HIDDEN IN PLAIN SIGHT:
DISPARATE-IMPACT DISCRIMINATION AS A LEGAL-THEORETICAL PARADIGM FOR DIFFERENCE-CONSCIOUS PUBLIC POLICY

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ABSTRACT

In this dissertation, I argue that the liberal multicultural paradigm of difference accommodation would have greater potency, tenability and relevance if scholars contextualized their claims and approach as intrinsic to U.S. political history and philosophy, as opposed to portraying it as extrinsic and antithetical to these political-philosophic traditions. Reframing liberal multiculturalism in this fashion allows for the acknowledgment of an extant legal-theoretical framework—disparate-impact discrimination—that addresses some of the demands of racial justice and aligns with the liberal multicultural commitment to cultural recognition. This is a significant contribution to the liberal multicultural paradigm of difference accommodation, as existing liberal multicultural theory does not incorporate demands for racial justice. Moreover, recasting liberal multiculturalism in this fashion contributes to the endeavors of difference theorists in general and liberal multiculturalists in particular by showing that, within the United States, difference-sensitive policies have been desirable, necessary and efficacious. A failure to reframe liberal multiculturalism in this way, however, reinforces the view that difference-conscious policies are foreign to the United States—a view consistent with the individualized reading of equal protection that has become ascendant on the U.S. Supreme Court. This reading of equal protection expresses hostility toward any race-conscious policies and has brought once inviolable, moderate race-conscious policies under attack. The current trajectory of race-conscious policies in the U.S., and the disavowal of the history on which such race-conscious policies are based, creates some urgency for remedying this oversight.

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For Elizabeth
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without your endless love, support
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CHAPTER 1

INTRODUCTION

The Problem

In contemporary political theory, the question of how liberal states should deal or cope with the empirical reality of difference—whether it is rooted in culture, ethnicity, race, gender, sexual orientation, nationality or religion—has produced a rich literature and debate that has spanned across continents and decades. Although authors vary as widely in their specific foci as they do in their solutions to the supposed problems of difference, a general concern has arisen among theorists that the contemporary liberal model of citizenship, with its focus on equality under the law, neutrality and universal citizenship rights, fails in the provision of justice for historically marginalized groups (See, for example, Baumeister 2000; Benhabib 2002; Bhikhu 2000; Dahmoon 2007; Gutmann 1994, 2003; Hekman 2004; Kymlicka 1995, 1998, 2001; Song 2007; Taylor 1994; Young 1990). It is not so much that contemporary theorists take issue with the notion that justice entails some form of equality, but rather, they find objectionable the peculiar understanding of equality enshrined in certain liberal theories of justice.

The problem, according to myriad observers, is that liberalism—at least in its contemporary, Anglo-American iterations (c.f. John Rawls and Ronald Dworkin)—attempts to achieve equality under the auspices of formal legal and political neutrality toward "difference," viewing citizens in their abstract sameness irrespective of particular group affiliations and/or identities. Although such a theoretical vision purports to achieve equality (and ultimately "justice") through state neutrality, some contend that it is decidedly unequal in its treatment of certain individuals and groups, as the allegedly neutral laws and political institutions of liberalism actually represent a particular and

situated—as opposed to abstract and universal—conception of the individual (citizen) and thus privilege those groups and/or individuals who identify with a given liberal society's particularized conception of the self over those who make no such identification. Therefore, it is only through the repression of differences among individuals and groups that one arrives at the liberal citizen—a citizen who represents the dominant cultural values of a given liberal-democratic society and not those of the individuals and groups on the margins (ethnic, racial, religious or national minorities, for example). Pursuant to this view, the liberal identity is homogenizing and repressive—not emancipatory (Baumeister 2000, 16-17; Hekman 2004, 40; Taylor 1994, 39; Young 1990, 96-97). This interpretation of liberalism has given rise to multifarious paradigms of difference accommodation (what one might label theories of "group-differentiated rights"), as well as impassioned defenses of traditional liberal principles of neutrality and equality under the law.

In what follows, I focus my attention on one such paradigm of difference accommodation—liberal multiculturalism—and argue that its chief exponents, Charles Taylor and Will Kymlicka, erroneously cast the United States as an exemplar of "rigorous neutrality" toward difference (however defined). Because these theorists err in portraying the US as an exemplar of "rigorous neutrality," liberal multiculturalists such as Taylor and Kymlicka fail to appreciate that many of the internal tensions of liberalism addressed by their theories have a deep history in the US—especially as these tensions relate to questions of religious accommodations and racial equality. An examination of the history of religious accommodations and liberalism in the US shows that purportedly neutral state policies often placed religious minorities at a disadvantage vis-à-vis

religious majorities, and exemptions to neutral laws of general applicability served as the primary means of ameliorating this disadvantage. Interestingly, the theory undergirding the exemptions approach in the context of religion is a species of disparate-impact discrimination, and courts and legislative bodies have employed this same paradigm of discrimination to remedy race-based disadvantage throughout US history. Overlooking the connection between religion and race in particular—and the history and theory of disparate impact in the US generally—misses an opportunity to address one of the major criticisms of liberal multiculturalism; mainly, that it does not incorporate demands for racial justice. If liberal-multicultural theorists contextualized their claims and approach as intrinsic to US political history and philosophy, as opposed to portraying it as extrinsic and antithetical to these political-philosophic traditions, liberal multiculturalism would have greater potency, tenability and relevance; it could address some of the demands of racial justice. Therefore, reframing liberal multiculturalism in this fashion allows for the acknowledgment of an extant legal-theoretical framework that aligns with the liberal multicultural commitment to cultural recognition, while simultaneously addressing some of the demands of racial justice.

What is more, acknowledging the history and theory of disparate-impact discrimination in the US contributes to the endeavors of difference theorists in general and liberal multiculturalists in particular by showing that "rigorous neutrality" and the principle of non-discrimination have often been insufficient on their own in meeting the demands of racial and religious justice. This history shows not only the desirability of "Liberalism II" (or egalitarian/difference-sensitive liberalism), but also its necessity within the liberal state. Although acknowledging the history and theory of disparate-

impact discrimination further substantiates and contributes to the efforts of difference theorists, ignoring the history and theory of disparate impact in the US reinforces the position of conservatives and the individualized reading of equal protection that has become ascendant on the US Supreme Court. This reading of equal protection expresses hostility toward any race-conscious policies—regardless of motive or effect—and it has brought once sacrosanct, moderate race-conscious policies in the cross hairs of those desirous of a color-blind society. The current trajectory of race-conscious policies in the US, and the repudiation of the history on which such race-conscious measures are based, creates some urgency for rectifying this oversight—especially within a literature concerned with the plight of marginalized groups (i.e. the difference literature).

Paradigms of Difference Accommodation

As mentioned in the previous section, critical accounts of liberalism and its ability to accommodate various modes of difference have spawned a rich debate and given rise to a multitude of theoretical frameworks for accommodating difference. They have also generated passionate defenses of traditional liberal principles, such as neutrality and equality under the law. For example, Brian Barry (2001) and Chandran Kukathas (1992; 1998) extol the virtues of liberalism and contend that it offers the most viable response to the multiplicity of religious, cultural, ethnic, and moral identities pervading the global political landscape (Barry 2001, 24; Kukathas 1998, 690). Liberal political theory, having its roots in the Wars of Religion that ravaged much of Europe during the 16th and 17th centuries, arose out of, and represented a response to, centuries of seemingly intractable group conflict animated by particular religious and cultural identities (Barry 2001, 21). It is within this historical context—a context within which the politicization of

difference threatened to impose unduly a single religion on each state—that the privatization or de-politicization of particular identities (whether cultural, religious, etc.) emerged as a reasonable solution to the problems posed by difference and particularity (Barry 2001, 25). As such, the distinguishing characteristic of most contemporary and classical liberal political theory is state-sanctioned neutrality toward religion, creed, ethnicity, race and questions of the "good" generally.

Although the liberal paradigm of justice purports to accommodate difference through state-sponsored neutrality and the relegation of particular affiliations and identities to the private sphere, radical pluralists, inspired largely by the postmodern deconstruction of the Western "logic of identity," argue that viewing citizens in their abstract sameness, irrespective of particular group affiliations and/or identities, has a repressive, homogenizing effect that undermines, rather than promotes, difference (Hekman 2004, 38-40; Young 1990, 96-104). As Susan Hekman and Iris Marion Young note, such blindness or uniformity of treatment through abstraction, such relegation of particularity to the private sphere, is not only undesirable, but also impossible. The seemingly universal, abstract citizen of liberalism is, in reality, a particular identity—that of the dominant group(s) in society—masquerading as the universal. Given this, it is clear that the identity of the liberal citizen is veiled; its particularity is cloaked in, and legitimated by, a universalism that obscures the hierarchical power relations of society. It is a universalism that historically has been employed to exclude certain groups—e.g. those who were deemed incapable of transcending particularity and adopting the "rational" point of view—from the public realm of liberal citizenship (Hekman 2004, 46-47; Young 1990, 97). For Hekman, the solution to these inequities of particularity

requires abandoning the abstract, generic citizen of liberalism and embracing "difference" through the radical pluralization of the political and legal spheres ("difference" is elevated over uniformity here) (Hekman 2004, 78). It requires a politics of emancipation that affirms, rather than transcends, group difference. It is an emancipatory politics informed by the realization that equality, if it is to create an inclusive political space in which all groups can meaningfully participate, must sometimes entail differential treatment for historically marginalized and/or oppressed groups (Young 1990, 157-158).

In response to theories of radical pluralism, liberal multiculturalists assert that basic, fundamental liberal rights must accompany any such recognition of particularity and difference; one cannot blindly adhere to a politics of difference (Gutmann 2004; Kymlicka 1995, 1998, 2001; Song 2007; Taylor 1994). In stark contrast to Hekman (and to some extent Young), these theorists posit that recognition of group-based particularity and difference, although consistent with the core tenets of liberal democracy, is permissible only in so far as certain individual rights remain unassailable and insubordinate to group interests (Gutmann 2004, 8; Kymlicka 1995, 147-148; 2001, 41; Song 2007, 10; Taylor 1994, 63). At its base, the liberal-multicultural paradigm offers a reconfiguration of the concept of equality within liberal political theory, and represents a movement away from the understanding of equality as state indifference or neutrality toward the particular affiliations and identities of individuals (Gutmann 1994, 10-11; Kymlicka 1995, 84-86; Taylor 1994, 40). As Amy Gutmann notes, "Recognizing and treating members of some groups as equals now seems to require public institutions to acknowledge rather than ignore cultural particularities" (Gutmann 1994, 5).

Other theorists find fault with the understanding of cultural group identity espoused in liberal multicultural and other identity/difference frameworks. Seyla Benhabib (2002), for example, cautions against interpretations of cultural groups that assume readily identifiable, ossified group boundaries (as the liberal multiculturalists do) that can and should be preserved to remedy historical patterns of oppression and marginalization (Benhabib 2002, 3-5). A more accurate delineation of cultural groups (and groups in general) would recognize their ever-shifting, dynamic character as formed through the continuous articulation, re-articulation and negotiation of imaginary borders that determine outside and inside—"we and other" (Benhabib 2002, 8). Individuals are born into socio-linguistic frameworks ("webs of interlocution") that provide multi-level life scripts (collective identity, gender, etc.), and it is by becoming an interlocutor—i.e. one who is conversant and engages these narratives—that selfhood is formed. To Benhabib, the issue of significance is not cultural preservation through recognition (for there is no monolithic culture to preserve), but ensuring that individuals have the ability to determine freely their narrative identifications—a goal best realized through the institutionalization of discursive deliberative democratic procedures (Benhabib 2002, 19-20). The deliberative-democratic paradigm of Benhabib expands the scope of political justification and requires that every individual affected by the adoption of institutional arrangements, norms and principles participate in the deliberative process through which those arrangements, norms, and principles are sanctioned (Benhabib 2002, 11). In the end, Benhabib focuses more on the actual process of identity formation and less on a defense of particular cultural rights.

Similarly, Rita Dhamoon (2007) finds problematic the outsized importance assigned to the concept of culture in liberal multicultural paradigms of identity/difference. Liberal multicultural theorists grant primacy to the concept of culture in understanding and explaining the politics of identity/difference, and this focus often results in attempts to use culture as a catchall explanatory concept. Theorists endeavor to understand myriad social, economic and political issues through the prism of culture and, in so doing, elide the actual power relations and conflicts that create and maintain "difference." Moreover, since culture is paramount within the liberal multicultural paradigm, theorists often exclude certain forms of difference—e.g. racism, poverty, homophobia—from their analyses altogether (Dhamoon 2007, 8). Given these and other shortcomings of liberal multiculturalism and the culture-centric approach, Dahmoon argues for a novel approach to the study of identity/difference politics—one that makes the concept of power and the processes through which difference is created and maintained the primary analytical focus (Dhamoon 2007, 9).

Qualifications of Argument

Having provided a rough sketch of the contours of debate within the difference literature, I move on to consider some of the important limitations of my research. The theses I present in this dissertation are circumscribed in several ways. First, regarding the assessment of "rigorous neutrality," one should note that the evidence provided and the arguments registered discredit only blanket assertions of "rigorous neutrality," such as those made by Taylor and Kymlicka. The evidence furnished throughout the ensuing chapters does not support a positive assessment of the actual character and development of the US state—of its political culture and guiding philosophy. I am not propounding,

similar to scholars of American Political Development (APD), a general, ideational theory of state development, such as a commitment to Lockean liberalism (Hartz 1955), civic republicanism (Sandel 1996), or multiple traditions (Smith 1997). Such claims are well beyond the scope of my research. Rather, I am simply repudiating the claim of monolithic "rigorous neutrality" by underscoring policies (and supporting theory) that should not come to pass if a doctrinal commitment to "rigorous neutrality" is the driving force behind public policy in the United States. When I refer to US political philosophy or theory, I am referring only to the manner in which the sometimes conflicting demands of liberal equality—specifically the demands of uniformity, on the one hand, and particularity, on the other—have remained in tension throughout the course of US history.

Second, for the most part, I do not analyze the processes through which individual and group differences ("otherness") are created and maintained, and I do not include a discussion of the role that such individual and group identities play in a paradigm of liberalism that incorporates difference-sensitive policies ("Liberalism II"). In short, there is very little focus on the identity side of the politics of difference, outside of acknowledging that under certain circumstances the state needs to recognize cultural, racial, and religious identities, as well as the practices that follow from these identities (in the case of religion and culture). Beyond this exception, I do not touch upon identity and its relation to difference-sensitive public policies. Although the relationship between identity and difference-sensitive policies is beyond the scope of my work, this relation is nonetheless important and complements my research. For example, it is likely that the enactment and maintenance of policies recognizing racial, religious and/or cultural

identities will require changes in how the dominant groups (i.e. religious, cultural and racial majorities) in society view marginalized and disempowered groups. Those whose identities are maligned and despised—i.e. viewed negatively as other—are unlikely to receive adequate protections, regardless of what form these protections take. In short, one must jettison "status differentiations" based on religion, race and culture and view racial, religious and cultural minorities as worthy of protections that are similar to those afforded to majority groups.[1] To the extent that such identity transmutations are necessary to support and sustain difference-sensitive policies, research and analysis that details the manner in which these recognitive changes take place serve as an invaluable complement to recognitive and redistributive policy proposals such as those contained in this dissertation (i.e. disparate impact in the context of race, religion and culture). Thus, the exclusion of such analyses from this work does not indicate their lack of importance; rather, it indicates only that they go beyond the limited scope of my thesis.

Third, while the paradigms of difference accommodation outlined in the previous section introduce some of the important questions and problems within the identity-difference literature, in what follows I do not offer an assessment of the various modalities of difference accommodation. Instead, I focus on one paradigm of difference accommodation—liberal multiculturalism—and make a contribution to this literature by showing how the liberal multicultural framework can incorporate some of the demands of

[1] The term "status differentiation" comes from Nancy Fraser. She uses it in the context of gender discrimination (See Fraser 2003, 21). In a similar vein, while describing the interconnected nature of recognitive and redistributive justice, Fraser also notes that liberal egalitarian assertions of redistributive justice are predicated upon the "equal moral worth of persons" (Fraser 1999, 15). This underscores the interrelatedness of redistributive and recognitive justice claims and parallels the example of racial, religious and cultural minorities above (i.e. that they must be viewed as worthy of protections that are similar to those protections afforded to majority groups).

racial justice. Additionally, the evidence presented in chapters three and four bolsters the arguments of liberal multiculturalists and evinces the importance of elucidating the history and theory of disparate-impact discrimination in the US—a history overlooked by scholars advancing various models of difference accommodation.[2] With these limitations in mind, I offer a preview of the organizational logic of my project.

Thematic Organization of Work

In chapter two, I lay the groundwork for assessing the empirical claim of liberal multiculturalists—the assertion of "rigorous neutrality"—by highlighting how various theorists portray the US liberal state within the differnce literature. Empirically, these theorists assert that the US is a bastion of "rigorous neutrality," at least doctrinally speaking, and that this doctrinal neutrality limits the range of permissible policy options. In chapter three, I move on to offer a critical examination of equal protection case law in the United States—specifically as it relates to race—and argue that there are two discernible trends within this body of case law. One trend views race-conscious action as permissible under the Equal Protection Clause (to the extent it does not reflect racial prejudice); the other views Equal Protection as encapsulating a positive right to be judged and evaluated as an individual. This latter view has become ascendant on the US Supreme Court and represents a disavowal of the history of Title VII specifically, and race-conscious policies generally. My conclusions in chapter three help contribute to the defense of such race-conscious policies—bringing the actual history and original

[2] Sarah Song (2007) comes closest to acknowledging this history, as she discusses disparate impact in the context of her theory of "rights-respecting accommodationism." While Song acknowledges the practice of exemptions to generally applicable laws, she does not draw a connection between this form of disparate impact and race—specifically Title VII of the Civil Rights Act. In fact, discussions of the disparate-impact strain of Title VII within the difference literature are rare, and Song's work is no exception to this surprising trend.

interpretation of the disparate-impact strand of Title VII into sharp relief and making sense of the policy's contemporary relevance. Building on these conclusions, in chapter four I argue there is a nexus between the disparate-impact theory of racial discrimination and the legislative and judicial practice of carving out religious exemptions to neutral laws of general applicability. Additionally, I posit that the High Court's unwillingness to find a tension between the positive right to be judged as an individual and the tendency of Congress and other legislative bodies to engage in explicitly religious-conscious decisionmaking serves as a justification for race-conscious policies such as Title VII. This justificatory approach has the advantage of employing principles emanating from the conservative wing of the Court to defend a policy of which these jurists have become increasingly skeptical. Overall, chapters three and four contribute to a defense of a history that is currently under attack, and they simultaneously corroborate the arguments of difference theorists such as Taylor and Kymlicka. This is because the evidence proffered in chapters three and four shows that the more accommodative, difference conscious form of liberalism ("Liberalism II") has been a necessary and integral component of US political thought and policy. Although acknowledging the history and theory of disparate-impact discrimination further substantiates and contributes to the efforts of difference theorists, ignoring the history and theory of disparate impact in the US reinforces the position of conservatives and the individualized reading of equal protection that has become ascendant on the US Supreme Court.

Finally, in the concluding chapter I contend that the liberal multicultural depiction of liberalism and the liberal state do not hold up when examined in light of the actual policies and procedures of the United States. Because they erroneously portray the US as

the quintessence of "rigorous neutrality," liberal multiculturalists such as Taylor and Kymlicka fail to appreciate that many of the tensions intrinsic to liberalism addressed by their theories have a deep history in the US—especially as they relate to questions of religious accommodation and racial equality. Overlooking this history and the theory supporting it misses an opportunity to incorporate some of the demands of racial justice within the liberal multicultural framework. To show this, I adumbrate the theoretical mechanics of how disparate impact aligns with and encapsulates some of the demands of racial justice; I then move on to elucidate the racial identity presupposed, and some of the demands met, by this model.

CHAPTER 2

THE PROBLEMATIC PORTRAYAL OF LIBERALISM AMONG THEORIES OF LIBERAL MULTICULTURALISM

Introduction

Liberal multicultural theorists such as Charles Taylor and Will Kymlicka register an empirical assessment of the liberal state—of how things actually are in the day-to-day administration of justice. These theorists make the general observation that the policies and procedures of the liberal state, while non-neutral and therefore partial in practice, nevertheless endeavor to be neutral with respect to difference. In short, the liberal state is at least doctrinally neutral—having as the theoretical foundation for its actions a conception of neutrality that views citizens in their abstract sameness irrespective of their particular affiliations and/or identities (what one may call rigorous, or procedural, neutrality). This specific understanding of neutrality, however impossible its realization may be, informs the procedures and public policies of the liberal state, delimiting the range of legitimate policy options and imbuing various elements of the public political culture. What is more, the observations of Taylor and Kymlicka are said to apply primarily to the United States, as the US embraces, at least doctrinally, formal legal and political neutrality toward difference (with neutrality defined in the previously mentioned manner). As such, the United States is the quintessence of rigorous neutrality.

Although there is a degree of superficial plausibility to the aforementioned claims, this depiction of liberalism and the liberal state is highly misleading—especially within the so-called difference literature of contemporary political theory. In this chapter, I lay the groundwork for substantiating this contention by highlighting how various theorists portray the liberal state and liberal political philosophy within the difference literature—

focusing my attention specifically on the works of preeminent liberal multicultural scholars Charles Taylor and Will Kymlicka. After my expository account of their theoretical frameworks, I move on to consider whether their depiction of liberalism and the liberal state is accurate—whether it holds up when examined in light of the actual policies and procedures of the liberal state(s) in question. I reserve this portion of the analysis for chapter five, and focus my immediate attention on elucidating the way in which these theorists depict liberalism and the liberal state within the difference literature.

The Depiction of Liberalism and the Liberal State in Theories of Liberal Multiculturalism

As noted in the previous section, a concern has arisen among theorists that the contemporary liberal model of citizenship, with its focus on equality under the law and universal citizenship rights, fails in the provision of justice for marginalized groups in society. Here, contemporary theorists take issue with the understanding of equality enshrined in certain liberal theories of justice, focusing specifically on the manner in which liberal theories of justice attempt to realize equality. The problem is that liberalism—at least in its contemporary, Anglo-American iterations—endeavors to achieve equality under the mechanism of formal legal and political neutrality toward difference, viewing citizens in their abstract sameness irrespective of their particular affiliations or identities. Such attempts at neutrality are, in fact, impossible and lead only to the imposition of a particular identity and vision of the good life on all individuals and groups in society (it establishes hierarchy); on this view, neutrality and its corresponding universalism are oppressive, homogenizing and immure—rather than emancipate—

individuals. In short, according to its critics, contemporary, Anglo-American liberalism represents a paradigmatic case of the particular masquerading as the universal.

This interpretation of contemporary liberalism has given rise to the politics of group-differentiated rights. Within the disciplinary confines of philosophy and political science, theories of group-differentiated rights have been subsumed under multiple headings: minority rights, the politics of multiculturalism, the politics of difference, liberal culturalism, liberal multiculturalism, and the politics of recognition (to name a few). While there is considerable variability among these theoretical approaches, (difference among theories of difference), they share a core commitment to the "politicization of group identity," or the recognition of particular identities in the public sphere (Barry 2001, 5). Whereas liberal neutrality foreclosed opportunities for particular identities and differences among individuals and groups to be brought into the fold of political consideration (in terms of public policy and institutional procedure), theories of group-differentiated rights endeavor to amend this shortcoming through the jettisoning of neutrality and the recognition that true equality necessitates the politicization—not de-politicization—of particular identities and, in some cases, the differential treatment of groups and individuals in society (for some examples of theories of group-differentiated rights, see Benhabib 2004, Gutmann 2003; Heckman 2004; Kymlicka 1995, 1998, 2001, 2007; Taylor 1994; Young 1990, 2000).

Charles Taylor's Multiculturalism

Charles Taylor's seminal essay, "The Politics of Recognition (1994)," epitomizes the above-mentioned trend of acknowledging these failures of Anglo-American liberalism while at the same time propounding the corresponding notion that true equality

requires the politicization of particular identities and the differential treatment of individuals in society. Taylor begins by noting the concern in contemporary politics with the demand for recognition, and the idea that recognition or its absence (misrecognition) plays an important role in the formation of individual identity. This demand, or need, manifests in myriad ways and is visible especially in the political movements of minorities and other marginalized groups, as well as in the politics of multiculturalism and certain strains of feminism. With the claim that recognition and misrecognition affect the formation of one's identity comes the attendant observation that misrecognition has the potential to cause real, palpable injury to individuals by reflecting back to them abhorrent or derogatory images of themselves (Taylor 1994, 25). Though misrecognition may cause harm of varying degrees, it has the ability to engender acute injury and trammel victims in a world of self-loathing, wherein the victims of misrecognition espouse the very negative images purveyed by their victimizers, thus becoming sources of their own oppression. As such, "Due recognition is a vital human need" (Taylor 1994, 26).

According to Taylor, two changes brought about this modern concern with identity and recognition: the decline of hierarchically ordered society and the shift from the concept of honor to the modern notion of dignity. These changes were interrelated, as the dissolution of hierarchical, class-based understandings of identity created the space within which the modern concept of dignity could blossom and supplant notions of honor previously attached to social position. This notion of dignity is not peculiar to caste or class, but, rather, everyone is said to be worthy of equal dignity. The idea that everyone is worthy of equal dignity has an obvious affinity with democratic society and politics—

an affinity not shared by the concept of honor—and it is therefore no surprise that equal recognition of dignity has been a hallmark of democracy; it is "the only concept compatible with a democratic society" (Taylor 1994, 27). Politically speaking, the enactment of equal rights and entitlements—what Taylor labels the "politics of universalism"—has been the method of realizing the equal recognition of dignity among persons. In short, the transition from honor to dignity brought to the fore a politics of universal rights and entitlements, a politics designed primarily to eschew political stratification among the populace (political or social classes); no longer did certain privileges and immunities accrue only to specific political or social classes of persons (e.g. those with honor) (Taylor 1994, 37).

Although the "politics of equal recognition" has proven mutable through the years (i.e. dignity has taken on different meanings), one permutation has particular relevance to contemporary politics and the politics of recognition: the development of the "individualized identity." This is the idea that each individual has a particular way of living his/her life and participating in humanity that is peculiar to him/her (to one's authentic way of living life); to live a life that does not comport with this self-defined ideal, to be inauthentic, is to fail to live up to the purpose (or point) of life. Here, there is great moral significance and meaning affixed to the process of self-definition, a process of inward identity generation continuously under the strain of exogenous pressures to conform, as well as the pressure to follow instrumental reason; following instrumental reason and conforming to exogenous pressures—instrumental or otherwise—may cause individuals to lose touch with their "inner voice," thus leading to an inauthentic and unoriginal life. Therefore, from a moral vantage point, the relevant feature of identity is

self definition, of living a life in accordance with an identity that only I can discover and enunciate (of being authentic and original) (Taylor 1994, 30). In addition, although the demise of hierarchal society facilitated the development of this modern notion of identity, it did not, however, fully eradicate the nexus between social position and identity. This is because it is possible that individuals in a democratic society will continue to define themselves by their social position, even though their social position or class does not predetermine their identity as it does in hierarchical society (i.e. even though their identity is not purely correlative with social positioning or class). Even though social position may still influence modern identity, the pivotal distinction between hierarchical and democratic society is that identity is self-generated (internally generated) in the latter social system but not in the former (Taylor 1994, 31-32).

