus creating a presumption of discrimination against minorities, the Court was acting to prevent employers from evading Title VII by hiding discriminatory intentions behind neutral facades.

McDonnell Douglas's disparate treatment model of discrimination addressed employers' intentional actions. Was this theory consistent with *Griggs*' disparate impact model? If the *McDonnell Douglas* Court was reading the anti-discrimination principle as an anti-oppression principle, the answer would be yes. Viewed in that light, *McDonnell Douglas* would have been designed to discourage actions that intentionally disfavored minorities. Such actions obviously perpetuate if not increase the subordination of minorities, and thus would also be barred by the anti-subordination interpretation applied in *Griggs*. As previously observed, the anti-subordination interpretation is broader than and encompasses the anti-oppression interpretation.[196] Thus, if the rule of *McDonnell Douglas* is read as a protection for minorities against racially, ethnically, and sexually oppressive behavior, it is perfectly compatible with that of *Griggs*.

The Court was not willing to abandon the original understanding of the Civil Rights Act as an anti-differentiation principle so easily, however. This was made clear in *McDonald v. Santa Fe Trail Transportation Co.*,[197] in which two Caucasian employees claimed they were the victims of intentional discrimination when they were fired for misappropriating cargo but an African-American guilty of the same offense was not. The Court found the case to be "indistinguishable from *McDonnell Douglas*,"[198] and held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes."[199] In thus construing Title VII as prohibiting the differential treatment of the members of any race *including Caucasians* rather than merely the oppressive treatment of minorities, the Court was clearly reading it as an anti-differentiation principle.

The problem with this is that it makes *McDonnell Douglas*'s disparate treatment model of discrimination incompatible with *Griggs*' disparate impact model. *Griggs*' disparate impact model is based on an anti-subordination interpretation of Title VII that requires employers to avoid practices that perpetuate the subordination of minorities. As previously noted, under present societal conditions, this can require giving preferential treatment to minorities.[200] But under *McDonald*, *McDonnell Douglas*'s disparate treatment model is based on an anti-differentiation interpretation of Title VII that prohibits employers from intentionally treating minorities

195. *Id.* at 804.
196. *See supra* text preceding note 29.
197. 427 U.S. 273 (1976).
198. *Id.* at 282.
199. *Id.* at 280.
200. *See supra* text accompanying notes 34-35.

differently than Caucasians. Under this state of the law, it is possible for employers to find themselves liable for illegal discrimination no matter what they do.

Three years after *McDonald*, the Court again considered the problem of intentional discrimination in *United Steelworkers of America v. Weber*.[201] Like *McDonald*, the complainant in *Weber* was a Caucasian employee who claimed he had been denied a place in an in-plant craft-training program because of his race. The company, Kaiser Aluminum & Chemical Corporation, had voluntarily instituted an affirmative action plan that reserved fifty percent of the openings in the training program for African-Americans until the percentage of African-American craftworkers in the plant matched the percentage of African-Americans in the local labor force. As a result of the plan, Weber had been denied admission to the training program even though African-Americans with less seniority had been accepted. In keeping with the ruling in *McDonald*, the District Court and Court of Appeals ruled that because Kaiser's plan treated its employees differently on the basis of their race, it constituted a violation of Title VII.

In reversing the Court of Appeals decision, the Court seemed to again be changing its interpretation of the Civil Rights Act. In holding that Title VII "left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories,"[202] the Court appeared to be shifting from *McDonald*'s anti-differentiation interpretation, which would forbid all racial differentiation, to an anti-oppression interpretation, which would permit racial differentiation intended to benefit minorities. In *Weber*, the Court treaded close to an explicit rejection of the anti-differentiation interpretation in declaring that

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[203]

Had *Weber* truly signaled a rejection of the anti-differentiation interpretation, the Civil Rights Act could have been applied consistently. The disparate treatment model of discrimination could then be understood as the implementation of an anti-oppression principle prohibiting oppressive actions intended to retard the opportunities of minorities, something that would imply that only minorities could bring charges of discrimination under the Act. Under such an anti-oppression interpretation, there could be no "reverse discrimination" against Caucasian males. This

201. 443 U.S. 193 (1979).
202. *Id.* at 197.
203. *Id.* at 204 (quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey)).

would render the disparate treatment model consistent with the disparate impact model's anti-subordination approach. In effect, the disparate treatment model could be seen simply as a specific application of the disparate impact model—the application that addressed *intentional* actions that subordinated minorities. This would leave the more general disparate impact model to address the non-intentional actions that had this effect.

The Court soon made it clear, however, that *Weber* represented not a rejection of the anti-differentiation interpretation but merely a narrow exception to it. In *Johnson v. Transportation Agency*,[204] the Court essentially reaffirmed *McDonald*'s earlier anti-differentiation interpretation by holding that preferential treatment could be afforded to minorities only under strictly circumscribed conditions. Unless an employer was hiring according to a valid affirmative action plan, i.e., one designed as a temporary measure to remedy "a 'manifest imbalance' that reflected underrepresentation of [minorities] in 'traditionally segregated job categories,'"[205] he or she could not legally differentiate between Caucasians and minorities. In holding that a valid affirmative action plan could not unnecessarily trammel the rights of Caucasians by requiring their discharge or acting as an absolute bar to their advancement[206] and could not be designed to maintain a racially, ethnically, or sexually balanced workforce,[207] the Court made it clear that Title VII protected Caucasian males as well as minorities. Thus, it could not be understood as an anti-oppression principle.

This rendered the Civil Rights Act a confused amalgam of the three different interpretations. Under the disparate treatment model, Title VII acts as an anti-differentiation principle with a narrow anti-oppression exception that prohibits employers from drawing most, but not quite all distinctions between Caucasians and minorities. Employers can intentionally favor minorities only if they do so according to a plan designed to remedy a conspicuous underrepresentation of minorities in a traditionally segregated job category. Under the disparate impact model, Title VII acts as an anti-subordination principle that prohibits actions that have a negative effect on the status of any minority group.

This creates quite a conundrum for employers. On the one hand, because, under present societal conditions, neutral hiring practices can have a negative effect on minorities, employers who wish to avoid disparate impact liability have a strong incentive to give preferential treatment to minorities.[208] On the other hand, the disparate treatment model's anti-

204. 480 U.S. 616 (1987).
205. *Id.* at 631 (citation omitted).
206. *Id.* at 630.
207. *Id.* at 639.
208. It is, of course, not logically necessary for employers to give preferential treatment to minorities to avoid disparate impact liability. They could instead make all hiring and promotion decisions according to employment practices that meet the legal criteria for the validation necessary to show that they "measure the person for the job and not the person in the abstract." Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). Doing so, however, can

differentiation orientation does not permit employers to grant preferential treatment to minorities in order to avoid liability under Title VII, but only to remedy a conspicuous imbalance in a traditionally segregated job category. For employers not dealing with both a traditionally segregated job category and a conspicuous underrepresentation of minorities, efforts to avoid disparate impact liability by engaging in affirmative action can render them liable for the disparate treatment of Caucasian males, while efforts to avoid disparate treatment liability by employing strictly neutral hiring and promotion practices can subject them to disparate impact liability.[209]

This confused mix of incompatible principles has remained the Court's interpretation of the Civil Rights Act to the present day.[210] Being internally inconsistent, this state of the law has given all political persuasions legitimate grounds on which to criticize the application of the Act. Conservative adherents of the anti-differentiation principle regard the *Weber-Johnson* exception for valid affirmative action plans as an unjust and unjustifiable loophole that violates citizens' fundamental right to equal treatment and the *Griggs* disparate impact theory as a malignant step toward a system of racial quotas. Liberal adherents of the anti-oppression principle argue that there is no principled reason why departures from strict racial,

be so time consuming and expensive as to be beyond the reach of all but the largest companies. *See* James Gwartney, et.al., *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame L. Rev. 633, 658 (1979) (arguing that validation procedures are impractical and infeasible); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1235 (1995) ("Formal validation of even relatively straightforward objective selection devices is an expensive and time-consuming process, often requiring several years and hundreds of thousands of dollars in professional fees and employee time."); Barbara Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 (reporting that adequate criterion-related validity studies generally cost between $100,000 and $400,000 and require approximately two years to complete). As a result, most employers face the strongest possible incentive to ensure that their hiring and promotion practices do not produce a disparate impact in the first place, something that can be done only by differentiating on the basis of race, ethnicity, and sex.

209. This tension between disparate impact and disparate treatment liability has long been recognized. *See* Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989) ("The only practicable option for many employers will be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof . . . ."); United Steelworkers of Am. v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) ("If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.").

210. Subsequent decisions by the Supreme Court have addressed the evidentiary requirements of and relationships among the plaintiff's *prima facie* case, the defendant's response, and the plaintiff's showing of pretext for both the disparate treatment model, *see, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), and the disparate impact model, *see, e.g.*, *Ward's Cove Packing Co.*, 490 U.S. 642; Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Connecticut v. Teal, 457 U.S. 440 (1982). Such decisions, however, have not altered the underlying theory of either model.

ethnic, or sexual neutrality should be limited to plans designed to remedy conspicuous imbalances in traditionally segregated job categories. They regard affirmative action efforts designed to provide minority role models for the next generation, increase workplace or educational diversity, or counteract the effects of ongoing societal stereotyping and discrimination as morally justified, and an interpretation of the Civil Rights Act that prohibits them as morally perverse. Radical adherents of the anti-subordination principle view the anti-differentiation basis of the disparate treatment theory as both without moral foundation and as a reactionary roadblock to the achievement of a more racially, ethnically, and sexually just society. Given this state of affairs, it is entirely unsurprising that the field of employment discrimination law has become one of the favorite playgrounds of law review authors.[211]

2. The Equal Protection Clause

The anti-differentiation interpretation of the Equal Protection Clause the Court adopted during the period between *Brown* and *Loving* disintegrated almost as rapidly, if not as completely, as the anti-differentiation interpretation of the Civil Rights Act. Once government is prohibited from acting in ways that are inimical to minorities, the anti-differentiation interpretation of the Equal Protection Clause loses much of its appeal. In this context, a requirement of racial, ethnic, and sexual neutrality merely bars government from taking steps to improve the condition of those who had been the victims of past oppressive measures. President Johnson's famous declaration that, "[y]ou do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair"[212] sounded as a clarion call for benign racial, ethnic, and sexual classification by government.

The Court responded to this call by shifting its understanding of the Equal Protection Clause from an anti-differentiation interpretation to a fluctuating mixture of anti-differentiation and anti-oppression interpretations. Unlike the Civil Rights Act, however, the Court did not adopt an anti-subordination interpretation of the Clause, something it explicitly rejected in the case of *Washington v. Davis*.[213] In *Davis*, African-American applicants to the District of Columbia's police force brought a constitutional challenge to the District government's use of an employment test that had a disparate impact on African-Americans. To grant the complainants relief, the Court would have had to hold that the disparate impact model of discrimination it had created under the Civil Rights Act in *Griggs* applied in the constitutional context as well, i.e., that unintentional

211. *See supra* note 11.

212. *See* Kull, *supra* note 41, at 186-87 (quoting Lyndon Johnson's speech given at Howard University on June 4, 1965).

213. 426 U.S. 229 (1976).

governmental actions that have the effect of perpetuating the subordination of minorities violated the Equal Protection Clause.[214] The Court refused to do this, stating "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[215]

It is interesting to note that in rejecting the anti-subordination interpretation of the Equal Protection Clause, the Court seemed to be acting more out of fear of its consequences than out of a moral commitment to the anti-differentiation interpretation. In ruling that the disparate impact theory "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution,"[216] the Court was apparently concerned that allowing disparate impact challenges under the Equal Protection Clause could significantly undermine government's ability to function.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[217]

In order to avoid such unpalatable consequences, the Court refused to "embrace[] the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[218] Thus, the Court rejected the anti-subordination interpretation of the Equal Protection Clause predominantly on the ground of its impracticability.[219]

Moral considerations were the impetus behind the Court's shift in the direction of the anti-oppression interpretation, however; the first indication of which came in the 1971 case of *Swann v. Charlotte-Mecklenburg Board of Education*.[220] *Swann* involved a challenge to a court-ordered public school desegregation plan that included the race-conscious assignment of teachers and students. In upholding the plan, the Court specifically rejected the contention that courts are bound to act in an entirely color-blind manner, holding that it is constitutional to classify citizens by race for the purpose of

214. Because the challenge was brought against the District of Columbia, it was based on the Due Process Clause of the Fifth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment. The Court applied the same constitutional standard for equal protection challenges to the Fifth and Fourteenth Amendments, however. *Id.* at 239.

215. *Id.*

216. *Id.* at 247.

217. *Id.* at 248.

218. *Id.* at 239 (emphasis omitted).

219. The moral significance of this is addressed below in Part III.B.4. *See also infra* note 317.

220. 402 U.S. 1 (1971).

remedying past governmental discrimination.[221] As a purely logical matter, this decision does not constitute a departure from the anti-differentiation interpretation, which bars classification on the basis of *irrelevant* characteristics. Because the purpose of court-ordered desegregation plans is to reverse the effects of government-mandated racial segregation, the race of the individuals involved is obviously relevant. However, by specifically approving race-conscious governmental action in pursuit of a morally benign end, *Swann* opened the door to subsequent arguments for the anti-oppression interpretation of the Clause.

The Court walked through that door in *Regents of the University of California v. Bakke*.[222] In *Bakke*, a Caucasian applicant to the University of California at Davis Medical School challenged the school's program of reserving a certain number of the seats in its entering class for minorities. Although the Court struck down the particular program used by Davis that made race the determining factor for admission, it held that state universities could consider the race and ethnicity of applicants in deciding whether to grant admission. Specifically, the Court ruled that it was constitutionally permissible for state universities to attempt to achieve a diverse student body by employing "an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process,"[223] and thus that "race or ethnic background may be deemed a 'plus' in a particular applicant's file."[224]

Bakke represented a true shift in the direction of the anti-oppression interpretation. Unlike a court-ordered school desegregation plan, the state's essential purpose in maintaining a university is not to remedy past discrimination, but to provide a higher education for its citizens. Because a student's race is irrelevant to his or her academic ability, a strict adherence to an anti-differentiation interpretation of the Equal Protection Clause would therefore require a color-blind admissions process. An anti-oppression interpretation, on the other hand, would allow government to treat its citizens differently on the basis of their race for benign, non-oppressive purposes such as the creation of a diverse student body within state universities. Thus, *Bakke* suggested that, for some purposes, the Court was willing to view the Equal Protection Clause as an anti-oppression

221. *See id.* at 19 ("[T]he . . . school board has argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.").

222. 438 U.S. 265 (1978).

223. *Id.* at 318.

224. *Id.* at 317. The opinion of the Court announced by Justice Powell was actually much more restrictive than that of the other four members of the Court to address the constitutional issue, who would have explicitly adopted an anti-oppression interpretation of the Equal Protection Clause. They supported a rule that would allow government to "adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." *Id.* at 369 (Brennen, J., concurring in part, dissenting in part).

principle.

The Court's shift toward an anti-oppression orientation was confirmed in *Fullilove v. Klutznick*,[225] in which the Court upheld the minority business enterprise provision of the Public Works Employment Act,[226] which required that ten percent of every federal public works grant be directed to minority-owned businesses. The Court characterized this provision as "a strictly remedial measure,"[227] designed to counteract the effect of past racial discrimination in public works projects, albeit one "that functions prospectively, in the manner of an injunctive decree."[228] Citing *Swann*, the Court then "reject[ed] the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion,"[229] holding that Congress may classify citizens by race for the benign purpose of counteracting the effects of past discrimination.

Fullilove essentially converted the Equal Protection Clause into a limited anti-oppression principle.[230] It was limited in the sense that the Court did not declare that government can classify citizens on the basis of irrelevant characteristics for *any* non-oppressive purpose, but only for the purpose of remedying the effects of past discrimination (and, per *Bakke*, to achieve diverse student bodies in state universities). Within that sphere, however, *Fullilove* permitted government to intentionally treat its citizens differently on the basis of their race, ethnicity, and sex—characteristics that are obviously irrelevant to citizens' ability to perform public works contracts. *Fullilove* thus rendered the Equal Protection Clause a mixture of an anti-differentiation principle generally and an anti-oppression principle when government acts to remedy past discrimination or to achieve diverse student bodies in state universities.

Subsequent cases have addressed where to draw the line between the anti-differentiation and anti-oppression elements of this mixture, shrinking and enlarging the scope of the anti-oppression interpretation by turns.[231]

225. 448 U.S. 448 (1980).

226. Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified as amended in scattered sections of 42 U.S.C.).

227. *Fullilove*, 448 U.S. at 481.

228. *Id.*

229. *Id.* at 482.

230. Like *Davis*, *Fullilove* construed the equal protection component of the Due Process Clause of the Fifth Amendment, not the Equal Protection Clause of the Fourteenth Amendment. *See Fullilove*, 448 U.S. at 455; Washington v. Davis, 426 U.S. 229, 239 (1976); *supra* note 214. Because this article is intended as a philosophical analysis of the anti-discrimination principle contained in both the Constitution and the Civil Rights Act and not as an analysis of constitutional doctrine, I have chosen, for purposes of concision and simplicity, to speak in terms of the Equal Protection Clause exclusively, even though doing so is technically inaccurate. I ask the constitutional scholars who will be rankled by this to bear with me on this point. *See infra* note 231.

