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PHILOSOPHICAL PERSPECTIVES ON AFFIRMATIVE ACTION

Kenneth W. Simons*

EQUALITY AND PREFERENTIAL TREATMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER. Edited by *Marshall Cohen, Thomas Nagel, and Thomas Scanlon*. Princeton, N.J.: Princeton University Press. 1977. Pp. xiv, 209. Cloth, \$8.50; paper, \$3.95.

In the controversy about the justice of affirmative action programs, as in the controversy about abortion, moral philosophers have had much to say. But in each area the philosophical arguments have informed constitutional interpretation to a remarkably slight degree. Thus in *Roe v. Wade*¹ the Supreme Court's consideration of academic views consisted of the following statement:

We need not resolve the difficult question of when life begins.

When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer.²

The opinions in *Regents of the University of California v. Bakke*³ are no different. None of the four opinions that address the constitutional issue shows signs of philosophical influence.

Is the Supreme Court justified in ignoring the views of moral philosophers in constitutional adjudication? This handsome collection of essays, all but one from the pages of the journal *Philosophy and Public Affairs*, helps to answer that question. Most of the essays are by academic philosophers. The remaining three articles, although written by a professor of law and a professor of jurisprudence, have a decidedly abstract and philosophical cast. For the most part, these essays, despite their considerable intrinsic interest, regrettably fail to illuminate the constitutional issues. This Review tentatively proposes a few reasons why this might be so and at the same time notes some distinctions which these articles suggest and which, in my view, are critical to an intelligent analysis of the constitutional fairness of preferential treatment.

In a useful introduction, Thomas Nagel frames the book's general question as whether affirmative action unfairly

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1. 410 U.S. 113 (1973).

2. 410 U.S. at 159.

3. 438 U.S. 265 (1978).

"subordinates the individual's right to equal treatment to broader social aims" (p. viii). Those who would give a negative answer to this question might justify preferential treatment in either a stronger or weaker sense, Nagel points out. The stronger claim is that it is unfair *not* to accord preference to women and minorities. That claim's rationale is either that a group that has been traditionally disfavored deserves compensation as a group, or that the present individuals within the group, who presumably have suffered the effects of past discrimination, deserve individual compensation from the present members of the dominant group, who presumably have benefited from that past injustice. Nagel suggests that this strong claim has at least one serious weakness: the imprecise connection between the alleged wrong and the means of remedying it. With respect to the group fairness argument, "[o]ne does not automatically compensate for wrongs to some members of a group by benefiting other members" (p. ix). With respect to individual fairness, not every black is an indirect victim of discrimination and not every white is an indirect beneficiary; moreover, in practice affirmative action programs only benefit *some* women or blacks at the expense of *some* white males. This "imprecision" objection is a theme that runs through most of the essays.

The weaker justification for affirmative action is that it is a permissible, not obligatory, means of accomplishing an important social end. Even the weak claim is problematic, Nagel remarks, for affirmative action allows the explicit use of racial criteria that have traditionally been considered obnoxious. And apart from the special characteristics of such criteria, many believe that preferential treatment is unjust because it violates principles of merit.

The essays in this collection largely explicate and criticize these central ideas. There are exceptions, notably Owen Fiss's two ambitious articles expounding an original theory of equal protection adjudication and a sophisticated analysis of the Supreme Court's desegregation decisions. But the book is otherwise a well-integrated selection of philosophical perspectives on a few basic themes. This Review will discuss first arguments about the nature of the right that affirmative action programs allegedly infringe and then arguments about the putative justifications for overriding that right.

In the first essay, "Equal Treatment and Compensatory Discrimination," Thomas Nagel addresses the objection that affirm-

ative action offends merit principles. Affirmative action is not seriously unjust, Nagel declares, because the merit system from which it departs is itself necessarily unjust. Society's schedule of rewards compensates for differential abilities, yet the able do not *deserve* greater rewards than those less able. Indeed, the very concept of desert necessarily seems to cause injustice, for two persons of unequal ability might not deserve their different talents yet might deserve different opportunities to develop those talents. Under this analysis of merit, Nagel is careful to point out, the justification for affirmative action is not that it benefits less able minorities and women at the expense of abler white men and thus rectifies what we might call "discrimination based on ability." If this were the theory of justification, rectification should extend to all persons who are disfavored because of lesser ability and should not be limited to those who happen to be minorities or women. Rather, this analysis helps to justify affirmative action simply because it shows that social rewards inevitably will be distributed unjustly. The justification is of the weak sort mentioned above. Affirmative action is permissible, despite its injustice, because of its social utility. It is not an obligatory means of rectifying another form of injustice.

Nagel's analysis is, of course, controversial. "Discrimination by ability" does not strike most people as unjust. For centuries philosophers have struggled to explain what social rewards and opportunities individuals "deserve." Robert Nozick, for one, rejects the conclusion that people do not deserve what their natural talents earn them.⁴ Absent a firmer social consensus about the principles of distributive justice, then, it is doubtful whether a court should rely upon Nagel's critique of the concept of merit to justify affirmative action programs.

A court may justifiably ignore Nagel's critique for another, more fundamental reason—the merit argument itself is irrelevant to the fairness of affirmative action programs. That is, Nagel's analysis is rather beside the point, for the objection to affirmative action that it critiques is beside the point. Even if Nagel is wrong to assert that any merit system is inherently unfair, even if the state may judge persons according to merit, it does not follow that the state acts unfairly if it does *not* judge them according to merit. Merit, in the sense of ability to perform a job or to succeed academically, is not the only constitutionally (or morally) per-

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4. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

missible goal of a business or educational institution.⁵ The permissibility of preferences for veterans, children of alumni, and persons whose admission promotes "diversity," although it cannot decisively justify affirmative action programs, does reveal that merit is not the only legitimate selection criterion. Put another way, applicants have no "right" to be judged on the basis of merit. As Ronald Dworkin points out with respect to law school admissions, intellectual standards are proper "not because applicants have a right to be judged in that way, but because it is reasonable to think that the community as a whole is better off if its lawyers are intelligent" (p. 65).