Nevertheless, as Taylor perspicuously notes, there are grave problems with this interpretation of identity. Most notably, it elides an integral part of social ontology by glossing over the fact that identity formation takes place through one's dialogical interaction and engagement with others; identity formation does not take place under conditions of solitude, or in a vacuum. Individuals gain cognizance of themselves and develop the capacity to form their particular identities through the adoption of various modes of linguistic expression, and these forms of expression are learned through one's engagement and interaction with others (Taylor 1994, 32). Aside from the dialogical nature of these common modes of expression (of our dialogical process of edification), how other persons view a given individual affects how he/she sees him or herself; it affects his/her identity formation. "We define our identity in dialogue with, sometimes in struggle against, the things our significant others want to see in us" (Taylor 1994, 35). In

short, there is no such thing as an inwardly generated, monological identity. Moreover, neither the important and necessary role that others play in the identity-formation process nor the need for recognition arose with the modern notions of dignity or identity. For even in hierarchically ordered society, individual identity and recognition depended on the value others accorded to social positions/categories (there was still an other-dependence related to identity formation); however, since these values were intrinsic to the very social categories and positions determining identity, an asymmetry did not exist between one's socially defined identity and others' recognition of that identity. The possibility of recognitive failure, of not having one's identity recognized (or of having it misrecognized), is what the movement from honor to dignity and the modern notion of identity brought about (Taylor 1994, 35).

Whereas the shift from honor to dignity brought about the "politics of universalism," the modern understanding of identity—the "individualized identity"—ushered in the "politics of difference." This is the idea that due recognition should be given to each person's unique identity (Taylor 1994, 37-38). Such recognition is necessary because the "politics of universalism," with its focus on equal rights and entitlements and the uniform application of rules/laws, overlooks important differences among the populace. The "politics of universalism" avoids classification and rank among the citizenry—it avoids the recognition of difference—to combat the baleful effects of hierarchal society. It offers a principle of nondiscrimination that requires the state to treat every individual, regardless of his/her particular affiliations/identities, in the same fashion (this is the now familiar idea of neutrality, or equality as uniformity, also labeled "difference-blind liberalism"). The problem, however, is that the generally applicable

laws and rules of "difference-blind liberalism" often reflect a particular identity and cultural point of view; they are, in fact, not difference blind or neutral and instantiate the view and identity of the majority. As such, individuals must conform or assimilate to the majority identity, and such conformity with the majority identity undermines individual authenticity; it has a homogenizing effect (Taylor 1994, 38). In order to remedy the assimilative effects of the "politics of universalism," the "politics of difference" offers a reconfiguration of the principles of nondiscrimination and equality—asserting that true equality and nondiscrimination necessitate differential treatment and distinction among the populace (it is implied here that not all forms of discrimination are objectionable, thus bifurcating discrimination into two categories: invidious and innocuous) (Taylor 1994, 40).

These two visions of politics—the "politics of universalism" (or "politics of equal dignity") and the "politics of difference"—are in tension with one another, as the "politics of difference" deviates from the uniform application of rules/laws to further its ends. And since, according to this vision of politics, the uniform application of law constitutes non-discrimination, the "politics of difference" patently discriminates against certain groups and individuals in order to further its so-called egalitarian objectives. As such, the "politics of difference" contravenes the principle of non-discrimination.[3]

[3] There are two concepts of "equality" under consideration here. In accordance with the "politics of universalism," equality connotes uniformity in the application of laws/rules. Equality inheres in the application phase of law, in its application to every person, regardless of his/her particular affiliations or identities. Equality does not move beyond the application phase of law in the "politics of universalism" (it deals solely with legal inputs). In contradistinction to this model of politics, the concept of equality within theories of difference focuses not solely on the application phase of law, but also on the effects resulting from the application phase of law; it is a more comprehensive concept and deals with both the inputs and outputs of law. In short, it examines the impact that a particular application of law—in this case uniform application—has on persons with disparate affiliations and identities. If uniform or equal application of a law causes undue hardship on, say, certain religious persons, equality of application (level one) causes inequality in the realm of practice (level two, the effects of application). It is therefore appropriate to

Conversely, proponents of a "politics of difference" contend that the principle of non-discrimination and the uniform application of rules/laws foreclose opportunity for the consideration of relevant differences—thus fitting individuals, in a rather Procrustean fashion, into an identity form that is inauthentic and foreign to them; such politics has a homogenizing character (Taylor 1994, 43). This homogenizing brand of politics has taken two forms in Western Civilization, with one form owing to the legacy of Jean-Jacques Rousseau and the other to Immanuel Kant (Taylor 1994, 44).

Within the "politics of equal dignity," the brand of politics owing to Rousseau—a politics defined by "freedom-in-equality"— stands at antipodes to a political system characterized by hierarchy and "other-dependence." Rousseau posits that equal respect is a necessary condition for human freedom, and that such equality of respect cannot exist under a system of hierarchy and "other-dependence." Although this "other-dependence" is multifaceted, with individuals depending upon others for survival, for assistance in achieving goals, and for political power, the greatest dependence one has under such conditions is for the esteem and good opinion of others. Under such a system, there is a direct relationship between other-dependence and hierarchy; meaning, equality and "other-dependence" are mutually exclusive conditions and, as such, cannot coexist. These conditions cannot coexist because inextricably bound up with the esteem and good opinion desired by individuals is the traditional conception of honor or preference—a conception that inherently differentiates among persons by awarding esteem and good opinion on the basis of one's position and/or rank in society; esteem is not meted out in

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distinguish these concepts of equality in the following manner: the "politics of universalism" champions a concept of equality that is application only, whereas the "politics of difference" embraces a more comprehensive concept that is both application and effects-of-application oriented. It is the difference between the consideration of single level and multi-level conceptions of equality.

an egalitarian fashion. As Taylor notes, "It is a positional good" (Taylor 1994, 45). Interestingly, the importance of honor means that, although a power differential exists among individuals, every person is "other-dependent" (e.g. both the master and slave), albeit at levels of dependence that differ positionally and are thus unequal. While regimes operating under the threat of physical violence and coercion may obviate these conditions of esteem-based dependence somewhat (i.e. the master enslaves through use of violence), insofar as an honor-based, hierarchical system obtains, maintenance of the existing social order is necessarily dependent upon the esteem and good opinion accorded to social status (Taylor 1994, 45-46). What is more, since, under such an arrangement, individuals slavishly seek out the esteem and good opinion of others, they are constantly hewing their actions to the desires, inclinations and goals of others, hoping for their favor, and moving away from, or outside, the self; in this way "other-dependence" is "alienating" and inauthentic (Taylor 1994, 48).

To counteract this other-dependence and transition to a system of equal respect and "freedom-in-equality," Rousseau does not advocate the jettisoning of the concept of esteem; rather, he espouses a political arrangement wherein esteem is coextensive with equality and liberty, a system of "balanced reciprocity" (Taylor 1994, 48). In the social contract of Rousseau, individuals give up all of their rights to the community at large and, in so doing, paradoxically retain their political liberty. "In giving himself to all, each person gives himself to no one. And since there is no associate over whom he does not acquire the same right that he would grant others over himself, he gains the equivalent of everything he loses" (Rousseau [1762] 1987, 148). Such an arrangement allows for the attainment of liberty, equality, and community—thus brining individuals closer, at least

in some sense, to the natural conditions of humankind and the true potential of humanity (Rousseau's delineates these "natural conditions" in his *Discourse on the Origin and Foundations of Inequality Among Men*, 1754). Furthermore, the condition of "alienation"—of giving oneself to all—is universally applicable and represents the advancement of equality (it applies to all equally) (Rousseau [1762] 1987, 148).

This condition of equality is of extreme importance. Since everyone gives him or herself to the entire community, everyone has an interest in supporting only those policies that are fair and unencumbering (Rousseau [1762] 1987, 148). By giving up one's rights to the entire community, then, one is not simply committing to majority rule, but rather, is consenting to be ruled by the "general will" (the locus of sovereignty), which produces policies commensurate with the common good (simple majority rule does not). Insofar as the "general will" reflects the common good, it is not the product of private, particularistic interests; the "general will" is more than the sum of its parts—than the sum of private wills (Rousseau [1762] 1987, 155-156). In this way, the "general will" counteracts selfishness and dissolves the tension between individual and communal interests. Through the mechanism of the "general will" individuals achieve their full potential and live a life that accords with, or at least closely approximates, their true nature. Moreover, because the "general will" and "balanced reciprocity" create social cohesion, it is possible for individuals to act in accordance with the opinion (esteem of others) while remaining true to themselves (maintain authenticity). "I am still 'obeying myself' as a member of this common project or 'general will'" (Taylor 1994, 48). In other words, concern with the esteem and good opinion of others is, in the Rousseauian republic, consistent with liberty, equality, authenticity and social cohesion; the social

disunity and lack of reciprocity that rendered the pursuit of esteem problematic in the hierarchal, honor-based system no longer exists, having been superseded by a system where all worthy citizens (i.e. those following the general will) receive equal honor and esteem. "Under the aegis of the general will, all virtuous citizens are to be equally honored. The age of dignity is born" (Taylor 1994, 49).

The Rousseauian politics of equal dignity, while ameliorating some of the problems arising from an inegalitarian, honor-based politics, offers a solution that requires such a high level of social cohesion and common purpose that it precludes differentiation among the populace (Taylor 1994, 50). It does not provide space for the consideration of relevant differences. Without a high level of social cohesion and common purpose, the potential arises for "other-dependence" between and among individuals in the polity, and under such circumstances, individuals inhabit a polity devoid of liberty; they are not free (Taylor 1994, 51). Therefore, the very complaint proponents of a "politics of difference" register above—mainly, that such uniformity has a homogenizing effect on individual identity—appears to have applicability to the political philosophy of Rousseau. As noted, proponents of a "politics of difference" view such homogenization as problematic because it forces individuals into a Procrustean bed of sorts—putting them in a position where assimilation to the dominant, majority identity is necessary.

If rigid social cohesion and lack of differentiation are the pitfalls of Rousseau's paradigm of equal dignity, perhaps a "politics of equal dignity" grounded in equal rights—removed from the stricture of tight, undifferentiated social unity—allows for equal recognition of dignity without similar homogenizing effects. The "politics of equal

dignity" taking this form has a distinct Kantian pedigree and is not predicated upon a "general will," but rather finds its basis in an egalitarian schedule of rights that abstracts from the particulars of individual identity and social roles (Taylor 1994, 51). This view of equal dignity and rights, which Taylor labels a species of liberalism, has drawn criticism from those espousing a "politics of difference," as they contend that such abstraction from the particulars of identity and social roles precludes consideration of relevant differences; it glosses over, and does not grant well-justified and necessary recognition to, distinctions among the populace (Taylor 1994, 51-52). Taylor assents to the view of the critics, asserting that this variant of liberal political theory severely delimits recognition of different cultural identities and lacks flexibility in the application of its schedule of rights to varying cultural contexts. Even under circumstances where collective goals presumably warrant consideration of such cultural distinctness, this species of liberalism does not sanction deviation from its standard schedule of rights. As such, it appears that the "restrictive view of equal rights," as Taylor calls it, lacks adequate defense against the charges of homogenization leveled by proponents of a "politics of difference" (Taylor 1994, 52).

Although the "restrictive view of equal rights" is, in a fashion similar to Rousseau, guilty of homogenization, Taylor notes that there exists a more hospitable variant of the "politics of equal dignity," and he examines the case of the 1982 Canadian Charter of Rights to tease out the critical features of this form of liberalism. The ratification of the Canadian Charter of Rights in 1982 laid the foundation for judicial review of legislative actions—regardless of the level or unit of government from where such actions originated. In this way, ratification of the Charter of Rights created

symmetry between the political systems and procedures of the United States and those of Canada, but such alignment of system and procedure also brought about questions of how, exactly, the Canadian government should deal with the claims for "distinctness" and autonomy propounded by Quebeckers and autochthonous persons (Taylor 1994, 52). The source of concern was, in essence, cultural survival and fear that the invariant application of constitutional principles and rights would abrogate policies and procedures already in place to ensure cultural survival and distinctiveness (Taylor 1994, 52-53).

This question of cultural survival came to a head with the Meech Lake amendment, a proposal that recognized the "distinctness" of Quebec society and sought to use this "distinctness" to underpin the practice of judicial review and create space for variance in constitutional interpretation by region and culture (Taylor 1994, 53). According to Taylor, scads of Canadians viewed the type of variance proposed in the Meech Lake amendment as problematical because two themes of the Charter—themes common to other Western democracies, especially the United States—"dominate in the public consciousness." These themes are most neatly summarized as (1) the embrace of a schedule of individual rights common to Western democracies (Taylor cites the US and Europe here) and (2) the equal treatment of citizens under the law. Here, equal treatment under the law entails a principle of non-discrimination, or, stated differently, a proscription against the singling out of individuals on the basis of certain attributes, such as race, sex or ethnicity (Taylor 1994, 53-54). These two themes—individual rights and equal treatment under the law—derive from the American example, as part of the novelty of the American experiment was its codification and entrenchment of an explicit set of rights. And although the role of judicial review in preserving these rights was ambiguous

in the antebellum United States, in the post-bellum US, the passage of the Reconstruction Amendments—especially the Fourteenth Amendment—brought prominence to the principle of non-discrimination within the institution of judicial review, eventually allowing for its application to all levels of government. In short, the passage of the Fourteenth Amendment had a two-fold effect: it allowed for the application of the institution of judicial review to all levels of government in the US (through the Incorporation Doctrine), and it elevated the principle of non-discrimination to a position of centrality within the institution of judicial review (Taylor 1994, 54).

In the Canadian case, the embrace of these (American) twin themes of individual rights and non-discrimination rendered problematic the championing of collective goals such as the survival of the Francophone culture in Quebec (the "distinct society clause"). This is because scores of English Canadians viewed the collective goal of cultural survival as necessitating the circumscription of behavior such that it violated individual rights and/or the principle of non-discrimination. In accordance with the English Canadian perspective, then, individuals either had to sacrifice certain rights or violate the principle of non-discrimination in the name of some collective good, namely the perpetuation of culture (Taylor 1994, 55). Quebec language laws regulating who has the option to send their children to English-language schools (a decision determined by immigrant status and ethnicity), as well as the rules governing commercial signage and business communications, were said to exemplify this tradeoff between individual rights and the collective good. In each example, the state placed limitations on individual behavior—limitations that purportedly undermined individual rights—in order to serve the collective good of survival (Taylor 1994, 52-53). Additionally, the restrictions placed

on individuals contravened the principle of non-discrimination by treating persons differently based on their ancestry or immigrant status. As such, the extant laws singled out individuals based on certain irrelevant attributes (in this case ascriptive characteristics of ethnicity or immigrant status) and thus ran counter to principle of non-discrimination (Taylor 1994, 55). Because recognition of Quebec as a "distinct" society ostensibly elevated the collective goal of cultural preservation above individual rights and non-discrimination, for many Canadians the price of adopting the amendment was some sort of guarantee that the "distinct society clause" would have subordinate status to, and could not act as a trump on, the Charter of Rights (Taylor 1994, 55).

While one might be tempted to dismiss such opposition to Meech Lake and the "distinct society clause" as nothing more than sheer anti-Quebec prejudice, there is an earnest and forceful philosophic argument undergirding such opposition. Those espousing the idea that individual rights, as well as the principle of non-discrimination, are inviolable and take priority over collective goals (e.g. cultural survival) "are often speaking from a liberal perspective that has become more widespread in the Anglo-American world" (Taylor 1994, 56). The origin of this view is the United States, and some of the country's preeminent legal and philosophical scholars have articulated and defended its chief tenets (John Rawls, Ronald Dworkin, and Bruce Ackerman, to name a few). Among these cardinal tenets is the notion that the liberal state should not embrace any substantive good or end, but instead should embody only a procedural commitment to the equality of respect (Taylor 1994, 56). The commitment is procedural, as opposed to substantive, because society does not embrace any particular vision of the good life (a substantive end). For example, it does not have as a stated goal of legislation the creation

of virtuous citizens, however defined. Amid the diversity of people and the variegated conceptions of virtue populating the modern world, a legislative objective such as this would undoubtedly violate the procedural commitment to equal respect—explicitly valuing one understanding/interpretation of virtue over another and conveying a message of hierarchy and inferiority to those espousing the devalued conception of virtue (Taylor 1994, 56-57). In short, the preferred, state-championed understanding of virtue, which, in a democratic society, is likely to be representative of the view of the majority, does not give due respect to counter-majoritarian, dissenting points of view. This lack of due respect, this statement of valuation (or de-valuation), conveys a profound message of inferiority and inequality, and it is precisely this sign of disrespect (or lack of equal respect) that forms of procedural liberalism attempt to eschew through their commitment to procedure over substance.

Underpinning this strain of liberalism are several deep philosophical commitments and assumptions, owing primarily to the philosophy of Immanuel Kant (Taylor 1994, 57). Following the work of Michael Sandel in "The Procedural Republic and the Unencumbered Self (1984)," Taylor contends that the Kantian theory of the transcendental subject represents the theoretical foundation of procedural liberalism. Pursuant to the Kantian vision, human dignity is not defined in accordance with any particular substantive vision of the good, but rather with the ability of every agent to exercise autonomy and to define for him or herself one's own vision of the good life (Taylor 1994, 57). For Kant, it is the eschewal of any substantive vision of the good that both allows for the possibility of human freedom—that is, a subject who is capable of exercising his/her will outside the confines of heteronomy—and the discovery of a

categorical, as opposed to contingent, moral law (Sandel 1984, 83-84). Whether one is discussing class harmony and living a life in accordance with one's function in *The Republic* of Plato, or the maximization of happiness in Utilitarian ethical theory, the presupposition of particular ends in each of these examples forecloses the opportunity for one to act out of his/her own volition and simultaneously act in accordance with that particular vision of the "good" (Sandel 1984, 83).[4] As Sandel succinctly states, "Only when I am governed by principles that do not presuppose any particular ends am I free to pursue my own ends consistent with a similar freedom for all" (Sandel 1984, 84). Analogously, only when the foundation of the moral law is prior to all experience—that is, has no foundation in the empirical realm—is the derivation of the categorical moral law possible. Since individuals have divergent inclinations and ends, it is impossible for any moral law derived from actual experience—our actual ends and desires—to provide a categorical foundation for moral law; at best, any pronouncement of moral law under this scenario will be contingent (Sandel 1984, 83). For this reason, the foundation of the moral law must reside in the transcendental subject itself—which is prior to and removed from all experience—and its ability to pursue ends of its own choosing (the exercising of an autonomous will). This stands in sharp contrast with traditional moral theory, which views the foundation of moral law as residing in a particular end, such as the maximization of utility (Sandel 1984, 84-85).

It is the Kantian theory of the subject, which lies at the core of procedural liberalism, that significantly inhibits the ability of the liberal state to champion any

[4] In both of these examples—Utilitarianism and Platonism—the will is not the originator of action, but is simply an instrumental good allowing us to achieve some desideratum. Michael Sandel notes this aspect of heteronomy in "The Procedural Republic and the Unencumbered Self (1984)." See pp. 83-85 for his discussion on the heteronomy of the will and its relation to the transcendental subject.

particular vision of the good life; such an espousal would be tantamount to elevating one person's particular vision of the good life over another's, therefore undermining ability of some individual(s) to exercise autonomy. The upshot of all this is that the state, if it is to respect the human dignity of every person (treat each as an end in him/herself), must remain reticent on pronouncements of the "good" (i.e. it must remain neutral toward the "good") and instead focus its efforts on ensuring fairness among individuals so that each person may pursue ends of his/her choosing freely and equally (Taylor 1994, 57). Another common way of expressing this vision of the state is to say that the right—defined as the principles required to allow for the exercising of an autonomous will—is prior to the good (Sandel 1984, 82). Although the idea of the right as prior to the good has its foundation in the metaphysics of Kant and his particular conception of human freedom, this idea also represents a common thematic element in contemporary neo-Kantian strains of procedural liberalism. John Rawls, for example, in an attempt to situate the transcendental subject of Kant in the real world, employs the conceptual apparatus of the "original position" to determine the principles of justice that individuals would choose if they were ignorant of certain information deemed irrelevant from the standpoint of justice (Sandel 1984, 86). Similar to Kant, Rawls embraces a view of the subject as prior to, and disengaged from, his/her ends and any substantive vision of the "good." In the "original position," individuals are ignorant of their "particular conceptions of the good and their psychological propensities"—among other things (Rawls 1971, 11). Such ignorance is efficacious in producing a set of symmetrical relations among individuals, a "situation of equal liberty," that allows for the fair selection of principles of justice (Rawls 1971, 11).

Just as the Kantian subject must be prior to experience and independent from any substantive ends if it is to be free and represent the foundation for categorical principles, so too in Rawls' "original position" must the subject be prior to his/her ends in order to allow for the derivation of principles of justice that are unconditionally valid and respect the freedom of individuals to choose their own ends. Because of the circumscriptions placed on the initial, hypothetical situation of choice, Rawls concludes that individuals would necessarily choose two principles of justice, and these principles will "regulate all further agreements" among individuals in society (Rawls 1971, 11-13). Thus, similar to the transcendental subject of Kant, the condition of choice—i.e. a situation of initial equality independent from individual ends obtaining under a "veil of ignorance"—regulates and takes priority over the substance of choice (individual conceptions of the "good" and particular ends).[5] In fact, even before delineating the conditions of free and fair choice among individuals with disparate and conflicting interests, Rawls foreshadows the priority of the right over the good, positing that principles of justice can never be sacrificed in the name of advancing the greater good; for principles of justice are "inviolable" (Rawls 1971, 3).

At the base of the above-mentioned theoretical visions of Kant and Rawls is a particular conception of the subject—one that imagines individuals as detached from their specific projects and ends. As Michael Sandel notes, under the liberal theory of the subject no attachment or affiliation, no substantive end, can define a person such that detachment from his/her ends and life projects represents a denial of the self, a

[5] Another way of describing the conditions governing choice is that they elevate procedure (i.e. regulative principles of choice) over substance. In other words, the right being prior to the good is coterminous with procedure over substance.

renunciation of who one is. In the parlance of Sandel, the liberal theory of the person discounts "the possibility of *constitutive* ends"; given this detachment from ends, Sandel recognizes the unbounded, unburdened nature of the liberal subject (i.e. that it is not constrained by its desires, inclinations, and attachments) and felicitously labels the Rawlsian subject the "unencumbered self" (Sandel 1984, 86). Thus, although Rawls endeavors to anchor the transcendental subject of Kant in the real world, the aim of his project—to vouchsafe the priority of the right over the good—causes the Rawlsian subject to remain forever distanced from his/her ends, from his/her real-world attachments. Therefore, with both the transcendental subject of Kant and the "unencumbered self" of Rawls, a certain vision of the person is required to establish the priority of the right over the good and a subject capable of autonomous choice (Sandel 1984, 87). Charles Taylor, echoing Sandel, asserts that the aforementioned species of liberalism (i.e. a species that values procedure over substance) and its attendant theory of the person (selfhood) infuses the political agenda of the United States and undergirds its political institutions. The US is, in Sandel's words, the "procedural republic" (Sandel 1984, 91-5; Taylor 1994, 58).

While the strain of liberal thought animating the "procedural republic" may have a great degree of appeal, Taylor implores us to consider that the source of the theory—i.e. the geographic locus within which it has been urged—might be as much, if not more, responsible for the success and strength of the theory than the actual tenability of its central premises and conclusions. "But we must also consider that it has been urged with great force and intelligence by liberal thinkers in the United States, and precisely in the context of constitutional doctrines of judicial review. Thus it is not surprising that the

idea has become widespread […] that a liberal society cannot accommodate publicly espoused notions of the good" (Taylor 1994, 57-58). What is more, as Taylor notes, if we probe more deeply into the theoretical commitments of procedural liberalism, we find that the theory founders on at least two counts. First, as the example of Quebec clearly demonstrates, procedural liberalism is incapable of accommodating collective goals—such as the perpetuation of a linguistic and cultural community ("*survivance*")—because of its commitment to cultural neutrality. As Taylor notes, public policies designed to meet such collectivist goals go beyond merely ensuring the ready accessibility and availability of the French language, for example—a policy which a procedurally-liberal state could countenance— and actively endeavor to mold (or "create") future generations of community members, a policy that ultimately contravenes the core precepts of procedural liberalism (Taylor 1994, 58-59).[6] Second, through the relegation of irreconcilable differences among individuals and groups to the private sphere, procedural liberalism purports to be blind to cultural difference, thus circumscribing the boundaries of the political realm and the range of claims that individuals and groups can legitimately press upon government. It is specifically through this delineation of public-private boundaries that procedural liberalism endeavors to be a "neutral meeting ground on which people of all cultures can meet and coexist" (Taylor 1994, 62).[7] This assertion of neutrality is problematic, however. Since the procedurally liberal state itself embodies a

[6] A procedurally liberal society could accommodate a policy designed to ensure access and availability to a specific language. However, such availability—possibly realized through the employment of bilingual policies on state signage—does not guarantee that there will exist in perpetuity a group of persons desirous to exercise a given language, as wells as to partake in its cultural symbols and traditions. Given its theoretical constraints, the procedurally liberal state cannot, however, engage in conscious attempts to manufacture community for the purposes of cultural survival (Taylor 1994, 58).

[7] To illustrate this point, Taylor cites the case of Salman Rushdie's *Satanic Verses*.

spectrum, of cultural commitments (it is not rigidly procedural/neutral to "difference"), it cannot—strictly speaking—provide a neutral "meeting ground for all cultures" and therefore represents certain cultural commitments that are inhospitable to, and at antipodes with, other cultural commitments that do not jibe with the liberal model. It cannot accommodate cultural difference (Taylor 1994, 62).

Overall, then, the procedurally liberal state, with its unswerving devotion to the principle of non-discrimination and individual rights, does not allow space for the pursuit of collective goals/projects (such as cultural survival) and/or the accommodation of difference, cultural or otherwise. As such, procedural liberalism, or the "restrictive view of equal rights," is, in a fashion similar to Rousseau's "politics of equal dignity," guilty of homogenization. The "politics of equal dignity" is not, however, doomed to failure. As the example of Quebec and the debate over the "distinct society" clause illustrate, there is a more hospitable and accommodating variant of liberalism, one that differentiates between immutable rights, such as *habeas corpus*, and "the broad range of immunities and presumptions of uniform treatment that have sprung up in the modern culture of judicial review" (Taylor 1994, 61). Under this more accommodating variant of liberalism, the state does not presumptively dismiss collective goals when they conflict with the principle of non-discrimination and the uniform application of rights; rather, in cases of conflict, it examines the significance of pursuing a given collective goal (e.g. cultural survival) against the benefits and burdens that accrue from the uniform application of rights. Therefore, this form of liberalism leaves open the possibility that, for example, the collective goal of cultural survival may take precedence over the principle of non-discrimination and the uniform application of rights.

Although this form of liberalism leaves open the possibility that a given collective goal, such as cultural survival, could take precedence over the principle of non-discrimination and the uniform application of rights, Taylor is inexplicit as to how individual rights, the principle of non-discrimination, and uniform application are related (or unrelated). He employs these three concepts to analyze events in the Unites States and Canada, drawing a stark contrast between the accommodative and restrictive variants of liberal political theory and the policies that ensue from each, but he omits a detailed analysis of the connections and/or disconnections between and among these concepts. Such an elision is problematic because Taylor appears to move seamlessly between the concepts of nondiscrimination and uniform application without explicit theoretical justification. Having a richer, more nuanced understanding of the principle of nondiscrimination and its relation to the uniform application of rights allows for a profounder grasp of how the restrictive/procedural species of liberalism operates *vis-à-vis* the hospitable, difference-sensitive variant of liberalism. What is more, the relationship between the concepts of nondiscrimination and individual rights is left undefined, and this nebulousness makes it difficult to discern whether nondiscrimination is itself an individual right, albeit a negative one (i.e. a right to nondiscrimination). When examining the Canadian case, Taylor intimates that the principle of nondiscrimination and individual rights are analytically and practically separable, but he does not engage in a thoroughgoing examination of these concepts such that clear discernment of the relationship between them obtains. Finally, when Taylor describes the rigidity of the restrictive strain of liberalism, he oscillates between the language of invariant rights, on the one hand, and the language of uniformity in the application of the rules/regulations

defining these individual rights, on the other. However, when Taylor speaks of invariance and uniformity, which category does he consider invariant or uniform: individual rights or the rules/regulations that define these rights (or both)? This may sound like a distinction without difference (i.e. between the rights and the rules defining them) or a trifling question, but since it is possible to have a schedule of invariant rights that is applied in a non-uniform fashion—as in the case of exemptions to generally applicable laws—it is clear that these categories are not necessarily mutually inclusive. Therefore, the non-trivial nature of this question is beyond reproach. In general, the absence of at least a rough adumbration of these relations makes it difficult to assess the fit between Taylor's analyses and the empirical and theoretical evidence from the case studies and scholarly works under consideration in his essay. In an effort to draw a rough sketch of these relations, in what follows I address each of the questions posed above.