231. To some extent, the fluctuation simply reflects the highly divided nature of the Court on this issue, as evidenced by the number of cases that could manage only plurality opinions with no five justices agreeing on any single line of reasoning. As a result, as the individuals serving as justices changed, so did the place where the line between the anti-differentiation

Thus, in *Wygant v. Jackson Board of Education*,[232] which involved an agreement by which the school board gave minorities preferential protection against layoffs, the Court refused to extend the reach of the anti-oppression interpretation to cover governmental efforts to remedy societal as opposed to past governmental discrimination. In rejecting the school board's argument that its "interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision," the Court held that societal discrimination is insufficient to justify a racial classification, insisting "upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[233] This restricted scope of application for the anti-oppression interpretation was reaffirmed in *City of Richmond v. J.A. Croson Co.*,[234] in which the Court held that "a generalized assertion that there has been past discrimination in an entire industry"[235] could not justify a minority set-aside program similar to that in *Fullilove*.

The anti-oppression element of the mixture was greatly expanded, however, in *Metro Broadcasting, Inc. v. FCC*,[236] which considered the constitutionality of Federal Communications Commission ("FCC") programs designed to encourage minority participation in the broadcast industry to promote the diversification of programming. In upholding the FCC programs, the Court explicitly added the promotion of diversity to the list of purposes for which government could engage in racial, ethnic, and sexual classification, stating,

> Congress and the Commission do not justify the minority ownership

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and anti-oppression interpretations was drawn.

As I did in discussing *Fullilove*, *see supra* note 230, in the discussion that follows, I speak strictly in terms of the Equal Protection Clause, ignoring the difference between it and the Due Process Clause of the Fifth Amendment and the differing standards the Court at times applied to each. *See, e.g.*, Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990). I do so to keep the article's focus on the Court's understanding of the nature of the anti-discrimination principle rather than on the intricacies of constitutional analysis—and to prevent an already long article from becoming excessively so. Accordingly, the discussion addresses solely the purposes the Court was willing to let government, whether state or federal, pursue by means involving racial, ethnic, or sexual classification, and ignores any differences in the stringency of the restrictions placed on the states as opposed to the federal government. A non-idealistic reading of the cases may suggest that to the extent that the Court employed different standards for the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment, this may be as much a function of which faction of the Court could command a majority at the relevant time as of any theoretical commitment to the difference between the application of the amendments. If so, my practice of disregarding the distinction between them may not be entirely inappropriate.

232. 476 U.S. 267 (1986).
233. *Id.* at 274.
234. 488 U.S. 469 (1989).
235. *Id.* at 498.
236. 497 U.S. 547 (1990).

> policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.[237]

Further, in doing so, the Court adopted an open-ended rule that came close to transforming the interpretation of the Equal Protection Clause from a mixture of anti-differentiation and anti-oppression elements to an outright anti-oppression principle. By holding that

> benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives,[238]

the Court authorized Congress to employ racial, ethnic, and sexual classifications for potentially any non-oppressive purpose that does not exceed its constitutional power.

Metro Broadcasting's expansive application of the anti-oppression interpretation was relatively short-lived, however. Five years later in *Adarand Constructors, Inc. v. Pena*,[239] the Court did an about face, abandoning the permissive rule of *Metro Broadcasting* for the more restrictive requirements for racial classification that it had previously applied. In *Adarand*, a non-minority subcontractor who had not been awarded a project despite being the low bidder challenged the constitutionality of a minority set-aside program similar to the one approved in *Fullilove.* Applying the rule of *Metro Broadcasting*, the lower courts upheld the program. Rejecting this rule, the Court vacated and remanded the case, declaring,

> we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.[240]

Although it is reasonable to believe that *Adarand* simply returns the anti-differentiation/anti-oppression balance back to what it had been before *Metro Broadcasting*, the present scope of the anti-oppression element of the Court's mixed interpretation of the Equal Protection Clause cannot be known with certainty. The Court's statement that "[w]hen race-based

237. *Id.* at 566.
238. *Id.* at 564-65 (footnote omitted).
239. 515 U.S. 200 (1995).
240. *Id.* at 227.

action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out *in previous cases*"[241] suggests that things have indeed returned to the *status quo ante*. Further, the *Adarand* standard certainly permits racial, ethnic, and sexual classification to remedy past governmental discrimination, which was cited with approval in the opinion.[242] However, in rejecting the rule of *Metro Broadcasting*, the Court by implication rejected that decision's holding that government may engage in racial, ethnic, and sexual classification for the purpose of promoting diversity. This casts doubt on the constitutionality of the type of minority preferences designed to produce diverse student bodies in state universities that were approved in *Bakke*. Whether such preferences can meet the *Adarand* standard is now an open question.[243]

The Court's mixed and fluctuating interpretation of the Equal Protection Clause reflects the same theoretical dissatisfactions that beset the Civil Rights Act. Conservatives regard the anti-oppression element of the mixture as an unjustifiable departure from the ideal of a color-blind Constitution that opens a Pandora's box of racial, ethnic, and sexual politics. Liberals argue, as they did in the context of the Civil Rights Act, that there is no principled reason to limit the non-oppressive purposes for which government may employ racial, ethnic, and sexual preferences to those of remedying past governmental discrimination and creating diverse student bodies in state universities. Radicals regard the Court's unwillingness to employ the disparate impact theory of discrimination in the constitutional context as evidence of entrenched power's resistance to the demands of social justice. Thus, in the case of the Equal Protection Clause as well as the Civil Rights Act, the judicial understanding of the anti-discrimination principle seems to have arrived at a theoretical impasse. Perhaps an examination of the moral underpinnings of this principle can

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241. *Id.* at 237 (emphasis added).

242. *Id.*

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy.

Id. (citing United States v. Paradise, 480 U.S. 149 (1987)).

243. *See, e.g.*, Justin Schwartz, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence*, 58 Ohio St. L.J. 1055, 1087-93 (1997).

This question is likely to be resolved in the near future. The recent Sixth Circuit decision in the case of *Grutter v. Bollinger*, 288 F.3d 732 (2002) (approving the use of racial and ethnic preferences to achieve a diverse student body at the University of Michigan) is in direct conflict with the Fifth Circuit decision in *Hopwood v. Texas*, 78 F.3d 932 (1996) (declaring the use of such preferences to be a violation of the Equal Protection Clause). Should the Supreme Court grant *certiorari* in the *Grutter* case, the balance between the anti-differentiation and anti-oppression elements of the Court's interpretation of the Equal Protection Clause may soon shift again.

show us a way out.

III. THE PROPER LEGAL INTERPRETATION OF THE ANTI-DISCRIMINATION PRINCIPLE

Our historical survey of congressional intent and the evolution of the Supreme Court's interpretation of the Equal Protection Clause and Civil Rights Act shows how political and legal forces transformed what was originally understood as an anti-oppression principle into the confused mixture of incompatible principles that burdens the Court today. Perhaps the only way out of the theoretical cul-de-sac in which the Court now finds itself lies in a return to first principles, i.e., in leaving aside political and legal considerations long enough to seek the moral foundation of the principle we wish our law to reflect. Accordingly, in this part of the article, I undertake a strictly normative analysis of both legal provisions in an effort to determine the morally proper interpretation of each. The conclusion I reach is that for American anti-discrimination law to accurately reflect the underlying moral anti-discrimination principle, the Civil Rights Act must be interpreted as an anti-oppression principle and the Equal Protection Clause must be interpreted as an anti-differentiation principle. Let us consider the Civil Rights Act first.

A. *The Civil Rights Act of 1964*

The Civil Rights Act is a federal statute. In seeking the proper interpretation of the anti-discrimination principle it is intended to embody, we are seeking an interpretation that yields a morally justified statute. It is therefore worth taking a moment to reflect upon what it means for a statute to be morally justified.

Regulatory statutes, whether federal, state, or municipal, are designed to restrain the behavior of the individual members of society.[244] Put bluntly, their purpose is to restrict the realm of autonomous action open to individuals, i.e., to curtail individual liberty, in order to attain what is considered a more valuable societal end.[245] Because individual autonomy

244. H.L.A. Hart pointed out that not all statutes are regulatory in nature. Many types of legislation are designed to enhance individuals' ability to engage in autonomous action. The rules of contract law, for example, allow individuals to coordinate their behavior so that each party's ability to achieve his or her desired ends are increased. *See* H.L.A. Hart, The Concept of Law 26-48 (1961). The present discussion, however, is limited to statutes like the Civil Rights Act that are regulatory in nature, and the comments regarding the moral evaluation of statutes should be understood as limited to that context.

245. Statutes, of course, regulate the behavior of corporate entities such as businesses and other private organizations as well as that of individuals. However, the purpose of creating such corporate entities is to enhance individuals' ability to achieve their personal ends through coordinated collective action. As a result, regulating the behavior of private corporate entities is simply a mediated way of regulating individual citizens' pursuit of their personal ends. It is therefore not inappropriate to evaluate statutes exclusively in terms of their effects on individuals. Because doing so greatly simplifies the description of the

has significant moral value, the minimum requirement for such legislation to be morally justified is that the societal end to be attained have greater moral worth than the autonomy that must be sacrificed to attain it.[246] This suggests that there are at least two questions that must be answered to evaluate the moral quality of legislation: 1) Does the societal end that is its object possess genuine moral value?, and 2) Is this value great enough to justify the cost in personal autonomy?

Determining whether the Civil Rights Act can meet this fundamental moral requirement should be relatively straightforward. The basic premise underlying the Act is that a society free of racial, ethnic, and sexual discrimination is a more just society. The Act aims to achieve this more just society by restricting the liberty of individual citizens to treat each other in a discriminatory manner. By plugging the definition of discrimination supplied by each of the candidate interpretations of the Act into this formulation, we can begin to evaluate the moral quality of the relevant interpretation. With regard to the first question, we would want to know whether a society free of the type of discrimination identified by the anti-oppression, anti-differentiation, or anti-subordination interpretation truly is a more just society. If so, then with regard to the second question we would want to know whether the improvement is morally significant enough to justify the loss of personal autonomy that results from depriving citizens of the liberty to engage in the relevant type of discrimination.

1. Evaluating the Anti-Oppression Interpretation

There is a strong argument that under the anti-oppression interpretation, the Civil Rights Act serves a societal end of genuine moral value at a reasonable cost in personal autonomy. This argument rests on the

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evaluative process, I have adopted this expedient for purposes of this article.

246. This is certainly a necessary condition for a statute to be morally justified, although it is not necessarily a sufficient one. If the condition is not met, if the societal end of legislation is not of greater moral value than the autonomy that must be sacrificed to attain it, then the legislation is not morally justified. The fact that a statute's societal end is of greater value than the autonomy that is lost, however, does not in itself imply that the statute is morally justified. There may be other conditions to be met as well.

For example, a libertarian adherent of John Stuart Mill's harm principle, *see* John Stuart Mill, On Liberty 9 (Elizabeth Rapaport ed., 1978) (1859), might contend that in order to be justified, legislation must be designed to prevent physical harm to others. Such a libertarian might argue that not all morally worthy goals may be pursued through the mechanism of state coercion. Because all interpretations of the Civil Rights Act propose to curtail individual liberty to prevent actions that do not cause direct physical harm to others, such a libertarian may argue that no interpretation of the Act is morally justified and that the elimination of private discrimination that does not cause physical harm is not a proper state function.

I do not address such arguments in this article or, indeed, the question of whether there are additional necessary conditions for morally acceptable legislation. In this article, I propose to show no more than that because only the anti-oppression interpretation of the anti-discrimination principle meets the instant condition, it yields the only *potentially* morally justified interpretation of the Civil Rights Act. I leave the question of whether the Civil Rights Act actually is morally justified for another day.

observation that the anti-oppression interpretation of the anti-discrimination principle can be directly derived from a more fundamental moral principle: the principle of respect for persons.[247] To show the connection, however, requires a brief excursion into Kantian moral philosophy to explain the nature of the principle of respect for persons.

Kantian ethics posits a fundamental moral distinction between persons and all other things.[248] Persons are rational agents—beings capable not only of initiating action, but also of reasoning about how to act. The ability to value ends and deliberate about and choose among various courses of action in order to achieve them invests every person with a dignity, an absolute or unconditional moral worth. For this reason, Kant argued that all persons have intrinsic moral value. This sets them apart from other things such as tools, which have instrumental value, but are not valuable in themselves. A hammer has value to a carpenter because it aids the carpenter in driving nails and achieving his or her end of constructing useful wooden objects. The hammer has no value to or in itself, however. The carpenter may be foolish or a wastrel for destroying a hammer in a fit of pique after hitting his or her thumb with it, but in doing so the carpenter does not morally wrong the hammer. Persons, on the other hand, do have

247. As described below, *see infra* text accompanying notes 248-251, the principle of respect for persons requires that individuals act with respect for others' autonomous choices as to how to live their lives. Although widely accepted, there are, of course, moral philosophers who do not agree that the principle of respect for persons is a legitimate moral principle. For example, thoroughgoing utilitarians deny that there are any legitimate moral principles other than the principle of utility and ethical relativists or particularists deny that there are any legitimate moral principles at all. *See generally* Richard B. Brandt, Ethical Theory: The Problems of Normative and Critical Ethics (1959). Fortunately, there is no need for us to debate the position of these theorists in the present context.

Those who advocate the inclusion of the Equal Protection Clause in the Constitution and the Civil Rights Act within the body of federal law do so on the ground that these provisions provide legal sanction to an important underlying moral principle. Theorists who deny that there are any legitimate moral principles at all would not, and could not consistently, argue for the Equal Protection Clause or Civil Rights Act on this basis in the first place. Further, as discussed in Part II, *see supra* text accompanying notes 8-9, supporters of the Equal Protection Clause and Civil Rights Act see them as containing a moral principle that must be observed even when doing so may impede the efficient attainment of important social benefits. They emphatically do not see these provisions as declarations that state governments and individuals should not discriminate *unless there are societal gains from doing so*, which is the only way they could be understood by utilitarian moral theorists.

Because most of the moral philosophers who would deny the legitimacy of the principle of respect for persons do so on grounds that also undermine the moral significance of the Equal Protection Clause and Civil Rights Act, they may be safely ignored for purposes of this work, which proceeds on the assumption that the Equal Protection Clause and Civil Rights Act do have moral significance. This is done in full recognition of the fact that if any of their positions are correct, then the present project is a futile exercise and the national consensus on the moral significance of the anti-discrimination principle is merely a reflection of widespread moral error.

248. Immanuel Kant, Groundwork of the Metaphysic of Morals (H.J. Paton trans., 1964) (1785).

value to and in themselves. To fail to respect this value, to treat a person as though he or she was merely a tool for the achievement of one's own ends, is, according to Kant, to act wrongly. Kant embodied this insight in a fundamental moral principle, his "categorical imperative," that instructs human beings to "[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[249] This basic injunction to treat every person as an end and never merely as a means,[250] i.e., to treat every person with the respect due to entities with intrinsic moral value, is the principle of respect for persons.

In this abstract form, the principle of respect for persons can usually command a high degree of assent. Implementation is another matter. Applying the principle to resolve specific ethical dilemmas can be a complex and daunting task. However, it is clear that at a minimum the principle of respect for persons prohibits oppression. We act oppressively when we exploit others by completely disregarding their desires, interests, and choices in order to enhance our own wealth, status, or power or when we otherwise denigrate their humanity by reducing them to the status of second-class citizens. This is precisely what it means to fail to treat a person as an end.

The essence of the injunction to treat all persons as ends in themselves is that we must always recognize that they are autonomous moral agents, beings with goals and desires of their own and the ability to act upon them. Thus, treating others as ends requires that we respect their autonomy, i.e., that we recognize them as authors of their own actions entitled to make certain fundamental choices for themselves. This does not mean that we may never use other persons as means to the achievement of our own ends,[251] but it does mean that we may not so use them without their autonomously given consent. It also means that we may not treat them as though they were not capable of thinking for themselves and making their own decisions about how best to live their lives, i.e., as though they were less than fully human. We may not act so as to denigrate their humanity. In a word, we may not oppress them.

Once this is understood, it is clear that the principle of respect for persons entails the anti-oppression interpretation of the anti-discrimination

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249. Kant, *supra* note 248, at 96 (footnotes omitted). This is the second of Kant's three formulations of the categorical imperative, and is the formulation most frequently invoked in the context of applied ethics. *See* Tom Beauchamp & LeRoy Walters, Contemporary Issues in Bioethics 24 (3d ed. 1989). As this is our present context, this is the only formulation I discuss.

250. It is important to note that the categorical imperative does not prohibit using other people as means to one's own ends; it prohibits using them *merely* as means. Because life in society is based on trade and the division of labor, we cannot live without continually using others as means to accomplish our ends. The categorical imperative instructs only that in doing so, we must always simultaneously recognize that such individuals possess a dignity and inherent moral value in themselves.

251. *See supra* note 250.

principle. The principle of respect for persons prohibits the oppressive treatment of all persons. The anti-oppression interpretation of the anti-discrimination principle prohibits one particular form of oppressive treatment—oppressive discrimination. In forbidding the drawing of racial, ethnic, or sexual distinctions for purposes of oppressing the members of the non-dominant group, the anti-oppression interpretation of the anti-discrimination principle simply acts as a specific instantiation of the more general principle of respect for persons. There is a strong moral argument for prohibiting oppressive discriminatory treatment of minorities, i.e., for the anti-oppression interpretation of the anti-discrimination principle, because there is a strong moral argument for prohibiting any type of oppressive treatment of anyone.