In her essay "Preferential Hiring," Judith Jarvis Thomson skirts the merit issue by discussing only programs that prefer minorities or women to *equally* qualified white male applicants. Although this limitation appears artificial, and although Thomson does not attempt to justify it, the discussion we have just concluded suggests that the limitation is entirely sound. For if there is no right to be preferred because of one's qualifications, if selection according to merit improves the efficiency of a program but not its fairness, then a preference for a minority or female candidate over a better qualified white male is no more unjust than a preference for an equally qualified minority or female candidate. This point is useful, I believe, for it helps to narrow considerably the inquiry about the fairness of affirmative action programs, directing it away from questions of merit and efficiency and toward the significant constitutional issues: what is the nature of the right, if any, that preferential treatment infringes, and what social policy, if any, justifies overriding that right?

Thomson's views about the first issue are rather unusual. In a private institution, she reasons, a white male applicant has no right to an equal chance at a job, but in a public institution, he does have some such right. The difference arises from the applicant's status as "joint owner" of the public institution, *i.e.*, as taxpayer. Although Thomson finds the source and content of this right somewhat obscure, she is willing to assume that the right exists. She nevertheless concludes that preferential treatment programs readily override it.

Thomson takes a novel path to this conclusion. It is widely

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5. Of course, if "merit" is interpreted as the quality by virtue of which an applicant in fairness *deserves* admission, then it is a tautology that justice permits only admission on the basis of merit. But most advocates of the merit objection undoubtedly mean to refer to academic or job qualifications.

believed, she notes, that a right may be overridden only by a conflicting and stronger right or by a very great social benefit. But this belief is wrong. If the members ("joint owners") of an eating club vote, out of gratitude, to give a particular member a benefit that they otherwise would have shared, then they do no injustice to a dissenting voter when they refuse to honor his right to an equal chance at the benefit. Similarly, someone with flat feet who was refused induction in the army cannot complain about veterans' preference, for a veteran has in fact served his country in a way the complainant has not. Finally, affirmative action, which seeks to repay a debt incurred because minorities have been *wronged*, must be even more justifiable than the practices mentioned.

In the remainder of the essay, Thomson describes the social benefits of affirmative action with such eloquence that she virtually establishes what she had said was unnecessary to establish—that the "right" is overridden by a very great social benefit. Unfortunately her argument about the nature of the right is less convincing. In concluding that the "right to an equal chance at a job" can easily be overridden by a majoritarian decision to confer the benefit on a limited class, she reveals, I fear, not an original understanding of the defeasibility of rights but an inadequate appreciation of the concept of a right itself. An interest that can be overridden so easily is not a right at all.⁶ Of course, we might define the term "right" to include such lesser interests, but then we can simply recast the point: Thomson has failed, in her analysis, to recognize that an applicant to a public institution who is disfavored because of a program that prefers minorities or women can plausibly assert an *important* right, one more important than the "right" of a club member to a customarily shared benefit or the "right" of a nonveteran to a civil service job. Thomson was wrong to ignore the question of the content of the right, for its content determines how easily the right can be overridden.

A white male applying for a job or a place in a university has no right to be accepted because of his superior qualifications, but he has more than the right to an equal chance at whatever benefits the majority has not yet preferentially distributed. Thomson's arguments and those of several others in this collection manage, remarkably, to ignore what is at the heart of the reverse discrimination controversy: the right not to be discriminated against on grounds of race or sex.

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6. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-92 (1978).

It is puzzling at first that so many of these essayists feel no need to define the contours of the right they discuss. Most of them are much more interested in the nature and strength of the potential justifications for overriding that right. Perhaps a partial explanation is that moral philosophers ordinarily do not create an analytic structure that incorporates legal categories such as burden of proof and standard of review. A modern constitutional scholar, by contrast, quite naturally conceives of personal interests and rights of escalating constitutional status as triggering correspondingly escalating levels of judicial review. In the contemporary equal protection jargon, for example, most classifications need only have a rational basis, but classifications by gender must be "substantially" related to an "important" governmental interest,⁷ and if the classification infringes upon a "fundamental" interest or burdens a "suspect" class, the classification must be "necessary" to achieve a "compelling" state interest.⁸ Such a conceptual scheme derives in no small part from the judicial process's need for predictability, intelligibility, and an allocation of evidentiary burdens of persuasion. Brute logic does not compel the scheme.

Perhaps, too, the essayists do not define the right because of its universality. It is tempting to think that since all members of our political community have the right to the equal protection of the laws, no member has a stronger claim to the law's "protection" than any other; thus courts need not closely examine the nature of the right. Indeed, the argument goes, a white applicant's allegation of unfair treatment should be judged by the same standard of review as a black's similar allegation. But this temptation must be avoided. In a trivial sense, of course, the thought is sound. Every person has standing to assert the right to equal protection when the government burdens him. But once courts articulate the content of this right, they might determine that some kinds of individual interests deserve greater judicial solicitude than others.

Justice Powell's opinion in *Bakke* contains a quotable but ill-considered passage that invites confusion on that score. "The guarantee of equal protection," he stated, "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the

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7. *Craig v. Boren*, 429 U.S. 190 (1976).

8. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088, 1120 (1969).

same protection, then it is not equal."⁹ If this passage suggests that the term "equal" in the fourteenth amendment requires courts to treat discrimination against whites as immediately suspect if it so treats discrimination against blacks, then Justice Powell is surely in error. Courts may treat the discriminations differently not because whites have only watered-down equal protection rights compared to blacks but because the content of the right might justify the difference. For example, a court might interpret the right as demanding special scrutiny of classifications that burden any group possessing the following "traditional indicia of suspectness: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁰ This description, from an opinion Justice Powell wrote, is perfectly universal in form but "discriminatory" in application: blacks, but not whites, fall under it. Clearly, then, the universality of the equal protection right does not imply that courts must review all allegations of its violation with uniform scrutiny.

What is the nature and strength of a white applicant's right not to be disfavored by a preferential admissions program? To answer this question, one might search for the reasons why courts demand a compelling justification for discrimination against blacks and then decide whether these reasons also justify a similar standard for discrimination against whites. Two sophisticated essays in this collection by Ronald Dworkin and Owen Fiss employ this method to great advantage. Before examining these essays, however, we should review one facially attractive characterization of the white applicant's equal protection right that seems to avoid the complexities these essays must explore.

A fairly popular argument in favor of Alan Bakke's right to be admitted to medical school was that, because of its preferential treatment program, the state failed to treat Bakke as an individual. Justice Powell decided, through somewhat convoluted reasoning,¹¹ that Bakke had such a right to individual treatment,

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9. 438 U.S. at 289-90.

10. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

11. Justice Powell does not assert that the equal protection clause straightforwardly guarantees the right to be treated as an individual. But he derives the right in the following way. Intentional discrimination on the basis of race, even if benign, demands a compelling justification. The only compelling justification for a university's preferential admission program, however, is the university's interest in having a diverse student body.

and Justice Powell chastised Justice Brennan and the three other Justices who joined Justice Brennan's opinion for failing even to consider it.¹² The idea that equal protection guarantees some right to individual treatment has also received expression in recent Supreme Court decisions invalidating classifications based on gender.¹³ Unfortunately, in its strict sense the idea is misguided.¹⁴ Every classification violates the norm of individual treatment, because to classify is to distinguish according to a general, *group* characteristic. To be sure, a man who objects to a statute that excuses women from any obligation to pay alimony,¹⁵ or a white applicant who objects to an affirmative action program that denies him any opportunity to compete for a number of positions, seems to be complaining that the state has not treated him as an individual—that it has simply *assumed* that he is dissimilar from all of those who receive the benefit (or are excused from the burden), even though many of these preferred individuals deserve the benefit no more than he does. The alleged fault, however, is not that the process of group classification as such is unfair, but that *these* classifications are terribly overbroad and are poor surrogates for the class (it *is* a class) that the state should

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And only the interest in "genuine" diversity is compelling. A program that excludes persons on the ground of race from all consideration for a certain number of positions does not promote "genuine" diversity, unlike a program that gives every person *some* individualized consideration without regard to race.

This conclusion does not seem to follow from its premises. Justice Powell does not explain why "genuine" diversity is a compelling state interest whereas the interest in a diversity in which minorities are secured a certain number of places is not. He undoubtedly means to emphasize that the program of the University of California at Davis was not *necessary* to achieve the goal of diversity, but he does not explain why "diversity" must be construed so narrowly.

Justice Powell does suggest that a program, such as Harvard's, that at least considers every individual for every position is preferable because it does not involve a facial intent to discriminate. But this is unpersuasive: Harvard does facially discriminate on the basis of race, it just does not permit race to be the decisive criterion in a fixed number of cases.

What Justice Powell means to say, I suspect, is that a program such as Harvard's inflicts a less serious injury, is less unjust, to white applicants, for it is more solicitous of their right to individualized treatment. Consequently it does not demand as stringent a justification as Davis's. But because Justice Powell derives this "right" from the right not to be discriminated against on the basis of race absent a compelling interest, his argument fails if there are reasons to doubt that "genuine" diversity is the *only* compelling interest that preferential admissions programs necessarily serve. The discussion in the text *infra* suggests some such reasons.

12. 438 U.S. at 318 n.52.

13. See, e.g., *Orr v. Orr*, 99 S. Ct. 1102 (1979).

14. See Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 828-29 (1978).

15. See *Orr v. Orr*, 99 S. Ct. 1102 (1979).

have burdened. I suppose that no one would doubt that the state could require the spouse with the greatest current actual income to pay alimony. Yet this classification, too, fails to treat the financially burdened spouse entirely "as an individual," for he or she might in fact have a lesser earning capacity than the other spouse. Nevertheless, this classification is acceptable because it is a reasonably good surrogate for a more ideal classification in which those who truly deserve alimony receive it. Similarly, quite apart from its affirmative action program, the University of California failed to treat Bakke as an individual insofar as it presumed that he was less qualified for admission than applicants with higher grades and MCAT scores. The right being invoked, in short, is not the right to be treated as an individual, regardless of one's group characteristics. Instead, it is the right not to be classified by a group characteristic *when* the group so defined is a poor surrogate for the class that the law is reasonably meant to benefit.¹⁶

There is, however, a stronger sense of "individual" treatment. Sometimes the legislature will enact a law that does not rely upon group characteristics but permits an administrator to decide who deserves a benefit or burden. Invariably, of course, the administrator creates some objective standards for the exercise of his discretion, and in that case we have a group classification once again.¹⁷ But suppose that the administrator neither receives instructions from the legislature nor creates them on his own. Instead, he considers each person's application separately and employs no general presumptions about the relevance or strength of the individual's proof. For example, imagine that a driving examiner's only criterion for passing applicants is whether they are "good" drivers. He does not presume that any set of traits, such as compliance with traffic laws, confidence behind the wheel, or caution, satisfies the criterion.

Such an administrator will have succeeded in treating the

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16. Advocates of "individual" treatment might have in mind a somewhat less serious limitation upon the permissibility of group classification. They might wish to forbid only those classifications which burden a class based on a *single* trait rather than a multiplicity of traits. But this position is analytically no different than the broader one. Surely the gender discrimination in an alimony statute would be no less troublesome if it forbade only men less than 65 years of age from collecting alimony, even though possession of *two* traits—male gender and nonsenior status—is now the condition of being denied alimony. If in a given case classification by a multiplicity of traits rather than by a single trait improves a law's fairness, it will not be because of that multiplicity but because the classification is well-tailored to achieve its goals.

17. See Note, *supra* note 14, at 782-83.

applicant as an individual. Notice, however, that the administrator has also succeeded in insulating his decisions from any possibility of review for error. There is no classification here, but the scheme also gives the individual no "protection," equal or otherwise. Indeed, one wonders whether the administrator is applying "law" at all. "Individual" treatment, in this radical sense of treatment other than by group classification, is simply treatment according to whim. Apologists for individual treatment do not, of course, endorse this extreme version. Thus there does not seem to be an acceptable version of the concept that is analytically sound.¹⁸

We return, then, to the efforts of Dworkin and Fiss to explain the nature of the right not to be discriminated against on account of race. Ronald Dworkin's essay, "DeFunis v. Sweatt," was originally published in the *New York Review of Books* and has also been reprinted in his stimulating jurisprudential work, *Taking Rights Seriously*.¹⁹ The essay, a bold and masterful attempt to uncover the central principle of the equal protection clause, is one of the highlights of this collection, and its thesis is worth recounting with some care.