Non-Discrimination and Uniform Application of Rights

First, Taylor addresses the relationship between the principle of nondiscrimination and uniform application of rights/regulations obliquely during his examination of the Meech Lake amendment. Recall that, according to Taylor's analysis, two ascendant themes—(1) the embrace of a schedule or rights common to Western democracies and (2) the equal treatment of citizens under the law—bear responsibility for the amendment's demise. Here, equal treatment under the law entails the principle of non-discrimination, or, stated differently, a proscription against the singling out of individuals based on certain attributes, such as race, sex, or ethnicity. As Taylor notes, the Canadian Charter "guarantees equal treatment of citizens in a variety of respects, or, alternatively put, it protects against discriminatory treatment on a number of irrelevant grounds, such as race

or sex" (Taylor 1994, 53-54).[8] Additionally, Taylor, while noting that the Meech Lake amendment in particular and collective goals in general violate theme (2) above, contends that collective goals are "inherently discriminatory" because the "pursuit of the collective end will probably involve treating insiders and outsiders differently" (i.e. treating those inside a given group, say, African Americans, differently from those outside of that group) (Taylor 1994, 55). So here, the consideration of particularities (such as race or sex) for the purpose of differential treatment—i.e. "treating insiders and outsiders differently" ("singling them out")—constitutes discrimination, and such discrimination runs counter to equality under the law ("equal treatment of citizens"). Moreover, if consideration of particularities under the law for the purpose of differential treatment constitutes discrimination, then, through contraposition, one can infer that nondiscrimination is simply the absence, or non-consideration, of particularities under the law for the purpose of differential treatment. Nondiscrimination is the absence of differentiation, and this absence typifies "equal treatment of citizens" (equality under the law).[9]

[8] Taylor notes that themes (1) and (2) above derive from the American example. Americans were novel insofar as they "were the first to write out and entrench a bill of rights." What is more, the period of Reconstruction and the ratification of the Fourteenth Amendment brought with it, among other things, the constitutional guarantee of "equal protection for all citizens under the laws." It was with this guarantee "that the theme of nondiscrimination became central to judicial review" (Taylor 1994, 54).

[9] Taylor neither attempts to provide an exhaustive list of irrelevant particularities under the restrictive model nor does he explicitly acknowledge that there might be relevant particularities under consideration in such a model, though at first glance his remarks appear at least to leave open the possibility of such relevant particularities and their consideration. As noted above, the Canadian Charter "guarantees equal treatment of citizens in a variety of respects, or, alternatively put, it protects against discriminatory treatment on a number of irrelevant grounds, such as race or sex" (Taylor 1994, 53-54). The implication seems to be that, although adherence to the principle of non-discrimination and equality under the law requires that certain (fixed) irrelevant particularities remain outside the sphere of legislative and juridical consideration, there might be certain relevant particularities that lie within the realm of legitimate legal consideration. For example, outside of race and sex (and the other "irrelevant" particularities) it is possible that a particularity such as one's occupation, economic activity, or economic class constitutes a relevant particularity worthy of consideration under the law. The consideration of relevant, as opposed to irrelevant,

If the absence of differentiation or variation constitutes equality under the law and non-discrimination, then equality/non-discrimination represent uniformity in the application of law and/or principle. Exclusion of irrelevant particularities from consideration means that the raw materials or inputs necessary for differentiation among persons are not present, and uniformity in the application of law and/or principle follows apodictically. In other words, a distillation process of sorts ensures there are no irrelevant particularities (impurities) among individuals on which to predicate such differential treatment. According to this vision, then, equality/non-discrimination is realized through uniformity—by treating all persons, regardless of their particular religious, ethnic, cultural and racial identities and/or affiliations in the same fashion (equality as uniformity). Moreover, because equality and non-discrimination are coterminous with

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particularities here is tantamount to the difference between invidious, or objectionable, forms of discrimination and non-invidious (innocuous) forms of discrimination. Remember, discrimination is simply differential treatment—"treating insiders and outsiders differently"—so any differentiation under law necessarily entails discriminatory treatment; however, with the distinction between invidious and non-invidious discrimination the question is not whether discrimination is present, but rather, what kind of discrimination is present. Although Taylor's remarks appear to leave open the possibility of this distinction among forms of discrimination, his characterization of restrictive liberalism as "suspicious of collective goals" belies this interpretation. According to Taylor, collective pursuits "will probably involve treating insiders and outsiders differently"— i.e. it will probably involve discrimination— and he cites the discrimination inherent in such pursuits as the reason for this suspicion (Taylor 1994, 55). In other words, the discriminatory nature of collective pursuits renders them problematic, at least from the procedurally liberal perspective. While it is true that Taylor is referring specifically to the collective good of cultural survival here, he goes on to argue that the restrictive, or procedural, variant of liberalism forbids the state from adopting any particular vision of the good life—any substantive end (Taylor 1994, 57). The obvious implication being that the procedurally liberal state is at least doctrinally committed to eschewing pronouncements of the "good," regardless of the collective or individual nature of the good(s) in question. This refusal upholds the commitment to non-discrimination, as espousing a particular vision of the good would entail elevating one person or group's particular vision of the good life over another's, thus treating insiders—i.e. those who espouse the particular vision of the good in question—and outsiders—i.e. those not embracing the particular conception of the good in question—differently. Treating individuals differently in this fashion fails to respect the human dignity of every person; it treats some as more valuable or worthy of respect than others, and, as such, fails to treat individuals as ends in themselves, as persons capable of exercising autonomy. Therefore, if the state is to realize the ideal of equal dignity, it must remain neutral toward the "good" and not differentiate between insiders and outsiders; it must not discriminate. If the commitment to non-discrimination within the procedurally liberal state runs this deeply, it is difficult to conceive of forms of non-invidious discrimination (i.e. discrimination/differentiation not tied to some individual or collective notion of the good). The thrust of the argument is that, from a procedurally liberal standpoint, discrimination is intrinsically bad.

uniformity, Taylor's seamless movement between the concepts of non-discrimination and uniformity has theoretical justification. That is why Taylor can refer to the less accommodative species of liberalism as guaranteeing the "equal treatment of citizens" and protecting "against discriminatory treatment on a number of irrelevant grounds" in one instance, while also referring to it as "the uniform application of rules […] without exception" in another (Taylor 1994, 53-54, 60). Therefore, the interchangeability of non-discrimination and uniformity, as well as its theoretical foundation, is clear.

Non-Discrimination and Individual Rights

Second, the debates surrounding the Meech Lake amendment prove to be a good point of departure when examining the relationship between the concepts of non-discrimination and individual rights. During his exposition of the public debate, Taylor presupposes an analytic and practical separability between the concepts of individual rights and non-discrimination (or non-discrimination provisions). Such treatment of these concepts indicates, at least on the face of things, that there is no conceptual overlap between non-discrimination and individual rights. In other words, non-discrimination is not an individual right. However, Taylor's discussion of the centrality of non-discrimination to the institution of judicial review implies some degree of overlap, with non-discrimination provisions acting as a constitutional guarantee against unequal treatment in nearly every facet of law. Such a guarantee insinuates an overlap between these concepts; it implies a right to non-discrimination, or, positively stated, a right to equal treatment under the law. A scrupulous examination of the debates surrounding the Meech Lake amendment and the issue of cultural distinctness evinces this conceptual overlap and abets in unearthing the right to equal treatment under the law.

After delineating the two themes encapsulated in the Canadian Charter of Rights—(1) the embrace of a schedule or rights common to Western democracies and (2) the equal treatment of citizens under the law —Taylor notes the historical distinctness (the practical severability) of these two themes. Citing the American example, he shows that the entrenchment of a schedule of rights preceded the establishment of the principle of non-discrimination. It was not until the passage of the Fourteenth Amendment and the codification of the "equal protection clause" that the "theme of nondiscrimination became central to judicial review." Over time, however, the principle of non-discrimination rose in importance, arguably becoming the more dominant theme in the public mind (or at least as dominant) (Taylor 1994, 54). Practically speaking, then, non-discrimination and individual rights represent distinct themes; they have different pedigrees and are substantively disparate such that one theme is readily identifiable as more dominant (or at least as dominant). If individual rights and the principle of non-discrimination were indistinguishable, if there were an exact overlap between these concepts, then any discussion of one theme's dominance would be misplaced. One would simply speak of the growing dominance of individual rights, or of particular rights. Moreover, Taylor goes on to assert that collective goods such as cultural survival are problematic because they ultimately entail violations of one or both of these themes. That is to say, even if the goal of cultural survival and its attendant public policies do not violate one of the two themes—say, for example, no individual right is violated—it is possible for a violation of the other theme, the principle of non-discrimination, to occur (Taylor 1994, 53-55). "Even if overriding individual rights were not possible, espousing collective goals on behalf of a national group can be thought to be inherently discriminatory" (Taylor 1994,

55). Separating individual rights and the principle of non-discrimination for the purpose of analysis—i.e. rendering the concepts analytically separable—once again seems to intimate a lack of overlap between these concepts; there is at least enough conceptual differentiation to allow for the possibility of a particular action running counter to the norm of non-discrimination but not the norm of individual rights.

Although the evidence presented in the foregoing paragraphs appears to bolster the contention that these concepts are analytically and practically separable, one would be remiss not to assay these concepts in light of the central role that the principle of non-discrimination plays within the institution of judicial review. To understand fully what Taylor means when he speaks of the institution of "judicial review," it is imperative that one contextualize his remarks. When discussing the themes of non-discrimination and individual rights, Taylor focuses exclusively on the American example (as noted above). He posits that: "The Americans were the first to write out and entrench a bill of rights. In this sense, the Western world, perhaps the world as a whole, is following American precedent. It was after the Civil War […] and particularly with the Fourteenth Amendment, which called for 'equal protection' for all citizens under the laws, that the theme of nondiscrimination became central to judicial review"(Taylor 1994, 54). Thus, he examines judicial review through the American experience—noting that, with the ratification of the Fourteenth Amendment, the principle of non-discrimination (equal protection under the laws) began to play a central role in the process of judicial review.

In the United States, the process of judicial review is not simply a matter of the federal courts interpreting and applying laws when cases or controversies arise; since *Marbury* v. *Madison* (1803), the federal judiciary has possessed the authority to overturn

and countermand the actions of other governmental units if they do not pass constitutional muster. This is the essence of judicial review in the United States; it is a process with the potential for invalidating legislative and executive acts. Originally, prevailing constitutional interpretation circumscribed the role of judicial review and restricted its application to the policies and procedures of the federal government. Underlying this interpretive stance was the notion that the Bill of Rights had applicability against only the federal government and protected citizens from federal encroachments of enumerated rights, but not from impingements by other governmental actors (state and local governments, for example). However, with the adoption of the Fourteenth Amendment, the expansion of this review process to actions beyond the federal government came to fruition. For this reason, one should cognize the centrality of non-discrimination to the institution of judicial review in both qualitative and quantitative terms; quantitatively, the Fourteenth Amendment—specifically the Due Process Clause and the Incorporation Doctrine to which it gave birth—increased the scope of actions that the judicial branch of government could review.[10] Qualitatively, the enumerated requirement that citizens of the United States receive "equal protection of the laws" (the Equal Protection Clause) changed the demands of constitutionality; it brought the process of judicial review into conformance with the principle of non-discrimination.

[10] Taylor cites the First Amendment as an example of this expanded scope. Originally, the Establishment Clause of the First Amendment was enforceable only against the federal government and served to protect state and local arrangements from federal encroachment. In short, it protected against a federally established church, not state or locally established churches. As such, several states had established churches even after the ratification of the U.S. Constitution. However, after the ratification of the Fourteenth Amendment and the Incorporation Doctrine that its Due Process Clause spawned, the Judiciary began to apply First Amendment protections to all levels and units of government; the scope of reviewable actions dealing with the same qualitative issue, religion, expanded (Taylor 1994, 54).

By combining the aforementioned insights regarding the qualitative and quantitative changes ushered in by the ratification of the Fourteenth Amendment, one arrives at the following basic conclusions. The principle of non-discrimination began to play a primary or central role in the process of evaluating the constitutionality of actions at every level of government (pursuant to the Due Process Clause and Incorporation), and policies/procedures not jibing with the demands of non-discrimination faced the possibility of abrogation (in accordance with the Equal Protection Clause). In other words, since equality under the law/non-discrimination is realized through uniformity—by treating all persons, regardless of their particular religious, ethnic, cultural and racial identities and/or affiliations in the same fashion (equality as uniformity)—the principle of non-discrimination began to play a role in the process of judicial review insofar as it had the potential to deem unconstitutional those governmental actions deviating from uniformity in the application of law and/or principle. What is more, the centrality or primary nature of this role readily manifests once one understands how Taylor differentiates the principle of non-discrimination/equal protection from other elements in the schedule of rights. The implied argument seems to be that, because it applies to laws generically (it is purely procedural), equal protection affects the interpretation and implementation of other rights—requiring, for example, the uniform application of the Free Exercise Clause of the First Amendment. This controlling force is what sets it apart.

To be sure, if Taylor did not envision equal protection and non-discrimination as having this controlling force, it would be difficult for him to classify the United States as a procedurally liberal state. Remember, pursuant to the restrictive/procedural liberal paradigm, if a state is to realize the ideal of equal dignity, it must remain neutral toward

the "good" and not differentiate between insiders and outsiders; it must not discriminate. Discrimination is intrinsically bad. Granting the guarantee of equal protection under the laws—or, stated negatively, granting the guarantee of non-discrimination—ensures that such differentiation between insiders and outsiders does not occur; it is part and parcel of procedural liberalism. Moreover, if this guarantee is not only on par with other entries in the US Bill of Rights, but has controlling power over other rights and their application, it seems reasonable enough to conclude that non-discrimination/equal protection is a right. It is a protection constitutionally guaranteed to citizens; they are "entitled" to equal protection/non-discrimination just as they are "entitled" to freedom of speech and religious observance.[11] Therefore, Taylor's discussion of the centrality of judicial review shows there is conceptual overlap between equal protection/non-discrimination and individual rights, with the concept of individual rights subsuming equal protection/non-discrimination. The analytic and practical separation employed to expound these concepts is simply a method for underscoring the distinction and rank among rights within the procedurally liberal paradigm.

Invariant Rights versus Invariant Application of Rights

Finally, when describing procedural liberalism, Taylor oscillates between the language of invariant rights (universal principles) and the language of uniformity in the application of rights (i.e. the rules/regulations defining these individual rights). At first glance, this dual usage makes it difficult to determine which category Taylor considers invariant or uniform: individual rights or the rules/regulations that define these rights (or both). With a cursory read of the text, then, it is unclear if Taylor predicates his rejection

[11] *In Taking Rights Seriously* (1978), Ronald Dworkin uses the language of entitlements to differentiate rights from political goals.

of the restrictive liberal paradigm upon its embrace of an invariant schedule of individual rights, a uniform application of individual rights, or both. The most cogent reading of the text is, however, that Taylor rejects the procedural/restrictive liberal model not because of its support of invariant rights per se, but rather, because of its espousal of the invariant application of the rules and regulations that define these individual rights. The nuance between the language of invariant rights, on the one hand, and the language of uniformity in the application of regulations defining these rights, on the other, is critical for ascertaining this key feature of Taylor's critique. It may sound like a distinction without difference (i.e. between rights and the rules/regulations defining them), but because it is possible for a schedule of immutable rights to be applied in a non-uniform fashion—as in the case of exemptions to generally applicable laws—invariance in rights does not inexorably lead to uniformity in the application of rights (policy/procedures of implementation).

With a clear understanding of the distinction between invariant rights and uniformity in application of rights (invariant application)—as well as a sense of what follows logically if Taylor is critical of procedural liberalism for its embrace of invariant rights—one has the requisite background information to determine which category of invariance Taylor deems problematical. Answering this question not only helps one better comprehend Taylor's critique of procedural liberalism, but it also allows for a deeper understanding of the solution he propounds. To comprehend fully Taylor's solution and critique, it is fruitful to begin one's textual analysis at the point where he introduces the restrictive model of liberalism ("liberalism of equal dignity"). When Taylor introduces procedural liberalism, he conceives of it as a form of the "politics of

universalism" that endeavors to realize the equality of rights and entitlements among the citizenry. The principal goal of this model of politics is the eradication of political or social class—the elimination of hierarchy (Taylor 1994, 37). Moreover, "The liberalism of equal dignity seems to have to assume that there are some universal, difference-blind principles" (Taylor 1994, 43). Although the process of defining these principles remains ongoing and open to contestation, the underlying presupposition of "liberalism of equal dignity" is that only one theory is right—there can be only one set of universal, difference-blind principles (Taylor 1994, 43-44).[12] According to Taylor, the problem with forms of difference-blind liberalism ("liberalism of equal dignity"), as noted by proponents of a politics of difference, is that the so-called universal principles and rights for which these theories advocate often are representative of a particular cultural point of view. In its strongest and most damning form, the criticism leveled against "liberalism of equal dignity" is that it is embroiled in "a kind of pragmatic contradiction, a particularism masquerading as the universal" (Taylor 1994, 44).

In examining these incipient descriptions of the restrictive model of liberalism, criticism appears to focus on the impossibility of deriving universal principles that are not themselves reflective of a particular cultural viewpoint. From this critical vantage point, the invariant rights of restrictive/procedural liberalism are problematic because they, too, are artifacts of a particular culture. In accordance with this perspective, then, the category of invariant rights is problematical. Although this nascent presentation and discussion of the restrictive paradigm of liberalism includes language critical of invariant rights, one must be cognizant of the fact that Taylor is presenting a basic expository

[12] Taylor cites present-day examples of this species of liberalism. He cites, among others, John Rawls, *A Theory of Justice*, and Ronald Dworkin, *Taking Rights Seriously*.

account of procedural liberalism and some of its critics (i.e. specifically, proponents of a politics of difference); he is not expounding his own critique and alternative position. His critique and alternative position begin to take shape during his discussion of the debates surrounding the Meech Lake amendment. For example, when trying to assess the homogenizing character of the "liberalism of equal rights" (restrictive/procedural liberalism), Taylor states, "The notion that any of the standard schedules of rights might apply differently in one cultural context than they do in another…is considered quite unacceptable" (Taylor 1994, 52). Continuing in a similar vein, Taylor asserts, "There is a form of the politics of equal respect, as enshrined in the liberalism of rights, that is inhospitable to difference, because (a) it insists upon uniform application of the rules defining these rights, without exception, and (b) it is suspicious of collective goals" (Taylor 1994, 60). Given its inability to accommodate difference through legal distinction and variance, this strain of liberalism has a homogenizing effect, forcing individuals into a cultural straight jacket of sorts (Taylor 1994, 61).

To remedy the homogenizing effects of this form of liberalism, Taylor does not proffer a wholesale rejection of uniform individual rights; rather, he champions a more hospitable and accommodating variant of liberalism—one that differentiates between immutable rights, such as *habeas corpus*, and "the broad range of immunities and presumptions of uniform treatment that have sprung up in the modern culture of judicial review." As noted above, under this more accommodating variant of liberalism, the state does not presumptively dismiss collective goals when they conflict with the principle of non-discrimination/equality under the law (uniform treatment). Instead, when conflicts arise, the state weighs the significance of pursuing a given collective goal (e.g. cultural

survival) against the benefits and burdens that accrue from particular forms of uniform treatment. In other words, the state weighs the importance of pursuing a given collective goal against the benefits and burdens that follow from adherence to the principle of non-discrimination, and, on certain occasions, the collective goal takes precedence (Taylor 1994, 61).

In the end, Taylor espouses a paradigm of liberalism that, while still giving sanction to an invariant schedule of rights, is nonetheless flexible enough to accommodate collective pursuits of the "good," such as cultural survival (Taylor 1994, 61). Therefore, after comparing the categories of invariant rights and invariant application of rights, it is at once clear that Taylor deems the invariant or uniform application of rights (i.e. the principle of non-discrimination/equality under the law) the problematic category. Both the solution propounded and the language employed to characterize the inhospitable nature of procedural liberalism bespeak a repudiation of the "application of the rules defining these rights, without exception," as opposed to a rejection of invariant rights, per se (Taylor 1994 60). As such, Taylor's criticism of procedural/restrictive liberalism focuses on the theory's inability to deviate from uniformity in the application of rights, not its espousal of a schedule of uniform individual rights.

Non-Discrimination and Uniform Application as "Privileges and Immunities"—not Individual Rights

In propounding an alternative model of liberalism that rejects the uniform application of rights, Taylor's solution maintains fidelity to a scheme of invariant individual rights while also creating space for collective pursuits of the "good" that

require differential treatment under the law. Since the principle of non-discrimination (equality under the law) is realized through the uniform application of rules/regulations, it follows that this differential treatment—this deviation from uniformity—runs counter to the principle of non-discrimination. At its base, then, Taylor's solution represents a rejection of the principle of non-discrimination; it indicates a jettisoning of the procedurally liberal understanding/interpretation of equality under the law (non-discrimination)—an interpretation that does not allow for exceptions to uniformity in the application of individual rights or in the service of collective pursuits of the good. Because Taylor's work stands as a repudiation of the principle of non-discrimination/equality under the law, this principle obviously cannot serve as an invariant, fundamental right within the alternative liberal model (as it did in the procedurally liberal model).

Instead of conceiving of equality under the law/uniformity as a "fundamental liberty" or right within the alternative paradigm (as it was conceived in the procedural/restrictive liberal paradigm), Taylor theorizes it as a privilege or immunity that, while important, may be infringed or rescinded in pursuit of public policy goals. In Taylor's words, "One has to distinguish the fundamental liberties, those that should never be infringed […] from privileges and immunities that are important, but that can be revoked or restricted for reasons of public policy" (Taylor 1994, 59). Taylor goes on to illuminate the specific privileges and immunities from which fundamental rights must be distinguished, arguing that those championing the more accommodating strain of liberalism must "distinguish these fundamental rights from the broad range of immunities and presumptions of uniform treatment that have sprung up in the modern culture of

judicial review" (Taylor 1994, 61). Thus, one must differentiate fundamental liberties such as due process, freedom of religion, and freedom of speech—all of which Taylor deems inviolable—from the "immunities and presumptions of uniform treatment" that pervade the modern institution of judicial review; for uniform treatment, in contradistinction to these fundamental rights, may be assailed in pursuit of a public policy goal (Taylor 1994, 59-61).

Invoking the coterminous relationship among equal protection, non-discrimination, and uniform treatment yields a different formulation of this conclusion; mainly, one must differentiate the privileges and immunities of equal protection and non-discrimination from the fundamental liberties. Equal protection/non-discrimination, while having applicability and importance (as noted above), is not a fundamental, entrenched right within Taylor's alternative model of liberalism. Moreover, if equal protection/non-discrimination is not a fundamental right (as it is in the procedural model), it cannot serve as a constitutional standard to which laws interpreting and applying individual rights must conform; it cannot serve as a necessary condition of constitutionality as it purportedly did in the post-Fourteenth-Amendment United States. Therefore, in addition to creating space for public policy goals (collective pursuits of the "good") that do not jibe with the principle of non-discrimination, the alternative model allows for deviation in the interpretation and application of the rules and regulations defining individual rights. In accordance with the alternative liberal model, the state may apply individual rights in a non-uniform fashion; it creates space such that "standard schedules of rights might apply differently in one cultural context than they do in another" (Taylor 1994, 52). "There will be variations when it comes to applying the

schedule of rights" (Taylor 1994, 62). If equal protection/non-discrimination is not tantamount to a fundamental right, what role does it play within the alternative model? Why is equal protection/non-discrimination still important in the alternative liberal model? The examples of voting rights and cultural survival aptly illustrate the importance of uniform treatment within the alternative liberal paradigm.

Voting is unequivocally a fundamental, invariant right. It is something to which all citizens meeting certain minimal requirements should have ready access. In the United States, the consideration of certain irrelevant particularities, such as race, sex, religion, ethnicity, and culture has no place in determining who has access to the franchise. As such, voting in the US appears to comport with the principle of non-discrimination/equal protection under the law. In other words, the exclusion of irrelevant particularities (race, sex, culture, religion, etc.) from considerations of who has access to the franchise satisfies the criterion for equal protection/non-discrimination, thus ensuring the state treats all persons, irrespective of their particular identities and affiliations, in the same fashion. In this way, then, voting is uniform, equal and invariant. Given the sordid history of race-based exclusions to the franchise in the United States, it is especially difficult for one to inveigh against the omission of such particularities in determinations of access to the vote. Equal protection/non-discrimination, as conceived within the procedurally liberal paradigm, appears to have some degree of legitimacy in this context. For example, the Voting Rights Act of 1965 represented an instantiation of the principle of equal protection/non-discrimination. Section two of the original act proscribed the use of race as a qualification for voting and forbade the use of race-based procedures and practices to deny implementation of the Fifteenth Amendment of the US Constitution

(Voting Rights Act 1965, 437). The race-neutral measures of the Voting Rights Act had profound results—reversing trends of Jim-Crow era disenfranchisement by removing historic barriers to black voter registration and turnout (King and Smith 2011, 170). Thus, in determining the inclusiveness of the franchise, there exists a clear role for equal protection/non-discrimination.

Even with increased black participation in the franchise, however, the Voting Rights Act did not increase levels of black representation in Congress (King and Smith 2011, 170). It is unsurprising that the initial measures of the Voting Rights Act did not engender increases in the number of black elected officials. After strict enforcement of voting rights rendered traditional mechanisms of disenfranchisement obsolete (e.g. literacy tests), several state and local governments made changes to their electoral laws. These changes were race-neutral on the surface—and thus ostensibly compliant with the Voting Rights Act— but they had the effect of diluting the black vote (King and Smith 2011, 172). This led to calls for an interpretation of the Voting Rights Act that not only demanded the proscription of racially based mechanisms of disenfranchisement, but one that also outlawed myriad forms of vote dilution. The Supreme Court heeded these calls in *Allen* v. *State Board of Elections* (1969) and struck down measures used to diminish black political power, such as the adoption of at-large electoral arrangements and the replacement of elected officials with politically appointed ones. The Court embraced an expansive interpretation of the right to vote in this case, contending that the Voting Rights Act applied both to explicit race-based denials of the right to vote, as well as to inexplicit, subtle mechanisms that "have the effect of denying citizens their right to vote

because of their race" (*Allen* v. *State Board of Elections* 1969, 565; King and Smith 2011, 173).

Although the Court employed this broad reading of the Voting Rights Act (VRA) to countermand electoral changes in Mississippi and Virginia, it did not reach any determinations regarding the discriminatory intent or effect of the electoral changes under examination. Moreover, the Court did not give any clear guidance as to whether the presence of discriminatory intent—however subtle and masked by subterfuge that intent may be—is a necessarily condition for invalidation of a law under the VRA. The chief question before the Court was whether section five of the VRA, which prohibits changes in voting qualifications and/or procedures unless enacted in accordance with specific approval processes, applied to the cases under consideration (*Allen* v. *State Board of Education* 1969, 550). The states involved in this case contended that section five applied only to voting registration requirements and not to other changes in electoral regulations, such as rules relating to appointive and elective offices (*Allen* v. *State Board of Education* 1969, 564). The Court disagreed with the states' assessment and countered that the VRA supported an understanding of the right to vote as one that subsumed "all action necessary to make a vote effective" (*Allen* v. *State Board of Education* 1969, 565-566). This broad interpretation of the right to vote formed the basis for the court's conclusion that section five applies to "any state enactment which altered election law of a covered state in even a minor way" (*Allen* v. *State Board of Education* 1969, 566). Although this broad interpretation imposes the "pre-clearance" requirements of section five of the VRA upon covered states, it is not necessarily out of step with the principle of non-discrimination/equal protection under the law as enshrined in procedural liberalism.