The intimate connection between the anti-oppression interpretation of the anti-discrimination principle and the principle of respect for persons provides a strong normative grounding for the anti-oppression interpretation of the Civil Rights Act. Under its definition of discrimination, the societal end the Act is intended to achieve is the elimination of the oppressive unequal treatment of racial, ethnic, or sexual minorities. This end clearly has genuine moral value since the principle of respect for persons demonstrates that the elimination of any type of oppression is morally valuable. Thus, under the anti-oppression interpretation, the Civil Rights Act truly does promote a more just society.

As always, the promotion of this societal end carries a cost in personal autonomy. Under the anti-oppression interpretation, however, this cost is rather small. Citizens will be deprived of the liberty to act oppressively toward racial, ethnic, or sexual minorities. In practice, this means that they will be not be permitted to act out of racial, ethnic, or sexual animus in deciding who should be granted access to public accommodations and educational and employment opportunities. Thus, they could not refuse to hire or educate African-Americans as part of a widespread practice designed to keep them sufficiently impoverished and dependant to be subject to economic exploitation, or because of racist beliefs that African-Americans are inherently inferior or constitute a degraded form of humanity. The liberty lost would be the liberty to attempt to reduce the prospects of members of minority groups for happy and successful lives in order to benefit from their exploitation or indulge one's racism, i.e., the liberty to take a type of action that has a negative moral value.

Thus, there is very good reason to believe that when interpreted as an anti-oppression principle, the Civil Rights Act satisfies the threshold requirement for a morally justified statute. The Act produces a genuine moral improvement in society at the minimal cost of excluding from the realm of autonomous actions open to the citizenry only actions that are themselves morally insupportable. Hence, to the extent that the national consensus in support of the Civil Rights Act is based on understanding it as a statute designed to prevent harmful racist and exploitative actions being

directed against the members of minority groups, it is morally well-grounded.[252]

2. Evaluating the Anti-Differentiation Interpretation

It is perhaps unsurprising that the anti-oppression interpretation of the Civil Rights Act can meet the basic requirement for a morally justified statute since, as the weakest, least restrictive of the three interpretations, it imposes the lowest cost on citizens' personal autonomy. The anti-differentiation interpretation of the anti-discrimination principle is considerably stronger—prohibiting all irrelevant racial, ethnic, or sexual classification and requiring decisions concerning education and employment to be made strictly on the basis of qualifications and ability. Can an anti-differentiation interpretation of the Civil Rights Act meet the threshold requirement for a morally justified statute?

I believe the answer is no. Under the anti-differentiation interpretation, the type of discrimination the Civil Rights Act would be designed to eliminate is the unequal treatment of individuals on the basis of characteristics not relevant to the tasks they will be called on to perform. This implies that the goal of the Civil Rights Act is the creation of a society in which all employment and educational opportunities are allocated strictly on the basis of qualifications and ability. The problem is that there is no reason to believe that the production of such a meritocratic society has genuine moral value. Neither the principle of respect for persons nor any other readily identifiable moral principle generates a moral obligation to evaluate individuals strictly on the basis of their qualifications and abilities and no such obligation can be derived from a utilitarian moral perspective. If there is a legitimate moral ground for this obligation, I am unable to identify it.

Consider the principle of respect for persons first. This principle does not entail an anti-differentiation principle. The moral obligation to treat all persons as ends in themselves does not require employers and educators to judge potential employees and students solely on the basis of characteristics directly related to job performance or educational ability.

As noted above,[253] treating persons as ends in themselves means that we must recognize them as autonomous moral agents—as beings who are the authors of their own actions and entitled to make fundamental decisions about how to lead their lives for themselves. Thus, treating persons as ends requires us to respect their autonomy, which means we may not force them

252. Opponents of the Civil Rights Act could reasonably argue that this is an overstatement because all I have shown is that when interpreted as containing an anti-oppression principle, the Act meets one necessary condition for a morally justified statute. I recognize the possibility that the Civil Rights Act could be morally unjustified because it fails to meet some other necessary condition. As stated previously, however, this issue is be addressed in the present work. *See supra* note 246.

253. *See supra* text accompanying notes 247-251.

to serve our interests without their consent or otherwise treat them as though they were incapable of thinking and deciding for themselves. In short, we may not deprive them of control over their lives.

In the context of employment and educational opportunities addressed by the Civil Rights Act, this has many implications. It means we may not force persons to work for us either directly by coercively conscripting their labor or indirectly by preventing them from offering their services to others. It means we may not prevent persons from pursuing an education or dictate what type of education they may receive as a means of rendering them dependant and exploitable. It means we may not refuse to hire or educate them because of racist beliefs about their natural inferiority or sub-human or degraded status. The moral obligation to treat all persons as ends in themselves requires us to allow others to offer their labor to and seek educational opportunities from whomever they choose, and to regard them as fully human in deciding whether to employ or educate them. It does not, however, require us to evaluate them on the basis of merit or any other particular set of (non-oppressive) criteria.

If there is something wrong with refusing to hire a more qualified individual because one's nephew would be a bigger help to the company softball team, it is not that one has failed to recognize the more qualified individual as an autonomous agent or has otherwise attempted to denigrate his or her humanity. In deciding not to employ, educate, or otherwise associate with the most qualified person available, one does not deprive that person of control of his or her life or use him or her merely as a means. One does not use the person at all. Denying an applicant a position he or she desires and is qualified for may disappoint that person, but it implies nothing more than that one would prefer to associate with someone else. It is not oppression and it does not indicate that the person lacks intrinsic moral value or is a mere tool for the advancement of one's own ends. It certainly does not imply that one regards the applicant as less than fully human. Hence, it does not violate the principle of respect for persons.

And this is necessarily the case because employers and educators are persons as much as are those applying for jobs or academic positions. As such, they too are entitled to be treated as ends in themselves, which means that their autonomy is of value and must be respected, and therefore that they may not be forced to serve others' interests without their consent or be deprived of control over their lives. In the contexts in which the Civil Rights Act applies, this can only mean that they may not be forced to hire or educate those they would prefer not to associate with simply to advance those others' interests. As much as the principle of respect for persons implies that respect for the autonomy of applicants requires that they be permitted to offer their services to or seek an education from whomever they choose, it implies that respect for the autonomy of employers and educators requires that, as long as they are not acting oppressively, they be permitted to accept the applications of whomever they choose. The

principle of respect for persons not only does not require employers and educators to judge applicants solely on the basis of qualifications and job or educational performance, it suggests that in the absence of an oppressive design, they must be permitted to make such judgments on the basis of their own autonomously chosen values and personal preferences.

This, of course, only demonstrates that the moral value of a meritocratic society cannot be derived from the principle of respect for persons, not that a meritocratic society is without independent moral value. However, there does not seem to be any other moral principle that entails the conclusion that a meritocratic society is a more just society. Outside of the employment and educational contexts governed by the Civil Rights Act, there is no duty to decide whether to associate with others on a meritocratic basis. In general, we do not act immorally in judging others on the basis of our personal preferences. We often choose our friends, spouses, tennis partners, and favorite baseball teams on irrational or purely emotional grounds, not because they are the most qualified or will perform the best in these capacities. Yet in doing so, we do nothing wrong. It is not immoral to decide not to be friends with an otherwise worthy person simply because one does not like him or her. It is not immoral to refuse to marry a potentially ideal mate because one is not in love or to refuse to play tennis with the ideal doubles partner because one would rather play with one's athletically challenged spouse. It is not immoral to root for the Chicago Cubs rather than the New York Yankees. In each of these cases, we evaluate others on the basis of our personal preferences rather than their qualifications and abilities, and yet we do them no wrong.

Perhaps things change when we enter the employment and educational contexts. But if so, it is not clear why. It cannot simply be the importance of the decisions being made. Decisions concerning where one works or goes to school are certainly important decisions, but, although they may be more important than who one plays tennis with, they are not more important than who one will marry and spend the rest of one's life with. Indeed, even within these contexts, it is not clear how broadly any principle requiring meritocratic judgments would apply. It has been noted that the one hundred persons who serve as Senators were not chosen because and almost certainly are not the most qualified persons for their jobs.[254] Is there anything morally objectionable about one who has personally built a company from the ground up appointing himself or herself CEO even though there are others who would certainly do the job better?

The problem is that there is no reason to believe that qualifications and abilities are a ground of moral entitlement. For this to be the case, there must be some morally significant connection between the possession of superior qualifications and abilities and the right to preference in the assignment of employment and educational opportunities. But none is readily apparent.

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254. *See* Wasserstrom, *supra* note 11, at 619.

> To be at all persuasive, the argument must be that those who are the most qualified *deserve* to receive the benefits (the job, the place in law school, etc.) because they are the most qualified. And there is just no reason to think that this is a correct premise. There is a logical gap in the inference that the person who is most qualified to perform a task, *e.g.*, be a good student, deserves to be admitted as a student. Of course, those who deserve to be admitted should be admitted. But why do the most qualified deserve anything? There is just no necessary connection between academic merit (in the sense of qualification) and deserving to be a member of a student body. Suppose, for instance, that there is only one tennis court in the community. Is it clear that the two best tennis players ought to be the ones permitted to use it? Why not those who were there first? Or those who will enjoy playing the most? Or those who are the worst and therefore need the greatest opportunity to practice? Or those who have the chance to play least frequently?[255]

Furthermore, this logical gap cannot be filled by claiming that individuals morally deserve their qualifications and abilities since these arise largely as a matter of chance or as a result of past societal inequities.

> Most of what are regarded as the decisive characteristics for higher education [or employment] have a great deal to do with things over which the individual has neither control nor responsibility: such things as home environment, socioeconomic class of parents, and, of course, the quality of the primary and secondary schools attended. Since individuals do not deserve having had any of these things vis-à-vis other individuals, they do not, for the most part, deserve their qualifications. And since they do not deserve their abilities they do not in any strong sense deserve to be admitted [or hired] because of their abilities.[256]

It is of course true that if an employer or educational institution makes an affirmative representation that it will hire or admit applicants strictly on the basis of qualifications and abilities and then fails to do so, applicants who relied on that representation have been wronged. But the wrong inheres in the fraudulent behavior of the employer or educational institution,[257] not in

255. *Id.* at 619-20.

256. *Id.* at 620. One's genetic or natural endowments are usually added to the list of undeserved characteristics that produce superior qualifications and abilities. *See* John Rawls, A Theory of Justice 104 (1971).

> It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases.

Id.

257. There is no difficulty finding a legitimate moral grounding for the obligation to keep one's word. Inducing one to act on the basis of a falsehood is simply a nonviolent way overriding another's autonomous consent. As such, it is a way of using the other merely as a means to one's own ends and runs afoul of the principle of respect for persons.

the violation of an independent moral entitlement to be judged purely on one's qualifications and abilities. The wrong would be equally great if the employer or educational institution represented itself as accepting applications strictly on the basis of need and then also considered the applicants' qualifications and abilities.

Although there does not appear to be any moral principle that generates an obligation to evaluate others on a meritocratic basis, the possibility remains that such an obligation could be derived from a utilitarian moral perspective. This may appear initially promising because, especially with regard to employment matters, the anti-differentiation interpretation of the Civil Rights Act is often defended on grounds of efficiency, i.e., on the grounds that hiring strictly on the basis of qualifications and abilities yields the most productive workforce and thereby maximizes the overall wealth of society. Despite appearances, however, the appeal to utilitarianism fails for both theoretical and empirical reasons.

As a moral theory, utilitarianism cannot support an anti-differentiation principle because it cannot support any moral principle other than the principle of utility.[258] For a utilitarian there is only one moral injunction, to act so as to maximize the sum total of good consequences that are produced, however the good is defined. Even for those who define the good in terms of material wealth, the most a utilitarian could consistently advocate would be an obligation to hire or accept applicants strictly on the basis of qualifications and abilities whenever doing so increases societal wealth. But as noted in Part I,[259] the supporters of the Civil Rights Act are pointedly not arguing for a ban on discrimination unless there are societal gains from engaging in it, but for a ban on discrimination *per se*. This suggests that utilitarianism could provide a moral grounding for an anti-differentiation interpretation of the Civil Rights Act only if as a matter of empirical fact, hiring job applicants and accepting students strictly on the basis of qualifications and abilities always leads to an increase in societal wealth. This, however, is patently not the case.

There are many forms of economically rational discrimination, discrimination on the basis of characteristics unrelated to qualifications and

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258. In fact, this statement is true only of one of the two common variants of utilitarian moral theory. Utilitarians often distinguish between pure or "act" utilitarianism and restricted or "rule" utilitarianism. Act utilitarianism, the variant discussed in the text, requires every action to be evaluated on the basis of its tendency to produce the greatest amount of good consequences, and thus can recognize no moral principles that might conflict with this directive. Rule utilitarianism, on the other hand, instructs individuals to abide by a set of "utilitarian rules"—rules which, if followed by all, would produce the greatest amount of good consequences. This variant of utilitarianism can recognize the moral force of principles and rules other than the principle of utility, as long as they qualify as utilitarian rules. *See generally* Brandt, *supra* note 247.

I do not discuss rule utilitarianism in the text because although distinct from act utilitarianism, it fails to provide a grounding for the anti-differentiation interpretation of the anti-discrimination principle for precisely the same reasons as act utilitarianism. It would thus be redundant to discuss both. For a fuller explanation, see *infra* note 266.

259. *See supra* text accompanying notes 8-9.

abilities that enhances business performance, and hence societal wealth. For example, hiring a workforce with a common linguistic or cultural background can greatly reduce a firm's governance costs.[260] Hiring people who speak the same language or dialect has obvious efficiencies, but hiring those with common cultural understandings not only tends to reduce workplace conflicts and hence the costs of creating and utilizing workplace grievance procedures, but also facilitates collective decision-making. It is easy to see how a firm all of whose workers are fundamentalist Christians will run more smoothly than one in which there is a mix of fundamentalist Christians and dedicated supporters of abortion rights. It is also apparent that the first firm will have an easier time deciding whether to close up shop on Good Friday.[261] In addition, hiring on the basis of one's ethnic, religious, or racial background can also reduce the firm's security and search costs. With regard to security costs, a common heritage can be a basis for trust that can reduce a firm's loses due to employee dishonesty.

> [I]nformal enforcement becomes more effective when the members of a firm are all drawn from the same ethnic or racial group. The party who cheats at work now knows that he faces stricter sanctions, given the strong likelihood that the information will be brought home to him at play, at church, or in other business and social settings. The complex network of human interactions thus induces persons to honor their deals.[262]

Part of the reason that Orthodox Jews dominate the diamond trade in New York is that the greater trust generated by their group solidarity reduces the security costs associated with the handling of small, extremely valuable objects.[263] With regard to search costs, hiring by word of mouth or referral from ethnically restricted self-help groups can both lower the cost of seeking employees and provide "a better chance of getting a reliable employee, because all referrals were implicitly bonded by the referring organizations who wanted to continue to be able to place their people."[264] Finally, hiring on the basis of characteristics other than qualifications and abilities can increase a firm's income as well as reduce it costs. It is well-known that hiring physically attractive employees can generate increased sales in businesses in which there is frequent client contact as can hiring

260. For an extended discussion of this, see Epstein, *supra* note 36, ch. 3.

261. Richard Epstein points out that considering how well one with the applicant's ethnic, religious, or racial background will fit into the firm's workforce can influence how easy it is to decide upon "the music played in the workplace, the food that is brought in for lunch, the holidays on which the business is closed down, the banter around the coffeepot, the places chosen for firm outings, and a thousand other small details that contribute to the efficiency of the firm." *Id.* at 68.

262. *Id.* at 70.

263. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. of Legal Stud. 115, 140-41 (1992).

264. Epstein, *supra* note 36, at 71 (discussing the Daniel Lamp case in which the employer lowered his search costs by accepting employment referrals from the Spanish Coalition and Latino Youth Organization).

salespeople of the same ethnic background as the customers they will be serving.[265]

Thus, the problem with the efficiency-based argument for the anti-differentiation interpretation is that its conclusion is too strong for its premises. It is certainly true that considering an applicant's qualifications and abilities will produce a more productive workforce than will hiring without regard to qualifications and abilities. But it is not true that hiring *exclusively* on the basis of qualifications and abilities will produce a more productive workforce than will taking other factors into consideration *in addition to* qualifications and abilities. This suggests that the efficiency argument actually supports the anti-oppression rather than the anti-differentiation interpretation of the anti-discrimination principle. Because those who seek to oppress members of minority groups will refuse to hire them despite superior qualifications or abilities, their actions produce a less productive workforce than would hiring significantly or exclusively on the basis of qualifications and abilities. Oppressive discrimination is indeed inefficient. By banning inefficient oppressive discrimination but not efficient non-oppressive rational discrimination, the anti-oppression interpretation would improve overall business performance, increasing societal wealth. Therefore, the anti-oppression interpretation can probably be justified on utilitarian grounds as well as on the basis of the principle of respect for persons. On the other hand, by banning both inefficient oppressive discrimination and efficient rational discrimination, the anti-differentiation interpretation would result in less improvement in business performance than would the anti-oppression interpretation, and hence less increase in societal wealth. Therefore, it cannot be justified on utilitarian grounds.[266]

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265. Similar arguments can be and are made with regard to educational matters. For example, considering a prospective student's geographical home, life experiences, and ethnic, religious, or racial background can be relevant to assembling a class with sufficient diversity of viewpoint to generate the vigorous discussion that advances the educational mission.