Dworkin analyzes the justice of preferential treatment from the perspective of DeFunis, the white applicant to the University of Washington Law School whose case the Supreme Court dismissed because of mootness.²⁰ According to Dworkin, when DeFunis says that he has a right not to be disfavored because of his race, he is relying upon an individual right to equality of one of two kinds. The first is the right to equal treatment, *i.e.*, the right to an equal distribution of some burden or benefit. An example would be the right to vote or to an elementary education. The second is the right to treatment as an equal, *i.e.*, the right to be treated with the same respect and concern as anyone else. DeFunis does have this second sort of right, to have the university treat his interests as sympathetically as it treats the interests of any other applicant. But he does not have the first sort of right, for he has no right to a law school place just because others are given places.²¹

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18. This is not to say that the right to individual treatment has no constitutional status. Due process might guarantee the individual the opportunity for a hearing and for a chance to confront directly the agency that is proposing to take action against him. I do suggest, however, that equal protection is not the source of such a guarantee.

19. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 9 (1978).

20. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

21. Moreover, Dworkin explains, the right to treatment as an equal is fundamental,

DeFunis's right to be treated with equal respect and concern does not, however, entitle him to *win*. The law school may, after sympathetically considering the injury that he suffers by reason of an affirmative action program, properly decide on grounds of social utility that his burden is outweighed by the social advantages of the program. Dworkin recognized that this is not yet a satisfactory justification for preferential treatment. After all, one might object, institutions that discriminated in the past *against* blacks might make a similar argument. They might say that, although harboring no prejudice themselves, they properly excluded blacks because the state economy then had little use for black attorneys or because alumni gifts would have fallen off if blacks were admitted. Again the institution may have considered the interests of blacks, but it concluded that the social costs of integration outweighed the benefits.

To explain why the first institution's decision is justifiable while the second institution's is not, Dworkin introduces another set of distinctions. The first institution can advance two sorts of collective justifications for favoring some applicants over others. It can argue that society is better off in a *utilitarian* sense, because the average or collective level of community welfare is improved, or in an *ideal* sense, because the community is more just or is in some other way closer to an ideal society. The second institution, however, cannot make the ideal argument, for it cannot reasonably assert that segregation makes society more just. Consequently it must rely upon a utilitarian argument.

Now utilitarian arguments present new difficulties. The only coherent form of utilitarianism is preference utilitarianism, under which one policy is more justifiable than another only if the first

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and the right to equal treatment only derivative. Thus, "[i]f I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug" (p. 68).

Dworkin is fond of distinctions and often employs them to great advantage, but this distinction between the two sorts of rights is rather gratuitous. Only in extraordinary cases does one have the right to equal treatment. Equality is always with *respect* to something, if only implicitly. Fairness demands that two individuals be treated equally only if they are similarly situated with respect to some acceptable criterion. Ordinarily not all individuals will pose a similar social harm or have a similar social need; therefore fairness will rarely require that all individuals receive the same treatment.

Thus to suggest in the above example that the two children have been treated equally (though not as equals) is false, for the children have not been treated equally with respect to any sensible criterion, such as their need for the drug. By contrast, it is easy to justify distributing the right to vote equally, because giving every individual the right does treat each equally with respect to a legitimate criterion, namely, the state's interest in encouraging full participation in the political process.

satisfies more individual preferences (taking into account their intensity). This form of utilitarianism actually appears to be egalitarian, for it gives equal consideration to every individual's choice and intensity of desire. But this appearance, Dworkin tells us, is deceiving. An unrestricted preference utilitarianism can be seriously unjust because it gives weight to some preferences that it should ignore.

To demonstrate this conclusion, Dworkin introduces yet another distinction.

[T]he preferences of an individual for the consequences of a particular policy may be seen to reflect . . . either a *personal* preference for his own enjoyment of some goods or opportunities, or an *external* preference for the assignment of goods and opportunities to others, or both.

. . . If a utilitarian argument counts external preferences along with personal preferences, then the egalitarian character of that argument is corrupted, because the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life. [P. 77]

Racist views are, of course, external preferences under this theory, and altruistic preferences are external as well.

This distinction explains why an institution that excludes blacks cannot rely upon the kind of utilitarian arguments suggested earlier. Such arguments improperly give consideration to preferences that are either clearly external or so inextricably linked with external preferences that they corrupt the argument. (An example of the latter is the associational preference of white students for white classmates, a preference that usually will be based in part on simple prejudice.) Indeed, because of this last effect,

[u]tilitarian arguments that justify a disadvantage to members of a race against whom prejudice runs will always be unfair arguments, unless it can be shown that the same disadvantage would have been justified in the absence of the prejudice. If the prejudice is widespread and pervasive, as in fact it is in the case of blacks, that can never be shown. [P. 80]

This analysis is not without problems. Dworkin says that a segregated white institution cannot invoke an "ideal" justification for its discrimination but he fails to explain what "ideals" other than his own vision of a just society are acceptable justifications. Why can't the institution appeal to an "ideal" community in which the state assiduously protects its citizens' deeply held

associational preferences, which, it turns out, are preferences for segregation? The answer, of course, is that Dworkin means to describe a collective justification for disadvantaging an individual that is compatible with the individual right to treatment as an equal. A justification will be compatible, he believes, if it actually incorporates egalitarian principles. Thus utilitarian arguments, as well as ideal ones, are justifications in Dworkin's view insofar as they too are egalitarian.

But this characterization of egalitarian arguments is disturbingly vague. What kinds of egalitarian ideal arguments *are* compatible with the right to treatment as an equal? Dworkin confidently asserts that an affirmative action program can be justified by the ideal "argument that a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself" (p. 82). But this argument expresses only Dworkin's conception of equality. Surely DeFunis and Bakke would deny that affirmative action promotes "a more equal society." Moreover, simply incanting an argument that is "ideal" in form cannot suffice to justify affirmative action, but Dworkin does not explain what else the state must show—for example, he does not state whether the preferential treatment must be the least restrictive way to achieve the ideal. In short, if an ideal argument, no matter how general in form or controversial in content, will justify an affirmative action program, then the right to treatment as an equal guarantees very little.

Dworkin's analysis of utilitarian arguments can also be criticized, for his distinction between external and personal preferences is sketchy. As it stands, for example, the distinction seems to condemn any form of paternalism. When the state acts paternalistically, it imposes its external preference (albeit altruistic) because it believes that the individual's personal preference for (or indifference to) risk is irrational. In a case of pure paternalism, where the individual is harming only himself, it appears that no argument of social utility *other* than one relying upon external preferences can justify interference. Unless Dworkin would forbid state paternalism, he must explain why this apparent consequence of his distinction between external and personal preferences does not follow.