Since the Court did not reach any determinative conclusions regarding the role of discriminatory intent in *Allen*, it is not clear that subjecting election law changes to the heightened scrutiny of the US Attorney General and/or US District Court for the District of Columbia does anything more than require the transcendence of facial analysis of legislation for the purpose of unearthing discriminatory intent (i.e. violations of the principle of equality under the law/non-discrimination).[13]

The Court brought greater clarity to the issue of discriminatory intent in *Mobile* v. *Bolden* (1980). In *Mobile* v. *Bolden*, the question before the Court was whether the at-large election of city council members in the City of Mobile, AL, diluted the vote of black citizens in violation of section two of the VRA and the Fourteenth and Fifteenth Amendments (*City of Mobile* v. *Bolden* 1980, 58). Writing for the majority, Justice Stewart asserted that section two of the VRA was nothing more than a restatement and elaboration of the racial prohibitions of the Fifteenth Amendment (*City of Mobile* v. *Bolden* 1980, 61). As such, the Court shifted its focus from questions of statutory violations to an examination of alleged constitutional infringements of the Fourteenth and Fifteenth Amendments. With the Fifteenth Amendment, an examination of relevant precedent led the Court to conclude that "racially discriminatory motivation" must be present in order to offend the voting protections espoused in the Fifteenth Amendment (*City of Mobile* v. *Bolden* 1980, 62). Similarly, the court reasoned that legislation offends the Equal Protection Clause of the Fourteenth Amendment only if "purposeful discrimination" exists (*City of Mobile* v. *Bolden* 1980, 66). Therefore, since section two

[13] In *White* v. *Register* (1973), the Supreme Court used such a process to go beyond a superficial facial analysis of a race-neutral statue to discern discriminatory intent. Just as in *Allen*, however, the Court did not explicate a hard-and-fast rule governing discriminatory intent.

of the VRA is nothing more than an extension of the Fifteenth Amendment, it is clear that the statute interdicts only intentional/"purposeful" discrimination and jibes with the procedurally liberal principle of non-discrimination/equality under the law, as well as the Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. In other words, simply showing the "racially disproportionate impact" of electoral systems is not enough, in and of itself, to traduce the VRA.

All of this changed with the VRA's extension in 1982. Much to the chagrin of conservative Republicans—and in many ways following as a direct result of the ruling in *Mobile* v. *Bolden*—the 1982 extension of the VRA spelled out an explicitly "results oriented" measure of equal voting participation among the populace (King and Smith 2011, 175-176). Specifically, the amended section two allowed for levels of electoral success among members of a "protected class" to be a factor of consideration when determining if the right to vote had been abridged "on account of race or color." However, the amendment went on to specify that this outcome-oriented standard may be applied only to the extent that such considerations were not misconstrued as mandating proportional representation for members of a "protected class" (Voting Rights Act 1982, 134). This standard would thus allow for judicial challenges to voting schemes based on electoral results, and showing it was difficult, if not impossible, for members of a protected class to gain office—irrespective of discriminatory intent—would likely imperil those systems under scrutiny. One way to circumvent such challenges, however, was through the purposeful creation of "majority-minority" districts (King and Smith 2011, 176). In fact, this is just what happened. State legislators, emboldened by the amended VRA extension and favorable judicial rulings, used the 1990 census to draw

several Congressional, state and local "majority-minority" districts (King and Smith 2011, 179-181). And although later judicial rulings would curtail the deliberate creation of such districts, this brief sketch of the history of "majority-minority" districts in the US illustrates how voting rights in the US evolved from a system that mandated uniform treatment/non-discrimination (under the 1965 VRA) to one that went beyond this singular guarantee of non-discrimination and required certain race-based, substantive outcomes to uphold the right to vote (under the amended VRA of 1982).

This transmogrification of the right to vote in the US shows how equal protection has relevance even if it is not a fundamental, entrenched right. The notion that racial qualifications should have no role in determining access to the franchise is indisputable; it is a settled question that the liberal state should employ race-neutral principles when determining access to the franchise. On this level, then, the principle of non-discrimination holds. The state should not treat insiders and outsiders differently, and this guarantee of non-discrimination was the purported goal of the Voting Rights Act of 1965. However, if the equality under the law is not an entrenched right, it cannot serve as a constitutional standard to which all laws interpreting and applying individual rights must conform. In other words, there is space for deviation in the interpretation and application of the rules and regulations defining individual rights (as in the alternative model of Taylor). As such, one may reasonably interpret "majority-minority" districts and the race-conscious decision-making they require as a deviation from uniformity in the rules and regulations defining the right to vote. Doing so does not augment the right to vote—as it still applies to all citizens meeting minimal qualifications—but it changes the application of the laws employed to implement that right. Therefore, in this example,

the principle of non-discrimination/equality under the law fits the description of a privilege or immunity that, however important, the liberal state may jettison in pursuit of substantive—as opposed to strictly procedural—equality. In short, the state deviates from the uniform application of the rules and regulations defining the right to vote in the name of substantive equality; such equality requires non-uniform application of the rules and regulations defining the right to vote. To extrapolate from this case, it is fair for one to conclude that, under this alternative liberal vision ("Liberalism II"), it is perfectly acceptable to offer a substantive, results-based vision of equality as a corrective to majority domination—regardless of whether this corrective plays out in the realm of religion (exemptions to generally applicable laws) or racial politics (e.g. "majority-minority" districts).

Outside the realm of individual rights, concern with majority domination may lead to collective pursuits of the "good" such as cultural survival. Recall that non-discrimination/equal protection is a privilege or immunity that, while important, may be infringed or rescinded in pursuit of public policy goals (Taylor 1994, 59). Even under such circumstances, however, uniformity in application/non-discrimination still plays an important role, just as it does within the realm of individual rights. When describing the more accommodating variant of liberalism, Taylor argues that citizens "are willing to weigh the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favor of the latter" (Taylor 1994, 61). Although Taylor is not explicit in describing the specific role that uniformity plays in dealing with matters of the collective "good," his language on balancing is telling and allows one to envisage situations wherein uniformity may be advantageous when compared to non-

uniform policies that discriminate (i.e. that treat insiders and outsiders differently). For example, uniformity/non-discrimination's ability to stave off divisiveness and effect political cohesion among cultural groups could be the source of its importance or value. Alternatively, providing a uniform language for commercial activity and intercourse might be a source of value or importance. Under such conditions, legislators would have to examine these and other justifications for uniformity/nondiscrimination and decide whether the collective good of cultural survival should take precedence over the good that ensues from the uniform application of law. Here, the circumstantial nature of policy outcomes—i.e. the fact that one cannot derive outcomes in an *a priori* fashion, but must instead reach them through a balancing exercise—allows uniformity/non-discrimination to maintain an important role while simultaneously acknowledging the legitimacy of non-uniform policy outcomes. In short, allowing the collective goal of cultural survival to trump the uniform application of law does not entirely delegitimize uniformity in the application of rules/laws.

In the examples above, recasting the role of non-discrimination/uniformity has far-reaching effects for liberal theory. Theorizing non discrimination/equality under the law as a privilege or immunity, as opposed to an individual right, moves this species of liberalism beyond the realm of pure procedure and into the realm of substance. With individual rights (e.g. voting and free exercise) and pursuits of the good falling outside the domain of rights (e.g. cultural survival), there was concern with a specific substantive outcome—one that procedure itself (i.e. uniform application of law/the principle of non-discrimination) could not vouchsafe (Taylor 1994, 61). For example, the inability of procedure to act as a guarantor of substantive outcomes—specifically, the substantive

good of cultural survival—impelled proponents of the "distinct society clause" (the Meech Lake amendment) to press for its adoption. What is more, Taylor's exegesis of the controversy surrounding the Meech Lake amendment, as well as his discussion of the controversy's philosophical and political roots, makes it clear that there are two disparate and irreconcilable modes of liberalism at work here (Taylor 1994, 60). On the one hand, there is the restrictive, procedural variant of liberalism, which derives from the Anglo-American culture of judicial review (specifically the United States). On the other hand, there is the more accommodating variant, which sometimes deviates from the principle of non-discrimination and uniform application in pursuit of a collective good (e.g. cultural survival) and/or an understanding of individual rights that recognizes minority disadvantage. The former strain of liberalism champions a schedule of individual rights, demands uniformity in the application of laws and regulations that specify these rights, and does not allow special exemption or deviation from the application of these laws. It was the prospect of deviation or variance in the interpretation and application of the Charter of Rights to Quebeckers—the prospect of the Charter's subservience to collective goals—that opponents of the "distinct society clause" found problematical. To opponents, such collective goals required a check, a limitation, which they saw the Charter of Rights as effectively providing through its relative priority. In contradistinction, Quebeckers perceived the championing of this form of procedural liberalism—i.e. one that would give precedence to the Charter over collective concerns—as thrusting upon them a form of liberalism that could not accommodate Francophone culture and, as such, would result in the eventual forfeiture of their unique identity (Taylor 1994, 60). In sum, the inflexibility and rigidity of procedural liberalism rendered

it unaccommodating in the face of demands for the recognition of difference, especially demands for the perpetuation of distinct cultural values (culture survival through recognition of cultural difference) (Taylor 1994, 61).

Although there are important differences between the cases cited above, all are clear instantiations of the more accommodating strain of liberalism. With the 1982 amendments to the Voting Rights Act and the Meech Lake amendment, there is a deviation from the uniform application of law—a movement away from the paradigm of equality as uniformity—and a reconfiguration of the principles of nondiscrimination and equality such that true equality (e.g. voting rights) and the realization of certain societal goods (e.g. cultural survival) requires the recognition of particularity and difference. Consequently, a violation of the principle of non-discrimination occurs. Recall that the principle of nondiscrimination, as understood within the restrictive (or procedural) model of liberalism, requires the state to treat every individual, regardless of his/her particular affiliations/identities, in the same fashion; it is coextensive with equality as uniformity. Thus, the singling out of specific persons for differential treatment because of their religious and/or cultural affiliations represents an unambiguous violation of the principle of non-discrimination; it requires discrimination, albeit in an innocuous, non-invidious form. In other words, arguing for religiously based dispensations from general laws, race-conscious voting laws, and culturally accommodating forms of judicial review requires a recognition of particularity that runs counter to the principle of nondiscrimination within the procedurally-liberal, universalist paradigm. This further underscores the tension between the "politics of universalism" and the "politics of

difference," as the latter is willing to part with the uniform application of rules/laws to realize its ends, while the former is not open to such variance (Taylor 1994, 44).[14]

Michael Walzer's "Two Liberalisms"

Continuing in a similar vein, Michael Walzer, in his comment on Taylor's essay, further elucidates this tension between the "politics of universalism" and the "politics of difference." Focusing his attention on the two models of liberalism explicated in Taylor's essay—the accommodative and inhospitable variants—Walzer employs a similar analytical framework to interpret liberalism in the United States and to discern the theoretical and practical similarities, divergences, and complementarities that follow from

[14] To avoid terminological confusion here, it is necessary to expand upon Taylor's classificatory scheme. The "politics of universalism" and the "politics of difference" are two broad categories that subsume various political modes and theories. For example, Kantian-inspired procedural ("difference-blind") liberalism and Rousseauian-style republicanism each serve as examples of the "politics of universalism." Neither deviates from the uniform application of law, and both forms of universalism foreclose opportunities for the consideration of relevant differences. As such, this brand of politics is homogenizing—regardless of whether it derives from the transcendentalism of Kant or the republicanism of Rousseau. Several textual clues lead to this particular hermeneutical stance. First, Taylor uses the terms "politics of equal dignity" and "politics of universalism" interchangeably: "With the move from honor to dignity has come a politics of universalism, emphasizing the equal dignity of all citizens, and the content of this politics has been the equalization of rights and entitlements. What is to be avoided at all costs is the existence of 'first class' and 'second-class' citizens" (Taylor 1994, 37). Thus, there is an explicit nexus between "the politics of universalism" and the attempt to ensure the equal dignity of all citizens (the "politics of equal dignity"). Moreover, Taylor goes on to affiliate the political philosophies of Rousseau and Kant with the "politics of equal dignity." In Taylor's words, "The politics of equal dignity has emerged in Western civilization in two ways, which we could associate with the names of two standard-bearers, Rousseau and Kant." From the textual evidence above, then, one can reasonably conclude that the "politics of universalism" and the "politics of equal dignity" are logically equivalent (and thus fungible terms), and that Rousseau and Kant—given their express affiliation with the "politics of equal dignity"—also espouse a "politics of universalism." The politics of difference also shares these familiar themes of equal respect and universalism. According to Taylor, "In the case of the politics of difference, we might also say that a universal potential is at its basis, namely, the potential for forming and defining one's own identity, as an individual, and also a culture. This potentiality must be respected equally in everyone" (Taylor 1994, 42). However, the commonality between these two models inheres only in this universal basis. "These two modes of politics […] both based on the notion of equal respect, come into conflict. For one, the principle of equal respect requires that we treat people in a difference-blind fashion […] for the other, we have to recognize and even foster particularity" (Taylor 1994, 43). The accommodative, hospitable variant of liberalism straddles the border between the two political modes and incorporates elements of the "politics of difference" and the "politics of universalism." Thus, the borders demarcating these categories are permeable, and they allow for one "to distinguish the fundamental liberties, those that should never be infringed and therefore ought to be unassailably entrenched, on the one hand, from privileges and immunities that are important, but that can be revoked or restricted for reasons of public policy […] on the other" (Taylor 1994, 59).

these paradigms of liberalism. Walzer begins by summarizing the key features of each paradigm, referring to the restrictive, procedural variant and the accommodative, difference-sensitive variant as "Liberalism 1" and "Liberalism 2" respectively:

> (1)The first kind of liberalism ("Liberalism 1") is committed in the strongest possible way to individual rights and, almost as a deduction from this, to a rigorously neutral state, that is, a state without cultural or religious projects or, indeed, any sort of collective goals beyond personal freedom and the physical security, welfare and safety of its citizens. (2) The second kind of liberalism ("Liberalism 2") allows for a state committed to the survival and flourishing of a particular nation, culture, or religion, or of a (limited) set of nations, cultures and religions—so long as the basic rights of citizens who have different commitments or no such commitments at all are protected (Walzer 1994, 99).

Walzer, in his delineation of the two strains of liberalism, highlights some important distinctions; namely, the unflinching commitment to neutrality and individual rights renders "Liberalism 1" impotent in the face of demands for collective goals that transcend the basal Hobbesian goods of physical welfare and security. Unless done in pursuance of one of these basic collective needs, deviations from "rigorous neutrality" are without theoretical sanction.

Obviously, "Liberalism 2" does not maintain the same degree of rigidity when collective goals come into conflict with the principle of nondiscrimination (Walzer 1994, 99). For example, as mentioned in the exegesis of Taylor's essay above, under the more accommodating variant of liberalism—"Liberalism 2"—the state does not presumptively dismiss collective goals when they come into conflict with the principle of nondiscrimination (i.e. when they come into conflict with "Liberalism 1"). Rather, in cases of conflict, the state examines the significance of pursuing a given collective goal (e.g. cultural survival) against the benefits and burdens that accrue from the uniform

application of rights (Taylor 1994, 61). Thus, "Liberalism 2" leaves open the possibility that a given collective goal may take precedence over the principle of nondiscrimination and the uniform application of rights (Walzer 1994, 99-100). It leaves open the possibility—but does not guarantee *a priori*—that a given collective goal will take precedence over the uniform application of rights. Thus, consistent with this approach is the idea that exponents of the more accommodative model, "Liberalism 2," will sometimes choose the uniformity and rigidity of "Liberalism1" over the hospitality and flexibility of "Liberalism 2." In other words, the circumstantial orientation of "Liberalism 2" creates a situation wherein accommodation of a collective goal ("Liberalism 2") is not overdetermined, and the preferred option is sometimes "Liberalism 1" (Walzer 1994, 100).

The continuities between the works of Walzer and Taylor are not limited to the theoretical paradigms they employ; Walzer arrives at similar empirical conclusions regarding the United States and the species of liberalism it embodies. According to Walzer, the United States typifies "Liberalism 1" because of its doctrinal commitment to "rigorous neutrality" and the wholesale rejection of collective religious and cultural endeavors that follows (Walzer 1994, 99-102). "The first sort of liberalism…is the official doctrine of immigrant societies like the United States" (Walzer 1994, 101). Although, doctrinally speaking, the United State exhibits a steadfastly principled commitment to liberal neutrality, "state neutrality is often hypocritical, always (for reasons Taylor makes clear) incomplete" (Walzer 1994, 102). Focusing on the section of text where Taylor discusses the hypocritical or disingenuous nature of liberal neutrality allows one to decode Walzer's parenthetical and determine the purported reasons for

neutrality's incompleteness. The theoretical precepts of procedural liberalism—specifically its rigorous commitment to neutrality among competing visions of the "good"—ensure there exists in perpetuity an unbridgeable chasm between doctrinal commitment and governmental practice. For in pursuit of rigorous neutrality toward divergent visions of the "good," the procedurally liberal state endeavors to provide a "neutral meeting ground for all cultures"—a theoretical demand that is dependent upon public and private spheres of action and the relegation of irreconcilable differences among individuals and groups to the private sphere (religious differences are limited to private, not public, consideration, for example). Because the procedurally liberal state itself embodies a spectrum of cultural commitments (it is not rigidly procedural), it cannot—strictly speaking—provide a neutral "meeting ground for all cultures" and therefore represents certain cultural commitments that are inhospitable to, and at antipodes with, cultural commitments that do not jibe with the liberal model. In Taylor's words, "All of this is to say that liberalism can't and shouldn't claim complete cultural neutrality" (Taylor 1994, 62).

Although they employ disparate terminology, it is clear that both Taylor and Walzer conclude the US is a rigorously neutral state—an archetype of "Liberalism 1" (Taylor 1994, 56; Walzer 1994, 102). For example, Walzer primarily makes use of the term "rigorous neutrality" when connoting the hallmarks of "Liberalism 1," whereas Taylor uses the terms non-discrimination and uniformity to express the distinguishing characteristics of "Liberalism 1." "Rigorous neutrality" and equality as uniformity are interrelated, however, as abstracting from the particulars of identity—a distillation process of sorts—ensures there are no relevant distinctions among individuals upon

which to predicate differential treatment (at least in theory). The procedurally liberal state achieves equality through viewing all citizens in their abstract sameness, irrespective of particular group affiliations and/or identities; it is neutral toward "difference," and this neutral stance toward particular affiliations and/or identities means that the raw materials for differentiation—i.e. non-uniform treatment—are not present. Thus, equality as uniformity/nondiscrimination is simply a corollary to viewing citizens in their abstract sameness; it follows inexorably from neutrality toward "difference."

Interestingly, the conclusions of Taylor and Walzer derive not from an examination of specific policy outcomes or governmental practice, but rather from an interpretation of the doctrinal commitments of the United States. However, neither Taylor nor Walzer offers a great degree of empirical evidence in support of their conclusions. The main piece of corroboratory evidence proffered is the fact that "Liberalism 1"—i.e., the variant of liberalism that prioritizes individual rights above collective concerns—has its intellectual roots in the Anglo-American world, specifically the United States. According to Taylor, this origin is unsurprising since scholars propounding arguments for the procedurally liberal state have done so primarily within the confines of the constitutional doctrines of judicial review and, consequently, within a political culture that increasingly favors textual constitutional interpretation over democratic political processes (Taylor 1994, 56-58). It is important to note here that Taylor's assertion is not simply a statement about the intellectual archaeology of "Liberalism 1"; it is, in fact, a more comprehensive statement on the nexus between theory and practice—between the theoretical ideals of a particular strain of liberal thought and practical politics in the United States. In other words, it is not fortuitous that

"Liberalism 1" finds its origin in a country that holds the constitutional doctrine of judicial review in higher regard than the ordinary democratic processes of majoritarian politics; it is no accident that this development occurred in what Michael Sandel labels "the procedural republic" (Taylor 1994, 58; Sandel 1984, 93-94; 1996, 4). To be sure, Taylor does not delineate an explicit causal relationship between academic theory and the practical politics of the prototypically liberal state. However, there is undoubtedly an implied nexus between the culture and institutions of judicial review in the United States and the academic writing emanating from these environs.

Will Kymlicka's Liberal Multiculturalism

The complex of theory and practice that comprises the "procedural republic" is also evident in the political-philosophical writings of Will Kymlicka. The theoretical point of departure for Kymlicka is the fundamental principles of liberal political theory—the "principles of individual freedom"—and their necessary connection with a particular cultural form: what Kymlicka labels "societal culture" (Kymlicka 1995, 75). "Societal culture" refers primarily to the cultural forms of national groups; it subsumes private and public spheres of action and renders meaningful "the full range of human activities." What is more, societal cultures are geographically circumscribed and founded upon a common language (Kymlicka 1995, 76). The liberal ideal of individual freedom, which Kymlicka defines as the freedom to choose one's life plan (a choice among ends/competing visions of the good), is inextricably bound up with, and presupposes, this notion of "societal culture" (Kymlicka 1995, 80). For example, freedom may be tantamount to a choice among ends, but one can make a meaningful choice among competing ends only if he/she has the ability to interpret the value or worth of certain

practices. Individuals come to understand the value or worth of certain practices or ends through the denotations and connotations "societal culture" affixes to them; valuation comes about through tapping into, or having knowledge of, the communal lexicon of "tradition and convention" that undergirds social procedures, practices and institutions. In other words, one must have a firm grasp of the "language and history which constitute that vocabulary" in order to render decisions on the value of actions, practices and experiences (Kymlicka 1995: 83). Therefore, if individuals in the liberal state are to exercise meaningful choice, if they are to exercise robust individual freedoms, they must have—in addition to the normal liberal rights of conscience, expression and association—guaranteed access to societal culture. In this way, "societal culture" operates on two levels: it furnishes the available options from which individuals choose (the choice set), and it provides the prism of meaning though which choices derive value (Kymlicka 1995, 84).

Although it is clear that access to a "societal culture" is necessary to furnish available options and render choice meaningful, this says nothing about a guarantee of access to one's particular "societal culture." Is access to one's particular "societal culture" something that an individual or group can reasonably demand from the state? Kymlicka, after noting the extreme difficulty involved in leaving one's "societal culture," answers in the affirmative. In other words, the conclusion drawn here goes beyond the simple need for guaranteed access to "society culture" in general and instead demands that individuals have access to their particular societal cultures (Kymlicka 1995, 86). This conclusion, while helping to flesh out the social presuppositions of individual freedom, does nothing to reveal the political arrangements and procedures required to

guarantee access to one's particular "societal culture." For this reason, there is disagreement even among liberals who recognize the interrelation between individual freedom and culture, and this has engendered a bifurcation of culture-conscious liberals. On the one hand, there are those who support a regime of common citizenship rights and a standing policy of "benign neglect" (analogous to equality under the law in Taylor); on the other, there are those who support a regime of "group-differentiated rights" and a public policy that recognizes cultural difference and particularity (Kymlicka 1995, 107-109).

Those who contend that a system of universal, invariant individual rights—what Kymlicka labels "the common rights of citizenship"—adequately protects access to one's particular culture argue from a voluntaristic-associational perspective. They envisage the right to associate freely—to join associations or groups of one's choosing—as protecting access to particular cultures and ensuring the perpetuation of a diverse marketplace of cultural groups and life pursuits (Kymlicka 1995, 107). To realize this freedom of association, however, it is crucial that the state remain neutral with respect to the "good" and not bolster the efforts of any particular group. Such neutrality ensures that those groups who lose adherents and face an existential threat do so because they do not furnish individuals with a valuable way of life. In short, neutrality guarantees that individual choice—not state support (or lack thereof) or oppression/discrimination—is the determinant of group longevity. Here, the state exhibits "benign neglect" toward cultural groups—not intervening in the decisions of individuals and the marketplace of

associations (Kymlicka 1995, 107).[15] While this voluntaristic system may lead to extinction of certain groups, this occurrence, however lamentable, is not unjust or unfair. It is simply the result of individuals rejecting an unworthy way of life through voluntary action. Conversely, allowing the state to prop up groups and support them through policy would undermine this voluntarist system and value the choices of some individuals over others (Kymlicka 1995, 107-108). Thus, "giving political recognition or support to particular cultural practices or association is unnecessary and unfair" (Kymlicka 1995, 107).

Kymlicka finds this view problematic and ultimately untenable. This is because the state must inevitably make choices that favor some cultural groups over others when it renders decisions on languages, territorial boundaries, public symbols and holidays. In short, "rigorous neutrality" on the part of the liberal state is impossible (similar to Taylor and Walzer above), and these non-neutral decisions ultimately favor majority cultural groups and put minorities at a disadvantage. This is to say that the state is neither neglectful (i.e. non-interventionist) nor benign when it comes to decisions affecting cultural groups and associations. What is more, the "common rights of citizenship" do nothing to mitigate the impact of this favoritism on minority groups, as these common

[15] For a theory that epitomizes "benign neglect," see Chandran Kukathas (1998) "Liberalism and Multiculturalism: The Politics of indifference." The overarching argument is that multiculturalism does not create a serious problem for liberal political theory, as liberalism is, at its base, a variant of pluralism; it represents the most viable reaction to the existence of multifarious cultural, moral, and religious attachments among individuals. Since the state cannot and should not eliminate the social discord, disunity, and competition among groups arising from said attachments—thus inducing a permanent harmony between individual and communal interests—its institutions endeavor to mitigate, rather than eradicate, the impact of discord and division though indifference to these particular attachments (Kukathas 1998, 690). To that end, the liberal state simply establishes and maintains a system of law within which individuals and groups have the ability to pursue their ends peacefully. Individuals have the freedom to join and exit associations, but the state does not take an interest in these particular associations or pursuits; "it is indifferent to particular human affairs or to the particular pursuits of individuals and groups" (Kukathas 1998, 691).

rights—e.g. freedom of association—simply require that the same rules apply to all individuals and groups within extant boundaries already favoring majority groups. Thus, something greater than the basic rights of citizenship is required to ensure equality among different groups; mainly, true equality among groups requires group specific or group differentiated rights (differential treatment), and Kymlicka sets out to develop a bona-fide theory of cultural group rights (Kymlicka 1995, 108).

In developing a thoroughgoing paradigm of group rights (based on his equality-among-groups thesis), Kymlicka's primary focus is not on all disadvantaged groups, but rather, group rights that apply to national minorities and ethnic groups (Kymlicka 1995, 19-20). Kymlicka distinguishes national minorities and ethnic groups from demands for group rights among other disadvantaged and disempowered social groups, what he classifies as "new social movements." These are associations of marginalized persons—such as gays, women, the poor and the disabled—who have a connection that pervades ethnicity and nationality (Kymlicka 1995, 19). While these groups have a readily identifiable culture in the narrow sense of having a shared point of view, an ethos, and/or certain traditions or customs, the culture of such groups is, for the most part, outside the ambit of Kymlicka's work (Kymlicka 1995, 18-20). Instead, Kymlicka employs an understanding of culture that is coextensive with "a nation or a people"—a territorially concentrated, multi-generational, linguistic community that shares a common history and is "institutionally complete."[16] This limitation notwithstanding, there is a strong

[16] In accordance with this understanding of culture, multicultural states are those in which the citizens of the state comprise multiple nations (multinational state) and/or have emigrated from various nations (polyethnic state) (Kymlicka 1995, 18). These groups—multinational and polyethnic—both share in Kymlicka's definition of culture, with the major difference being that polyethnic groups do not have the "institutional completeness," geographic concentration, and/or institutionalized linguistic community in their host country that would give them national minority status (Kymlicka 1995, 77). Thus, polyethnic

analogue between the group rights claims of ethnic groups and those claims registered by "new social movements." As such, Kymlicka asserts that a legitimate theory of group rights must be able to accommodate the claims of these variegated social groups. Therefore, while each of these three ideal-typical groups is disparate and elicits a host of separate problems that merit independent study, there are connections among them that allow for absorption into a unified theory of group rights (Kymlicka 1995, 19-20).