It must be noted that the problem rational discrimination poses for the anti-differentiation interpretation cannot be addressed by simply expanding what counts as a job qualification to include any characteristic that improves a firm's profitability since this would render the anti-differentiation interpretation vacuous. Hiring on the basis of qualifications and abilities would then become hiring on any basis at all, including one's ethnic, religious, or racial background, as long as profits are thereby increased. Although this may represent a position that a utilitarian could support, it is certainly not what the advocates of a color-blind society have in mind in arguing for the anti-differentiation interpretation of the Civil Rights Act.

266. It may be objected that the possibility remains that the anti-differentiation interpretation could find support in rule utilitarianism. *See supra* note 258. This would be the case if the injunction to hire (or admit students) strictly on the basis of qualifications and abilities was a utilitarian rule, one which if followed by all, would produce the greatest amount of good consequences. However, the same argument that shows the anti-differentiation interpretation cannot be derived from act utilitarianism shows that it is also not a utilitarian rule. Following a rule that requires employers (or educators) to refrain from both oppressive and rational discrimination would produce less efficient businesses and hence less good consequences than following a rule that required them to refrain only from

This analysis indicates that there is simply no moral obligation to evaluate others strictly on the basis of their qualifications and abilities either in general or in the more limited contexts of employment and education. No identifiable moral principle entails such an obligation and no such obligation can be derived from utilitarian moral theory. Thus, there is no reason to believe that the production of a society in which all employment and educational opportunities are allocated on a strictly meritocratic basis has independent moral value. This suggests that the anti-differentiation interpretation of the Civil Rights Act cannot meet the first of the two threshold requirements for a morally justified statute, that the societal end it is designed to serve possess genuine moral value. Is there, then, any way to escape the conclusion that the anti-differentiation interpretation of the Civil Rights Act yields a morally unjustified statute?

Perhaps. Although the anti-differentiation interpretation possesses no independent moral value, it might still be justified on the ground that it is a useful instrument for realizing a state of affairs that does. We have seen that the anti-oppression interpretation of the anti-discrimination principle can be justified on the basis of the principle of respect for persons and perhaps on utilitarian grounds as well. Thus, we can have a high degree of confidence that creating a society free of oppressive discrimination has genuine moral value. If interpreting the Civil Rights Act as an anti-differentiation principle provided an effective means of eliminating oppressive discrimination, then the anti-differentiation interpretation might be derivatively justified as a mechanism for realizing the morally significant goal of the anti-oppression interpretation.

An argument can be made for the anti-differentiation interpretation on this ground. As the stronger of the two interpretations, the anti-differentiation interpretation encompasses the anti-oppression interpretation, prohibiting oppressive discrimination along with all irrelevant racial, ethnic, and sexual differentiation. Therefore, its implementation would realize the morally valuable goal of eliminating oppressive discrimination as much as would the implementation of the anti-oppression interpretation. Furthermore, the perpetrators of oppressive discrimination often try to disguise it as non-oppressive rational discrimination, making it difficult to identify and eliminate. If banning all non-meritocratic hiring and admissions practices was a more effective means of eliminating oppressive discrimination than going after oppressive discrimination directly, then the anti-differentiation interpretation could possess the moral value of a necessary means to an anti-oppression end. The anti-differentiation interpretation could then be justified as a prophylactic measure designed to protect against covert oppressive

oppressive discrimination. Therefore, there is no need to consider rule utilitarianism separately to conclude that the anti-differentiation interpretation cannot be grounded on utilitarian moral theory.

discrimination.

If successful, this argument would get the anti-differentiation interpretation of the Civil Rights Act over the first hurdle for a morally justified statute—it would show that it served a societal end of genuine moral value. However, there remains the second hurdle—the requirement that the moral improvement be great enough to justify the cost in personal autonomy. This is where the instrumental justification for the anti-differentiation interpretation founders.

Under the instrumental justification we are presently considering, the moral value of the anti-differentiation interpretation, although definite, is relatively small. It lies not in the elimination of the oppressive discrimination that is the province of the anti-oppression interpretation, but in the elimination of cases of covert oppressive discrimination that it can catch, but which would escape even the vigorous application of a statute embodying the anti-oppression interpretation.

Although the world would be a better place, morally speaking, if the anti-differentiation interpretation of the Civil Rights Act caught even one instance of oppressive discrimination that an anti-oppression interpretation would not—if it prevented even one instance of a refusal to hire or educate on the basis of racial, ethnic, or sexual animus or one attempt to degrade or exploit someone because of his or her minority status—it must be recognized that isolated instances of such conduct can inflict only limited harm on its victims. In a market environment, oppressive discrimination must be widespread to cause serious harm to its targets. To see why, consider the situation of one seeking employment. What matters to the job seeker is his or her ability to secure *one* desirable job. Although it would be nice if every prospective employer was willing to consider his or her application, the job seeker's life prospects will not be significantly harmed unless so many are unwilling that not even one desirable offer of employment is forthcoming. To be sure, even isolated instances of oppressive discrimination can impose heavier search costs and greater inconvenience on its targets than that incurred by individuals not subjected to racial, ethnic, or sexual animus. Nevertheless, in an environment in which a prohibition on oppressive discrimination is vigorously enforced, it is extremely unlikely that the amount of such discrimination that would escape detection would be sufficiently widespread to prevent its targets from obtaining acceptable employment.[267] In such a situation, the harm

267. Richard Epstein explains this as follows:

> [I]n a world in which 90 percent of the people are opposed to doing business with me, I shall concentrate my attention on doing business with the other 10 percent, secure in the knowledge that as long as the tort law (with its prohibitions against the forceful interference with contract or prospective trading advantage) is in place, my enemies are powerless to block our mutually beneficial transactions by their use of force. The universe of potential trading partners is surely smaller because some people bear me personal animus and hostility. I would prefer that everyone be willing to do business with me, even if I have no wish to do business with them. But the critical question for my welfare is not which opportunities are

suffered consists more in the loss of an opportunity for gain than in a serious material deprivation.

> The person who wishes to discriminate against another for any reason has it in her power only to refuse to do business with him, not to use force against him. The victim of discrimination, unlike the victim of force, keeps his initial set of entitlements—life, limb, and possession—even if he does not realize the gains from trade with a particular person.[268]

Thus, in a market environment in which the anti-oppression interpretation of the Civil Rights Act prevents the widespread practice of oppressive discrimination, the harm that can be inflicted by undetected individual acts of oppressive discrimination is relatively small because the presence of other trading partners renders their effects avoidable.[269] Hence, the moral improvement that can be gained by adopting an anti-differentiation interpretation of the Act is relatively small as well.

This small improvement, however, must be purchased at an excessively high price in the personal autonomy of those not behaving immorally. The anti-differentiation interpretation produces an extremely restrictive statute that prohibits anyone offering an employment or educational opportunity from acting on any of their non-oppressive personal preferences. It outlaws not only rationally discriminatory hiring and admission practices that help employers and educators accomplish their legitimate ends, but also practices designed to effectuate group self-help[270] or motivated by

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> lost but which are retained. Even for persons who find themselves in relatively isolated minorities, the opportunities retained will not be trivial as the number of persons in society increases from the tens to the hundreds, thousands, and millions. Viable trading economies have thrived in much smaller populations.

Epstein, *supra* note 36, at 30-31 (footnote omitted).

268. *Id.* at 30.

269. This conclusion is not based on any unrealistic assumptions about the rationality of individual market actors.

> It might be said in response that this argument presupposes that firms are rational in their behavior, which they often are not. But again there is the confusion between the competence of the marginal and the average firm. The argument works, provided there is *one* firm that understands that it is in its interest to seek gold in a new mine after the old mine has been worked out. Thus, if most firms are unaware of the way in which the quality of the pool changes as items are taken from it, then the firm that *is* aware of the shift will prosper enormously. Even if other firms are not aware of the problem at the outset, their internal feedback mechanism will tell them that their second round of new hirings is inferior to the first. Experience and example will educate where abstract calculation fails. The rationality of the market system qua system is therefore far higher than the rationality of its average participant or than the sole government bureaucrat asked to make job assignments. It is very hard to envision any state of affairs in which all firms would adopt the strategy of hiring only workers in the preferred class before taking any from the second. At the margin someone will break ranks.

Id. at 35-36.

270. Group self-help, in which disfavored minorities create their own businesses and schools in order to provide other members of the group with the employment and educational opportunities denied them by the larger society, has been a traditional route out

charitable purposes including sympathy for those less well-off or those who were treated unfairly in the past. This both makes society as a whole poorer by driving up the material cost of doing business and educating students and prevents individuals and institutions from acting in accordance with intimate and potentially deeply held personal values.

Consider, for example, an African-American business person who had to overcome poverty and racial prejudice in order to succeed and who believes that he or she should "give something back to the community" by according hiring preference to other African-Americans in his or her situation. Or consider a group of women attorneys who believe they have been denied advancement in male-dominated law firms and who wish to "break the glass ceiling" and help create what they believe to be a more caring legal system by forming their own firm in which they can give hiring or advancement preferences to women.[271] In both cases, the employers wish to exercise their autonomy in ways that are profoundly important to them and reflect their views of what it means to live a good life. And in both cases, our analysis of moral theory shows their intended actions to be morally unobjectionable. By prohibiting such actions, the anti-differentiation interpretation seriously restricts citizens' autonomy and impedes their ability to pursue genuinely good ends. Unlike the anti-oppression interpretation, which bans only actions that are morally insupportable, the anti-differentiation interpretation deprives citizens of the liberty to take many actions that have positive, and potentially great, moral value.

Thus, the conclusion to which we are driven is that the anti-differentiation interpretation of the Civil Rights Act cannot satisfy the threshold requirement for a morally justified statute. There is no genuine moral value in purely meritocratic decision-making in itself, and whatever instrumental value it can derive as a means to a morally valuable anti-oppression end is insufficient to justify the serious infringement on citizens' personal autonomy that it entails. Hence, to the extent that the national consensus in support of the Civil Rights Act is based on understanding it as a statute designed to ensure that all employment and educational opportunities are distributed strictly on the basis of qualifications and ability, it is not morally well-grounded.[272]

3. Evaluating the Anti-Subordination Interpretation

There remains the question of whether the anti-subordination interpretation of the Civil Rights Act can meet the threshold requirement for

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of poverty and social subordination. The anti-differentiation interpretation of the Civil Rights Act cuts off this route to self-improvement by prohibiting the preferential hiring and academic admissions practices that are its heart.

271. *See* Ann Davis, *Women's Networking Spreads Work Around*, Nat'l L.J., Oct. 9, 1995, at A1.

272. For an explanation of why there is such a widespread belief to the contrary, see *infra* text accompanying notes 324-327.

a morally justified statute. It is the strongest of the three interpretations, prohibiting all conduct that has the effect of subordinating or continuing the subordination of a minority group. Under it, the Civil Rights Act would require individuals to scrutinize every action assigning employment or educational opportunities to ensure that it neither intentionally nor unknowingly adds to or perpetuates the subordinated status of any minority group. Unlike the anti-differentiation interpretation, which requires color-blind decision-making, the anti-subordination interpretation mandates the intense color-consciousness necessary to make sure that one does not engage in apparently neutral practices that can differentially and negatively impact minorities. It is clear that the societal end of such a statute is the creation of a radically more egalitarian society in which no group is legally or socially subordinated to any other. It is equally clear that the achievement of this end requires a significant restriction on the liberty and autonomy of business people and educators.

Morally evaluating the anti-subordination interpretation in the same manner as I have the anti-oppression and anti-differentiation interpretations would be a complex, difficult, and time-consuming task. Such an evaluation would require a determination of the moral value inherent in producing an egalitarian society as well as a metric by which to compare it to the value of the liberty that must be sacrificed to achieve it. This would require a resolution of the dispute over the relative value of equality and liberty that has been at the heart of public moral discourse since at least the publication of John Rawls' *A Theory of Justice*,[273] if not forever. An attempt to merely describe the contours of this debate, much less resolve it, would be considerably beyond the scope of this article. Fortunately, no such attempt is necessary because, regardless of the relative value of equality and liberty, the anti-subordination interpretation can be shown not to be the proper interpretation of the Civil Rights Act on completely independent grounds—specifically, on the ground that it would render the Civil Rights Act impracticable.

In analyzing the moral foundations of the anti-oppression and anti-differentiation interpretations of the anti-discrimination principle, I focused exclusively on substantive moral principles and theories. Much like the law, however, there are also purely procedural moral principles that apply universally across all substantive positions. One of the most fundamental of these is the principle that "ought implies can."[274] This holds that one can be morally obligated to do only that which it is possible for him or her to do. No substantive analysis of the relative value of equality and liberty is required to determine that a statute that violates this principle, i.e., that requires the impossible, is not morally justified.

273. *See* Rawls, *supra* note 256.

274. Immanuel Kant, Critique of Pure Reason 307-08 (J.M.D. Meiklejohn trans., 1990) (1787).

To appreciate the significance of the principle that "ought implies can," one must understand that it requires more than merely that it be physically possible for citizens to act in accordance with a statute. It requires that it be epistemically possible as well. That is, citizens must be able to acquire the knowledge necessary to determine whether their actions will contravene the requirements of the statute. A statute that requires citizens to refrain from any economic transaction that could have a negative effect on the nation's gross domestic product is just as impossible to comply with as one that requires them to walk a hundred miles a day.

The problem with the anti-subordination interpretation of the Civil Rights Act is that it is epistemically impossible for citizens to comply with it. This is because there is simply no way for citizens to know in advance which of their actions will have a subsequent subordinating effect. The American economy and American culture are the products of the individual actions and beliefs of hundreds of millions of people. No individual employer or educator is capable of calculating how his or her individual hiring or admission decisions and practices will alter the ultimate structure of these complex matrices. Over half a century ago, Friedrich Hayek demonstrated that there are inherent limitations on human beings' ability to gather and utilize the dispersed information that determines the structure of such dynamic social systems.[275] Because it is impossible to acquire "knowledge of the particular circumstances of time and place"[276] upon which others will base their reactions to changes in their societal environment, it is impossible to predict how one's particular inputs into the system will alter the greater social fabric.[277] Hence, it is impossible to know in advance whether one's actions will in fact perpetuate or add to the societal subordination of any minority group.

Consider, for example, the case of *Bradley v. Pizzaco*.[278] In that case, Domino's Pizza had a policy that required its pizza delivery personnel to be clean shaven. Bradley was an African-American delivery man who suffered from pseudofoliculitis barbae (PFB), a skin condition that is exacerbated by shaving. When Bradley refused to comply with Domino's no-beard policy, he was fired. It turns out, however, that PFB affects a significant percentage of African-Americans but very few Caucasians. As a result, "Domino's policy necessarily excludes black males from the company's work force at a substantially higher rate than white males,"[279] and thus has a disparate impact on African-Americans.

In retrospect, armed with the knowledge that PFB affects African-

275. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

276. *Id.* at 521.

277. Hayek's observations were directed toward the difficulty that dispersed knowledge presented for central economic planning. It should be clear, however, that our inability to obtain the information necessary to predict particular human reactions to societal changes makes it equally, if not more, difficult to effect consciously intended changes in society's culture.

278. 939 F.2d 610 (8th Cir. 1991).

279. *Id.* at 612.

Americans to a much greater extent than Caucasians, it is easy to see that a policy requiring male employees to be clean-shaven can have the effect of adding to the subordination of African-Americans. But how could the operators of a pizza delivery service know in advance that adopting this policy would have a subordinating effect? For this to be the case, Domino's managers would not only have to have knowledge of a rather obscure medical condition, but would have to think to ask whether a no-beard policy could have a racially subordinating effect in the first place. Is it reasonable to expect ordinary business people to have this level of foresight and knowledge?

History is replete with examples of our inability to anticipate the subordinating effect of our actions. In the early part of the twentieth century, many members of the progressive movement believed that women were a vulnerable group that needed protection against exploitation in the workplace. To protect them against "unconscionable employers['] . . . . selfish disregard of the public interest,"[280] the progressives supported measures designed to prevent women from being worked excessively long hours[281] and to ensure that they received a minimum wage.[282] In retrospect, we know that these and other protective measures that "put women on a pedestal" also put them at a competitive disadvantage in the labor market. By making it more difficult for them to find work outside the home, these measures had the effect of perpetuating women's economic and societal subordination, precisely the opposite of what their authors intended.

In the middle of the twentieth century, political liberals believed that requiring a strict adherence to meritocratic hiring and educational admissions procedures would break down racial barriers to entry into the market and was the most effective way of improving the life prospects of African-Americans. In retrospect, we know that subjecting those who had previously been denied the employment and educational opportunities necessary to develop their qualifications and abilities to evaluation on a strictly meritocratic basis has the effect of perpetuating their subordination, a result clearly not within the contemplation of the mid-century liberals.

The situation is no different today. In Part I, I noted that the anti-subordination interpretation of the anti-discrimination principle apparently requires affirmative action.[283] But not just any form of affirmative action will do. The anti-subordination interpretation requires only that form of affirmative action that does not itself have the effect of adding to or perpetuating the subordination of any minority group. But how can we know before the fact which forms of affirmative action have this character? Many advocates of affirmative action argue that the best way to improve the social position of disfavored minority groups is to institute programs that

280. W. Coast Hotel v. Parrish, 300 U.S. 379, 399-400 (1937).
281. *See* Muller v. Oregon, 208 U.S. 412 (1908).
282. *See W. Coast Hotel*, 300 U.S. at 379.
283. *See supra* text accompanying notes 34-35.

provide hiring and admission preferences for members of these groups. This may be correct. On the other hand, critics of affirmative action believe that such programs will retard the prospects of minorities. They argue that by placing minorities in direct academic and career competition with those who are better prepared and more experienced than they are, affirmative action programs will cause minorities to fail at a greater rate than would be the case if they attended universities and began their careers with jobs for which they were better qualified.[284] Such failure, the critics contend, will not only reinforce racist beliefs about the inferiority of minorities in the dominant community, but will also undermine feelings of self-worth among the members of minority groups themselves. If the critics are correct, then the implementation of the proposed affirmative action programs will have the effect of perpetuating or perhaps increasing the subordination of the minorities they are intended to benefit. Do we really have sufficient ability to predict the future performance of individuals and societal reaction to it to know whether or not preferential hiring and admissions programs will ultimately reduce or increase the subordination of minorities?