A final problem with Dworkin's analysis is his conclusion that utilitarian arguments can never justify state action that disadvantages blacks. Dworkin may be correct when he suggests that because of prejudice against blacks, the state must shoulder

the burden of proving that the disadvantage is justifiable without regard to prejudice. But he is less convincing when he concludes flatly that, given the pervasiveness of prejudice, the state can *never* make this showing. Dworkin does not specify whether his theory is concerned with the fairness of utilitarian arguments that actually motivate a government decision or that are simply potential justifications in the abstract. On either interpretation, however, his conclusion is doubtful. Not every state action disadvantaging blacks is motivated by external preferences (although we might wish to establish a rebuttable presumption to that effect). And it is almost absurd to suggest the alternative, that any abstract argument that justifies state action disadvantaging blacks must rely on prejudice.

In a footnote (p. 79 n.7), Dworkin recognizes but does not answer this objection. Perhaps he only means to say that the state can *almost* never employ a utilitarian argument to justify action that disadvantages blacks. But this revision is incomplete. We still must know whether the problem with external preferences in utilitarian arguments is one of legislative motivation or justification. If (as I suspect) it is the latter, then even the revised conclusion seems too strong, for state conduct with legitimate race-neutral justifications often may have a disproportionate impact upon blacks.²² Perhaps Dworkin is suggesting the more radical conclusion that *any* state action that seriously burdens blacks violates equal protection principles. (As we will see, Owen Fiss reaches a similar conclusion.) Dworkin's conception of the right to treatment as an equal is too weak, however, to justify this conclusion.

But any new theory is bound to be incomplete. Dworkin's analysis remains the most original exploration of the roots of equal protection doctrine in recent years. One of its sparkling achievements, I believe, is its accurate articulation of the aspect of racial prejudice that most offends our sense of justice. Prejudice seems most obnoxious when it reflects not simply selfishness, insensitivity, or irrationality, but an affirmative disrespect for another, a deliberate "pre-judging" before any understanding of the individual's needs or interests is even possible. Perhaps the Supreme Court also views this kind of prejudice as the principal demon to be exorcised by the equal protection clause, for the Court has emphasized that classifications burdening suspect

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22. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 538 (1972).

groups such as blacks are subject to the most severe judicial scrutiny only if they are motivated by a "discriminatory intent."²³ Dworkin's theory, however, provides a more complete explanation of the equal protection principle (in his view, the right to treatment as an equal) that justifies the special judicial concern about racial prejudice.

Owen Fiss endorses a very different theory of the nature of the equal protection right. In a long and exhaustive essay, "Groups and the Equal Protection Clause," Fiss criticizes the received interpretation of the clause, which he calls the "antidiscrimination principle," for its rigid structure and individualistic bent. He proposes in its stead the "group-disadvantaging principle." This essay contains many insightful reflections on the nature of equal protection adjudication and, despite its considerable length, deserves a wide reading. Here I can only touch upon its more important arguments.

The antidiscrimination principle, according to Fiss's definition, "has two facets: (a) the identity of the discrimination is determined by the criterion upon which it is based, and (b) the discrimination is arbitrary if the criterion upon which it is based is unrelated to the state purpose" (p. 86). But this "core idea" of means-end rationality gives an incomplete theory of equal protection. Thus, Fiss explains, the principle has been supplemented in several ways. For example, a court must determine whether the state's purposes are legitimate; it must require very close fit if the criterion is "suspect" or the right "fundamental"; and it must permit certain defensive doctrines, such as the idea that some legitimate state purposes are so important that they excuse imperfect means. Although these supplementary doctrines sometimes distort the basic antidiscrimination principle, courts remain committed to that underlying principle. Fiss's explanation of why that principle has had so much appeal to courts is original and thoughtful. He notes that it seems to embody such judicial values as color-blindness, value-neutrality, objectivity, respect for individualism, and universality, but he reveals with discomforting acuity that this appearance is misleading.

Perhaps the most provocative part of Fiss's analysis is his exposition of the limitations of the antidiscrimination principle. He begins by discussing the problem of preferential treatment. This problem is difficult, Fiss acknowledges, "but the antidis-

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23. See *Washington v. Davis*, 426 U.S. 229 (1976).

crimination principle makes it more difficult than it is: the permissibility of preferential treatment is tied to the permissibility of hostile treatment against blacks" (p. 106). Thus preferential treatment is governed by the same strict standard that governs hostile treatment: the classification must be *perfectly* related to the state interest. Although preferential treatment serves a number of permissible goals, such as elevating the status of a perpetual underclass by giving some members of the group positions of power and prestige, or atoning for past wrongs to the group, none of these purposes is perfectly served. The degree of ill-fit becomes pronounced once the perspective shifts from groups to individuals (*e.g.*, some blacks have not been seriously wronged, and some whites have been).

Fiss also believes that the antidiscrimination principle unnecessarily complicates the issue in two other areas. In one class of cases, state action does not seem to discriminate between blacks and whites at all, as when the state enforces racially restrictive covenants against blacks and whites alike,²⁴ or when the government makes an "on-off" decision whether or not to have a public facility such as a swimming pool.²⁵ Because it is difficult to perceive any "discrimination" in these cases, courts cannot easily evaluate them under the antidiscrimination principle. Instead courts must ask, in the first case, whether private discrimination that the state indirectly abets can be *imputed* to the state, and, in the second case, whether the action had an illicit *motive*. Yet the principle itself fails to explain what is so troubling about the (non)discrimination. In a second class of cases, when the state does discriminate but employs facially innocent criteria and not suspect traits, courts are inclined to invalidate the action if it has the effect of disadvantaging blacks.²⁶ But the antidiscrimination principle again fails to explain this inclination.

The reader who understands these criticisms will not be terribly surprised by Fiss's positive thesis. Under his group-disadvantaging principle, the equal protection clause would be concerned with state conduct that impairs the status of a "specially disadvantaged group." The distinctive characteristics

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24. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

25. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

26. This essay was published in winter 1976 and thus did not consider the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976). Today Fiss would certainly revise his remarks about the judicial inclination to invalidate laws with a discriminatory effect.

of such a group are: (a) it is a social group, with an identity distinct from its members', but its members nevertheless identify themselves by reference to their membership in the group; (b) the group has perpetually been in a position of relative socioeconomic subordination; and (c) the group lacks political power. The group-disadvantaging principle protects the group against state conduct that harms its status. Because the conduct need not be "discriminatory" in any other sense, this principle readily explains many cases the antidiscrimination principle had to struggle to resolve. For example, racially restrictive covenants are invalid not because they discriminate against blacks, for they do not, but because they impair the status of blacks. Once a court is persuaded that state conduct has disadvantaged a group that is entitled to protection, the state can justify its action only by showing that it serves a compelling benefit that cannot be achieved in a way less harmful to the group.