Because each of these groups presents a different set of issues and problems, the level of accommodation to which a group is entitled varies based on its classification as one of these three groups, with national minorities garnering a greater degree of accommodation than ethnic groups and "new social movements" (Kymlicka 1995, 114). National minorities, which Kymlicka defines as "distinct and potentially self governing societies incorporated into a larger state," have a greater degree of attachment to their societal culture than do ethnic groups, which he defines as "immigrants who have left their national community to enter another society" (Kymlicka 1995, 19). Since immigrant groups, unlike national minorities, usually exercise choice in leaving one culture for another, the expectation of accommodation is lower. Yes, individuals should have a right to their particular "societal culture," but individuals may abdicate this right if it is done of their own volition. Additionally, most immigrants leave their cultures with cognizance of the fact that success in their new homeland at least partially depends upon integration into society, and that, coupled with the voluntary renunciation of the right to one's particular "societal culture," renders legitimate the expectation of integration on the

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rights do not usually include demands for self-governance, as the conditions conducive to such governance are not present (Kymlicka 1995, 96). However, they do have a historical connection to their original "societal culture" that they carry with them, and that places them within the purview of Kymlicka's definition of culture (Kymlicka 1995, 19, 77).

part of the host society (Kymlicka 1995, 95-96). This does not mean there is no case for group-based accommodations for immigrants or ethnic groups, as cultural integration is a bidirectional process of mutual adaptation between immigrant groups and their host societies (Kymlicka 1995, 96). This process entails not just the enforcement of anti-discrimination statutes and the common liberal rights of citizenship, but also group-differentiated rights, such as exemptions to Sunday closing laws, to ensure that these minority groups are not disadvantaged in the mainstream culture (Kymlicka 1995, 96-97). "Immigrants can rightfully insist on maintaining some of their heritage, and dominant institutions should be adapted to accommodate those differences" (what Kymlicka labels "polyethnic rights") (Kymlicka 1995, 97).[17]

In a similar way, integration into the mainstream "societal culture" is the principal issue facing "new social movements." Thus, the remedial claims "new social movements" register are, in many ways, analogous to those of ethnic groups; they are similar to demands of polyethnic rights. Members of the dominant national culture denied full participation and inclusion to these groups because of their particular identities (because of their "difference") (Kymlicka 1995, 19). As such, these groups endeavor to redress identity-based exclusions from the dominant (national) "societal culture" through various mechanisms designed to effect integration. Although inclusion in, and enforcement of, the common liberal rights of citizenship is an important step in this integrative process, this step does not bring about full social integration. Ultimately,

[17] Kymlicka makes sure to distinguish voluntary immigrants from refugees—i.e. those who were forced to emigrate and jettison their cultural attachments in order to survive (Kymlicka 1995, 98). Furthermore, he notes that, in a world fraught with poverty and injustice, there is an immense difficulty involved in differentiating between involuntary and voluntary forms of immigration. This differentiation is an important component of Kymlicka's theory, however, as those emigrating involuntarily may be entitled to national rights and a greater degree of solicitude—much like existing national minorities (Kymlicka 1995, 99).

full integration requires group-differentiated rights to ensure these groups are on equal footing with the dominant groups in society (Kymlicka 1995, 180-181). Remember, the "common rights of citizenship" are themselves are ineffective because, as noted above, they simply require that the same rules apply to all individuals and groups within extant boundaries already favoring majority groups.

With national minorities, the case differs from ethnic groups and "new social movements" insofar as inclusion and integration are not the primary goals of such groups. Whereas ethnic groups have a lesser expectation of cultural accommodation and generally do not seek to reestablish, to the fullest extent possible, their erstwhile "societal culture" in their new homeland, national minorities usually have struggled to maintain their distinct "societal culture" through linguistic and self-governing rights. In short, the goal with national minorities is not integration, but rather protection from the assimilationist tendencies of the dominant "societal culture." This difference between polyethnic and national rights stems primarily from the processes of incorporation used to bring these groups into the dominant "societal culture." In most cases, incorporation of national groups came about through "conquest, colonization, or federation." Therefore, national minorities often did not voluntarily renounce the right to their particular "societal culture" in the manner that immigrants did; rather, the colonizing or conquering state often forcibly incorporated them (Kymlicka 1995, 79). The degree of attachment to one's culture is thus greater for national minorities than it is for immigrant groups, and given the difficulties involved in abandoning one's culture, it is reasonable for national minorities to demand, as a matter of right, access to their particular "societal culture" (Kymlicka 1995, 85-86). National minorities usually realize this access through some

form of external protection, usually "self-government rights" (Kymlicka 1995, 28-30). The issue for these groups, then, is not the reestablishment of their particular "societal culture" in a new territory or land—as these practices were already institutionalized and active—but maintaining external protections to preserve their particular "societal culture" (Kymlicka 1995, 79).

The external protections granted to national minorities and ethnic groups, protections ostensibly designed to insulate minority practices from majoritarian encroachment, are not without qualification. One must remember that Kymlicka is working within the confines of liberal political theory; after all, his point of departure is the liberal ideal of individual freedom and the inextricability of this ideal with "societal culture" (Kymlicka 1995, 80). Thus, what Kymlicka offers is not simply a theory of minority rights, but a peculiarly liberal theory of minority rights—what he has labeled "liberal culturalism" in subsequent works (Kymlicka 1998, 148; 2001, 22). Kymlicka notes at least two restrictions or limitations to which minority rights must conform. First, a liberal theory of minority rights cannot give sanction to "internal restrictions" that undermine the civil and political rights of members of minority groups. It is imperative that members of minority cultures have the ability to determine on their own which elements of their culture they wish to pass on to posterity. This in turn requires that members of cultural communities have the ability to question and amend the procedures and practices of their community. Second, although liberal political theory is often compatible with the demands for "external protections," liberal principles cannot countenance the granting of powers or rights to groups to subjugate and oppress other groups (e.g. apartheid). "External protections" from majoritarian decisions are justified

only to the extent that they advance intergroup equality through the redress of specific group disadvantages. "In short, a liberal view requires freedom within the minority group, and equality between the minority and majority groups" (Kymlicka 1995, 152).

Kymlicka and the Claims of Liberal Multicultural Critics

In the first section of this chapter, I argued that critics of liberalism writing from within the liberal multicultural perspective (and some communitarians, such as Sandel) register an empirical assessment of the liberal state—how things actually are in the day-to-day administration of justice. These theorists make the general observation that the policies and procedures of the liberal state, while non-neutral and therefore partial in practice, nevertheless endeavor to be neutral with respect to difference. In short, the liberal state is at least doctrinally neutral, and this specific understanding of neutrality informs the procedures and public policies of the liberal state, circumscribing the range of legitimate policy options and imbuing various elements of the public political culture. Moreover, these observations apply primarily to the United States, as the US embraces, at least doctrinally, formal legal and political neutrality toward difference. Will Kymlicka's theory of minority rights fits squarely within this line of criticism.

The most compelling evidence of this fit derives from Kymlicka's criticism of the theory of "benign neglect." As noted above, the theory of "benign neglect" offers what one may label a voluntaristic-associational perspective, wherein the right to associate freely and other "common rights of citizenship" protect access to particular cultures and ensure the perpetuation of a diverse marketplace of cultural groups and life pursuits. Part and parcel of this approach is state neutrality with respect to "good"; the state does not

intervene in the decisions of individuals and the marketplace of associations—it exhibits "benign neglect" toward cultural groups and life pursuits—thus guaranteeing that individual choice, not state support or oppression, remains paramount in determining valuable ways of life. In accordance with the theory of "benign neglect," then, "giving political recognition or support to particular cultural practices or association is unnecessary and unfair" (Kymlicka 1995, 107). Kymlicka finds this view problematic and ultimately untenable. This is because the state must inevitably make choices that favor some cultural groups over others when it renders decisions on languages, territorial boundaries, public symbols and holidays. In short, "rigorous neutrality" on the part of the liberal state is impossible, and these non-neutral decisions ultimately favor majority cultural groups and put minorities at a disadvantage. Therefore, something greater than the basic rights of citizenship and its attendant theory of neutrality and "benign neglect" is required to ensure equality among groups; true equality among groups demands group specific or group-differentiated rights (Kymlicka 1995, 108).

While the demand for greater equality among groups is not without merit, many scholars and politicians have perceived this demand for group-differentiated rights as a relatively novel phenomenon—one that runs counter to traditional liberal principles and practices. According to this perspective, "benign neglect" has been both a longstanding practice and theoretical commitment of liberalism. As such, demands for the recognition of cultural difference constitute a violation of cardinal liberal principles and practices. In short, such an approach to cultural groups is simply incongruous with traditional liberal principles and procedures (Kymlicka 1995, 49-50). Although this represents the prevailing view among politicians and theorists, this view of liberalism is erroneous.

Minority rights represented an integral component of liberal theory and practice throughout the 19th and 20th centuries—though its influence began to flag around the second half of the 20th century. Contrary to popular belief, the theory and practice of "benign neglect"—not the notion of group-specific rights—is relatively new to liberalism, and one can trace much of its origin within liberal theories of justice to the racial-desegregation movement in the United States (Kymlicka 1995, 50).

With its decision in *Brown* v. *Board of Education* (1954), the Supreme Court transformed the predominant understanding of racial justice and equality in the United States from one of color-conscious decision-making (under the old "separate-but-equal doctrine") to a color-blind paradigm that associates equality with the principles of non-discrimination and equal opportunity. It was with the *Brown* decision that the policy of "benign neglect" became an issue of justice (Kymlicka 1995, 58). The underlying logic of *Brown*, which rules out exclusions from social and political institutions based on the consideration of certain irrelevant attributes (e.g. race), was eventually extended to other classes of persons—mainly, ethnic and national minorities (Kymlicka 1995, 58-59). While Kymlicka ultimately lauds the Court's decision and reasoning in *Brown*, he finds problematic the spillover effect that the color-blind paradigm has had on other groups. This is because application of the color-blind model to ethnic and national minorities renders illegitimate any group-specific policies, even if those policies facilitate equality among ethnic and cultural groups in society; it puts seemingly egalitarian policies on par with those that have a decidedly inegalitarian purpose and effect, as in the case of *Brown*. "Viewed in this light, legislation providing separate institutions for national minorities seems no different from the segregation of blacks." What is more, the actual decision set

forth in *Brown* is circumstantial and does not provide justification for deploying the logic of *Brown* to issues beyond those under the Court's immediate consideration; mainly, it does not provide guidance beyond the question of whether racially segregated facilities are equal and constitutionally permissible. Nowhere in the opinion did the Court advert to the issue of ethnic or minority rights and the peculiar problems of cultural access these groups face; at no time did the Court address the issue of self-governing rights and other external protections required to guarantee access to one's particular "societal culture." These questions were simply beyond the purview of the Court's decision (Kymlicka 1995, 59).

The "overgeneralization" of *Brown* and the ascendancy of color-blind liberalism lead Kymlicka to conclude that the US "is the prototypically neutral state" (Kymlicka 2001, 24). In other words, the extension of *Brown* to the relations of ethnic and national groups has created a state that does not consider the particularities of cultural identity—much in the same way it does not consider the particularities of racial identity—in its legislative, judicial and executive pronouncements. Here, one can see a clear convergence in the terminology of Taylor and Kymlicka, with neutrality and non-discrimination connected to a policy that eschews consideration of certain (irrelevant) particularities of identity at the expense of cultural survival. Paradoxically, if one takes Kymlicka at his word, it is impossible for the United States to be neutral because "ethnocultural" neutrality is unrealizable in practice; the state cannot be neutral toward ethnicity, culture, etc., and this observation is the mainstay of his theory of minority rights (Kymlicka 1998, 108; 2001, 24-25). However, one can reconcile this apparent inconsistency if he/she interprets Kymlicka's claim as one of doctrinal, as opposed to

practical (or actual), neutrality. Here, doctrinally neutrality simply means that the US liberal state embraces a conception of neutrality that views citizens in their abstract sameness, irrespective of their particular affiliations or identities. This specific understanding of neutrality, however impossible its realization may be, informs the procedures and public policies of the state, circumscribing the range of legitimate policy options and imbuing various elements of public political culture. Operating in accordance with the concept of doctrinal neutrality, Kymlicka can classify the United States as "prototypically neutral" while contemporaneously asserting the impossibility of realizing the goals that such neutrality purports to achieve. It is in this manner that Kymlicka eschews self-contradiction.

From the arguments outlined above, it is clear that Kymlicka offers a variant of the liberal multicultural critique of liberalism. He registers an empirical assessment of the liberal state, and makes the general observation that the policies and procedures of the liberal state, while non-neutral and therefore partial in practice, nevertheless endeavor to be neutral with respect to difference. In short, the liberal state is at least doctrinally neutral, and these observations are said to apply primarily to the United States: the "prototypically neutral" state. To use Michael Walzer's terminology, the United States is the quintessence of "rigorous neutrality." In addition to the empirical claim, I contend that liberal culturalists such as Taylor and Kymlicka argue that the variant of liberalism espoused by many Anglo-American theorists is emblematic of a similar conception of liberal neutrality (i.e. similar to the conception of neutrality that infuses public policy in the US).

Addressing a Potential Counterargument to My Dual-Claim Thesis

While the evidence above certainly goes a long way in substantiating my thesis, I must address one additional objection. In *Politics in the Vernacular* (2001), Kymlicka offers a thoroughgoing defense of "procedural liberalism"—the very form of liberalism that Charles Taylor and Michael Walzer identify with "rigorous neutrality." On the surface, this appears to undermine my thesis; it demonstrates Kymlicka's commitment to the specific form of liberalism he allegedly condemns, and it appears to evince a sharp divergence in the theoretical commitments of Taylor, Kymlicka and Walzer. However, a deeper reading of Kymlicka's defense reveals that he offers a more nuanced understanding of "procedural liberalism" than Taylor or Walzer does (not all forms of "procedural liberalism" are "rigorously neutral"), and it is this greater level of nuance and depth that accounts for Kymlicka's defense of "procedural liberalism." One might be tempted to conclude that a divergence in thought over the desirability and tenability of "procedural liberalism" accounts for the differing conclusions of Taylor and Kymlicka, with one theorist offering a defense of this political form (Kymlicka) and the other a critique (Taylor), but such an interpretation oversimplifies the issue. Both Kymlicka and Taylor find "procedural liberalism" problematic and undesirable; however, for Kymlicka, what separates desirable from undesirable forms of liberalism is not their procedural or non-procedural nature—as proceduralism is not the problem—but whether they are liberal egalitarian or libertarian in orientation ("left wing" or "right wing"). In fact, liberal egalitarian forms of "procedural liberalism," the species that Kymlicka defends, are very much in line with the variant of liberalism that Taylor and Walzer endorse: "Liberalism II." Therefore, the discrepancy between the works of Taylor and Kymlicka—and their seeming disagreement over the desirability of "procedural

liberalism"— stems not from a disagreement over the problematic features of "procedural liberalism" per se, but rather from a disagreement over what, exactly, constitutes "procedural liberalism," as well as what features of this form of liberalism generate undesirable consequences (i.e. the inability to accommodate collective goals and deviate from uniformity in law).

When defining procedural liberalism ("Liberalism1"), Taylor and Walzer do not speak of intra-category variations; they do not identify differentiations within the class of "procedural liberalism." In contrast, Kymlicka defines "procedural liberalism" in more precise fashion and contends there is a multitude of variation within this category. This variation is important, as the two forms of procedural liberalism Kymlicka focuses on—"left-wing liberal egalitarianism" and "right-wing libertarianism"—result in substantially different political outcomes. "Right-wing libertarianism" views property rights as sacrosanct and, consequently, is inimical to any form of state-sanctioned redistribution, whereas "left-wing egalitarianism" grants moral primacy to the plight of the least advantaged in society and champions remedial action to combat "morally arbitrary inequalities," such as economic, political and social inequities. Despite these divergent substantive commitments, adherents of left and right wing liberalism premise their support of these varying commitments and concerns on similar philosophical presuppositions regarding the "non-perfectionist state" and "rational revisability." These two assumptions are the quintessence of procedural liberalism; they are the common attributes that allow for a procedurally liberal taxonomy among right and left wing species of liberalism (Kymlicka 2001, 328). Below, I delineate each of these characteristics in turn.

"Rational-revisability" relates to the manner in which left and right wing liberals theorize individuals within their respective philosophic frameworks. They theorize individuals as having mutable and fluid conceptions of the "good" that can be readily amended when reflective and contemplative processes of thought render them undeserving of attachment and support. Simply stated, there are no immutable, irrevocable attachments to ends or visions of the "good" under this model. Thus, every individual should have the freedom of thought and conscience necessary to reflect upon his/her ends and amend them if necessary, and it is the state's responsibility to conduce conditions favorable to "rational revisability." As Kymlicka notes, Michael Sandel labels the claim of "rational revisability" the "priority of the self over its ends" or the "unencumbered self" (Kymlicka 2001, 329; Sandel 1984, 86).

The "non-perfectionist state" signifies the idea that the state should be neutral with respect to individualized conceptions of the "good"—i.e., those life plans and pursuits designed to make one's life worthwhile, fulfilling and rewarding (Kymlicka 2001, 335-336). The liberal state realizes this neutrality by eschewing a hierarchical ordering of conceptions of the "good" that would rank them in accordance with their innate value or worth, thus inhibiting the ability of individuals to render their own valuations. This means that the basis for legislation should not be the inherent value or worth of a given conception of the "good," as it is the role of individuals—not the state—to determine the intrinsic value of a particular conception of the "good." The role of the state is limited to fostering conditions within which individuals can pursue freely their particular conceptions of the "good," and this requires the enforcement of a fair allocation of rights and resources, as well as the demand that individuals amend and revise their

conceptions of the "good" when they come into conflict with the rights of others (Kymlicka 2001, 330). It demands, in the parlance of Rawls, "reasonable comprehensive doctrines" (Rawls 2005, 60-61). When pursuits of the "good" do not engender such conflict—that is, when "comprehensive doctrines" are reasonable—the state does not intervene (Kymlicka 2001, 330).

Here, Kymlicka classifies the state as neutral not because it avoids neutrality in procedure, which would mean it does not refer to or presuppose any moral or normative commitments whatsoever and treats all conceptions of the good equally, but rather, because it does not evaluate claims of the "good" from a pubic perspective (in the way that one assesses justice claims, or claims of the "right") (Kymlicka 2001, 330; Rawls 2005, 191). Kymlicka is explicitly indebted to Rawls in his understanding of neutrality, as Rawls asserts that the principles of political liberalism are substantive (not procedurally neutral in the sense that there is no appeal to moral values) and endeavor to be the product of an "overlapping consensus"—that is, the product of public justification among persons with commitments to disparate "comprehensive doctrines" (conceptions of the "good"). It is in this "overlapping consensus" between reasonable comprehensive doctrines and the principles of political liberalism (right) that neutrality inheres; neutrality is simply "a common ground […] given the fact of pluralism." This justificatory standard does not apply to visions of the "good" or various "comprehensive doctrines," as they could not form the basis for such "overlapping consensus" or common ground (Rawls 2005, 192-193).[18]

[18] Another way to understand the neutrality claim of Rawls is that "Justice as Fairness," as outlined in *A Theory of Justice* (1999), is itself a comprehensive doctrine that is incapable—as originally formulated—of generating reasonable agreement on basic political principles within the context of "reasonable pluralism."

These two features—"rational revisability" and the "non-perfectionist state"—represent the distinguishing characteristics of procedural liberalism in both its right and left wing variations. What tends to differentiate right and left wing variations of procedural liberalism is the addition of a tertiary consideration: the redress of "morally arbitrary inequalities." By "morally arbitrary" inequalities, left-wing liberals, such as Rawls and Dworkin, mean those inequities that do not result from choice or dessert, but rather follow from chance and circumstances outside the ambit of one's control. These "morally arbitrary" inequalities take different forms and may be social (e.g. poverty) or natural (e.g. diminished physical or mental capacity or differing levels of talent). Regardless of which form they take, inequalities that come about in this manner are unjust and worthy of remedial action, and the rectification of such inequities is constitutive of the difference between left and right wing species of procedural liberalism (Kymlicka 2001, 330). Although the exponents of left and right wing variants of liberalism share similar philosophical assumptions regarding state neutrality and the mutability and alterability of ends, such theoretical assumptions engender different practical effects when combined with either the concern for "morally arbitrary inequalities" or property rights (Kymlicka 2001, 328). In this way, then, the egalitarian impulse of left wing liberalism is an extremely important distinction that one should not overlook if he/she is to offer a fair appraisal of procedural liberalism.

Simply stated, it is a non-neutral "comprehensive doctrine." In *Political Liberalism* (2005), Rawls endeavors to adjust the principles of justice in *Theory* to the "fact of reasonable pluralism" so they can form the basis of an agreement on the basic institutions and structures of society; that is, so they can form the basis of an agreement among persons with disparate philosophic and religious commitments ("comprehensive doctrines"). To do this, Rawls introduces a "freestanding" political conception of justice that, while independent of any comprehensive moral or religious doctrine, nonetheless encapsulates several normative and moral commitments (Rawls 2005, xl-xlii).

For example, this egalitarian impulse (i.e. the attempt to rectify "morally arbitrary inequalities"), when combined with more profound and refined conceptions of neutrality, the right, and the good, can be employed to justify a scheme of minority rights; however, no such justification follows from right wing procedural liberalism (Kymlicka 2001, 340). Critics of procedural liberalism, such as Charles Taylor and Michael Sandel, overlook its accommodative potential because they misconstrue the distinction between the "right" and the "good" and misunderstand the implications of state neutrality.[19] It is perfectly consistent with procedural liberalism for a given state to endorse certain understandings of "communal identity" and "virtue" if it adopts these conceptions/understandings for the express purpose of facilitating justice-based obligations to other persons (Kymlicka 2001, 333-334). That is, if principles of "right," which are subject to public processes of justification, serve as the foundation for the adoption of such policies, and if the effectuation of these policies does not undermine justice, then it is consistent with liberal neutrality to endorse such identity and virtue-based claims. As noted above, the distinction between the "right" and the "good" is one of justification, and it has no necessary connection to specific legislative referents (i.e. the particular substance of policy) (Kymlicka 2001, 334-335).

Rawls, for example, explicitly acknowledges that the principles of "justice as fairness" require specific virtues, one of which is reasonableness (Rawls 2005, 194). If one justifies a particular policy because of its ability to promote the virtue of reasonableness as it relates to the principles of "right" or justice (and it does not

[19] Although Kymlicka, when speaking of the critics of procedural liberalism, primarily focuses his attention on the critical works of Michael Sandel, it is fair to include Charles Taylor as an object of Kymlicka's critical attack, for Taylor offers a wholesale embrace of Michael Sandel's critique of procedural liberalism (Taylor 1994, 57-58).

undermine justice in effect), it is consistent with liberal neutrality to support such a virtue-laden policy. It is consistent with liberal neutrality because one is not publicly evaluating a claim about what makes life worthwhile, rewarding or fulfilling (the "good"); rather, he/she endeavors to work within the boundaries of public/shared justification to attain "overlapping consensus" for the promotion of the principles of "right" or justice. He/she offers public reasons related to the principles of justice, and these reasons are not peculiar to any particular "comprehensive doctrine." As such, these public reasons ostensibly justify policies fostering reasonableness because they in turn promote the principles of justice (Rawls 2005, 217-218). If, however, one argues for such policies because they promote the most worthwhile way of living one's life (they promote the "good"), he/she attempts to evaluate the "good" publicly and bring this process of valuation under state control. This approach ignores the "fact of reasonable pluralism" and the reality that all citizens embracing "reasonable comprehensive doctrines" could make similar and equally valid claims for state support. In short, this claim cannot form the basis for "overlapping consensus" or neutrality among "comprehensive doctrines." It cannot form the basis of the "right."

In a similar vein, Kymlicka notes that liberal states often promote communal identities in an effort to enhance the probability that persons will fulfill their justice-based obligations (e.g. societal culture). Similar to the case above, liberal states do not promote these identities because they represent a more worthy conception of the good life; rather, liberal states promote communal identities because they abet in the promotion of the principles of justice. Thus, the embrace of certain communal identities is consistent with the condition of liberal neutrality insofar as the state bolsters these identities to promote

the principles of justice, and the effectuation of these identities does not undermine the principles of justice. In sum, the embrace of these virtues and identities neither undermines procedural liberalism's commitment to neutrality nor its distinction between the "right" and the "good." Key to procedural liberalism's understanding of neutrality and its distinction between the "right" and the "good" is the nature of justification; neutrality obtains in non-public assessments of the "good," whereas claims of justice or the "right" are distinguished by their public nature—their appeal to common ground and "overlapping consensus." Thus, it is a difference in justification—not one of policy substance (i.e. whether or not a policy deals with virtue or identity)—that defines the boundaries of neutrality and accounts for the demarcation between the "right" and the "good" (Kymlicka 2001, 334).

Critics of procedural liberalism such as Taylor and Sandel overlook this compatibility precisely because they fail to apprehend the minutiae of the distinction between the "right" and the "good," and they grossly err in determining the implications of liberal neutrality. Sandel and Taylor both assume that virtues and identities are automatically the province of the "good," thus basing their distinction on substantive considerations (i.e. virtue and identity are, in an analytic sense, matters of the "good") (Kymlicka 2001, 334-335). Recall that, without any theoretical justification, Taylor considers policies promoting collective identities to be instantiations of the "good" (or collective good), not matters of the "right" (Taylor 1994, 61). In a similar fashion, Sandel rigidly bifurcates issues of the "right" and the "good" and assumes that "issues of virtues and identities fall on the side of the good" (Kymlicka 2001, 334). Ultimately, this misapprehension causes Sandel and Taylor to overlook the accommodative potential of

procedural liberalism. For it is the egalitarian impulse (i.e. the attempt to rectify "morally arbitrary inequalities") of left wing procedural liberals, when combined with the refined conceptions delineated above, that justifies a scheme of minority rights within Kymlicka's theoretical framework. First, Kymlicka contends that the left wing liberal concern with redressing "morally arbitrary inequalities" subsumes both social and natural inequalities (Kymlicka 2001, 330). Social inequalities are the result of circumstance (not choice), and it is therefore difficult to see why "special protections" designed to rectify the disadvantages faced by "ethnocultural" minorities would not qualify as "morally arbitrary" inequities worthy of remediation. In other words, "ethnocultural" inequalities are clearly circumstantial, and it is therefore difficult to see why they would not fit into the category of a "morally arbitrary inequality" worthy of redress. Second, liberal states often promote communal identities in an effort to enhance the probability that persons will fulfill their justice-based obligations (Kymlicka 2001, 334). From this perspective, then, there is a secondary justification for these "special protections"; mainly, recognizing the identities of ethnic or national minorities may help encourage persons to fulfill their justice-based obligations. It is important to note, however, that one can recognize this second motive as consistent with procedural liberalism only if he/she espouses the refined understanding of neutrality and its attendant conceptions of the "right" and the "good" outlined above. It is thus unsurprising that, in the end, Kymlicka concludes that the "justification for the recognition of these identities is that they help to sustain just institutions, and to rectify injustices" (Kymlicka 2001, 337). This conclusion is part egalitarian impulse (rectification of injustice) and part refined conceptions of neutrality, the "right," and the "good" (sustenance of just institutions).

The conclusion that left wing procedural liberalism is consistent with minority rights is germane to our discussion regarding Taylor and Sandel's mischaracterization of procedural liberalism primarily because right wing variants are hostile to such efforts. In short, overlooking the intra-category variations of procedural liberalism is no trivial matter, as these within-category variations induce divergent policy outcomes. Generally speaking, right wing liberalism is not concerned with the rectification of inequalities, and this lack of concern for egalitarian justice translates into a repudiation of the state sponsored virtues and identities that are designed to promote egalitarian justice (Kymlicka 2001, 340). More specifically, right wing procedural liberalism does not furnish the theoretical raw material to sanction group specific or group-differentiated rights because it does provide a role for the redressing of "morally arbitrary inequalities" within its paradigm of justice. Thus, it is at once clear that the egalitarian impulse of left wing procedural liberalism represents a critical distinction that engenders disparate policy outcomes.