This question actually minimizes the knowledge problem since even if we could know that an affirmative action program would improve the societal standing of the members of a subordinated group, it could still run afoul of the anti-subordination interpretation if it increased or perpetuated the subordination of the members of another minority group in doing so. For example, a hiring practice that enhances the employment opportunities for Hispanics in a geographical area would violate the anti-subordination interpretation if it had the unintended consequence of reducing employment opportunities of African-Americans in that area.[285] Similarly, academic affirmative action programs that enhance the educational opportunities of African-Americans would violate the anti-subordination interpretation if they did so by curtailing the educational opportunities of Asian-Americans.[286] Feminist scholars have recently suggested that racial and sexual affirmative action as currently practiced may actually contribute to

284. *See, e.g.*, Alexandra D. Mease-White, Hopwood v. Texas*: Challenging the Use of Race as a Proxy for Diversity in America's Public Universities*, 29 Conn. L. Rev. 1293, 1309-10 (1997); Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 Harv. L. Rev. 1331, 1334-35 (1999).

285. See, for example, the case of the Daniel Lamp Company, in which the EEOC found the company to have engaged in illegal discrimination against African-Americans by recruiting workers from two Hispanic organizations, the Spanish Coalition and the Latino Youth Organization, discussed in Epstein, *supra* note 36, at 70-71.

286. Until ended by Proposition 209, California's academic affirmative action program increased African-American and Hispanic enrollment by providing members of these groups with preferences over not only Caucasian but also Asian-American applicants. *See* M. Ali Raza et al, The Ups and Downs of Affirmative Action Preferences 122-26 (1999); Jennifer C. Brooks, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado About Nothing?*, 48 Drake L. Rev. 567, 578-79 (2000).

the subordination of women of color by failing to recognize the dual nature of the discrimination they suffer.[287]

As these examples illustrate, inherent limitations on human knowledge coupled with the immutable law of unintended consequences implies that even the most knowledgeable and highly educated academic and professional experts have a limited ability to predict the effects of particular inputs on the overall configuration of a dynamic social system. How much more must this be the case for the ordinary business person or educator? Yet by prohibiting any action that *has the effect* of perpetuating or increasing the societal subordination of any minority, the anti-subordination interpretation of the Civil Rights Act requires precisely this ability. To comply with the statute, citizens must know at the moment of action what the effects of that action will be on the overall structure of society. Because such knowledge is unattainable, i.e., because compliance is epistemically impossible, the anti-subordination interpretation of the Civil Rights Act violates the "ought implies can" principle, and hence cannot be the morally proper interpretation of the statute.

It is essential to understand just how limited the present point is. I am not contending that it is morally unacceptable to prohibit citizens from acting to perpetuate or increase the subordination of minorities, only that it is unacceptable to prohibit them from doing so *when they cannot know that*

287. *See* Angela D. Hooton, *Constitutional Review of Affirmative Action Policies for Women of Color: a Hopeless Paradox?*, 15 Wis. Women's L.J. 391, 422-24 (2000).

> Ironically, affirmative action policies, which tend to treat people as group members rather than as individuals, also fail to address the unique situation women of color are in given their susceptibility to dual forms of discrimination. . . .
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> . . . The troubling statistics on women of color, coupled with the potentially growing divide between those who have been traditionally grouped together, such as minority and white women, beg the question: Can affirmative action continue to exist in its present form and improve opportunities for women of color?

Id.; *see also* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9, 9-10 (1989).

> The economic, political, and social situation of black women in America is bad, and has been bad for a long time. Historically, they have borne both the disabilities of blacks and the disabilities which inhere in their status as women. These two statuses have often combined in ways which are not only additive, but synergistic--that is, they create a condition for black women which is more terrible than the sum of their two constituent parts . . . .
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> Despite, or perhaps because of, this dual disability and its negative effects on life opportunities for black women, the problems of black women often go unrecognized. Black women have not been seen as a discrete group with a unique history, unique strengths and unique disabilities. By creating two separate categories for its major social problems—"the race problem," and "the women's issue"—society has ignored the group which stands at the interstices of these two groups, black women in America. For example, social reformist discussion tends to focus on the need to protect "minorities and women" from the hardships of discrimination. Although this term is intended to be inclusive, in fact, it misleads by overlooking those Americans who are both "minorities" *and* "women."

Id. (footnote omitted).

they are doing so. A certain percentage of actions that are intended to harm the life prospects of members of minority groups will succeed in doing so. Preventing subordination by prohibiting such *intentional* action presents no epistemic problem. Everyone knows the contents of his or her own mind and this is all that is required to refrain from acting on a specified intent. An interpretation of the Civil Rights Act that enjoins citizens from purposely acting to subordinate minorities, as the anti-oppression interpretation does, is entirely unproblematic. The epistemic objection applies only to an interpretation that enjoins citizens from taking *any* action that has the effect of perpetuating or increasing the subordination of minorities, whether intentional or not. Such an injunction requires more than merely knowledge of one's own mental state. It requires employers and educators to have sufficient empirical knowledge of the way particular policies and decisions will alter the overall structure of society to be able to screen all of their actions that are *not* intended to perpetuate or add to the subordination of minorities to ensure that none of them has this effect. But this level of knowledge is unattainable. There is no epistemological problem with prohibiting a Domino's Pizza manager who is aware that PFB affects many more African-Americans than Caucasians from instituting a no-beard policy for the purpose of excluding African-Americans from the workforce. There is an epistemological problem with prohibiting Domino's Pizza managers, who have never heard of PFB and think a no-beard policy will increase the success of their business, from adopting such a policy because of its unknown effects on African-Americans.[288]

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288. By allowing the punishment of citizens whose actions have produced a subordinating effect even though it was impossible for them to know that this would be the case, the anti-subordination interpretation creates strict liability for subordinating action. Strict liability can make sense where the object of legislation is not to encourage people to act more carefully, but to discourage certain types of action entirely. For example, imposing strict liability on blasting in heavily populated areas discourages the use of blasting as a method of demolition. *See* Richard A. Posner, Economic Analysis of Law 163 (3d ed. 1986); Steven Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980). Strict liability is inappropriate in the present context because the purpose of the Civil Rights Act is not and could not be to discourage citizens from engaging in business or educational pursuits or, more narrowly, from making employment and admissions decisions. The most that could be hoped for in this context is that the Civil Rights Act will encourage citizens to exercise more care to ensure that their decisions do not perpetuate or increase the subordination of minorities.

This consideration points out that there is logical space for a type of action that is not addressed by either the anti-oppression or the anti-subordination interpretations, i.e., negligent action. An anti-discrimination principle could require employers and educators to both refrain from intentional subordinating actions and to exercise reasonable care to ensure that their actions did not have a subordinating effect, a more stringent interpretation than the anti-oppression interpretation, which prohibits only intentional action. Such an interpretation would not run afoul of the "ought implies can" principle because it does not require employers and educators to know the unknowable, but only to know what the reasonable and prudent employer or educator would know. Although this fourth interpretation of the anti-discrimination principle is conceptually distinct from the three under consideration, it has probably not been previously remarked because it would have little practical significance. This is because a reasonable and prudent employer or educator would probably know next to nothing about the subordinating effect of his or her actions that

I am also not contending that the state and federal governments may not act to end the societal subordination of minorities, only that they may not do so by imposing an obligation on individual citizens that the citizens cannot possibly meet. The anti-subordination interpretation of the Civil Rights Act seeks to end subordination by requiring the diverse individual members of society to make particular employment and educational decisions that cumulatively have this effect. This is morally unacceptable because limitations on human knowledge make it impossible for the citizens to comply with the requirements of the statute. But the fact that this particular method of reducing subordination is impracticable does not imply that government may not act in other ways to achieve anti-subordination ends. Assuming for the moment that the substantive moral dispute over the proper balance between liberty and equality were resolved in favor of equality, there are many steps that governments could take to produce a more egalitarian society. States could alter the method by which they fund public education or create job training programs so as to improve the status of subordinated groups. The federal government could alter tax policy or reform its welfare system to more effectively reduce differences in income and wealth. Constitutional amendments could be passed requiring legislation to comply with Rawls's difference principle.[289] Hate crime and anti-harassment laws could be strengthened or more vigorously enforced. Measures such as these in which government acts directly to reduce societal subordination rather than by deputizing the citizenry to do so are not subject to the epistemic objection. None of them require citizens to know the unknowable. Hence, none of them violate the "ought implies can" principle.[290] The epistemic objection, which shows the anti-subordination interpretation of the Civil Rights Act to be morally unacceptable, carries no implications for the moral acceptability of other government policies designed to reduce the societal subordination of minorities.

4. Conclusions

Careful moral analysis shows that for the Civil Rights Act to be morally well-grounded, it must be interpreted as an anti-oppression principle. Under the anti-oppression interpretation, the Civil Rights Act functions as a specific instantiation of the fundamental moral principle of respect for

are not intended to produce this result, and so the fourth interpretation would essentially collapse into the anti-oppression interpretation.

289. *See* Rawls, *supra* note 256, at 83 ("Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.").

290. This is not to say that such measures are morally acceptable, merely that they are not subject to the objection I am bringing against the anti-subordination interpretation of the Civil Rights Act. Whether they run afoul of any other moral requirements remains an open question that is taken up subsequently. *See infra* Part III.B.2.

persons, and accordingly derives direct support from that principle. There is thus no difficulty establishing a legitimate moral basis for this interpretation. Further, the anti-oppression interpretation imposes fairly minimal restrictions on the personal autonomy of the citizens, and even then, deprives them only of the liberty to engage in action that is itself morally illegitimate.

On the other hand, no moral support can be found for the anti-differentiation interpretation at all. A duty to judge others strictly on the basis of qualifications and abilities can be derived neither from the principle of respect for persons nor any other identifiable moral principle. It also cannot be derived from utilitarian moral theory because strictly meritocratic hiring and admissions practices are not efficient means of maximizing societal wealth. Further, such a duty cannot be justified purely as a means to the morally valuable goals of the anti-oppression interpretation because the relatively small improvement it can bring to achieving those goals is overborne by its large cost in citizens' personal autonomy and restrictions on their liberty to engage in morally unobjectionable action.

Finally, the anti-subordination interpretation can be rejected out of hand as impracticable. Individuals have moral obligations to do only that which it is possible for them to do. Because compliance with the anti-subordination interpretation requires a level of knowledge unattainable by human beings, it violates the fundamental moral principle of "ought implies can" and thus must be rejected regardless of the moral value of the ends it seeks to achieve.

B. *The Equal Protection Clause*

The Equal Protection Clause is part of a constitutional amendment. Unlike statutes, the purpose of constitutional amendments is not to regulate the behavior of individual citizens, but of government itself. Constitutions create governments and invest them with their powers. Constitutional amendments alter the internal structure of governments and expand or contract the scope of their powers. The Equal Protection Clause is part of the Fourteenth Amendment, which like the Bill of Rights and other post-Civil War amendments, is specifically designed to restrain governmental power.

Governments are not persons. They are instrumentalities created by persons to provide them with certain services. The relationship between government and citizenry is that of agent to principal; governments exist to perform those tasks, and only those tasks, delegated to them by their citizens. As such, governments can have no desires, goals, or values of their own. They possess no morally valuable personal autonomy that needs to be respected. Unlike the situation in which a statute restrains the liberty of individual citizens, nothing of *intrinsic* moral value is lost in restraining a government's liberty of action. Therefore, to morally evaluate a constitutional amendment that restrains government power, the only

question that must be asked is whether the amendment improves the moral functioning of the government.

A government functions morally when it exercises its powers to achieve morally appropriate ends by morally appropriate means. Thus, constitutional amendments that restrain governmental power can attempt to improve the moral functioning of a government by placing restrictions on either the ends it may pursue or the means by which it may pursue them. The Equal Protection Clause contains a restriction of the latter type. Each state possesses a police power that authorizes it to act for the end of protecting the health, safety, and welfare of its citizens.[291] The Equal Protection Clause is designed to impose a restriction on the means by which the police power may be exercised. It forbids states from acting to promote health, safety, or welfare in ways that afford lesser legal protection to some citizens than others; that is, it restrains states from exercising their police power in a discriminatory manner. Therefore, we can evaluate the moral adequacy of the various interpretations of the Equal Protection Clause by plugging their definitions of discrimination into the language of the amendment. The interpretation that most effectively curtails governments' ability to employ morally objectionable means to promote what they consider the public's health, safety, or welfare will be the proper one.[292]

1. Evaluating the Anti-Oppression Interpretation

Under the anti-oppression interpretation, the Equal Protection Clause prohibits government from taking any actions that draw distinctions among its citizens for the purpose of oppressing or imposing disadvantages on minorities. This interpretation prohibits racial, ethnic, or sexual rent-seeking[293] by forbidding government from acting to improve the welfare of the politically or socially dominant portion of the citizenry at the expense of racial, ethnic, or sexual minorities. It also forbids any action designed to degrade or dehumanize members of minority groups or otherwise reduce them to a second class political or societal status. Under the anti-oppression

291. *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

> There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.

Id.

292. For reasons previously discussed, *see supra* notes 230-231, I am writing as though the Equal Protection Clause, which applies only to the states, applies to the federal government as well.

293. In economic terms, rent-seeking refers to the expenditure of resources to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a "favorable" decision on some public policy. *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291 (1974); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. Econ. J. 224 (1967).

interpretation, the Equal Protection Clause demands that government exercise its police power only for the purpose of improving the health, safety, or welfare of all of its citizens and only in ways that treat all citizens with the respect due to full members of the body politic.

Little new need be said to show that the anti-oppression interpretation of the Equal Protection Clause produces a morally justified constitutional amendment. We saw in our consideration of the Civil Rights Act that the anti-oppression interpretation of the anti-discrimination principle follows directly from the principle of respect for persons.[294] This principle prohibits oppressive conduct of any kind. If oppressive conduct of any kind is morally unacceptable, then oppressive discriminatory conduct that targets minorities is obviously morally unacceptable. This applies to actions taken by government as much as it does to actions taken by individuals. Oppressive governmental measures directed against minorities are wrong because oppressive governmental measures of any kind are wrong. An interpretation of the Equal Protection Clause that prevents government from exercising its police power in a way that oppresses minorities clearly improves its moral functioning, and hence meets the test for a morally justified constitutional amendment. As was the case with the Civil Rights Act, to the extent that the national consensus underlying the Equal Protection Clause is based on understanding it as designed to prevent government from adopting racist and exploitative polices aimed at minorities, it is morally well-grounded.

2. Evaluating the Anti-Differentiation Interpretation

At this point, it is reasonable to ask whether any further analysis is required. Won't the evaluations of the anti-differentiation and anti-subordination interpretations of the Equal Protection Clause merely mirror those of the Civil Rights Act? Why re-cover old ground? The answer is that although the moral principles involved are indeed the same, they are being applied in widely divergent contexts. Placing restrictions on governmental action rather than on the liberty of individual citizens requires consideration of factors not addressed in our discussion of the Civil Rights Act. Unlike individuals, government has no personal autonomy at stake and is burdened with the fiduciary duty that all agents have to act in the interest of its principal. Although our analysis of the underlying moral principles may be the same for the Equal Protection Clause as it was for the Civil Rights Act, these contextual factors change the manner of their application sufficiently to alter our conclusion about how the two provisions should be interpreted.[295]

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294. *See supra* text accompanying notes 247-251.

295. These factors played no role in the analysis of the anti-oppression interpretation of the Equal Protection Clause, just completed. This is because under the anti-oppression interpretation there is little difference between the Equal Protection Clause and Civil Rights Act with regard to either factor. The anti-oppression interpretation of the anti-discrimination

Under the anti-differentiation interpretation, the Equal Protection Clause prohibits government from drawing distinctions among its citizens on the basis of irrelevant characteristics. This means that government may not treat members of different racial, ethnic, or sexual groups differently unless doing so is necessary to achieve a legitimate legislative end. Although this may allow the government to direct funds for the treatment of sickle cell anemia to African-Americans and to maintain separate bathrooms for men and women in state-owned facilities, it permits little else in the way of racial, ethnic, or sexual differentiation. It certainly forbids government from assigning legal, material, or educational benefits and burdens on the basis of these characteristics. Under the anti-differentiation interpretation, government is required to perform its functions in a color-blind manner, employing only "relevant" means to its legislative ends, i.e., those that most efficiently lead to their attainment. For example, the anti-differentiation interpretation of the Equal Protection Clause would forbid the state or federal governments from considering the race, ethnicity, or sex of an applicant in awarding government contracts, requiring such contracts to be awarded strictly on the basis of quality and price.