Fiss acknowledges that his principle bears a facial similarity to the strict scrutiny mode of inquiry under the antidiscrimination principle. But, he argues, the similarity is only apparent. Under the antidiscrimination principle, alternatives are less restrictive if they are more precise, not if they disadvantage a group less; and if there is no more precise way to achieve a goal, then the state action is permissible even though it impairs a group's status and fails to provide a sufficiently countervailing benefit.

There is considerable ingenuity and force to Fiss's argument, but I am afraid that he overstates his case. The traditional strict scrutiny test is not as unaccommodating a vehicle as he imagines. That test quite clearly *does* consider the strength of competing interests and almost as clearly subsumes within the definition of less restrictive alternatives not only more precise alternatives but also alternatives that burden the interests of the disfavored class more lightly.²⁷ Fiss's error, I believe, is to assume that the antidiscrimination principle, as he has narrowly defined it, is the principle governing discrimination against suspect groups. The cases belie this assumption. For example, in the original "suspect" category case, *Korematsu v. United States*,²⁸ the racial classification was highly overinclusive and underinclusive and thus clearly violated the "antidiscrimination principle"; the Court nevertheless upheld the law, not simply because there were no less restrictive alternatives (there undoubtedly were), but because the gov-

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27. See Note, *supra* note 14, at 877-78.

28. 323 U.S. 214, 216 (1944).

ernment interest, national security, was manifestly compelling.²⁹ The Court has of course employed the terminology of means-end rationality as well as of balancing in its suspect-class cases, but Fiss is unduly impressed by this circumstance. For these cases more often emphasize the strength of the state's justification and the nature of the disadvantage to the group member. The "accuracy" of the means-end fit often has only the modest negative effect of disqualifying certain putative state interests because they are irrationally served and thus are insufficiently weighty to justify the conduct.

Fiss's approach is indeed different from the approach of the strict scrutiny test in one significant respect: the nature of the injustice that it purports to remedy. Fiss would protect groups against status harm;³⁰ the traditional theory protects individuals against prejudice, unconstitutional motive, and the stigma accompanying them (not, as Fiss imagines, against irrational treatment). This difference between group and individual protection often has important consequences, according to Fiss. In particular, the constitutional permissibility of preferential treatment is much more doubtful under the latter theory than under the former. A white applicant might allege that the state is treating him unfairly because it is judging him according to an improper criterion (race) and because it is localizing the costs of a social policy on him. But Fiss denies that such allegations of individual unfair treatment are the domain of the equal protection clause. When evaluated under the group-disadvantaging principle, affirmative action programs fare much better. Thus the familiar objection that such programs fail to benefit the nonminority poor is misplaced, for the group-disadvantaging principle justifies special protection for *social* groups that have suffered perpetual disadvantage, not for economic groups. And the related objection that the programs illogically benefit wealthy blacks who do not deserve compensation is also misplaced because a benefit even to wealthy blacks redounds to the group as a whole.

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29. In establishing its strict standard for judicial review for racial classifications, the Court implies that the end must be compelling but does not suggest that the means must be necessary to achieve the end: "[C]ourts must subject [restrictions on the civil rights of racial groups] to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." 323 U.S. at 216.

30. There is little doubt that Fiss's theory of status harm is inconsistent with the Supreme Court's recent decisions that discriminatory intent rather than effect is the predicate for the most stringent judicial review. Despite this practical objection, many of his insights remain relevant and important, and his theory rewards consideration.

Although these arguments have some cogency, they seem to conceal a crucial premise. Fiss originally formulated his group-disadvantaging principle as an explanation of the kind of state conduct that the equal protection clause prohibits. Now he is arguing that preferential programs are permissible because they *embody* that principle. Fiss is not suggesting that preferential programs are obligatory remedies for violations of the principle. The premise, rather, seems to be that when the state voluntarily attempts to improve the status of disadvantaged groups, the constitutionally favored purpose of the program is a "compelling" benefit. What is strange about this argument, however, is that it seems unnecessary. A white applicant, who is not a member of a specially disadvantaged group, cannot invoke the group-disadvantaging principle. Inasmuch as his equal protection "rights" are not even violated, there seems to be no need to demonstrate a compelling or constitutionally favored justification for disadvantaging him.

Fiss might reply to these criticisms by noting that his principle, unlike the antidiscrimination principle, at least supplies a substantive standard for what is a "permissible" purpose, a "compelling" benefit, or a less "restrictive" alternative. Fiss indeed deserves credit for developing a more complete theory than the Supreme Court's test. The form of that test can, as we have seen, be misleading, for the test is simply an extension and elaboration of the rationality requirements of the rational basis and intermediate scrutiny standards. The Court seems not to have considered as thoroughly as Fiss has whether this formal structure is well-suited for evaluating the harm of racial discrimination—a harm that is not only a matter of irrationality.

Nevertheless, our discussion reveals that if, as Fiss argues, the guarantee of equal protection consists only of the group-disadvantaging principle (perhaps supplemented, Fiss concedes, by a weak rational basis test) (p. 149 n.83), then a white applicant's allegation of unfair treatment has no constitutional significance. This is an extreme conclusion which even most defenders of affirmative action programs would reject.

The theories of both Dworkin and Fiss define the paramount equal protection interests in such a way that the constitutional permissibility of affirmative action programs easily follows. This result suggests a problem with the definitions themselves. Dworkin is remarkably unconcerned about the possibility that state programs disadvantaging white applicants rest in part on external preferences, in particular guilt and altruism, which in Dwor-

kin's view distort the utilitarian calculus as much as malicious prejudice does.³¹ And Fiss's conception of the equal protection clause seems too narrow. His theory does have great explanatory power in such areas as nondiscriminatory state action, but it also has a major fault: it simply places claims of unfair treatment by nonmembers of specially disadvantaged groups outside the pale of the equal protection clause.³²

Thus none of the essays in this collection convincingly explains the nature of the right of a white applicant not to be disadvantaged by a preferential program, although Dworkin's theory, carefully applied, offers promise. Several of the essays do, however, consider and criticize in some detail putative justifications for overriding that right.