Right Wing Procedural Liberalism and the United States

Having provided an expository account of right and left wing liberalism, Kymlicka moves on to consider Sandel's claims about the hegemonic influence of procedural liberalism in the United States (his empirical claim). Although Sandel, Taylor and many others contend that a staunch commitment to proceduralism distinguishes the American strain of liberalism from other Western democracies, Kymlicka posits that the outsize influence of right wing procedural liberalism—not a commitment to proceduralism per se—accounts for the distinctive American brand of liberalism. "What makes American liberalism distinctive […] is that it is disproportionately right wing" (Kymlicka 2001,

342). Moreover, several illiberal ideologies undergird and influence the right wing liberalism of the United States. For example, an attitude closely paralleling Social Darwinism pervades American public policy. Those espousing this attitude look favorably upon those who are able to overcome their circumstances, while they look askance upon those who do not have the ability to triumph over the obstacles they face. Additionally, Americans have a deep distrust of big government that forestalls attempts to remedy inequalities of all stripes. The upshot is this: circumstantial inequalities are not relevant from the standpoint of justice. As Kymlicka notes, public policies predicated upon this attitude are antithetical to left wing egalitarianism, which has as one of its primary motivations the remediation of "morally arbitrary inequalities" (circumstantial inequities) (Kymlicka 2001, 342).

Pursuant to Kymlicka's definition of procedural liberalism, then, a commitment to "rational revisability" and "non-perfectionism" characterize the United States, but solicitude for "morally arbitrary inequalities" does not. Since the right wing proceduralism of the United States does not have special solicitude for the redress of "morally arbitrary inequalities," it follows that this variant of liberalism does not endeavor to promote the communal identities and civic virtues that are likely to foster liberal egalitarian principles of justice. This means that, to the extent it engages in identity promotion, the state is likely to champion an atomistic, non-communal identity—one that aligns with the Social Darwinian understanding of obligation; this sense of obligation follows from the basic rights necessary for security in our persons and property (the limited government liberalism of the "night-watchmen state"). To the extent that the state promotes certain virtues of the individual, they are likely to be those

of autonomy and self-sufficiency, etc. Under such a scheme, the non-perfectionist state cannot be neutral in a Kymlickian, liberal-egalitarian sense, as this would require the common ground of the "right," the "overlapping consensus," to be inclusive of the "communal identities" and virtues necessary to sustain just institutions and practices. In fact, neutrality under such a scheme is emblematic of Walzer's "rigorous neutrality"—"Liberalism 1"—because it deems illegitimate the championing of "cultural or religious projects or…any sort of collective goals beyond the personal freedom and the physical security, welfare and safety of its citizens" (Walzer 1994, 99). Therefore, the right wing variant of liberalism that Kymlicka associates with the politics of the United States is a form of "benign neglect" that aligns with the paradigm of liberalism criticized by Taylor, Walzer and Sandel ("Liberalism 1")—even though the primary target of Sandel and Taylor is the left wing liberalism of Rawls. This focus on Rawls and left wing egalitarianism results from a mistaken interpretation of left wing liberalism in general, and Rawls in particular, as well as a failure to recognize the within-category variations of procedural liberalism.

In sum, offering a defense of left wing procedural liberalism does not force Kymlicka into the position of defending that which he previously condemned; he is not embroiled in self-contradiction, and this is because the species of procedural liberalism he defends is congruent with his theory of minority rights. Ultimately, his theoretical commitments do not differ substantially from those of Taylor and Walzer, as left wing egalitarian forms of procedural liberalism are consistent with, and similar to, the strain of liberalism that Taylor and Walzer endorse: "Liberalism 2." The major difference between these two models of liberalism has to do with their classificatory schemes.

Kymlicka classifies some collective policies as matters of "right," whereas Taylor and Walzer categorize the same policies as matters of the collective "good." This difference stems from differing interpretations of neutrality and its relation to the concepts of the "right" and the "good." What is more, right wing procedural liberalism represents the very type of liberalism that Taylor, Walzer and Sandel criticize ("Liberalism 1"). Kymlicka also finds this variant of liberalism problematic and for reasons similar to Taylor and Walzer; mainly, right wing liberalism supports a policy of "rigorous neutrality" and "benign neglect" that is inhospitable to collective projects and concerns that transcend the provision of basic rights and physical security. Finally, Kymlicka argues that right wing procedural liberalism has dominated the United States, and this observation is consistent with the arguments of Taylor and Walzer insofar as right wing procedural liberalism is similar to "Liberalism 1." Again, there is a terminological difference here, but also a great deal of substantive accord.

Conclusion

In this chapter, I showed how various liberal multicultural theorists portray the liberal state and liberal political theory within political science. I focused specifically on the works of two preeminent liberal multicultural scholars—Charles Taylor and Will Kymlicka—and underscored how each theorist registers an empirical assessment of the liberal state. Both theorists make the general observation that the policies and procedures of the liberal state, while non-neutral and therefore partial in practice, endeavor to be neutral with respect to difference. In short, they contend that the liberal state is doctrinally neutral, and that this understanding of neutrality informs the procedures and public policies of the liberal state, thus circumscribing the range of legitimate policy

options. Furthermore, Taylor and Kymlicka (among others) argue that these observations of the liberal state apply primarily to the United States, as the US embraces formal legal and political neutrality toward difference (at least doctrinally). Therefore, Taylor and Kymlicka agree that the US is an exemplar of "rigorous neutrality." This depiction of liberalism as it applies to the United States is highly misleading, and in the next two chapters, I furnish evidence in the realms of equal protection and free-exercise jurisprudence and policy that repudiates this characterization of US liberalism. At the same time, however, the evidence proffered in the next two chapters substantiates many of the assertions of liberal multicultural theorists; it illuminates the internal tension between the principle of non-discrimination (rigorous neutrality/uniformity) and groups marginalized for myriad reasons (e.g. histories of prior discrimination, unpopular beliefs, minority disadvantage, etc.). As such, the next two chapters contribute to the efforts of difference theorists in general and liberal multiculturalists in particular by showing that "rigorous neutrality" and the principle of non-discrimination have often been insufficient on their own in meeting the demands of racial and religious justice. This history shows not only the desirability of "Liberalism II" (or egalitarian/difference-sensitive liberalism), but also its necessity within the liberal state.

CHAPTER 3

EQUAL PROTECTION AND THE DISPARATE-IMPACT THEORY OF RACIAL DISCRIMINATION

Introduction

In this chapter, I offer a critical examination of equal protection case law in the United States—specifically as it relates to race—and argue that there are at least two discernible trends within this corpus of Supreme Court decisions. While jurists unanimously express their acceptance of a per se rule against racial prejudice, they diverge in their interpretation of what the Equal Protection Clause of the Fourteenth Amendment prohibits (and permits) outside the range of cases dealing with explicit or implicit racial prejudice. Commencing with the case of *Strauder* v. *West Virginia* (1880), there is a tradition of decisions exhibiting fidelity to the notion that, at least as it pertains to race, the Equal Protection Clause proscribes only discrimination predicated upon racial prejudice. This tradition, while not granting a constitutional mandate for race-based action, nonetheless views race-conscious action as permissible under the Equal Protection Clause insofar as it does not reflect impermissible racial prejudice. Countervailing this is an equally discernible trend—one that views the Equal Protection Clause as encapsulating a positive right to be judged and evaluated as an individual. This body of law has expressed hostility toward any race-based (race conscious) policies—regardless of motive or effect—because such policies ultimately contravene the positive right of persons to be treated as individuals. The ascendancy of this view on the High Court has brought drastic changes to the realm of anti-discrimination law and has moved US public policy closer to the normative vision of colorblindness. The problem with this trend is it

neither has firm roots in the legislative history of the Fourteenth Amendment nor the judicial precedents that guided questions of race and equal protection from the Reconstruction Era to the late Twentieth Century. Overall, then, the conclusions drawn in this chapter help to contribute to a defense of race-conscious policies such as Title VII, as they bring the actual history and original intention of the policy into sharp relief. Bringing this history to the fore helps to clarify the contemporary relevance and role that Title VII should play in addressing issues of racial inequality in the US—a history and role that is almost inscrutable given the ascendance of the highly individualized construal of equal protection.

Impermissible Racial Discrimination

A cursory examination of equal protection case law in the United States reveals that the question of what, specifically, constitutes impermissible racial discrimination is exceedingly complex and multifaceted. Importing the operational definition of discrimination from chapter two, this is to ask, "Under what circumstances is singling out persons based upon race impermissible under the constitutional regime of the United States?" Although one may be disposed to think that, based upon the assumptions of procedural liberalism delineated in the works of Taylor, Kymlicka and others, there has been, since the *Brown* decision, a *per se* rule against racial classifications of any kind (i.e. doctrinal neutrality with respect to race), this contention is simply apocryphal. Such an assertion is not borne out by relevant case law, as the Court has been disinclined to deem all racially classificatory laws unconstitutional—espousing instead a distinction between invidious and non-invidious forms of discrimination, finding the former categorically

impermissible (unconstitutional) and the latter suspect, but not necessarily unconstitutional.

One can find the foundational precedent for this distinction in early Supreme Court jurisprudence, specifically the case of *Strauder* v. *West Virginia* (1880). The question before the Court in *Strauder* was whether citizens of the United States, when answering to criminal charges leveled against them, had a right to a jury trial devoid of racially discriminatory jury-selection processes. Of particular relevance in this case was a West Virginia statute that prohibited blacks from participation in petit and grand juries—a statute that, on its face, singled out blacks for differential treatment under the law. In its opinion, the Court did not proffer a general rule outlawing all race-based discrimination, but rather, roundly rejected race-based laws motivated by prejudice (at least within the context of a public institution, such as the courts). Citing the *Slaughter-House Cases* (1873) as its authoritative source, the Court noted that the Fourteenth Amendment works in concert with the Thirteenth and Fifteenth Amendments to serve a "common purpose," which is to afford blacks protection against state laws designed to continue their racial subordination (*Strauder* v. *West Virginia* 1880, 305-306).[20] What is more, the Equal Protection Clause of the Fourteenth Amendment guarantees protection to emancipated blacks through the interdiction of state laws that single out persons for differential treatment because of their race. In short, the Equal Protection Clause ensures "that no discrimination shall be made against them by law because of their color" (*Strauder* v. *West Virginia* 1880, 307).

[20] In *Strauder*, when describing the elements of the Fourteenth Amendment, the Court states, "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" (*Strauder* v. *West Virginia* 1880, 306).

Here, the Court understood discrimination "because of their color" as differential treatment under law based upon one's somatic characteristics—a form of differential treatment premised singularly upon the color of one's skin. Such discrimination insinuated class inferiority and conferred upon black persons a subordinate status in civil society.[21] "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 […] is practically a brand upon them, affixed by the law, an assertion of their inferiority" (*Strauder* v. *West Virginia* 1880, 308). The Court associated such discrimination with racial prejudice, or judgments against particular groups or classes of persons that served "to deny persons of those classes the full enjoyment of that protection which others enjoy" (*Strauder* v. *West Virginia* 1880, 309). Prejudice, then, is tantamount to viewing certain groups as subordinate or inferior, and the Court asserted that the proscription of discriminatory laws motivated by such prejudice was the primary reason the Framers of the Fourteenth Amendment granted the Federal Government the power to enforce, and ensure continued compliance with, the Equal Protection Clause (*Strauder* v. *West Virginia* 1880, 309).[22] Since the race-based discrimination present in the West Virginia statute was of the precise order that the Equal Protection Clause sought

[21] The Fourteenth Amendment inoculates against such second-class treatment and grants "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of the subject race" (*Strauder* v. *West Virginia* 1880, 308). Here the Court expressly identifies legal discrimination—i.e. laws which facially discriminate against blacks—with inferiority, hierarchy and denials of rights that protect other persons.

[22] In the Court's words: "By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws" (*Strauder* v. *West Virginia* 1880, 309).

to forbid, the Court ultimately concluded that the statute was violative of the Fourteenth Amendment (*Strauder* v. *West Virginia* 1880, 310).

Although the Court appeared to diverge from the *Strauder* precedent in *Plessy* v. *Ferguson* (1896), which upheld the constitutionality of Louisiana's racially classificatory "separate-but-equal" railway accommodations statute, the decision ultimately maintained fidelity to the *Strauder* Court's interpretation of the Fourteenth Amendment's proscription on discriminatory laws motivated by racial prejudice. Instead of countermanding the Court's ruling in *Strauder*, the *Plessy* Court drew a distinction between two types of statutes: laws that undermined the political equality of blacks and laws that mandated the segregation of blacks and whites in public accommodations, specifically theatres, schools and train cars (*Plessy* v. *Ferguson* 1896, 545). Discriminatory laws such as the one under consideration in *Strauder* resulted from prejudice and therefore implied the inferiority of blacks, compromised their enjoyment of rights, and led to their subordination in civil society; however, laws requiring segregated public accommodations made no such implication (*Plessy* v. *Ferguson* 1896, 544-551). In the Court's words, "We consider 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" (*Plessy* v. *Ferguson* 1896, 551).

In large part, the Court was able to practice such judicial prestidigitation because the Louisiana statute, unlike the statue under consideration in *Strauder*, did not single out blacks for differential treatment on its face; it was, to borrow terminology from Gerald Gunther and Kathleen Sullivan, a "facially symmetrical race-based law" (Sullivan and Gunther 2010b, 517). For this reason, the Court, in failing to employ more than a

legislatively deferential reasonable basis test, could conclude with relative ease that, if the Louisiana statute does subordinate blacks, "it is not by reason of anything found in the act" (*Plessy* v. *Ferguson* 1896, 551). Justice Harlan, in his dissenting opinion, found this equality argument specious and acknowledged that a desire to single out blacks on the basis of race—a desire motivated by racial prejudice and a belief in class inferiority—was the true motivation underlying the Louisiana statute. "What can more certainly arouse race hate […] than state enactment, which, in fact, proceeds 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 we all will admit, is the real meaning of such legislation as was enacted in Louisiana" (*Plessy* v. *Ferguson* 1896, 560). Therefore, the dissenting opinion of Justice Harlan further bolsters my supposition that the *Strauder* precedent was not under attack in *Plessy*. Both sides attempted to defend their positions in terms of the precedent of impermissible racial discrimination set forth in *Strauder* and simply disagreed as to whether the statute in question satisfied the criteria of impermissible racial discrimination; neither side disputed the notion that laws rooted in racial prejudice serving to subordinate blacks and maintain white supremacy were categorically unconstitutional.

Since *Plessy*, the Court has continued to uphold the *Strauder* standard of impermissible racial discrimination in various contexts, with the common denominator of unconstitutionality among such cases being racial discrimination motivated by prejudice— what the Court has consistently referred to as "invidious discrimination." In *Korematsu* v. *United States*, for example, the Court explicitly noted the *Strauder* standard when considering a law that baldly discriminated because of race. The law before the

Court in *Korematsu*—Civilian Exclusion Order No. 34—mandated the exclusion of "all persons of Japanese ancestry" from a West Coast military area for fear that persons of such descent might be involved in espionage and other subversive activities. As the Court acknowledged, the law in question unequivocally infringed upon "the civil rights of a single racial group," but such overt discrimination, while always suspect and worthy of rigorous, searching scrutiny by the judiciary, was not enough in itself to constitute impermissible discrimination (*Korematsu* v. *United States* 1944, 215-216).[23] In maintaining fidelity to the *Strauder* standard, the Court asserted that Civilian Exclusion Order No. 34 did not satisfy the criteria of impermissible racial discrimination because the law served a "pressing public necessity" and was not grounded in racial prejudice or animus. In other words, the law was necessary to the realization of a legitimate public aim/end (i.e. public safety), and it was neither predicated upon a belief in Japanese inferiority nor represented an attempt to reduce persons of Japanese descent to a subordinate status in society (*Korematsu* v. *United States* 1944, 216-219). The Court made it clear that the presence of such motivation would have been sufficient to invalidate the law: "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Korematusu was not excluded from the Military Area because of hostility to him or his race" (*Korematsu* v. *United States* 1944, 223). Thus, although laws singling out persons for differential treatment because of race are suspect and worthy of "the most rigid scrutiny," they are not necessarily unconstitutional (*Korematsu* v. *United States* 1944,

[23] In *Korematsu*, the Court explicitly stated, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny" (*Korematsu* v. *United States* 1944, 216). The Court reiterated this point in *Bolling* v. *Sharpe* (1954): "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and constitutionally suspect" (*Bolling* v. *Sharpe* 1954, 499).

216). Pursuant to the *Strauder* standard, however, laws predicated upon racial prejudice and animus are necessarily unconstitutional.

This trend of adherence to the *Strauder* standard is also evident in several post-*Korematsu* cases dealing with "facially symmetrical" anti-miscegenation and interracial-marriage statutes. Cases such as these do not display overt racial hostility or animus in the letter of the law (as did *Korematsu*), and the Court has often employed strict scrutiny analysis to tease out improper motives lingering beneath the surface of such facial symmetry. In *McLaughlin* v. *Florida* (1964), for example, the Court applied the standard of "rigid" or strict scrutiny pursuant to *Korematsu* v. *United States* and found a Florida statute prohibiting nocturnal cohabitation of unmarried interracial couples unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Florida statute defined "interracial" couples as those comprised of a black man and a white woman, or a black woman and a white man (*McLaughlin* v. *Florida* 1964, 184). Thus, it singled out for differential treatment only relationships between white and black persons and left untouched relationships between persons of the same race (*McLaughlin* v. *Florida* 1964, 188).

The under-inclusiveness of the law (i.e. that it applied only to interracial couples) represented the crux of the Equal Protection question before the Court. "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" (*McLaughlin* v. *Florida* 1964, 192). For the law to pass constitutional muster and survive strict scrutiny, a necessary connection between the legitimate state interest of regulating lewd behavior (e.g. fornication and cohabitation

among unmarried couples) and the specific ban on cohabitation among interracial couples must be present. In other words, such a proscription must be necessary to the realization of a legitimate state end in the way that exclusion based on ancestry was necessary to achieve the end of public safety in *Korematsu*. The Court was at pains to find such necessity between means and ends—especially since the state of Florida already had statutes of general applicability on the books that, in the eyes of the Court, served the same state end of interdicting lascivious behavior (*McLaughlin* v. *Florida* 1964, 196). Therefore, although the racial classification under examination treated whites and blacks alike by meting out the same penalty for breach of the law (facially symmetrical), the Court determined that the law in question was sufficiently under-inclusive to constitute an Equal Protection violation. Here, absence of the racial classification's necessity in achieving a legitimate state end furnished proof of illicit motivation on the part of the state. "Without such justification (of necessity) the racial classification […] is reduced to an invidious discrimination forbidden by the Equal Protection Clause" (*McLaughlin* v. *Florida* 1964, 193).[24] In other words, because the law under consideration could have achieved its alleged purpose through a generally applicable, non-racial classificatory scheme, it offended the Equal Protection Clause (*McLaughlin* v. *Florida* 1964, 184). The assumption here is, of course, that racial prejudice and animus motivated the state's action, and the state's decision to forego an equally viable, non-racial policy alternative represents proof of such prejudice (invidious discrimination).[25] As such, the *Strauder*

[24] I added the parenthetical to this quotation for emphasis and explanatory detail.

[25] Strict scrutiny represents a two-stage analysis. First, courts determine whether governmental objectives are legitimate and compelling. Second, if courts deem an objective compelling, they endeavor to determine whether the means chosen to further a particular end are "narrowly tailored"—meaning they do not encapsulate a greater or lesser degree of behavior than is required to realize the legitimate governmental

standard is apparent in *McLaughlin*—though applied in a more oblique and implicative fashion.

Although the *McLaughlin* Court applied the *Strauder* standard in a more oblique and implicative fashion, on the question of state proscriptions of interracial marriage the Court's channeling of *Strauder* was more overt. In *Loving* v. *Virginia* (1967), the Court considered the constitutionality of Virginia's ban on interracial marriage—again rejecting the argument that facial symmetry is the only standard states must meet in order to eschew contravention of the Equal Protection Clause in the context of racial classifications. In accordance with the standards of analysis set forth in *Korematsu*, Chief Justice Warren, writing for the Court, noted that all racial classifications are suspect and require strict scrutiny. What is more, if laws employing racial classifications are to survive the rigors of strict scrutiny "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" (*Loving* v. *Virginia* 1967, 11). The Court, in a manner similar to *McLaughlin*, noted that the Virginia statute in question was under-inclusive, as it limited application of the ban on interracial marriage to only those unions including white persons. As such, it was manifest that the law served no purpose independent of the very type of racial

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objective under examination. As the Court noted in *McLaughlin* (pursuant to *Korematsu*), there must be a necessary connection between means and ends (Winkler 2006, 800). This determination of "fit" between means and ends allows courts to discern whether a legislature is disingenuous in its stated purpose (Winkler 2006. 801). In fact, the Court has subsequently noted, "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are […] motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" (*City of Richmond* v. *J.A. Croson Co.* 1989, 493). Again, it is pellucid that the motivating presence of racial prejudice, as expounded in *Strauder*, is sufficient to invalidate legislation. Moreover, strict scrutiny is an analytical tool used to "smoke out" such illicit motivations.

discrimination the Fourteenth Amendment sought to forbid. It was clearly an attempt to maintain institutions of white supremacy, and the Court had long considered race-based restrictions of rights grounded in prejudice (c.f. *Strauder*)—i.e. judgments rooted in class inferiority and subordination—constitutionally impermissible (*Loving* v. *Virginia* 1967, 11-12). Therefore, the decision in *Loving* abided by the standard of invidious discrimination propounded in *Strauder*; it fit squarely within the pedigree of cases that harkened back to the early interpretations of the Reconstruction Amendments—a corpus of law that incontrovertibly proscribes legislation motivated by racial prejudice.

From the evidence presented in this section, it is apparent that the Court has been unwilling to deem all racially classificatory laws unconstitutional—espousing instead a distinction between invidious and non-invidious forms of discrimination, finding the former category impermissible and the latter suspect but not necessarily unconstitutional. Laws motivated by racial prejudice—or judgments of class inferiority based on race—are per se unconstitutional, and the Court's opinion on this matter has not vacillated over the last hundred and thirty years. It derives from the precedent set forth in *Strauder* v. *West Virginia* (1880) and has applicability across facially symmetrical (c.f. *Loving* and *McLaughlin*) and overtly disadvantaging statutes (c.f. *Strauder*). Outside this range of cases (i.e. those grounded in racial prejudice), however, the constitutionality of legislation employing racial classifications has been less than crystalline. In the next section of this chapter, I focus on one area of law in which the constitutionality of racial classifications has been in flux and clarity is wanting. Specifically, I examine laws employing racial classifications and/or race-conscious decision-making to remedy the ongoing effects of previous racial discrimination. Here, I concentrate primarily on the

disparate-impact theory of discrimination and its legislative incarnation: Title VII of the Civil Rights Act of 1964.

Muddying the Waters: Remediation of Racial Discrimination through Disparate-Impact Legislation

Laws with the purpose of subordinating and disadvantaging persons because of race—i.e. those laws grounded in and motivated by prejudice—are patently unconstitutional. If there is one indubitable, invariant principle of constitutional law in the post-Reconstruction United States, it is this. There is an impressive lineage of case law corroborating this assertion—one that is manifestly traceable to the earliest Supreme Court decisions interpreting the Reconstruction Amendments (see above). Additionally, it is abundantly clear that statutes containing racial classifications, while suspect and worthy or rigorous scrutiny, are not by that fact alone unconstitutional (i.e. unconstitutional per se). Such classifications could pass constitutional muster if they are "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination it was the object of the Fourteenth Amendment to eliminate" (*Loving* v. *Virginia* 1967, 11). In other words, something beyond the presence of mere racial classifications, such as impermissible purpose, must be present in order to invalidate a law.

While it is clear that laws with a discriminatory purpose grounded in racial prejudice are impermissible, what, if anything, does this standard portend regarding the constitutional status of facially neutral laws (i.e. race-neutral statutes) that do not have discriminatory intent or purpose but produce discriminatory effects, such as disproportionate impact based on race? This question gains legitimacy once one

considers that racial classifications on the face of a statute do not represent a necessary condition for constitutional invalidation. In several cases, the Court has looked past the racial neutrality of a law to find a constitutional violation. In *Gomillion* v. *Lightfoot* (1960), for example, the Court found that a 1957 law redrawing the boundaries of Tuskegee represented a violation of the Fifteenth Amendment, even though the statute in question did not contain express racial classifications (i.e. it was facially neutral). The Court used the effects of the statute in question to discern an impermissible discriminatory purpose: "segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote" (*Gomillion* v. *Lightfoot* 1960, 341). Thus, while the effects of the statute were of constitutional relevance in *Gomillion*, the effects were germane only insofar as they directly related to the discernment of impermissible racial purpose or motivation pursuant to *Strauder* (Sullivan and Gunther 2010b, 522-523). Similarly, in *Griffin* v. *County School Board of Prince Edward County* (1964), the Court found a racially discriminatory purpose in a law that contained no explicit racial classifications. Once again, statutory effects gained constitutional relevance only because such effects allowed the Court to determine illicit purpose, which, in this case, was the closing of public schools and running private schools in defiance of a school desegregation decree (*Griffin* v. *County School Board of Prince Edward County* 1964, 231; Sullivan and Gunther 2010b, 523).

Interestingly, the Court did not find similar impermissible discriminatory purpose in the case of *Palmer* v. *Thompson* (1971). The city of Jackson, Mississippi, closed all of its public pools in response to a desegregation order, citing economic and public safety considerations (i.e. race-neutral purposes) for the closures (*Palmer* v. *Thompson* 1971,

217). The Court found no equal protection violation because the city government had no constitutional or congressionally authorized statutory obligation to provide public swimming pools; moreover, the city was not providing unequal access to a public good because of race, and it was not operating segregated recreational facilities (*Palmer* v. *Thompson* 1971, 217). What is more, the Court endeavored to distinguish its decision in *Palmer* from *Griffin* and *Gomillion*. In *Griffin*, unlike *Palmer*, the government had direct involvement in supporting a scheme of racially segregated private schools; the state and county funded attendance to these schools through a grant and tax-credit system, and the Court's decision in *Griffin* thus focused on the state's actual operation and funding of a segregated private school system (*Palmer* v. *Thompson* 1971, 222). That is to say, the Court's decision focused on the actual effects and operation of the law under examination. No such comparable governmental support for the operation of segregated private swimming facilities existed in *Palmer*; as such, *Griffin* was not controlling in this case.

If there was no governmental support of a racially segregated system in *Palmer*, perhaps the city's action was unconstitutional due to the presence of an impermissible motive—specifically, a "desire to avoid integration of the races." In response to this supposition, the Court noted, "No case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it" (*Palmer* v. *Thompson* 1971, 224). The Court at least partially acknowledged its whitewashing of precedent here, stating, "It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality" (*Palmer* v. *Thompson*

1971, 225). And, rather than citing the plethora of case law dating back to *Strauder* that dealt with the very real concern of laws actuated by racial prejudice, the Court simply truncated its scope of precedent and cited two cases of potential relevance: *Gomillion* v. *Lightfoot* and *Griffin* v. *County School Board*. Although these cases suggest the constitutional relevance of the motivations that underpin government action, the Court's concern in these cases "was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did" (*Palmer* v. *Thompson* 1971, 225).