Our analysis of the anti-differentiation interpretation of the Civil Rights Act showed that there was no independent moral value in the creation and maintenance of a color-blind society in which individuals are evaluated and benefits and burdens distributed on a strictly meritocratic basis. Neither utilitarianism nor any identifiable moral principle entails an obligation to refrain from drawing distinctions on the basis of race, ethnicity, or sex for *non-oppressive* purposes. In the context of the Equal Protection Clause, this implies that there is no independent moral requirement that government function in a color-blind manner. Such a government is not inherently morally superior to one that classifies its citizens on the basis of race, ethnicity, sex, or any other irrelevant characteristic as long as none of these classifications are designed to oppress minorities.

However, as noted in our consideration of the Civil Rights Act,[296] this is not the end of the matter. Although a government that functions in a color-blind manner is not *inherently* morally superior to one that does not, there still may be an instrumental justification for requiring a government to function in such a manner. For example, if requiring governments to abide by the anti-differentiation interpretation of the anti-discrimination principle was necessary to prevent the oppression of minorities, then the anti-

principle deprives individuals of morally valuable personal autonomy to a very limited extent. As a result, its application to individuals via the Civil Rights Act is, in this respect, virtually indistinguishable from its application to governments that have no morally valuable personal autonomy to lose. Further, oppressive conduct violates the principle of respect for persons regardless of whether one is acting as an agent or in one's individual capacity, again rendering the principle's application the same in both contexts. Consequently, the reasoning that shows the anti-oppression interpretation of the Civil Rights Act to be morally justified works equally well for the anti-oppression interpretation of the Equal Protection Clause.

296. *See supra* text following note 266.

differentiation interpretation of the Equal Protection Clause could be justified as a means to morally valuable anti-oppression ends. With regard to the Civil Rights Act, we saw that no such instrumental justification was available. Because the anti-differentiation interpretation of the Act significantly curtailed individuals' ability to act upon their personally important, morally unobjectionable value decisions for only marginal reductions in oppression, the moral cost of adopting that interpretation was too high. However, the situation is considerably different in the case of the Equal Protection Clause, which restrains governmental rather than individual conduct. The combination of the government's status as an agent and the difference in incentives between individuals acting in a market and government officials acting politically is sufficient to alter the balance of equities in favor of the anti-differentiation interpretation in this context.

Consider government's status as an agent of the citizenry first. As an agent, it is empowered to act only in the interest of the citizens. Government is not a person, and possesses no morally valuable personal autonomy that can be lost. Hence, placing restraints on its activities carries no inherent moral cost. Further, government is the agent of *all* the citizens, each of whom possesses equal status as a principal. There are no classes of citizenship as there are of stock ownership; no "preferred" and "common" citizens with the former entitled to privileges not possessed by the latter. All citizens are required to support the government with their taxes and all must live out their lives subject to the law government creates and enforces. Hence, all citizens have an equal stake in the governmental enterprise. As the agent of *all* citizens, government has a fiduciary duty to act exclusively in the interests of *all* citizens, i.e., in the common interest. A government that acted to advance the interests of some citizens over those of others would be violating this duty. Thus, government has a duty to refrain from treating members of different racial, ethnic, or sexual groups differentially, not because there is anything inherently valuable about refraining from such differentiation, but because its fiduciary duty to act in the interest of all prohibits it from advancing or retarding the interests of these or any other particular subgroups of the citizenry. The anti-differentiation interpretation of the Equal Protection Clause follows not from an independent moral obligation to engage in purely meritocratic decision-making, but from the contingent moral obligation that arises out of government's role as agent for all its citizens.

Individuals have lives to live. To do so, they must decide what goals to pursue and what activities make life worth living. They must make value determinations and act upon them. As long as they are not attempting to oppress others, they do no wrong in valuing the interests of their loved ones, friends, co-religionists, or members of their race or sex over those of other members of society. They are morally entitled to give preference to these groups because they are morally entitled to exercise their autonomy. In contrast, governments have no corporeal existence. They are not alive

and have no personal goals or interests that they are entitled to pursue. They possess no personal autonomy that permits them to value the interests of some members of society over others. They exist solely to advance the common good of the entire body of the citizenry, and hence act wrongly when they treat different groups of citizens differently on the basis of characteristics that are irrelevant to the achievement of constitutionally authorized legislative ends. Thus, where an anti-differentiation interpretation of the Civil Rights Act would unjustifiably curtail individuals' morally valuable personal autonomy, an anti-differentiation interpretation of the Equal Protection Clause not only does not curtail such autonomy, but is apparently required by government's role as an agent for the entire citizenry.

Now let us turn our attention to the different cost and incentive structures of individual and governmental action. In discussing the Civil Rights Act, we considered the argument that the anti-differentiation interpretation could be instrumentally justified as a means of preventing oppressive discrimination. Because some people would try to disguise their oppressive conduct as non-oppressive differentiation, an anti-differentiation interpretation of the statute would catch instances of such covert oppressive discrimination that the anti-oppression interpretation might miss. In that discussion, I characterized the moral improvement that this would produce as relatively small because relatively little harm would be suffered by the victims of covert oppressive discrimination in a market vigorously policed by an anti-oppression interpretation of the Civil Rights Act.[297] In contrast, the costs of attempting to eradicate the cases of undetected oppressive discrimination by adopting an anti-differentiation interpretation of the Civil Rights Act would be excessively large, not merely to society as a whole, but to the members of minority groups themselves. Because the anti-differentiation interpretation prohibits minorities from offering preferential hiring and educational opportunities to members of their own group, it bans what has historically been one of the most effective strategies by which minorities improve their condition. Adopting an interpretation of the Civil Rights Act that forbids this type of group self-help in order to eliminate the relatively small harm caused by uncoordinated instances of covert oppressive discrimination can hardly seem like a good bargain from the minorities' point of view. This would appear to be a classic case of a cure that is worse than the disease.

In addition, the incentives in a marketplace policed by an anti-oppression interpretation of the Civil Rights Act make acts of oppressive discrimination expensive. Without the ability to engage in the type of widespread collusive oppressive discrimination banned by the Civil Rights Act, those who wish to discriminate against minorities on racist or oppressive grounds incur a cost for doing so. Our discussion of the anti-

297. *See supra* text accompanying notes 267-69.

differentiation interpretation of the Civil Rights Act revealed that there are several forms of economically rational discrimination—situations in which drawing distinctions on the basis of characteristics irrelevant to employees' qualifications and abilities provide economic advantages that enhance business performance.[298] It also revealed that drawing such distinctions for purposes of oppressing members of minority groups was not among them. Unlike rational discrimination, oppressive discrimination involves considering employees' race, ethnicity, or sex not in addition to their qualifications and abilities, but in derogation of them. Engaging in such hiring practices in a market policed by the anti-oppression interpretation of the Civil Rights Act, in which other employers remain free to hire those one rejects, tends to saddle one with a relatively less productive workforce. This places those with "a taste for discrimination . . . at a substantial cost disadvantage relative to their competitors"[299] who do not engage in oppressive discrimination:

> [P]eople who decide that they do not want to trade with or hire certain people because of race, sex, or age are making a decision that has more than just external costs. They bear a large part of the costs themselves, for their decision will surely limit their own opportunities for advancement and success, even as it leaves others free to pursue alternate opportunities. The greater the class of persons who are regarded as off-limits, and the more irrational the preferences, the more the decision will hurt the people who make it, and the more numerous the options it will open to rival traders.[300]

Thus, oppressive discrimination in a market vigorously policed by an anti-oppression version of the Civil Rights Act will tend to be self-limiting.[301]

The situation is entirely different in the case of governmental action. Not only are the costs associated with governmental acts of oppressive discrimination excessively high, political actors have strong incentives to engage in them. Consider costs first. We saw that the reason that individuals operating in a market could inflict relatively little harm on minorities by refusing to deal with them was because the presence of other trading partners made the consequences of this discrimination avoidable. Government action, on the other hand, is by its nature unavoidable. Government acts by issuing rules with which all citizens under its jurisdiction must comply. Should a government oppressively discriminate against a minority group, there is no way for the members of that group to escape the consequences of such discrimination. Should a state government

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298. *See supra* text accompanying notes 260-66.

299. Epstein, *supra* note 36, at 43.

300. *Id.* at 41-42; *see also* Gary S. Becker, The Economics of Discrimination ch. 3 (2d ed. 1971).

301. As noted in our discussion of the anti-differentiation interpretation of the Civil Rights Act, analogous arguments show oppressive discrimination to be equally inefficient and thus equally self-limiting in the educational context as well as in the employment context. *See supra* note 265.

bar women from the practice of law, for example, no woman could obtain employment as an attorney no matter how well-qualified or talented she may be and no matter how many law firms believe they could benefit from employing her. When dealing with governmental action, the harm that would result from even a single instance of oppressive discrimination can be very great.

Further, under the anti-oppression interpretation of the Equal Protection Clause, the risk that such measures will be upheld is significant. Our own history leaves little doubt that just as private actors who wish to oppress minorities try to do so covertly when confronted with the anti-oppression interpretation of the Civil Rights Act, political actors who wish to pass oppressive measures will disguise them with neutral language when confronted with the anti-oppression interpretation of the Equal Protection Clause. This is precisely the genesis of Jim Crow. During the period in which the Equal Protection Clause was interpreted as an anti-oppression principle, state governments continually sought for the neutral-sounding formulation of measures aimed at African-Americans that would meet with the Court's approval. Once this was discovered in cases such as *Pace* and *Plessy*, the pattern was copied throughout the South and the era of separate but equal was born. Given the judiciary's traditional deference to the legislature's characterization of its purposes, the risk that disguised oppressive measures can slip through an anti-oppression version of the Equal Protection Clause should not be discounted. Jim Crow was not introduced as legislation designed to oppress African-Americans, but as measures necessary to protect public morals, prevent social unrest, and maintain order.[302] There is little reason to believe that such legislative subterfuge is necessarily a thing of the past. Given present cultural conditions, it is not unreasonable to suspect that oppressive measures aimed at homosexuals or Islamic men of Middle Eastern extraction may be introduced under the guise of precisely the same benign purposes today. Under the anti-oppression interpretation of the Equal Protection Clause, the risk that covert oppressive legislation will be found constitutionally acceptable will always be a real one.

Under an anti-differentiation interpretation of the Equal Protection Clause, on the other hand, this risk is greatly reduced. By denying government the ability to draw any racial, ethnic, or sexual classification

302. *See* Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

Id.; *see also* Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. Econ. Hist. 893, 900-01 (1986).

not directly related to the purpose of legislation, the anti-differentiation interpretation relieves courts of the necessity of determining whether the legislature's purpose was oppressive or benign. This removes the possibility that covertly oppressive measures introduced under the guise of a benign purpose will be upheld. The anti-differentiation interpretation thus acts as an effective prophylactic against any future *Paces* or *Plessys*.

Further, employing the anti-differentiation interpretation as a prophylactic measure in this context incurs little moral cost. In the context of the Civil Rights Act, the anti-differentiation interpretation was rejected in part because of the excessive cost in morally valuable personal autonomy that it imposed on individual citizens. Because government possesses no personal autonomy, there is no comparable cost in adopting the anti-differentiation interpretation of the Equal Protection Clause. Thus, the moral cost of adopting an anti-differentiation interpretation consists solely in the loss of government's ability to pursue truly non-oppressive, beneficial ends by racially, ethnically, or sexually conscious means. Although this cost is real, I characterize it as relatively small because preventing government from pursuing beneficial ends by racially, ethnically, or sexually conscious means does not prevent it from pursuing those same ends by neutral means. If minorities comprise a disproportionate share of those below the poverty line, the anti-differentiation interpretation will prevent government from creating anti-poverty programs for which only minorities are eligible, but not from creating general anti-poverty programs that will disproportionately benefit minorities. Similarly, if minorities constitute a disproportionate percentage of the students receiving substandard education in public schools, the anti-differentiation interpretation will prevent government from creating scholarships available only to minorities or giving them preference in admission to state universities, but not from improving the quality of the public schools generally or creating need-based scholarship programs from which minorities will disproportionately benefit. Thus, although the anti-differentiation interpretation of the Equal Protection Clause may reduce the efficiency of governmental efforts designed to benefit minorities, it does not prevent government from taking actions that ultimately have this effect. This seems a reasonable price to pay for protection against the great harm that can be done by oppressive governmental discrimination.[303]

This conclusion is significantly reinforced when the incentives of governmental actors are taken into account. Unlike individuals acting in a market environment, political actors not only do not bear the cost of governmental oppressive discrimination themselves, they often stand to benefit from it. The currency of politics is not dollars, but votes.

303. Indeed, this is precisely what we would expect of a legal provision designed to embody a moral principle. As noted in Part I, *see supra* text accompanying notes 8-9, the purpose of a moral principle is to protect values of such exceptional moral significance that their preservation justifies reductions in the efficiency of individuals' or government's ability to realize their otherwise legitimate and worthy ends.

Politicians can gain votes by meeting the demands of their constituents. When a majority of their constituents (or even a politically dominant minority) constitute a single racial, ethnic, or sexual group, politicians can advance their careers by meeting these constituents' demand for the oppression of minorities.

Oppressive discrimination can consist either in the exploitation of minorities by using them merely as tools for the enhancement of the wealth, status, and power of the dominant group or in denigrating the humanity of minorities by treating them as less than fully human. These two forms of oppression correspond to the two types of "rents," economic and psychic, that politicians can deliver to their majority constituents by enacting discriminatory legislation.[304] Placing legal restrictions on the economic opportunities of minorities that make it difficult for them to compete with members of the dominant group or force them to deal with members of the dominant group on unfavorable terms effectively transfers wealth from the minorities to the dominant majority. Politicians can significantly enhance their electoral fortunes by delivering such economic rents.[305] Thus, in the Jim Crow era, Southern politicians earned political capital by sponsoring highly restrictive labor laws designed to suppress the wages of African-Americans and thereby provide an economic boon to the politically dominant Caucasian landowners and employers.[306] Further, even when no economic advantage is conferred, politicians can deliver psychic rents by advancing racially, ethnically, or sexually denigrating legislation that allows the dominant majority to indulge its sense of inherent superiority. Thus, Southern politicians could attract votes by supporting railway segregation even though it provided no economic benefit to their Caucasian constituents.

> White passengers seemed to be indifferent about segregation; streetcar companies resisted segregation; certainly black passengers resisted segregation. Who then wanted it badly enough to work for its introduction? The most likely candidates are politicians who believed that there existed latent sentiment in favor of segregation among whites. Political entrepreneurs could offer white voters something they valued enough to vote for, but not enough to bear the costs privately.[307]

304. *See* Jennifer Roback, *Racism as Rent Seeking*, 27 Econ. Inquiry 661, 673-76 (1989).

305. *See id.* at 676 ("Organizing ethnic groups into economic cartels is a promising field for political entrepreneurs. Exclusion of ethnic groups from economic activities such as occupations, education or land ownership is a typical device for generating rents for the dominant ethnic groups.").

306. *See* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161 (1984).

307. Roback, *supra* note 304, at 674. This also accounts for politicians' support for measures enforcing segregation in private schools and colleges.

> The economic motives for forcing Berea to segregate appear to have been minimal. That is, there were no obvious resources transferred from black to white hands by this legislation. . . . Evidently, the major motivation in the Berea case was

Indeed, when dealing with racial, ethnic, and sexual classifications, the incentive for political actors to sponsor oppressive legislation is especially strong.

> Ethnic groups can be powerful rent-seeking bodies because the identities of the winners and losers are clear from the outset. People cannot readily change their ethnic identity, making many race-specific transfers difficult to evade. That is, a black person cannot evade a restriction on blacks owning land by becoming not black . . . . More importantly, those who initiate race-specific legislation know that they will never be members of the dispossessed group, and hence they also know that they will never be one of the direct victims of the legislation. Few other rent-seeking activities can offer such a guarantee.[308]

Thus, in contradistinction to private acts of oppressive discrimination which impose a personal expense on the actor and thus tend to make such acts self-limiting, governmental acts of oppressive discrimination offer a potential for political gain that ensures that "political entrepreneurs" will continually pursue legislation implementing it.

These considerations lead to the conclusion that the anti-differentiation interpretation of the Equal Protection Clause curtails a government's ability to employ its police power in morally objectionable ways more effectively than does the anti-oppression interpretation, and thus better meets the test for a morally justified constitutional amendment. Although there may be no inherent moral value in a government which functions in a color-blind manner, requiring government to do so serves the genuinely valuable end of preventing the oppression of minorities to a greater degree than does merely directly prohibiting oppressive governmental discrimination. In contradistinction to the individual acts of oppressive discrimination regulated by the Civil Rights Act, oppressive governmental discrimination poses the risk of great harm to minorities unless entirely eliminated, something political incentives make very difficult to do. Indeed, because "[t]he publicness of social norms means that opportunities exist for political entrepreneurship[, i]n the absence of some explicit constitutional prohibitions or sanctions, race relations are bound to be politicized, in one direction or the other."[309] Further, because the anti-differentiation interpretation of the Equal Protection Clause carries no cost in morally valuable personal autonomy and does not prevent government from acting to improve the condition of minorities in race-, ethnic-, and sex-neutral ways, the moral costs of adopting it are well worth the heightened protection it buys. When we add that as the agent of the entire citizenry government has the contingent moral duty to refrain from favoring the

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> the desire of lawmakers to associate themselves with the widespread demand for segregation in a manner that was relatively inexpensive for themselves and their constituents.

Id.

308. *Id.* at 675.
309. *Id.* at 679.

interests of some citizens over others, the instrumental argument for the anti-differentiation interpretation of the Equal Protection Clause becomes compelling.