The objection to preferential programs most frequently voiced in this collection is that any preference for all and only minority group members is irrational because once the purpose of the preference—*e.g.*, compensating for past societal disadvantage—is articulated, we realize that the program benefits some of the undeserving and fails to benefit some of the deserving. Fiss's answer to this objection is that means-end irrationality is irrelevant to the fairness of an affirmative action program, but we have seen that this answer is inadequate: although such irrationality might not be the only or even the principal concern of the equal protection clause, if proved it does undermine the strength of the state's justification, especially if it can easily be remedied with little sacrifice of the state's goal.

The most direct response to the imprecision objection is just to deny that preferential treatment is invariably an irrational way of achieving a legitimate state end. The response, in other words, is to affirm that legislative purposes may be racially conscious. At first blush this response seems implausible. Thus Thomson remarks that race is not itself a qualification for a job, and Robert Simon³³ warns against defining the nature of the injustice suffered by blacks or women so narrowly that no other individuals can

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31. Dworkin does concede that some of the utilitarian arguments for preferential treatment rely on external preferences, such as the preference of some blacks for black lawyers (p. 82), but I think he underestimates how pervasive the altruistic preferences of whites are.

32. Fiss allows that courts might develop variable standards of protection for groups that share some but not all of the characteristics of specially disadvantaged groups (p. 132). But this concession seems insufficient, for it still leaves the white applicant disadvantaged by a preferential treatment program without any equal protection claim.

33. "Preferential Hiring: A Reply to Judith Jarvis Thomson."

complain of unjust treatment. In *Bakke*, as well, Justice Powell dismissed out of hand the university's interest in assuring that its student body contained a specified percentage of a particular group "merely because of its racial or ethnic origin"—a purpose, he said, that was facially invalid.³⁴

Yet the matter is not so simple. Some racially explicit policies, such as racial assignment of students to further school desegregation, are surely permissible. Of course, school desegregation is perhaps different because it is ordinarily imposed as a judicial remedy after a finding of discrimination. Still, voluntary desegregation plans seem almost as unobjectionable. A more convincing distinction is that affirmative action plans affect the distribution of a relatively *scarce* opportunity or benefit, while desegregation plans only affect where a child will attend school without denying that opportunity altogether.³⁵ Nevertheless, although the element of scarcity undoubtedly creates a more troublesome equal protection issue, it does not seem to eliminate the possibility that the goal of a preferential treatment program might be racially conscious.

Just as defenders of preferential treatment must admit that racial preferences are constitutionally more objectionable than other departures from merit and deserve more stringent judicial review, so, I suggest, must critics concede that a justification for preferential treatment should not be *rejected* simply because it explicitly notices the social significance of race.³⁶ Some plausible racially explicit goals include: supplying black role models in business and the professions; compensating for the discrimination, both private and official, that blacks have suffered because of their race; or improving the socioeconomic status of specially disadvantaged minority groups that have had a perpetually subordinated status. (As the third example indicates, I believe that much of Fiss's substantive analysis is adaptable to the traditional

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34. 438 U.S. at 307.

35. An unusually penetrating discussion of "scarcity" as the distinguishing factor between school desegregation and affirmative action programs is contained in Fiss's second essay in this collection, "School Desegregation: The Uncertain Path of the Law" (pp. 160-65). Fiss notes that this factor even affects how we describe the discrimination: scarcity "made *DeFunis* appear to be a case of *racial preference*, while the Court could conceive of *Swann* [*v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)] as a case of *racial assignment*" (p. 160).

Aside from this discussion, the essay says little about affirmative action. One wonders why the editors included it in this collection.

36. See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 683-92 (1975).

equal protection model. His insistence that courts must recognize group rights is not entirely different from the idea that benefiting racial groups as such is a permissible legislative purpose.)

If these goals are permissible, then the question of "imprecision" does not even arise; the means, preferring blacks, is perfectly related to the goal of, say, compensating blacks for past discrimination. Of course, it does not follow that the goal is an adequate justification. We must still be convinced that the goal is sufficiently compelling to outweigh the white applicant's equal protection right and (perhaps) that there are no less restrictive means to that goal. But we cannot criticize the program on the ground that it prefers some whom it should not and fails to prefer some whom it should.

Two objections might be raised to the method of eliminating classificatory inaccuracy by articulating racially explicit goals. The first, asserted by Simon among others, is that the elimination of one form of inaccuracy only creates another. For although the ostensible goal is to benefit blacks *generally*, the actual benefits of affirmative action programs accrue only to the black applicants with the most marketable skills.

I am not certain why a *white* applicant would wish to raise this objection, but in any case it is easily answered. The state obviously may pursue more than one goal at once when it distributes benefits. Preferring the most qualified blacks is not irrational. On the contrary, it is the most sensible way to pursue together the goals of improving economic efficiency and compensating for past discrimination. This explanation also helps to refute the related objection that the costs of affirmative action programs should not be localized upon white applicants but should be distributed upon society generally. Unfortunately, to achieve a more universal distribution of costs requires a much weaker form of compensation, because spreading costs is inconsistent with giving blacks preferential access to those scarce goods and opportunities that society most highly values. Once again, localization seems to be inevitable if the state is seriously committed to both the ends of efficiency and compensation.

A second objection to the above method of eliminating imprecision is that it does not succeed. Although racial preferences are indeed rationally related to the racially explicit goals mentioned above, the argument runs, the goals themselves are arbitrary insofar as they state that blacks but not other groups need role models, deserve compensation, or should be protected against harm to their status. This is a potent argument. To an-

swer it, we must expand our method and honestly consider whether there are reasons for endorsing a racially explicit goal that do not logically require the extension of the state practice to other groups.³⁷ I think it clear that the unique social experience of blacks in this nation supplies such a reason. Reasons probably also exist to justify preferential treatment of most other groups commonly included within affirmative action programs, though the justification might be more problematic. In any event, these are the issues that a critic of affirmative action should explore, rather than the imprecision objection, which as we have seen is fruitless once the legitimacy of racially explicit goals is acknowledged.