In *Gomillion* and *Griffin*, was the Court's reasoning grounded primarily in an evaluation of the actual effect of the statutes, or was its focus, as I contended above, on the impermissible purpose contained in each statute—a purpose at least partially derived from effects? An assessment of the diction in *Griffin* and *Gomillion* bolsters my assertion that the Court anchored its reasoning in the purpose—not the effects—of the legislation in question. For example, the *Griffin* Court focused on the reasons underpinning state action when it expounded its opinion. "The record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure that white and colored children […] would not […] go to the same school" (*Griffin* v. *County School Board of Prince Edward County* 1964, 231). Similarly, the *Gomillion* Court stated, "The conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote" (*Gomillion* v. *Lightfoot* 1960, 341). The "mathematical demonstration" of which the Court spoke was the effect of the legislation,

which served "to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident" (*Gomillion* v. *Lightfoot* 1960, 341). In all, the effect of the statute demonstrated the impermissible discriminatory purpose of race-based vote deprivation. As such, the reasoning in *Gomillion* and *Griffin* is consonant with the understanding of impermissible discrimination propounded in *Strauder*.

Moreover, applying the logic of the Court in *Palmer* to cases such as *Korematsu*, *Loving*, and *McLaughlin* would substantially alter the inquiry into the laws under consideration in those cases. For example, if the Court's primary focus were on the effects—not the purpose or motivation—of legislation, the Court would not have upheld the exclusion order in *Korematsu* (however lamentable its decision may have been), as the order undoubtedly discriminated against persons based on race. It was only after an inquiry into the purpose of the law that the Court conferred constitutionality upon the exclusion order. In both *Loving* and *McLaughlin*, the Court again focused on legislative purpose and endeavored to determine if a legislative purpose independent of invidious discrimination existed for legal restrictions on interracial cohabitation and marriage. In these cases, the Court found no purpose short of invidious discrimination; the implication here is that such a finding would have produced a different result (otherwise why would the inquiry have been taken up in the first place?). Moreover, it is unlikely that the Court would have reached the same decision had its focus been the effect of the laws in question, as the legislatures of Florida and Virginia carefully designed anti-miscegenation statutes and bans on interracial marriage to ensure facial symmetry between whites and blacks. As such, the facially symmetrical laws did not single out persons for differential

treatment because of race (as *Korematsu* did); rather, the laws treated whites and blacks in the same fashion. Without additional inquiry into the purpose of the laws, an examination of the effects would have yielded the conclusion that the statutes denied the same opportunity to whites and blacks alike—nothing more. It should come as no surprise, then, that the *Palmer* Court cited the racially symmetrical effect of pool closures as proof of the decision's constitutionality within the meaning of the Equal Protection Clause.[26]

From the evidence cited above, *Palmer* appears to be an outlier among cases representing a general trend of adherence to the *Strauder* precedent. Even still, the legislative effects approach in *Palmer* shows, at a minimum, that the judicial understanding of purpose and effect as they related to equal protection were somewhat nebulous at the time of the *Palmer* decision in 1971. Further increasing turbidity in this realm was the case of *Griggs* v. *Duke Power Co*. (1971), which was decided in the same term as *Palmer*. *Griggs* interpreted Title VII of the Civil Rights Act of 1964 as requiring not only a ban on purposeful discrimination in employment practices, but also a proscription on the use of tests and/or other metrics that served disproportionately to exclude persons from employment on the basis of race. This proscription would apply regardless of whether employers adopted a given test and/or metric with discriminatory purpose (intent) and could withstand judicial scrutiny only if the metrics in question were directly related to job performance ("business necessity") (*Griggs* v. *Duke Power Co*.

[26] "The issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the swimming pools to all citizens constitutes a denial of 'the equal protection of the laws'" (*Palmer* v. *Thompson* 1971, 226).

1971, 431).[27] Although this decision did not answer the broader, constitutional question of disparate impact and its relation to the Equal Protection Clause, whether the Court would reach such a conclusion was at least an open question. Thus, the constitutional status of facially neutral laws (i.e. race-neutral statutes) that did not have discriminatory intent or purpose but produced discriminatory effects, such as disproportionate impact based on race, remained an open question. Furthermore, even if my reading of the *Strauder* precedent and its progeny is correct, there is nothing in this body of case law to suggest that an impermissible discriminatory purpose is a necessary condition for constitutional invalidation. In other words, it is theoretically possible that laws devoid of impermissible discriminatory purpose with discriminatory effects could fall within the range of constitutionally impermissible statutes.

Lest one perceive this statement of theoretical possibility as contravening my earlier position on *Palmer* and the legislative effects approach, I draw the following distinction. *Palmer* argued for the irrelevance of legislative purpose in the adjudication of equal protection cases, and issued an admonition about engaging in such motivational inquiries. "There is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body re-passed it for different reasons" (*Palmer* v. *Thompson* 1971, 225). This conclusion of the *Palmer* Court holds only insofar as one presupposes a dichotomy between purpose and effect, such that one cannot discern

[27] In the Court's words, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity" (*Griggs* v. *Duke Power Co.* 1971, 431).

impermissible purpose from the effects of a law, or from other circumstantial evidence related to the case. However, the possibility remains that the Court could discern improper motive based on the effects of legislation, as it did in *Griffin* and *Gomillion*. Why would such an effects-based inference be foreclosed post-motivational change? It was available to the Court prior to the change, and it thus follows that this analytical tool would be available post-motivational change as well. Additionally, in the hypothetical instance cited by the *Palmer* Court, the fact that the legislature changed its stated purpose or intention after an inquiry that discovered illegitimate motive would seem to bear heavily on subsequent judicial inquiries into the legitimacy of legislative purpose. It seems apparent that such changes would have direct relevance to further inquiries into legislative intent and render all iterations of the law proximate to the finding of impermissible intent suspect, unless one assumes the irrelevance of such motives prior to subsequent considerations of legislative intent. Finally, in its critique of motivational inquiry, the *Palmer* Court's dichotomy between purpose and effect causes the Court to discount not only the possibility that motivational and effects-based inquiries are complementary and substantially related (i.e. effects used to discern motive or purpose), but also that they may at times indicate distinct but constitutionally harmonious inquiries (i.e. effects may constitute a constitutional violation even in the absence of illicit purpose). That is to say, it rules out the possibility that a court granting solicitude to legislative motivation may at times find constitutional violation in the disparate impact or discriminatory effects of a law (as in *Griggs*)—even when impermissible motivation is not present. And, as noted above, it is at least theoretically possible that laws devoid of impermissible discriminatory purpose with discriminatory effects could fall within the

range of constitutionally impermissible statutes; I examine this possibility in the next section.

Washington v. Davis, Title VII and Constitutional Permissibility of Disparate Impact Legislation

What is the constitutional status of race-neutral laws that do not have discriminatory intent or purpose but produce discriminatory effects, such as disproportionate impact based on race? The Court provided an answer to this question in the case of *Washington* v. *Davis* (1976), a case where it considered the validity of a racially neutral qualifying examination for the District of Columbia Metropolitan Police Department. To ascertain candidates' verbal ability, the city administered Test 21. Two black applicants whom the police department rejected alleged that the test constituted a form of impermissible racial discrimination because it disproportionately excluded blacks from police officer jobs in the city, and it had no discernible relationship to actual job duties and performance (*Washington* v. *Davis* 1976, 229). As noted above, the Court established the importance of disproportionate impact as it pertained to "business necessity" and job duties in *Griggs* v. *Duke Power Co*. (1971); however, *Griggs* dealt specifically with the interpretation of a statute and did not touch on larger constitutional issues such as the meaning of discrimination within Equal Protection Clause. In *Davis*, however, the Court reached the constitutional issue and endeavored to discern a rule governing racial discrimination pursuant to the Equal Protection Clause of the Fourteenth Amendment.

According to the Court, "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the

basis of race" (*Washington* v. *Davis* 1976, 239). Through a survey of equal protection case law in various contexts (e.g. jury selection, racial gerrymandering and school desegregation), the Court construed "conduct discriminating on the basis of race" to mean purposeful discrimination (*Washington* v. *Davis* 1976, 239-242). Nevertheless, the concept of purposeful discrimination is fraught with ambiguity, as one could assert that every law employing racial classifications has as its purpose discrimination based on race. In fact, legal scholar David Chang makes such an assertion. To Chang, "All racial classifications reflect a purpose to discriminate based on race—a purpose to use race as a sorting tool" (Chang 1991, 801). While there is certainly some merit to Chang's assertion, a close reading of the opinion in *Washington* v. *Davis* belies this understanding of purposeful discrimination. The examples cited by the Court in defense of its reading of the Equal Protection Clause follow a simple taxonomy. Jury selection cases such as *Strauder* and its progeny[28] are rather transparent when it comes to racial purpose or motivation; these statues overtly classify and disadvantage based on race. In school desegregation cases, governing bodies employ overt racial classifications that confer racial disadvantage covertly. A simple examination of the letter of the law would not yield the conclusion that such laws disadvantage certain racial groups; this is because the statutes in question embody racial symmetry (c.f. *Loving* and *McLaughlin*). Notwithstanding this difference, both lines of precedent reveal an important commonality; mainly, one cannot reduce the racial classifications under examination in either line of precedent to a purpose independent of racial discrimination (i.e. a purpose other than singling out persons on the basis of race, or using race as a "sorting tool"). If

[28] See also *Akins* v. *Texas* (1945), Alexander v. *Louisiana* (1972), *Carter* v. *Jury Commission* (1970), *Cassell* v. *Texas* (1950), and *Patton* v. *Mississippi* (1947) (*Washington* v. *Davis* 1976, 239-240).

statutes are not reducible to anything other than racial discrimination (singling out on the basis of race), then the sole purpose of the statue in question is to discriminate because of race, a motive which falls under the category of impermissible racial discrimination in accordance with the *Strauder* standard explicated above.

Recall that the *Strauder* Court, when discerning the meaning of the Equal Protection Clause, argued that the main purpose of the Fourteenth Amendment was to ensure that "no discrimination shall be made against them by law because of their color." Additionally, "The very fact that colored people are singled out […] because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, an assertion of their inferiority" (*Strauder* v. *West Virginia* 1880, 307). One should interpret discrimination "because of their color," then, as a proscription of discrimination based singularly on race. What is more, since the statute in question served no purpose other than to discriminate because of race, the Court associated such discrimination with racial prejudice, or judgments against particular groups or classes of persons that served "to deny persons of those classes the full enjoyment of that protection which others enjoy" (*Strauder* v. *West Virginia* 1880, 309). Prejudice, is tantamount to viewing certain groups as subordinate or inferior (prejudice as epistemic judgment), and the proscription of discriminatory laws motivated by such prejudice was the primary goal of the Fourteenth Amendment (*Strauder* v. *West Virginia* 1880, 309). Therefore, if the racial classifications under examination reduce to a purpose of racial discrimination (i.e. singularly based on race), the classificatory scheme represents nothing more than a constitutionally impermissible racial purpose—i.e. one grounded in prejudice.

This pattern of reasoning is also readily apparent in *McLaughlin*, for example, where the Court assayed the racial classification in Florida's interracial cohabitation law. The Court's analysis of the law focused on whether there was a purpose other than invidious discrimination for the conduct proscribed in the state's criminal statute (*McLaughlin* v. *Florida* 1964, 192). By "invidious discrimination," the Court clearly meant the presence of a racial classification that served no purpose other than to discriminate on the basis of race. As evidence of this, consider the language employed when speaking of legislative purpose. "Our inquiry, therefore, is whether there clearly appears […] 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 […] is reduced to an invidious discrimination forbidden by the Equal Protection Clause" (*McLaughlin* v. *Florida* 1964, 192-193). Ultimately, the Court found no such legislative purpose (*McLaughlin* v. *Florida* 1964, 193).

Outside of the two case types adduced above, both of which entailed overt racial classifications, the Court acknowledged the possibility of constitutionally impermissible racial discrimination in contexts devoid of racial classifications. For example, in cases such as *Yick Wo* v. *Hopkins* (1886), a race-neutral statue was applied in such a racially discriminatory fashion that one could not help but infer intentional discrimination (*Washington* v. *Davis* 1976, 241). Additionally, the Court noted that racially disproportionate effects of legislation had relevance only insofar as courts may use them to discern impermissible or invidious legislative purpose (as in *Griffin* and *Gomillion* above). "It is also not infrequently true that the discriminatory impact […] may for all

practical purposes demonstrate unconstitutionality because […] the discrimination is very difficult to explain on nonracial grounds" (*Washington* v. *Davis* 1976, 242). Thus, it is reasonable to conclude that, while the Court was willing to acknowledge the relevance of discriminatory effects (i.e. a singling out on the basis of race in the effects of law), such legislative effects are germane only to the extent that they reveal illicit or illegitimate purpose. In other words, effects are pertinent only if they show that a law or its application (administration) reduces to race and is inexplicable on race-neutral (nonracial) grounds. For this reason, the Court noted that, by itself, disparate impact did not require strict scrutiny, whereas laws employing racial classifications always triggered use of this analytical tool (*Washington* v. *Davis* 1976, 242-245). Moreover, it is abundantly clear that the manner in which courts have deemed discriminatory effects relevant jibes with the standard of purposeful discrimination set forth in *Strauder* and underscored in the jury selection and school desegregation cases above. As such, the *Davis* Court, unable to discern purposeful racial discrimination from the disproportionate impact of Test 21, did not find a constitutional violation (*Washington* v. *Davis* 1976, 246-248).

With *Davis*, the Court provided a definitive answer to the question of whether facially neutral laws devoid of discriminatory purpose were unconstitutional in circumstances where such laws engendered racially disproportionate results. Even though there existed some precedent for an effects-based approach to racial discrimination within the meaning of the Equal Protection Clause (c.f. *Palmer* above),[29]

[29] Conspicuously absent from the Court's discussion of effects-based discrimination in the context of school desegregation was the case of *Brown* v. *Board of Education* (1954). Although *Brown* is wanting in a clear-cut rationale for its decision (see Sullivan and Gunther 2010, 508), the diction of the Court is suggestive of an effects-based approach to remedying racial discrimination. Because the "tangible factors"

and although there was nothing in the body of case law to suggest that an impermissible discriminatory purpose is a necessary condition for constitutional invalidation, the Court remained steadfast in its commitment to the standard of purposeful discrimination. It reconciled *Palmer* with its decision by arguing that the actual holding of the case did not call for an effects-based approach to discrimination, regardless of what the Court's dicta implied (its admonition against motivational inquiries). Rather, the holding in the case was simply that the available evidence did not evince an illicit racial motivation on the part of city council—a motive that would have impugned the avowed legislative purpose of maintaining peace and order (*Washington* v. *Davis* 1976, 242). What the Court overlooked in its attempt to reconcile *Palmer* and *Davis* was the simple fact that a finding of permissible legislative motive or purpose was foreordained in *Palmer*, given the Court's position on such inquiries. The reasoning of the *Davis* Court is suspect here; the *Palmer* Court's critique of motivational inquires was relegated to dicta—not part of the official holding—because there was not evidence calling into question the stated legislative purpose (*Washington* v. *Davis* 1976, 243). However, such evidence could be discovered and called into question only if the *Palmer* Court embarked upon the very type of motivational inquiry it deemed problematic and discontinuous with constitutional precedent. Thus, the *Palmer* Court's opinion on motivational inquiries is inextricably

(i.e. those measurable elements such as physical space/buildings, teacher qualifications and salaries and curricula) of separate-but-equal schooling had been brought into a relative state of equality, the Court asserted, "We must look instead to the effects of segregation itself on public education" (*Brown* v. *Board of Education* 1954, 492). It is unclear whether this examination of effects—specifically the sentiments of inferiority and second-class personhood that segregated education arrangements generate—represented an attempt to ferret out impermissible purpose (racial prejudice). Nonetheless, it is incumbent upon the Court at least to address this potential counterpoint.

bound up with its holding of permissible motive, and the *Davis* Court's attempt to reconcile *Palmer* with its holding is ultimately lacking in cogency.[30]

Although the *Davis* Court's attempts at explaining away *Palmer* were unpersuasive, the decision remains a standard-bearer for defining impermissible discrimination under the Equal Protection Clause of the Fourteenth Amendment—particularly as it relates to legislative remedies for disparate racial impacts. Interestingly, although the Court held that facially neutral laws devoid of discriminatory purpose did not violate the Fourteenth Amendment—even if they produced racially disparate results—the Court felt it was constitutionally unproblematic for legislatures to take it upon themselves to remedy such disparate impacts. In short, the Constitution does not compel the redress of disparate racial impacts, but neither does it forbid legislative actions designed to remedy such disproportionate results (*Washington* v. *Davis* 1976, 248; Primus 2003, 497).[31] As Richard Primus notes, this was the theory propounded in *Davis*, and courts, attorneys and academics alike have approached disparate impact legislation from this perspective for almost 30 years (Primus 2003, 497-498).

While the theory proffered in *Davis* has been the prevailing standard in antidiscrimination law, there has been a trend in Equal Protection decisions since *Davis* that displays antagonism toward legislative efforts to distribute goods in accordance with

[30] In fact, Justice White, with whom Justices Marshall and Brennan dissented, engaged in such an inquiry, asserting that, "Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes or whites from eating together or from cohabiting or intermarrying" (*Palmer* v. *Thompson* 1971, 241).

[31] When discussing the prospect of a constitutional rule that would invalidate facially neutral laws with disparate impacts, the Court stated, "In our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription" (*Washington* v. *Davis* 1976, 248).

race—regardless of legislative motive (i.e. whether it is benign or malignant) (Primus 2003, 496). This movement has rendered equal protection more individualistic and mechanistic—placing less emphasis on vestiges of prior discrimination (historical focus) and their connection to present-day racial hierarchies (Primus 2003, 498). What is more, movement in this direction has also called into question the constitutionally permissible status of disparate impact statutes, such as Title VII, and it has circumscribed the ability of governing bodies to enact disparate impact legislation. Whether and to what degree the more individualistic and mechanistic approach to equal protection conflicts with disparate impact statutes remains to be seen, as the Court's most recent disparate-impact case—*Ricci* v. *DeStefano* (2009)—demurred on this constitutional question. What is clear, however, is the Court now favors a standard of disparate impact that is more consonant with a color-blind Equal Protection Clause—one that sees race-consciousness in any form of the legislative process as constitutionally problematic. In the next two sections, I explore the theory and policy of disparate impact in the United States and attempt to situate this approach within the framework of impermissible racial discrimination outlined in the foregoing sections of this chapter.

The Theory of Disparate Impact Discrimination

As outlined in the previous section, the *Davis* Court espoused a theory of purposeful discrimination, asserting that legislation offends the Equal Protection Clause and constitutes impermissible racial discrimination if and only if it serves no purpose other than to discriminate based on race.[32] Implicit in this statement is the existence of

[32] When discussing the case of *Yick Wo*. v. *Hopkins* (1886), the Court explicitly noted the necessary nature of discriminatory purpose: "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute" (*Washington* v. *Davis* 1976, 241). Thus, we can infer that discriminatory purpose is a necessary condition for unconstitutional discrimination under the Equal

constitutionally permissible racial classifications (i.e. constitutionally permissible discrimination); in other words, if courts unearth legitimate purposes outside of discriminating on the basis of race—that is, if the legislative purpose does not reduce singularly to racial intent—then the statute in question should pass constitutional muster. This is consistent with the history of racial classifications as constitutionally suspect but not per se unconstitutional, and the *Davis* Court acknowledged this precedent (*Washington* v. *Davis* 1976, 242).[33] Additionally, the *Davis* Court, while not ruling in favor of a constitutional rule proscribing legislation with racially disproportionate results, nonetheless did not express disapprobation of, or deem unconstitutional, statutory efforts employing disparate impact standards (such as those exemplified by Title VII of the Civil Rights Act) (*Washington* v. *Davis* 1976, 248). Given the aforementioned conclusions regarding racial discrimination, then, it follows that, to the extent that disparate impact legislation similar to Title VII singles out persons on the basis of race (uses race as a "sorting tool"), such statutes do not constitute an impermissible form of racial discrimination. If they did, it is fair to conclude that the Court would have acknowledged as such and not expressly underscored the legitimacy of such laws (*Washington* v. *Davis* 1976, 248). An examination of the theory underpinning disparate racial impact statutes also bolsters this conclusion, as it reveals that such statutes are not singularly reducible to

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Protection Clause. Combining this inference with what we already know regarding the presence of discriminatory purpose from cases like *Strauder*, *McLaughlin*, *Loving*, and *Korematsu* (i.e. that such purpose is enough, in and of itself, to render a law unconstitutional), we can reasonably conclude that discriminatory purpose represents both a necessary and sufficient condition for impermissible discrimination pursuant to the Equal Protection Clause of the Fourteenth Amendment.

[33] David Chang refers to this trend of racial classifications as constitutionally suspect but not per se unconstitutional as statutory distinctions that are "constitutionally disfavored, but permissible" (Chang 1991, 801-802). Such classifications may provide the foundation for claims of unconstitutionality when coupled with additional evidence, such as the discovery of impermissible motives (i.e. racial prejudice) (Chang 1991, 802).

racial intent (i.e. they do not represent purposeful discrimination). It is thus unsurprising that the *Davis* Court's dictum did not evince a constitutional conflict between such race-conscious measures and the Equal Protection Clause.

To discern the theory undergirding disproportionate racial impact statutes, the best place to turn is *Griggs* v. *Duke Power Co*. (1971); this case represents the most comprehensive expression of the logic of such legislation (Primus 2003, 523). *Griggs* endeavored to interpret the Civil Rights Act of 1964, specifically Title VII of the Act, which dealt with racial equality in employment opportunities. The issue before the Court was whether an employer may condition employment and/or job transfers upon the passage of tests and other requirements that do not substantially correlate with job performance if such tests disproportionately exclude blacks from positions formerly allocated to whites as a matter of racial preference (*Griggs* v. *Duke Power Co.* 1971, 425-426). The Court noted that Congress' main objective in enacting Title VII was attaining equal employment opportunity through the elimination of impediments that historically served to give preference to white employees at the expense of non-whites (*Griggs* v. *Duke Power Co.* 1971, 429-430). According to the Court, the purpose of Congress did not extend only to present-day acts of intentional discrimination, but also provided recourse for neutral employment policies that disproportionately disadvantaged those persons previously discriminated against. "Under 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" (*Griggs* v. *Duke Power Co.* 1971, 430).

One should not interpret the Court's construction of the Act here as requiring employers to hire persons simply because of their race, or because they were victims of racial discrimination, as the Act expressly forbids this type of bald racial preference. Simply stated, the construed purpose of the Act is to eradicate racial preference from employment practices, and the Act does this by eliminating unnecessary obstacles to hiring that have the effect of invidiously discriminating based on race (or other suspect classifications) (*Griggs* v. *Duke Power Co.* 1971, 431). Thus, although the employer under examination in *Griggs* did not purposely discriminate based on race (i.e. did not have racially discriminatory intent pursuant to *Strauder*), such a defense was not sufficient to remove the burden of liability under Title VII because the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" (*Griggs* v. *Duke Power Co.* 1971, 432). As such, for the employment practice under examination to stand in harmony with the spirit of Title VII, the employer would have to demonstrate that the test is "job related."[34] In Griggs, the Court found no connection between the intelligence tests used by Duke Power Co. and proficiency in the jobs that required such tests as a condition of employment (*Griggs* v. *Duke Power Co.* 1971, 431-432).

The theory of discrimination proffered in *Griggs*, a theory derived from the statutory language and legislative history of Title VII of the 1964 Civil Rights Act,

[34] "Congress has now provided that tests or criteria for employment may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity" (*Griggs* v. *Duke Power Co. 1971*, 431).

displays a concern not simply with racially discriminatory motives (c.f. *Strauder* and its progeny cited in *Davis* above), but also with the discriminatory effects of neutral rules governing employment decisions. This much should be clear from the exegesis of *Griggs* above. More broadly, however, the theory of disparate impact discrimination shows an understanding of the profound and long-lasting structural disadvantages that blacks face relative to whites as a consequence of generations of purposeful discrimination. These structural disadvantages wield a great deal of power in explaining why certain race-neutral laws, rules and regulations disproportionately affect blacks in adverse fashion. It is precisely because of prior invidious discrimination, for example, that a larger share of blacks suffers from poverty and a lack of quality education than do whites. Prior discrimination engenders social disadvantage for blacks in relation to whites, and rules and regulations encumbering those with less education and economic resources therefore disproportionately affect blacks in adverse fashion, irrespective of discriminatory intent (Perry 1977, 557-558).

The *Griggs* Court succinctly and cogently captured this underlying logic of disparate impact discrimination when it stated, "Under 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" (*Griggs* v. *Duke Power Co.* 1971, 430). Here, the Court acknowledged that the practice of *de jure* discrimination created a racially stratified system of employment. This pattern of racial stratification in employment continued—even after the cessation of legalized (*de jure*) discrimination. Under the disparate impact theory of racial discrimination, courts and legislative bodies interpret *de facto* racial segregation in contemporary employment

patterns as the net result of prior policies of *de jure* discrimination (Primus 2003, 523). This is because, for example, there were still significant disparities in educational opportunities for whites and blacks even after the elimination of legalized forms of racial discrimination; hence, employers using education as a criterion for employment were more likely to hire whites, regardless of their racially discriminatory motives (Primus 2003, 523-524). Given the important role that parental labor market success plays in determining employment and education opportunities for children, one can see how this pattern of disadvantage perpetuates itself, even in the absence of intentional discrimination (Primus 2003, 524). As such, simply proscribing *de jure* racial discrimination will not eliminate racial hierarchy and segregation in the US labor market. In fact, the data evince this trend, as *de facto* racial segregation in the US labor market continues at the regional, firm and intrafirm levels—despite the eradication of formal legal barriers to workplace integration (Anderson 2002, 1200).

The inadequacy of limiting remedial action to instances of intentional discrimination (i.e. proscribing *de jure* discrimination) explains the Court's concern in *Griggs* with disparate racial impact and the ossification of "prior discriminatory employment practices." Richard Primus refers to this as a concern with "self-perpetuating racial hierarchies"—hierarchies that do not require purposeful discrimination for their continued existence (Primus 2003, 523). Simply stated, Title VII views statutes, regulations and rules that cement the existing state of affairs as problematic because they further perpetuate such stratification and hierarchy; this is why the law mandates that, wherever possible, employers tailor rules and regulations to avoid the perpetuation and exacerbation of the disadvantaged position of blacks (Primus 2003,

524). In all, to combat racial hierarchies in the labor market effectively, and to live up to the 1964 Act's stated goal of equal employment opportunity (see Civil Rights Act of 1964, 253), courts and legislative bodies must transcend the singular focus on discriminatory intent (*de jure* discrimination). Thus, championing a paradigm of disparate impact discrimination is one way to combat the furtherance of such racial hierarchies and facilitate the integration of the American workplace (Primus 2003, 524).

In the example of racial hierarchies above, a history of overt discrimination engendered conditions of racial disadvantage; there is a nexus between prior discrimination and contemporary group disadvantage. Although myriad examples exhibit a similar nexus between discrimination and disadvantage, the disparate impact theory of discrimination encapsulated in Title VII has applicability even in the absence of a connection between such histories of discrimination and the contemporary structural disadvantages faced by certain groups. Above all else, the principal concern of disparate impact doctrine is the eradication of labor-market hierarchies predicated upon "irrelevant classifications" (Primus 2003, 524-525; *Griggs* v. *Duke Power Co.* 1971, 434). It is for this reason that, in the case of *Dothard* v. *Rawlinson* (1977), women were able to attack successfully height and weight restrictions for employment under the disparate impact doctrine—even though a history of discrimination against women was not connected to the specific disadvantage in this case. In this case, prior discrimination bore no relation to physical differences between women and men and the likelihood that height and weight requirements would disproportionately disadvantage women (Primus 2003, 524).

Situating the theory of disparate impact discrimination within the framework of impermissible racial discrimination outlined above yields one basic and straightforward

conclusion. If disparate impact statues akin to Title VII are unconstitutional, their unconstitutionality must reside in something other than an impermissible discriminatory purpose. The purpose of Title VII specifically, and disparate impact statutes generally, is the attainment of equal employment opportunity and the eradication of labor-market hierarchies (integration) (*Griggs* v. *Duke Power Co.* 1971, 429-430). Stated differently, the purpose is to foster hiring processes based on relevant job qualifications as opposed to hiring practices based on race or other irrelevant classifications (*Griggs* v. *Duke Power Co*. 1971, 434). It is unquestionable that this purpose is legitimate and within the boundaries of what constitutes a compelling governmental interest. Even someone in favor of a strictly color-blind reading of Title VII could assent to this legislative purpose, thus leaving the question of whether the relevant governing body has tailored the means employed in such statutes narrowly enough to avoid casting doubt on the avowed, legitimate purpose (as in cases such as *McLaughlin* and *Loving* above). In other words, do disparate impact statutes analogous to Title VII satisfy the second prong of strict scrutiny?