The history of the struggle from 1868 to 1967 to end governmental oppressive discrimination recounted in Part II of this article provides the strongest possible evidence for the observation that

> [t]he color-blind proposition . . . is the product . . . of a radical skepticism about our political capabilities where race is concerned. Because neither legislators nor judges may be trusted to choose wisely in this vexed area, and because we know that racial classifications are often highly injurious, our only safety lies in foreclosing altogether a power of government we cannot trust ourselves to use for good.[310]

The anti-differentiation interpretation of the Equal Protection Clause, then, is morally justified not because of anything inherently valuable about a meritocratic society, but because it is a necessary prophylactic against the political temptation to engage in racial, ethnic, or sexual rent-seeking. In evaluating the anti-oppression interpretation, we saw that to the extent that the national consensus underlying the Equal Protection Clause was based on an understanding of the Clause as designed to prevent government from adopting racist and exploitative polices aimed at minorities, it was morally well-grounded.[311] Although the anti-oppression interpretation serves this end and thus produces a morally justified constitutional amendment, the anti-differentiation interpretation does so more effectively. Thus, it, rather than the anti-oppression interpretation, provides the morally proper interpretation of the Equal Protection Clause.

3. Evaluating the Anti-Subordination Interpretation

Logically speaking, the conclusion that the anti-differentiation interpretation of the Equal Protection Clause is the morally proper one is premature since the anti-subordination interpretation has yet to be evaluated. This apparent oversight is quickly remedied, however, because the anti-subordination interpretation of the Equal Protection Clause can be dismissed on the same ground as was the anti-subordination interpretation of the Civil Rights Act—its impracticability.

Under the anti-subordination interpretation, the Equal Protection Clause prohibits government from taking action that has the effect of increasing or perpetuating the subordination of any minority group. This requires government to refrain not only from intentionally acting to subordinate minorities, but also from taking any action that does so inadvertently. Thus, government must monitor all its activity to ensure that it does not negatively impact the societal status of any minority group.

310. Kull, *supra* note 41, at 5.
311. *See supra* text following note 293.

In the context of the Civil Rights Act, we saw that the anti-subordination interpretation ran afoul of the procedural moral principle of "ought implies can." Although it is not physically impossible for the citizens of the United States to refrain from all action that has the effect of increasing or perpetuating the subordination of the members of any minority group, it is epistemically impossible for them to do so. Because of the inherent limitations on human ability to centralize knowledge, individuals cannot gather enough information to know in advance which of their actions will have the unintended effect of subordinating minorities or even what questions they should ask to make such a determination.[312] Because there can be no moral obligation for individuals to refrain from actions that they cannot know to be forbidden, the anti-subordination interpretation cannot be the morally proper interpretation of the Civil Rights Act.

The situation is no different when the actor to be restrained is government rather than individual citizens. It is of course true that with its greater resources and access to social science expertise, government can be expected to know more about the effects of its actions on the structure of society than can individual employers or educators. But the problem is not merely one of resources and scientific skill. The problem is that in a dynamic society of any significant size, individuals' reactions to changes in the legal environment are always partially dependent on their particular interests, abilities, and opportunities—that is, on knowledge that "never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."[313] Friedrich Hayek's observation that "the importance of the knowledge of the particular circumstances of time and place"[314] makes it impossible in principle for government to gather the information necessary to engage in fully determinate and successful economic planning is equally true for governmental efforts to influence the distribution of wealth and power and the relative status of social groups. No matter how much care and scientific acumen politicians bring to the legislative process, the law of unintended consequences guarantees that their measures will have ripple effects that are unforeseeable, some of which may increase or perpetuate the subordination of minorities.

The examples introduced in our discussion of the Civil Rights Act apply with equal force to the Equal Protection Clause.[315] Affirmative action programs granting minorities preference for government jobs or admission to state universities are intended to reduce the societal subordination of minorities. However, even some advocates of the anti-subordination interpretation recognize that such programs have the potential to backfire because,

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312. *See supra* text accompanying notes 274-277.
313. Hayek, *supra* note 275, at 519.
314. *Id.* at 522.
315. *See supra* text accompanying notes 280-287.

> In some places, race-conscious judgments have stigmatized their purported beneficiaries, by making people think that blacks are present only because of their skin color. In some places, such judgments have fueled hostility and increased feelings of second-class citizenship. Some people who would do extremely well in some good institutions—schools or jobs—are placed by affirmative action in programs or positions in which they perform far less well, with harmful consequences for their self-respect. Ironically, affirmative action programs can aggravate problems of caste by increasing the social perception that a highly visible feature like skin color is associated with undesirable characteristics.[316]

Under the anti-subordination interpretation of the Equal Protection Clause, if programs of preferential hiring and admission would reduce the societal subordination of minorities, then government is required to institute them. If they would in fact increase the subordination of minorities, however, then government is prohibited from instituting them. Government must either institute such programs or not. But because the effects of the programs depend on how they influence majority group members' perception of minorities as well as the minorities' perception of themselves; because this in turn depends on everything from general economic conditions to the programs' particular impact on the life prospects of and interrelationships among the myriad individuals affected by them; and finally, because such information cannot be gathered and known in advance, no amount of social scientific study will enable legislators to predict the programs' effects on the subordination of minorities at the time of their enactment. Under these circumstances, an interpretation of the Equal Protection Clause that instructs government to take no action that will have the effect of increasing or perpetuating the subordination of minorities saddles it with an impossible burden. And if this is the case with regard to measures intended to address the subordination of minorities directly, how much more must it be so for legislation concerned with matters of ordinary government concern such as taxes, commercial regulation, crime, etc.[317]

316. Sunstein, *supra* note 5, at 2453.

317. In rejecting the anti-subordination interpretation of the Equal Protection Clause because it "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes," Washington v. Davis, 426 U.S. 229, 248 (1976), the Supreme Court seems to have dimly (and belatedly, given *Griggs*) recognized the impossible burden that interpretation places on government. Indeed, even advocates of the anti-subordination interpretation such as Cass Sunstein admit the difficulty, although not the impossibility, of its implementation.

> The judiciary simply lacks the necessary tools to implement the anticaste principle. . . .
>
> . . . The anticaste principle, if taken seriously, calls for significant restructuring of social practices. For this reason, legislative and administrative bodies, with their superior democratic pedigree and fact-finding capacities, can better implement the principle than can the courts.

Sunstein, *supra* note 5, at 2440. For an explanation of why advocates fail to recognize the impossibility of applying the anti-subordination interpretation, see *infra* text accompanying notes 318-320.

Although government is an institution, it is ultimately comprised of individual human beings. As such, the inherent limitations on the abilities of individuals apply to it as well. Neither government nor individuals can know in advance the effects of their actions on the overall structure of social relationships in a large and dynamic society. Therefore, for government as well as for individuals, the anti-subordination interpretation of the anti-discrimination principle violates the moral principle of "ought implies can."

If this is indeed the case, if the anti-subordination interpretation is truly impossible to apply, why does it continue to command significant support among academics and intellectuals? Why do so many fail to recognize its impracticability? To some extent, this may be due to intellectuals' tendency to overestimate the power of human reason—what Hayek called "the fatal conceit that man is able to shape the world around him according to his wishes."[318] But to a greater extent, I believe it is because the anti-subordination interpretation of the Equal Protection Clause is usually confused with something that is not impracticable, i.e., with governmental efforts to *remedy* the subordination of minorities.

It is entirely reasonable for advocates of the anti-subordination interpretation to argue that government should take no action *intended* to subordinate or continue the subordination of minorities, and further, that it should undertake positive efforts to alleviate such subordination. Under the anti-oppression interpretation of the Equal Protection Clause, such efforts could include race-, ethnic-, and sex-conscious measures designed to improve the status of minorities and create a more egalitarian society. Under the anti-differentiation interpretation, the efforts would have to be the race-, ethnic-, and sex-neutral ones described in the previous section.[319] Arguing that government should take steps to *remedy* subordination, however, is not the same thing as arguing that government take no steps that *have the effect* of perpetuating or increasing subordination. The former is perfectly possible and presents no epistemic problem. It is true that the limitations on human knowledge mean that some of the intended remedial efforts will go awry and will eventually have to be abandoned. But neither the anti-oppression nor anti-differentiation interpretation of the Equal Protection Clause require government to act with perfect foresight. As long as government is acting for the purpose of alleviating subordination (and in the case of the anti-differentiation interpretation, in a race-, ethnic-, and sex-neutral manner), the measures would be constitutional. The latter, on the other hand, is impossible. Because government officials cannot know ahead of time which actions will unintentionally continue or increase the subordination of minorities, government cannot be required to refrain from all such action.

The distinction, though subtle, is crucial. As part of a constitutional

318. F.A. Hayek, The Fatal Conceit 27 (1988).
319. *See supra* text accompanying note 303.

amendment whose purpose is to improve the moral functioning of government, the Equal Protection Clause is designed to embody a moral principle that restrains the means government may employ to promote the public's health, safety, and welfare.[320] To accomplish this end, it must function prospectively. It must inform the legislators subject to it which measures are off-limits in advance of their enactment. Moral principles, like foul lines in baseball, can serve their purpose only if they are visible to those who must remain within their bounds. Thus, an interpretation of the Equal Protection Clause that makes it impossible to know which legislative actions are forbidden until after they have been enacted and their societal effects made manifest is untenable. In contrast, legislation designed to remedy subordination functions retrospectively as a response to the myriad of governmental and private factors that produce the societal subordination of minorities. Human inability to fully predict the future societal consequences of present actions is no impediment to efforts to alleviate the manifested consequences of past actions.

I believe that much of the appeal of the anti-subordination interpretation of the Equal Protection Clause derives from the erroneous belief that such an interpretation is necessary for government to act to remedy the societal subordination of minorities. But such remedial legislation requires only the positive exercise of government power within Article I, § 8 boundaries, not a prospective prohibition on all governmental action that may have a subordinating effect, whether intentional or not. Further, neither the anti-oppression nor anti-differentiation interpretation of the Equal Protection Clause would ban such legislation, although the anti-differentiation interpretation would prohibit the race-, ethnic-, and sex-conscious forms of it. Once it is recognized that legislation designed to remedy the societal subordination of minorities does not require the anti-subordination interpretation of the Equal Protection Clause, I would expect much of the support for this interpretation to melt away.

4. Conclusions

Careful moral analysis shows that the Equal Protection Clause is most appropriately interpreted as an anti-differentiation principle. The fundamental moral principle of respect for persons requires that government refrain from all oppressive unequal treatment of minorities. This suggests that the anti-oppression interpretation of the Clause would produce a morally justified constitutional amendment. Although this is the case, the high cost that even isolated instances of governmental oppressive discrimination imposes on society, the strong incentives for political actors to engage in such discrimination, and our own historical experience all suggest that the anti-oppression interpretation is unlikely to provide

320. *See supra* text accompanying notes 291-292.

adequate protection against such oppressive unequal treatment by government. In contrast, the anti-differentiation interpretation provides a much greater level of protection at the relatively small cost of potential reductions in the efficiency with which government may seek to improve the welfare and societal status of minorities. This is in keeping with the essential function of moral principles, which is to protect values of exceptional moral significance, in this case, the personal autonomy and basic dignity of all individuals, even if doing so makes it more difficult to achieve otherwise worthy goals. Thus, although there is nothing inherently morally valuable about a government that functions in a color-blind manner, one that does has great instrumental value for realizing the genuinely valuable end of eliminating the oppressive unequal treatment of members of minority groups. This, taken in conjunction with the fact that as an agent of all its citizens government is bound to act in the interest of all and possesses no morally valuable personal autonomy that can be lost, demonstrates that the anti-differentiation interpretation of the Equal Protection Clause is morally superior to the anti-oppression interpretation.

Finally, as in the case of the Civil Rights Act, the anti-subordination interpretation of the Equal Protection Clause is unacceptable because of its impracticability. Because government, like individuals, cannot determine in advance which of its actions will have the unintended effect of increasing or continuing the societal subordination of minorities, it has no ability to comply with an injunction to refrain from taking any such actions. Thus, the anti-subordination interpretation violates the procedural moral principle of "ought implies can" and must be rejected.

IV. EXPLANATIONS AND IMPLICATIONS

Having surveyed the legal history of the anti-discrimination principle and performed a normative analysis of the Civil Rights Act and Equal Protection Clause, I am now in a position to offer an explanation for much of the contemporary ideological strife over the issue of discrimination as well as draw some implications about how the Civil Rights Act and Equal Protection Clause should be applied. To begin with, the legal evolution of the anti-discrimination principle suggests that the ideological strife over its interpretation may not be a result of divergent and irreconcilable moral intuitions and value judgments as much as a failure to appreciate the different contexts in which the principle is being applied and the distinction between inherent and instrumental moral value.

It should be completely unsurprising that the anti-discrimination principle began its legal career as an anti-oppression principle. When the Fourteenth Amendment was adopted, the nation had just endured a bloody civil war, fought in part to end the scourge of slavery. Having secured the Northern victory on this point with the Thirteenth Amendment, the Thirty-ninth Congress was immediately confronted with the Southern states' effort to reinstitute the official oppression of African-Americans through the black

codes. Such state-sponsored oppression was precisely the evil that the Fourteenth Amendment was designed to eradicate. Because the black codes constituted such clear violations of the fundamental moral principle of respect for persons, the moral intuitions of the Amendment's authors would naturally lead them to understand it as an anti-oppression principle.

Understood in this way, the Equal Protection Clause was perfectly effective against its initial targets. Under it, the Supreme Court had no difficulty declaring the overtly oppressive black codes to be unconstitutional.[321] Given the incentives of the political marketplace, however, this victory was destined to be short-lived. As long as Southern politicians could reap political capital by delivering the economic and psychic rents associated with oppressive discriminatory legislation, the "political entrepreneurs" among them would seek to do so. As a result, the overt oppression of the black codes was soon replaced with facially neutral but nonetheless racially oppressive legislation introduced under the guise of protecting public morals or maintaining good order. Although the courts could recognize and strike down the more transparent examples of such legislation,[322] the judiciary's traditional deference toward the legislature's characterization of its own purposes limited its ability to second guess legislative intent. This ensured that the Southern legislatures would eventually find a putatively neutral formula for oppressive discriminatory legislation sufficient to pass constitutional muster—a goal that was achieved in cases such as *Pace* and *Plessy*.[323]

This situation meant that for the Equal Protection Clause to serve its anti-oppression purpose, the courts could not continue to treat racially classificatory legislation the same way they did other types of legislation. As *Plessy* demonstrated, judicial deference toward the legislature's stated goals and judgments as to the necessity of racial classification for their achievement completely undermined the Clause's ability to eliminate oppressive discriminatory legislation. For the courts to give the Equal Protection Clause its intended effect, they would have to view racially classificatory legislation with suspicion; they would have to "strictly scrutinize" all such legislation to ensure that it was not functioning as a facade for covert oppressive discrimination; they would have to treat such legislation as guilty, i.e., as unconstitutional, until proven innocent. In other words, they would have to interpret the Equal Protection Clause as an anti-differentiation principle.

The evolution of the interpretation of the Equal Protection Clause from an anti-oppression principle to an anti-differentiation principle chronicled in Part II reflected the growing judicial recognition that the anti-differentiation interpretation of the Clause was a necessary means to its anti-oppression

321. *See supra* text accompanying notes 76-79.

322. For example, see the discussion of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in the text accompanying notes 98-99.

323. *See supra* text accompanying notes 89-92 and 100-104.

end. The half-century of struggle against Jim Crow hammered home the lesson that the only way to protect minorities against oppression was to prohibit government from differentiating among its citizens on the basis of their race or ethnicity. In battling segregation, however, it was not unnatural for the distinction between means and end to become blurred. As a result, most of those involved in the civil rights movement came to view racial classification itself as the evil they were fighting, rather than the oppressive use to which it was put.[324] Over time, the belief that racial differentiation was wrong *per se*, i.e., that there was inherent rather than merely instrumental moral value in a society free of irrelevant racial, ethnic, and sexual classification, became widespread. By the early 1960s, it was generally believed that morality required

> a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life and practice of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong.[325]

The conventional moral wisdom of the time was well-captured by Alexander Bickel, who declared that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination [meaning differentiation] on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[326]

This understandable but erroneous attribution of inherent moral value to the anti-differentiation interpretation of the anti-discrimination principle sowed the seeds of moral confusion and ideological strife that was to beset the next generation. Having come to regard the elimination of irrelevant racial, ethnic and sexual differentiation as a morally worthy end in itself, the members of the civil rights community were blind to the difference in context between the Equal Protection Clause, which restrained state action, and the newly introduced civil rights bill, which was intended to restrain the actions of the citizenry. If treating individuals differently on the basis of their race, ethnicity, or sex was wrong *per se*, then it was just as wrong for individuals to engage in it as it was for government. Hence, the supporters of the Civil Rights Act argued for and obtained passage of a statue embodying an anti-differentiation principle.

As the normative analysis of Part III demonstrates, however, this is not the morally proper interpretation of the Act. Because the anti-differentiation interpretation neither exemplifies nor is entailed by a legitimate moral principle,[327] it does not have the inherent moral value the

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324. *See supra* text accompanying notes 169-173.
325. Van Alstyne, *supra* note 11, at 809-10.
326. Alexander Bickel, The Morality of Consent 133 (1975).
327. *See supra* text accompanying notes 253-266.

Act's supporters ascribed to it. And because the moral improvement it can achieve over the anti-oppression interpretation of the Act is insufficient to justify the loss of personal autonomy it imposes on the citizenry,[328] it cannot be justified on instrumental grounds. In the latter respect the Civil Rights Act is unlike the Equal Protection Clause, but this is due to contextual factors such as government's status as an agent and the different cost and incentive structures of political and market action;[329] precisely the factors that the mistaken belief that racial, ethnic, and sexual differentiation were wrong *per se* would cause civil rights advocates to overlook.