Why has the imprecision objection seemed so compelling to affirmative action critics? I believe that its attractiveness derives in part from an unspoken assumption that preferential programs must be as finely tailored as a judicial remedy in compensating for past discrimination. Of course, no affirmative action plans satisfy that test: many beneficiaries of the plans could not prove to a court that their educational or employment opportunities had been significantly abridged by official discrimination, and even fewer could prove that the institution that is now giving them preference was itself responsible for that abridgement. It is a natural temptation to subject preferential programs to this stringent test because the programs are in the broad sense remedial. Their purpose, however, is not to remedy specific violations of statutory and constitutional right, but to remedy the general effects of societal discrimination.³⁸ This kind of general purpose is quite characteristic of government programs. If it seems to justify an arbitrary distribution of costs and benefits, the observer is probably appealing to an ideal, the judicial remedy, that is not a sensible measure of the program's fairness.

The distinction between affirmative action as an obligatory remedy and as a permissible but nonobligatory legislative goal helps answer a second widespread objection to the fairness of

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37. It is interesting that Fiss also considered this one of the most powerful fairness objections to his argument in favor of preferential treatment of blacks. This is but another indication that his justification, embodying the group-disadvantaging principle, can be characterized as one kind of racially explicit goal.

38. In his introduction to the collection, Thomas Nagel seems to recognize this point, for he classifies the imprecision argument as an objection to the view that affirmative action is not only permissible but obligatory. Nagel points out that "[a]n advantage of arguing from the desirability of improving a bad situation, rather than from a claim of right, is that it does not require agreement about how much of the bad situation is due to past injustice. We may wish to improve it however it was caused" (p. xii).

preferential programs—namely, that the white applicants whom they burden are often not responsible for past discrimination. George Sher, in his essay “Justifying Reverse Discrimination in Employment,” dismisses the objection with an argument that obliquely relies upon this distinction. Otherwise qualified whites must shoulder the burden, Sher says, not because they are more responsible for discrimination than other whites but because they would otherwise benefit more than other whites from the present effect of past discrimination upon black applicants. “Thus, it is only because they stand to *gain* the most from the relevant effects of the *original* discrimination, that the bypassed individuals stand to *lose* the most from *reverse* discrimination” (p. 54).³⁹

Simon finds this argument unconvincing, for we “can question the assumption that if someone gains from an unjust practice for which he is not responsible and even opposes, the gain is not really his and can be taken from him without injustice” (p. 46). This is a fair criticism, but I believe that both Sher and Simon have missed the point. We need not demonstrate that white applicants are villains in order to justify burdening them by an affirmative action plan. Irrespective of their blamelessness, these applicants are so situated that a preferential program must disadvantage them. Sher usefully points out that white applicants may be burdened even if they were not responsible for discrimination. But he fails to recognize that they also need not have *profited* from discrimination, any more than a nonveteran applicant need have “profited” from the past sacrifices of war veterans if we are to justify imposing the costs of a veteran’s preference upon him. (He might have made an even greater *civilian* sacrifice.) Although a non-veteran or a white applicant might not have so benefited, a preferential program may burden him simply because he possesses borderline qualifications. The discrimination between him and white applicants who are accepted is not arbitrary: as Dworkin remarks, it is “a consequence of the meritocratic standards he approves” (p. 70). Again, one suspects that Sher and Simon are impressed with the fact that many white applicants are not culpable, because Sher and Simon mistakenly suppose that affirmative action must, as a judicial remedy must, benefit all and only those who have suffered identifiable discrimi-

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39. Sher ultimately rejects preferential treatment of blacks as a group, however, by defining the present effects of past discrimination narrowly as material deprivations that affect employment skills. Because this definition is colorblind, it does not justify preferential treatment.

nation and burden all and only those who are responsible for, or have benefited from, the discrimination.

We are now in some position to assess the problem noted at the outset of this Review: why do the views of moral philosophers shed such a faint light on the constitutionality of affirmative action programs? We have seen that some of the philosophers' theories, such as Nagel's view of merit, are somewhat too controversial for a court.⁴⁰ Other theories ignore or place little emphasis upon the special invidiousness of racial classifications, perhaps because the essayists feel no need to give a justification for their philosophical views about the fairness of preferential treatment that is consistent with the historical interpretation of the equal protection clause. Many of the arguments, indeed, do not explain, or even attempt to explain, the nature of the right that preferential programs implicate; philosophers, I suggested, do not have the same institutional need as courts for an argument neatly structured to balance the strength of a right against the strength of justifications for overriding it. Finally, we have seen that some of the philosophers in this collection are unduly concerned about the alleged irrationality of the distribution of the costs and the benefits of preferential treatment, perhaps because they blur the distinct standards of fairness that govern legislative decisions and judicial remedies.

The above critique of the philosophical perspectives in this book is quite unfair in one respect. Most of the essayists were attempting to analyze the fairness of affirmative action plans, not their constitutionality. Some (though by no means all) of my criticisms are thus misdirected. The discussion nevertheless does help to reveal some of the ways in which the inquiry into the legality of affirmative action is narrower than the inquiry into its fairness.

The question of the *wisdom* of affirmative action programs is broader still, of course. If some programs result in unqualified workers, stigmatize the beneficiaries or undermine their self-respect, or create racial polarization, then the framers of the programs might do well to reevaluate them. But I doubt that these objections count against the fairness of the programs.⁴¹ Those who

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40. Sher offers a similarly controversial analysis when he suggests that a person has less of a claim to preferential treatment if he exerts less effort, even if past discrimination caused his lethargy or if environmental influences transformed his very character (pp. 56-57).

41. See Dworkin (p. 64).

disagree with this assessment at least should explain the relevance of such objections to a disfavored applicant's right to be treated fairly or to the state's justification for disfavoring him.

In the passionate debate over affirmative action programs, there is still room for clear thinking. This volume contains a respectable sampling of views, from ill-considered contrivances to theories of genuine profundity. What is perhaps most heartening about the collection is the care and purpose with which the essayists attempt to articulate the roots and branches of their arguments, even when the attempts fail or the arguments are essentially unconvincing. This dogged rationalism is a quality perhaps easier to cultivate among philosophers than among judges, who are often constrained by precedent and institutional role from developing the full flower of their thought. Yet it is also a quality that should apply to the interpretation of the constraints themselves. A principled constitutional analysis might justify not only a sound conception of the equality guaranteed by the equal protection clause but also a reasoned accommodation of that conception to constitutional history and the judicial role. This collection is a small step in that direction.