With the passage of the Civil Rights Act, there was widespread consensus that American law now embodied the dictates of morality on the issue of discrimination—that both the Equal Protection Clause and Civil Rights Act enforced a fundamental moral principle prohibiting irrelevant racial, ethnic, and sexual differentiation. Because this consensus was based on an error, however, it could not long endure. Liberal groups seeking to improve the condition of African-Americans and other minorities soon recognized that, construed as an anti-differentiation principle, the Civil Rights Act constituted a serious impediment to the achievement of that end. As early as 1965, Daniel Patrick Moynihan had pointed out that

> three centuries of sometimes unimaginable mistreatment have taken their toll on the Negro people. The harsh fact is that as a group, at the present time, in terms of ability to win out in the competitions of American life, they are not equal to most of those groups with which they will be competing.[330]

A construction of the Civil Rights Act that mandated a society in which all employment and educational decisions were made on a strictly meritocratic basis would virtually ensure their continued societal subordination. Confronted with this reality, liberals quickly rediscovered the moral truth that differentiating on the basis of race, ethnicity, and sex for *non-oppressive* purposes is not in itself morally objectionable; i.e., that the anti-discrimination principle is essentially an anti-oppression rather than an anti-differentiation principle. Accordingly, they began to press for affirmative action.

With this, an ideological rift opened up. Conservatives adhered to the belief erroneously extrapolated from the civil rights struggle that racial, ethnic, and sexual discrimination is wrong *per se*. As a result, they regarded the liberals who advocated affirmative action as departing from moral principle to curry favor with their minority adherents. Liberals, on the other hand, who correctly perceived that only oppressive discrimination was wrong *per se*, failed to recognize that in the context of the Equal

328. *See supra* text accompanying notes 267-271.
329. *See supra* text accompanying notes 296-308.
330. The Moynihan Report, *supra* note 34 (quote taken from unpaginated summary introduction).

Protection Clause, a strict adherence to an anti-differentiation interpretation was a necessary prophylactic measure. As a result, they regarded conservative opposition to government-sponsored affirmative action as a departure from moral principle designed to protect the privileged societal position of Caucasian males. By overlooking the importance of the context in which the anti-discrimination principle was applied, both sides not only drew erroneous conclusions, but were led to question the good faith of the other.

This rift is a fair reflection of the one that has split the Supreme Court over the proper interpretation of the Equal Protection Clause for the past thirty years. The liberal justices who formed the majority in *Metro Broadcasting* correctly understood that the anti-discrimination principle is inherently valuable only when interpreted as an anti-oppression principle, but failed to appreciate that an anti-differentiation interpretation of the Clause is justified by its instrumental value in preventing governmental oppression. Thus, Justice Marshall, who perceived that the heart of the Equal Protection Clause was "the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more,"[331] found it "inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures."[332] The conservative justices who formed the majority in *Adarand*, on the other hand, correctly supported the anti-differentiation interpretation of the Clause, but did so on the mistaken ground that there is inherent moral value in prohibiting unequal treatment on the basis of irrelevant characteristics. Chief Justice Rehnquist, for example, expressly believes that

> [t]he evil inherent in discrimination against Negroes is that it is based on an immutable characteristic . . . . The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another. . . . I find a prohibition on all preferential treatment based on race as elementary and fundamental as the principle that "two wrongs do not make a right."[333]

In the context of the Civil Rights Act, this ideological rift was exacerbated by the fact that the initial interpretation of the Civil Rights Act as an anti-differentiation principle created a strong incentive for those interested in improving the conditions of minorities to argue not for the morally appropriate anti-oppression interpretation of the Act, but for the more radical anti-subordination interpretation. The Act's initial anti-

331. Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (Marshall, J., concurring) (quotation omitted).

332. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (Marshall, J., concurring).

333. United Steelworkers of Am. v. Weber, 443 U.S. 193, 228 n.10 (1979) (Rehnquist, J., dissenting).

differentiation interpretation inappropriately prohibited all benevolently-intended race-, ethnic-, or sex-conscious efforts to improve the employment and educational prospects of minorities as well as minorities' own efforts at group self-help. This left bringing lawsuits against employers and educators for illegal discrimination as the only legal alternative to a meritocratic competition in which African-Americans and certain other minority groups were systematically disadvantaged by past oppression. Just as when one's only tool is a hammer, everything looks like a nail, when one's only tool is a discrimination lawsuit, everything that disadvantages minorities looks like discrimination. In these circumstances, the most logical course for parties seeking to reduce the subordination of minorities to follow was to argue for the broadest possible interpretation of discrimination. Where the morally proper definition of discrimination as the oppressive unequal treatment of minorities would counterproductively limit discrimination lawsuits to cases of intentionally oppressive action, a definition of discrimination as *doing anything* that subordinates or continues the societal subordination of minorities would extend the range of such suits to all actions that negatively impact minorities. Responding rationally to incentives, the staff of the EEOC, whose mission was to improve the relative condition of minorities,[334] promptly defined discrimination as "all conduct which adversely affects minority group employment opportunities."[335] When the Supreme Court endorsed this definition in *Griggs*,[336] the disparate impact model of discrimination was born.

The introduction of an anti-subordination interpretation into the ideological mix not only widened the gulf between conservative and liberal opinion on discrimination, it also skewed the debate. The broad anti-subordination definition of discrimination may have arisen as a response to the mistaken initial interpretation of the Civil Rights Act as an anti-differentiation principle, but it nevertheless constituted a serious over-correction. Now, rather than arguing for the correct anti-oppression interpretation of the Act, a significant portion of liberal opinion was arguing for the philosophically untenable and epistemically impracticable anti-subordination interpretation. Further, because of the lack of attention to the context in which the anti-discrimination principle was applied, many began to argue for an anti-subordination interpretation of the Equal Protection Clause as well.[337] As a result, the debate over the anti-discrimination principle moved from a struggle between the anti-differentiation and anti-oppression interpretations, each of which was correct in one context, to a struggle between the anti-differentiation interpretation, valuable only

334. *See* Graham, *supra* note 1, at 247-54.
335. *See* Blumrosen, *supra* note 188, at vii.
336. *See* Graham, *supra* note 1, at 383-89.
337. *See, e.g.*, Colker *supra* note 11; Fiss, *supra* note 5; West, *supra* note 30; Sunstein, *supra* note 5.

instrumentally and only in the governmental context, and either a pure anti-subordination interpretation or a conflated mixture of anti-subordination and anti-oppression interpretations that was not correct in any context. In this confused state, it is not surprising that the debate over the proper interpretation of the anti-discrimination principle has raged on for as long as it has.

It is perhaps ironic that the most divisive political issue of our time arose from the simple failure to distinguish between inherent and instrumental moral value. Ironic or not, however, this, rather than any deep-seated normative disagreement, is the source of the dissension besetting the effort to legally prohibit discrimination in the United States.

Having explained the lack of consensus on the issue of discrimination, all that remains is to draw some implications for the proper application of the Equal Protection Clause and Civil Rights Act. Consider the Civil Rights Act first. Properly interpreted as an anti-oppression principle, the Civil Rights Act would prohibit employment and educational decisions made on the basis of racial, ethnic, or sexual animus or those intended to degrade or exploit minorities, but would not otherwise require that such decisions be made according to any specified set of criteria. As a result, there would be no legal restriction on citizens' ability to engage in *non-oppressive* racial, ethnic, or sexual classification. All forms of private affirmative action would be legally permitted. Women and members of minority groups who want to give employment or educational preference to members of their own group as a means of combating their societal subordination would be perfectly free to do so, as would anyone else who wishes to remedy the effects of past discrimination, prevent present or prospective prejudice, create a more diverse environment, or otherwise pursue a personal ideal of social justice.

This interpretation directly entails the abolition of the disparate impact model of discrimination. To the extent that this model had any reason for existing, it was because the anti-differentiation interpretation of the Act cut off other avenues by which disfavored minorities could improve their societal standing. Because when properly interpreted the Act imposes no such restraints, there can be no excuse for holding individuals liable for actions that cannot be clearly identified in advance. Therefore, only the disparate treatment model of discrimination should be recognized by the courts.

The disparate treatment model, too, would undergo a change. Under a properly interpreted Civil Rights Act, a complainant would have to prove not just that he or she had been treated differently because of his or her membership in a minority group, but that he or she had been treated differently and *oppressively*. This, of course, implies that there is no right to equal opportunity as it is currently understood. One is not morally entitled to be evaluated by others strictly on the basis of his or her qualifications and abilities. One is morally entitled only to be evaluated by others in a manner consistent with his or her equal dignity as a human

being. Thus, whether or not it is foolish, an employer or educator does not wrong an applicant by preferring his or her less qualified and less able nephew or one who would be a bigger help to the company or university soccer team to the applicant.[338] The cost of removing the restraints on affirmative action is that others are allowed to pursue their non-oppressive visions of justice and personal preferences as well.

This does not call for abandoning the *McDonnell Douglas* method of proving discrimination, however. Because those who wish to engage in oppressive discrimination will attempt to disguise their intentions behind a neutral façade, *McDonnell Douglas*'s presumption of discrimination whenever an adverse employment or educational decision is taken against a qualified minority would still be justified. The change would come in the second step of the evidentiary process in which the employer or educator is required to offer "legitimate, nondiscriminatory reasons for the employee's [or student's] rejection."[339] Under the proper interpretation of the statute, such reasons would include not only the currently acceptable business- or educationally-related justifications, but also those involving the genuine pursuit of the defendant's non-oppressive vision of justice or personal preferences. Thus, as embarrassing as it might be for the employer or educator to offer it, courts should accept the verified claim that the complainant was passed over because the boss wanted to hire his or her nephew or because someone else would better help the university soccer team as a legally adequate justification for the complainant's rejection. Amended in this way, the evidentiary requirements for proving discrimination would reflect the moral fact that although there may be justification for prohibiting individuals from oppressing minorities, there is none for prohibiting them from pursuing their non-oppressive personal values, as foolish or idiosyncratic as these may be.

Turning to the Equal Protection Clause, this is properly interpreted as an anti-differentiation principle. Designed as a prophylactic against governmental oppression of minorities, the Clause must deprive government of virtually all power to classify its citizens on the basis of race, ethnicity, and sex to serve its purpose. Political logic and history demonstrate that government should be trusted with the power to draw racial, ethnic, and sexual distinctions only to attain a goal of overriding moral significance, and then only when there are no racial-, ethnic-, or sex-neutral ways to achieve that end. Thus, the scrutiny with which courts should examine governmental actions that classify citizens on the basis of race, ethnicity, or sex should indeed be so strict as to prove "fatal in fact"[340]

338. Unless the employer or educator has made a previous representation that all employment or admission decisions will be made on a strictly meritocratic basis which he or she is now violating.

339. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

340. Gerald Gunther, *The Supreme Court 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 108

to almost all such measures.

As currently interpreted, the Equal Protection Clause permits racial, ethnic, and sexual classification for purposes of remedying past governmental discrimination and perhaps to obtain a diverse student body in state universities.[341] The latter certainly does not constitute a goal of sufficiently overriding moral significance to open the door to the governmental assignment of advantages on the basis of race, ethnicity, or sex. And even assuming that the former does, it may be achieved by the race-, ethnic-, and sex-neutral means described in Part III with only a moderate loss of efficiency.[342] Thus, under the proper interpretation of the Equal Protection Clause, neither of these exceptions to the bar on governmental classification by race, ethnicity, or sex would be permitted. It is difficult to imagine many that would. Desegregating public schools in states with Jim Crow legislation may have been one of these. It, like the assignment of medical treatment for sickle cell anemia or Tay-Sacks syndrome, may be one of the rare situations in which racial, ethnic, or sexual classification is truly necessary to the end to be achieved. But in all but the most extreme circumstances, a properly interpreted Equal Protection Clause will require color-blind government.

At any point in history, there is a tendency to view government oppression of minorities as a thing of the past—as an evil that we have evolved beyond. This tempts each generation to undervalue the prophylactic effect of the anti-differentiation interpretation of the Equal Protection Clause and believe that government can now be trusted to employ racial, ethnic, and sexual classifications for beneficent purposes. But this is a temptation best resisted. The internment of Japanese-Americans during World War II was upheld by the Supreme Court on the ground that "in the crisis of war and of threatened invasion, [the government may adopt] measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others."[343] How confident can we be in the wake of the terrorist attacks on the World Trade Center and the Pentagon that measures directed against Muslims or men of middle-eastern extraction will not be taken on the same ground today? In times of economic hardship, anti-immigrant sentiment often runs high. Are we truly certain that today's politicians will not try to exploit this by offering legislation that targets Hispanics or Asian-Americans? Are we really sure that political entrepreneurs will not seek political capital by introducing anti-gay legislation under guise of protecting public health and morals?

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8 (1972).

341. *See supra* text accompanying notes 239-243.

342. *See supra* text in the paragraph accompanying note 303.

343. Hirabayashi v. United States, 320 U.S. 81, 101 (1943).

The Siren's song of our desire to use government power to do good can blind us to the risks posed by the powerful political incentives to classify citizens by race, ethnicity, or sex in order to deliver economic and psychic rents to the politically dominant group. For this reason, we dare not loose ourselves from the mast of the anti-differentiation interpretation of the Equal Protection Clause. Andrew Kull expressed this quite well when, commenting on Justice Harlan's dissent in *Plessy v. Ferguson*, he stated,

> The advocates of a color-blind Constitution have at every stage been those who were unwilling to leave the proper use of racial classifications to be settled by the political process, and who sought therefore to put such distinctions beyond the reach of legislators and judges alike. The nineteenth-century argument as distilled by Harlan, at a time when the political objection to racial classifications was their use in the systematic oppression of black citizens, was careful to place the legal objection on racially neutral grounds. However we appraise the strength of Harlan's argument today, it applies with equal force to circumstances in which racial classifications may be thought to work a different harm:
>
> > The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.
>
> Harlan's prescription gains in force if for "each race"—by which he meant the black and the white—we substitute a reference to the present components of a diverse, multiracial, multiethnic society. His statement is more a political judgment than a constitutional reading. The judgment is essentially pessimistic: that tools of government we know to be capable of much harm, and that we cannot confidently use for good, should be abjured altogether. The experience of the intervening century has not yet proved Harlan wrong.[344]

CONCLUSION

What, then, of the case of Jacob's sons? Their actions clearly violate both the anti-differentiation and anti-subordination interpretations of the Civil Rights Act. The brothers are purposely differentiating among their job applicants on the basis of religion and national origin, and by preferring Caucasian applicants to more qualified Hispanics and African-Americans, they are acting in a way that tends to increase the subordination of those groups. Under the present interpretation of the Civil Rights Act, a successful case of discrimination could be brought against them using either the disparate treatment or the disparate impact models of discrimination.

This should not be. The Civil Rights Act is morally justified only when

344. Kull, *supra* note 41, at 224 (quoting Plessy v. Ferguson, 163 U.S. 537, 560 (1896)).

interpreted as an anti-oppression principle. This means that one should be liable for discrimination only if he or she has subjected an individual to oppressive unequal treatment because of that individual's membership in a minority group. Jacob's sons have treated their Hispanic and African-American applicants differently than their Caucasian applicants, but they have not treated them oppressively. They are giving Romanian Jews preferential treatment because of their belief that they have a moral obligation to discharge their family's debt to the Verein, not because they regard Hispanics or African-Americans as inferior, degraded, or less than fully human or because they wish to exploit the members of either group. The brothers are using the business that they and their father built to realize a value of profound personal significance to them, and, in a sense, to fulfill the demands of their personal vision of social justice. A properly structured Civil Rights Act would not prohibit such actions. Under such a statute, there would be no disparate impact liability and although a Hispanic or African-American complainant could make out a *prima facie* case of disparate treatment, the brothers' reason for giving preferential treatment to Romanian Jews would constitute a legally adequate justification for the complainant's rejection.

The brothers' hiring practices also run afoul of both New York City's and the federal government's affirmative action requirements. New York City's requirement is intended to remedy the lingering effects of past discrimination by the construction industry and its unions, while that of the Federal government is intended to help reduce the general societal subordination of minorities. Both of these may be morally worthy goals and both may be goals that federal, state, and local governments are entitled to pursue. And under the anti-oppression and anti-subordination interpretations of the Equal Protection Clause, which permit non-oppressive race-, ethnic-, and sex-conscious governmental action, both affirmative action requirements would be unobjectionable. But the Equal Protection Clause is morally justified only when interpreted as an anti-differentiation principle. And this means that governments should be constitutionally required to pursue even morally worthy goals by race-, ethnic-, and sex-neutral means.

Under the proper interpretation of the Equal Protection Clause, government is prohibited from actions that treat individuals differently on the basis of irrelevant characteristics. The race, ethnicity, and sex of a company's employees is completely irrelevant to the company's ability to engage in construction, supply equipment to the construction industry, or fulfill Federal government contracts. Therefore, under the proper interpretation of the Equal Protection Clause, both New York City's and the Federal government's affirmative action requirements would be unconstitutional and the brothers would not be subject to legal liability for failing to comply with them.

The resolution of the case of Jacob's sons and the conclusion of this article may be simply stated. Jacob's sons do nothing morally wrong by

paying their father's debt to the Verein. For American anti-discrimination law to be properly structured, they should not be punished for doing so.