Three features of Title VII as interpreted by the *Griggs* Court underscore the narrowly tailored structure of the law and lend credence to the assertion that it should survive the second prong of strict scrutiny. First, because the statute as construed by the Court limits disparate impact remedies only to situations wherein tests and/or procedures have no relevance to job qualifications, the law exhibits a closeness of fit between the expressed purpose and the means chosen to fulfill it. This limitation ensures that the category of rules and regulations covered is not overly broad—covering only those cases where adjusting employment practices to remedy disparate impact would not pervert

hiring and transfer practices based on pertinent job qualifications. Overall, the contemplated standard of review in disparate impact cases is flexible (Perry 1977, 559). Banning all tests and/or procedures resulting in disproportionate racial impact, regardless of their relation to job qualifications, would have the opposite effect, however; such laws would fail the closeness of fit test and would create uncertainty as to whether racial favoritism is at play (the class of covered legislation would be over-inclusive). Such over-inclusive means effectively ignore the importance of certain tests in assessing job-related skills, and this casts a dubious shadow on the stated legislative purpose. Second, according to *Griggs*, disparate impact relief is not limited to blacks. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (*Griggs* v. *Duke Power Co.* 1971, 431). Extension of scope beyond one race in particular, or to race generally, and including other "impermissible classifications" further bolsters the argument that the legislative means serve an end that is not reducible to a singularly racial purpose. Third, disparate impact laws akin to Title VII do not result in a zero-sum racial employment policies wherein the eradication of rules/regulations engendering racially disparate impact distribute jobs to one racial group at the expense of another. The Court notes this in a somewhat oblique fashion by stating, "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group" (*Griggs* v. *Duke Power Co.* 1971, 430-431). If anything, such changes simply increase competition amongst qualified applicants.

From above, then, one may conclude that, even if strict scrutiny analysis applies to disparate impact legislation (and it is far from clear that it does), statues similar to Title VII should survive this constitutional test. What is more, there is nothing to suggest that the purpose upon which disparate impact statutes rest, or even the means they employ, traduce other constitutional standards or principles. Therefore, even if one finds the *Davis* Court's ruling on constitutionally mandated disparate impact standards problematic, the Court's dictum on disparate impact statutes—its conclusion of their constitutionally unproblematic status—is sound. Within the confines of the *Strauder* standard of impermissible discrimination upon which *Davis* rests, and in accordance with the principles of strict scrutiny, there is nothing for jurists to draw upon that would produce a finding of unconstitutionality within the meaning of the Equal Protection Clause. Interestingly, however, the Court has slowly moved away the dictum of *Davis* and its ruling in *Griggs* by limiting the circumstances under which employers may voluntarily adopt disparate-impact standards (See *Ricci* v. *DeStefano* 2009). This trend in disparate impact cases typifies a general pattern of judicial activism in the context of equal protection and race-conscious action, with the High Court displaying an overall antagonism toward racially distributive policies. This very recent understanding of equal protection looks askance at racially distributive policies that entail overt racial classifications (e.g. affirmative action), as well as those that entail no such classifications but nonetheless endeavor to distribute goods in a race-conscious fashion (e.g. disparate impact) (Primus 2003, 496; 2010, 1342-1343). The result of this antagonism has been a truncation of the range of circumstances in which race-conscious state action is constitutionally acceptable—pushing US public policy in the direction of absolute color-

blindness and putting disparate impact on a collision course with the Equal Protection Clause (Primus 2010, 1342; King and Smith 2011, 95).

Ricci v. DeStefano and the Retreat from Griggs and Race-Conscious Constitutionalism

The importance of the *Griggs* decision is hard to overstate. After the decision upheld the race-conscious disparate impact standard of discrimination, the volume of Title VII lawsuits increased markedly, from hundreds per annum to more than five thousand (King and Smith 2011, 108). What is more, the prospect of disparate impact litigation induced employers to take preemptory steps to increase minority hiring through affirmative action programs—a practice commonly engaged in under the banner of "diversity" promotion and still championed by many American businesses today (King and Smith 2011, 108-109). Thus, the reach of *Griggs* extended far beyond those companies sued under the disparate impact standards of Title VII. Although *Griggs* made great strides toward equal employment opportunity, a pattern of retrenchment has threatened to roll back the racially integrative progress of *Griggs*. In the context of affirmative action, the Court has limited the application race-conscious remedial action to cases of identifiable purposeful discrimination.

In *Wygant* v. *Jackson Board of Education* (1986), for example, a plurality of the Court applied strict scrutiny analysis and struck down a racially preferential layoff provision—noting that "societal discrimination" is insufficient to justify the use of racial preferences. "As the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive" (*Wygant* v. *Jackson Board of Education* 1986, 276). Instead, there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial

classifications in order to remedy such discrimination" (*Wygant* v. *Jackson Board of Education* 1986, 274). Moreover, even assuming the legitimate purpose of remedying past discrimination, the layoff provision in question would not have satisfied the narrow tailoring requirement—the second prong of strict scrutiny—because there were less "intrusive" options available to facilitate the same remedial end (*Wygant* v. *Jackson Board of Education* 1986, 282-284). At first brush, the Court's opinion seems reasonable enough. However, on the view that the purpose of strict scrutiny is to ferret out illicit motivation, it seems problematic here to move to a second-stage analysis of means-end fit, given that the objective of such analysis is to determine the legitimacy of government purpose. In fact, it is telling that the Court did not discern illicit purpose (i.e. racial prejudice or favoritism) from the absence of narrow tailoring here (as it did in cases like *Loving* and McLaughlin above). Rather, the Court viewed a lack of narrow tailoring as evidence that the cost—measured in terms of the burden borne by innocent non-minorities—is simply too high; there are less costly (i.e. burdensome) alternatives (*Wygant* v. *Jackson Board of Education* 1986, 282-283; Anderson 2002: 1230).

In *Wygant*, the plurality's use of strict scrutiny, then, appears to serve a different analytic function than the discernment of illegitimate purpose. If the concern of strict scrutiny in general, and narrow tailoring in particular, had been the determination of governmental purpose, any reference to the effects of legislation after an admission of legitimate purpose would have been supererogatory; there would have been no need for further inquiry. Simply stated, admission of legitimate purpose should have satisfied judicial inquest. David Chang notes the unnecessary nature of this step in his analysis of *Wygant*. He notes that racial classifications are "disfavored" but nonetheless acceptable

under certain circumstances. They are "disfavored" because they present a high probability that "the government has pursued impermissible purposes reflecting racial prejudice" (Chang 1991, 802). A determination that racial classifications are not the result of racial prejudice, however, obviates further judicial skepticism of legislative motive (Chang 1991, 803). Thus, it is clear that the Court adopted another purpose for strict scrutiny here—mainly, ensuring that the effects of remedial legislation did not weigh too heavily on innocent parties (i.e. non-minorities) (Anderson 2002, 1230).[35] Instead of ferreting out illicit purpose, narrow tailoring in *Wygant* is an analytic tool employed to determine if the burden shouldered by innocent non-minorities is fair, and limiting race-conscious action to circumstances of identifiable intentional discrimination is a logical consequence of such an approach.

Although the plurality opinion in *Wygant* was in line with Justice Powell's concurring opinion in *Fullilove* v. *Klutznick* (1980)—an opinion that expounded the constitutional relevance of burdens carried by non-minorities—and his plurality opinion in *Regents of the University of California* v. *Bakke* (1978),[36] the ruling deviated from the *Strauder* standard of impermissible discrimination, the intent of the Framers of the Fourteenth Amendment, and the holding in *Washington* v. *Davis* (1976). In the cases of *McLaughlin* and *Loving* above, the Court employed strict scrutiny in accordance with the *Strauder* standard of impermissible discrimination. Strict scrutiny determined the

[35] Elizabeth Anderson convincingly makes this point, labeling this the "effects" or "balancing" approach to strict scrutiny. This approach examines the impact or effects of race-conscious laws and endeavors to find an equitable distribution of gains and encumbrances—benefits and burdens (Anderson 2002, 1230).

[36] Justice Powell's plurality opinion stated, "The purpose of helping certain groups whom the faculty of the Davis medical school perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered" (*Regents of the University of California* v. *Davis* 1978, 310).

presence or absence of impermissible racial prejudice, and narrow tailoring played a pivotal role in the making of such determinations. A lack of narrow tailoring was sufficient to conclude that the statutes in question served no purpose other than to discriminate based on race; they were predicated upon racial prejudice and deemed constitutionally impermissible. Pursuant to *Strauder* and its progeny, the rationale for strict scrutiny, as well as its application to specific cases, does not have a necessary connection to the effects of race-conscious policies independent of legislative motive or intent. This does not mean that such an effects-based approach violates the *Strauder* standard or has extra-constitutional origins; it simply means that the effects-based approach to strict scrutiny is not continuous with the *Strauder* standard of impermissible discrimination, and its derivation must therefore come from another source. Perhaps the original intent of the Framers of the Fourteenth Amendment is the source of this standard. However, an examination of the legislative history of the Fourteenth Amendment does not yield this conclusion, thus making it difficult for one to conclude that Supreme Court opinions espousing such circumscriptions represent something other than a normative preference for race-neutral policies masquerading as original intent.

The same Congress that adopted the Fourteenth Amendment—the 39th—simultaneously promulgated legislation that doled out benefits exclusively to blacks, explicitly repudiating arguments that such programs benefitted blacks at the expense of whites and constituted illegitimate racial preference (Schnapper 1985, 784). With the 1866 Freedman's Bureau Act, Congress authorized the Freedman's Bureau—created by statute in 1865—to assist freed blacks and white refugees. The Act's assistance, though ostensibly available on a race-neutral basis, distinguished benefits along racial lines by

providing white refugees only the level of assistance required to become "self-supporting." In contrast, the legislation did not place a similar limit on the level of assistance available to blacks. The race-conscious character of the legislation also extended to provisions for education and land, as the Act explicitly provided educational support to blacks and special protections to freed blacks occupying abandoned territory; the legislation did not offer similar assistance and protection to poor whites or refugees (Schnapper 1985, 772-773). What is more, the assistance provisions of the 1866 Act were not limited to recently emancipated slaves or to those blacks denied educational opportunity because of racial discrimination (i.e. limited to victims of identifiable discrimination). "The programs applied to all blacks" (Schnapper 1985, 792). Although the bill handily passed in both chambers of Congress, President Johnson, in agreement with the bill's detractors, vetoed the Act, labeling it a form of "class legislation" that gave special treatment to certain citizens (Schnapper 1985, 774). Congress had rejected similar arguments, which opponents had leveled against the Freedman's Bureau Acts of 1864 and 1865, and it did so again—voting to override President Johnson's veto by wide margins (Schnapper 1985, 775).

Signing the race-conscious programs of the Freedman's Bureau Act of 1866 into law is of great significance when attempting to understand the status of race conscious policies under the Fourteenth Amendment. Not only did the same Congress pass the Amendment and the 1866 Act, but the general makeup of the congressional majorities championing the Amendment and the Act were practically indistinct. Moreover, the legislative sponsors and the author of the Fourteenth Amendment voted for the Freedman's Bureau Act, and the objective of the amendment and the law was the same:

"ameliorating the condition of the freedmen" (Schnapper 1985, 784-785). Thus, to hold that race-conscious policies similar to those of the Freedman's Bureau Act are inconsistent with the Fourteenth Amendment, one would have to conclude that the 39th Congress had sought, with its passage of the Fourteenth Amendment, to prohibit the very type of legislation it had debated and passed in the same session year. This is most certainly a fatuous conclusion, and evidence suggests that members of Congress perceived the two measures as exemplifying one continuous, cohesive policy. As such, the perception of cohesion did not vacillate based on one's support or opposition to the Act and the Amendment. In other words, opposition or support for the Act was correlative with opposition or support for the Amendment; the two legislative actions, given their coherence, stood or fell together (Schnapper 1985, 785).

Additionally, there is significant evidence bolstering the contention that part of Congress' motivation in passing the Fourteenth Amendment was to provide a firm constitutional foundation for the Freedman's Bureau Act (Schnapper 1985, 785). While holding debate on an incipient draft of the Fourteenth Amendment, Congressman Woodbridge argued that one way around the thorny constitutional issues raised by President Johnson's veto (of the Freedman's Bureau Act) was to pass a constitutional amendment. The Speaker of the house echoed this sentiment (Schnapper 1985, 786). And although the Fourteenth Amendment was not yet applicable to the Federal Government, there is ample evidence to suggest that the Framers of the Amendment saw it as applying to the Federal Government (Schnapper 1985, 787). Therefore, "Any legislation that Congress past in 1866, when equal protection occupied so much of its

attention, must have been consistent with that principle even if the terms of the fourteenth amendment were literally applicable only to the states" (Schnapper 1985, 788).

From the evidence above, then, one can reasonably conclude that the Framers of the Fourteenth Amendment did not conceive of race-based measures as limited to instances of identifiable deliberate discrimination. Such limitations on race-based measures run counter to the character of the 1866 Freedman's Bureau Act and its application to all blacks—not just blacks who suffered injustice at the hand of purposeful discrimination. In fact, the 39th Congress roundly rejected proposals requiring such circumscribed reach (Schnapper 1985, 792). What is more, to the extent that one is operating in accordance with the understanding of "burden" espoused by the *Wygant* plurality, it is clear that the Framers of the Fourteenth Amendment were not concerned with the impact that such race-based measures had on innocent whites. When analyzing "burdens" in *Wygant*, Justice Powell distinguished layoffs, which he saw as too burdensome and "intrusive," and racial hiring goals, which he saw as less onerous and diffuse—foreclosing only "one of several opportunities" (*Wygant* v. *Jackson Board of Education* 1986, 283). So the *Wygant* plurality conceived of racial hiring goals, such as the 10 percent minority quota in *Fullilove* v. *Klutznick* (1980), as granting opportunity to some persons at the expense, or burden, of others—albeit a diffuse and constitutionally acceptable burden or expense (*Wygant* v. *Jackson Board of Education* 1986, 281-284). The denial of opportunity based on race imposed a burden on non-minorities, then, to the extent that such persons would have successfully obtained employment at institution "x" had it not been for the racial criterion used in the job-selection process. The use of this racial criterion added the step (or steps) of finding employment elsewhere (at institution

"y")—creating a degree of difficulty which would not have been present under race-neutral criteria. This is the plurality's cognizing of the burden (or cost) placed on innocent whites. Applying this logic to the Freedman's Bureau Act of 1866, the denial of government-sponsored opportunities for economic and social advancement through assistance in education, housing and other areas also represents a burden or cost to non-minorities—specifically to those who would have qualified for such assistance absent the racial distribution of benefits. The denial of opportunity here added the step (or steps) of procuring the same benefits elsewhere—creating a level of difficulty in obtaining resources that would not have been present under race-neutral criteria. In short, one can best understand the burden here as an imposition beyond what would have been required of someone under race-neutral criteria—an imposition the state could alleviate by extending benefits on a race-neutral basis. Because exponents of the Fourteenth Amendment and Freedman's Bureau Act of 1866 explicitly rejected measures that would have extended these benefits on a race-neutral basis, it is reasonable to conclude that they were not concerned with the burdens such measures placed on innocent whites.

If the aforementioned evidence of original intent is not convincing enough, the decision in *Wygant* is at antipodes with the Court's opinion in *Washington* v. *Davis* (1971). In *Davis*, recall that the Court did not find constitutional relevance in the pursuit of legitimate government ends or purposes that resulted in disparate racial impact (*Washington* v. *Davis* 1971, 242). Why, then, did the *Wygant* plurality deem the disparate racial impact of an avowedly legitimate government objective—remedying racial discrimination— constitutionally relevant? David Chang (1991) notes the tension between these two decisions; both involved a legitimate government purpose, but in one

case—*Wygant*—the race-based effects of the law had constitutional significance, while such effects were banished to irrelevance in the other (Chang 1991, 791). However, there is at least one important difference between these decisions: *Wygant* involved express racial classifications while the testing procedures in *Davis* were race neutral. Perhaps this accounts for the Court's distinction between the two cases (Chang 1991, 800). As noted in previous sections, the Court has never deemed racial classifications constitutionally impermissible per se; rather, it has only deemed laws steeped in racial prejudice as constitutional impermissible per se (c.f. *Strauder*). Laws reflecting racial prejudice have as a defining characteristic a singular purpose to discriminate or sort persons based on race; if there is no other purpose than to discriminate based on race, the "racial classification[…]is reduced to an invidious discrimination forbidden by the Equal Protection Clause" (*McLaughlin* v. *Florida* 1964, 192-193).

The *Davis* Court adhered strictly to this precedent, arguing that discriminatory purpose is the touchstone of invidious discrimination under the Fourteenth Amendment—thus clinging tenaciously to the *Strauder* standard of impermissible discrimination (*Washington* v. *Davis* 1976, 239). Because constitutional inquiry in *Davis* focused on the presence or absence of purposeful discrimination, and not on the race-based effects of a law with an avowedly legitimate purpose, the Court ultimately concluded that a statute or government action devoid of racially discriminatory purpose could not be deemed unconstitutional "solely because it has a racially disproportionate impact" (*Washington* v. *Davis* 1976, 239).[37] In other words, racially disparate impact, in itself, is not a

[37] "We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another" (*Washington* v. *Davis* 1971, 242).

constitutional violation. The Court provided a firm foundation for its position by citing precedent from multifarious venues, such as jury selection (*Strauder* v. *West Virginia* 1880), school desegregation (*Wright* v. *Rockefeller* 1964; *Keyes* v. *School Dist. No. 1* 1973), and receipt of government benefits (*Jefferson* v. *Hackney* 1972). These precedents confirmed that disparate racial impact had constitutional relevance only insofar as it provided evidence of impermissible discriminatory purpose, as when disproportionate racial impact cannot be explained by legitimate, race-neutral purposes and reduces to race (*Washington* v. *Davis* 1976, 242). In short, there is but one incontrovertible conclusion readily derivable from the *Davis* ruling: evidence of impermissible racial discrimination—discriminatory purpose—is a necessary condition for establishing a constitutional violation in race-based equal protection cases (*Washington* v. *Davis* 1971, 245). As such, the *Wygant* plurality deviated from the holding in *Davis*, granting constitutional relevance to disproportionate racial impact (or effects) independent of discriminatory racial purpose (Chang 1991, 791).

By now, it should be clear that the ruling in *Wygant* is discontinuous with the *Strauder* standard of impermissible discrimination, the intent of the Framers of the Fourteenth Amendment, and the holding in *Washington* v. *Davis* (1976). Neither the relevance granted to discriminatory effects of government action (absent discriminatory purpose) nor the limitations placed on remedying racial discrimination (i.e. to identifiable instances of purposeful discrimination) jibe with these constitutional metrics. This ruling circumscribed the range of cases in which race-based remedial action was constitutionally justifiable, and subsequent decision have upheld these standards (See,

especially, *City of Richmond* v. *J.A. Croson Co.* 1989 and *Adarand Constructors, Inc.* v. *Pena*. 1995). Though these cases did not eliminate race-conscious remedial action per se, they affirmed that the use of race-based measures is limited to circumstances of identifiable purposeful discrimination, as this is the only "compelling interest" that can justify this constitutionally suspect method of remediation. These cases go further than *Wygant*, however, because they appear to construe the narrow-tailoring requirement as reserving race-based remedies only for the direst of circumstances wherein race-neutral alternatives would not achieve the desired result (*City of Richmond* v. *J.A. Croson Co.* 1989, 507-509; *Adarand Constructors, Inc.* v. *Pena.* 1995, 237-238).[38]

Notwithstanding this difference, *Wygant*, *Croson* and *Adarand* all embraced a highly individualized interpretation of the Equal Protection Clause, one that put an emphasis on the closeness of fit between the identification of victims of prior racial discrimination and the determination of the party (or parties) responsible for shouldering the burden of compensatory action. This closeness of fit purportedly helped to ensure that the persons benefitting from racial preferences, as well as the persons burdened or disadvantaged by such preferences, were not advantaged or burdened simply because of their membership in a racial group. What is more, closeness of fit between injury and compensation also alleged to reduce the likelihood that racial classifications were the product of judgments about persons based singularly on their membership in a particular racial group; examples of such judgments are racial stereotypes and racial prejudice (*City*

[38] No such advertence to race-neutral alternatives is made in *Wygant*; in fact, the plurality's standard is simply that, where a "strong basis in evidence" exists for remedial action, the remedy must be narrowly tailored—meaning the burden imposed must be "diffuse" (as in *Fullilove*) (W*ygant* v. *Jackson Board of Education* 1986, 279-284). Justice Powell, in response to Jackson's layoff provision, states, "Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available" (*Wygant* v. *Jackson Board of Education* 1986, 283-284).

of Richmond v. *J.A. Croson Co.* 1989, 510). Therefore, generally speaking, closeness of fit can be understood as a method of treating persons as individuals and not members of groups,[39] and the *Croson* and *Adarand* Courts explicitly noted that this is the proper mode of analysis under the Equal Protection Clause (*City of Richmond* v. *J.A. Croson Co.* 1989, 508; *Adarand Constructors, Inc.* v. *Pena.* 1995, 227). In *Wygant*, however, the plurality opinion seemed to grant a greater degree of latitude in terms of tightness of fit than did the majority opinions of *Croson* or *Adarand*. The *Wygant* plurality required a "strong basis in evidence" of prior discrimination for the enactment of race-based remedial policies, and it demanded that the burdens of remediation not fall squarely on particular individuals; even still, the *Wygant* Court countenanced hiring goals similar to *Fullilove* (*Wygant* v. *Jackson Board of Education* 1986, 278, 283). This meant that it was possible for some persons to obtain an advantage (or disadvantage) in the employment process solely because of race. *Croson* and *Adarand* endeavored to rectify this shortcoming by espousing a more individualized, case-by-case analysis that, at least in theory, reduced the likelihood that persons would be advantaged or disadvantaged by remedial action solely because of their race.[40]

Overall, this more individualized understanding of equal protection, though originally applicable only to cases involving racially classificatory affirmative-action plans, became relevant in the context of disparate impact legislation generally, and Title

[39]From this, one can conclude that closeness of fit has applicability to both analytical functions of strict scrutiny: the discernment of illicit purpose/motivation and the determination of unfair distributions of burdens on innocent persons.

[40] It is therefore unsurprising that the Court has upheld race-conscious plans that take this individualized approach in contexts outside of minority contracting and employment. See, for example, *Grutter* v. *Bollinger* (2003), which affirmed the use of race-conscious admissions policies to achieve the "compelling interest" of diversity in higher education; compare this case to *Gratz* v. *Bollinger* (2003).

VII specifically, with the case of *Ricci* v. *DeStefano* (2009). In 2003, the City of New Haven, Connecticut, administered examinations to members of its fire department to determine which individuals to promote to the level of lieutenant or captain. Citing racially disparate test results, the City of New Haven discarded the test and did not promote high-performing candidates (*Ricci* v. *DeStefano* 2009, 562). As a result, some high-scoring white and Hispanic firefighters sued the city, contending that the City of New Haven and certain public officials discriminated against them because of their race (*Ricci* v. *DeStefano* 2009, 562-563). The plaintiffs in this case brought suit under Title VII of the 1964 Civil Rights Act, as well as the Equal Protection Clause. In its opinion, the Court did not reach the constitutional issue of equal protection—deciding only the statutory question of whether the City's race-based actions were permissible under Title VII's disparate-impact standard. The Court ruled in favor of the plaintiffs, importing from its affirmative-action cases the strong-basis-in-evidence standard to determine that race-based action was not warranted (*Ricci* v. *DeStefano* 2009, 563).

One of the novel features of the *Ricci* decision was the Court's construal of Title VII, as amended in 1991. As noted above, in *Griggs* v. *Duke Power Co.* (1971) the Court unanimously interpreted Title VII of the Civil Rights Act of 1965 as prohibiting both intentional discrimination ("disparate treatment") and unintentional effects-based discrimination in the context of employment ("disparate impact"). "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (*Griggs* v. *Duke Power Co.* 1971, 431). In unprecedented fashion, the *Ricci* Court interpreted this twin commitment of Title VII as contradictory, even though *Griggs* and subsequent decisions had unqualifiedly endorsed this dual commitment as a coherent,

comprehensive strategy for realizing equal employment opportunity. In other words, the *Ricci* majority presupposed that following the edict of disparate impact (pursuant to *Griggs*) necessarily engendered disparate treatment—thus violating Title VII's proscription on intentional/purposeful discrimination (*Ricci* v. *DeStefano* 2009, 583). Richard Primus has labeled this construal of tension or conflict between the two motives of Title VII the "Ricci premise" (Primus 2010, 1349-1350).

With this statutory tension as its point of departure, the Court endeavored to develop a method of reconciling these conflicting directives, and its preferred method was the strong-basis-in-evidence standard. Just as the strong-basis-in-evidence standard circumscribed the range of cases in which the Fourteenth Amendment's commitment to non-discrimination (race-neutrality) could be violated in the name of race-based affirmative action (*Wygant* v. Jackson 1986, 273, 280-282), this method—as applied to Title VII—significantly limited the circumstances in which employers could violate disparate-treatment standards for the purpose of adhering to disparate-impact requirements. This standard allows employers to violate disparate-treatment proscriptions only when they have a strong basis in evidence that not doing so would result in disparate-impact liability under Title VII (*Ricci* v. *DeStefano* 2009, 585). In other words, after a prima facie case of disparate-impact has been established, employers must have a strong-basis in evidence that the practice in question does not meet the "business necessity requirement"—or that there is a viable procedure without comparable adverse racial effects—before adopting a race-conscious measure (*Ricci* v. *DeStefano* 2009, 587). In all, "Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations

of one in the name of compliance with the other only in certain, narrow circumstances" (*Ricci* v. *DeStefano* 2009, 583). Thus, starting from the premise of conflict, the Court saw mitigation, or narrowing of application, as its goal.

Prior to *Ricci*, neither Congress nor the courts expressly or implicitly acknowledged that there was a tension between the dual mandates of Title VII (*Ricci* v. *DeStefano* 2009, 624) (Ginsburg, J, dissenting). Before *Ricci*, employers could avoid disparate-impact liability only by showing that a practice or procedure resulting in disparate racial impact was job related. In the univocal words of the *Griggs* Court, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited" (*Griggs* v. *Duke Power Co.* 1971, 431). In the same breath, the Court concluded that prohibitions on disparate racial impact did not sanction discriminatory racial preference. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed (*Griggs* v. *Duke Power Co.* 1971, 430-431). The fact that these statements refer to the same race-conscious policy of adjusting requirements and/or procedures to comply with Title VII shows demonstrably that the *Grigg's* Court did not view the particular brand of race-consciousness required by disparate impact as a form of discriminatory racial preference outlawed by the disparate-treatment strain of Title VII. Similarly, in *Albemarle Paper Co.* v. *Moody* (1975), the Court unanimously expounded on and applied the *Griggs* framework. Citing *McDonnell Douglas Corp*. v. *Green* (1973), the Court noted that the burden on employers to prove business necessity comes about only after a plaintiff or plaintiffs have established a prima facie case of discrimination (*McDonnell Douglas Corp.* v. *Green* 1973, 802). Once a prima-facie case

has been established, the burden is on the employer to prove that the requirements and/or procedures are "job related." Meeting this burden of proof does not, however, terminate investigation into whether discrimination has taken place; the plaintiff still has an opportunity to show that there are other requirements and/or procedures at the employer's disposal that would not engender a comparable racially disproportionate outcome and would satisfy the employer's legitimate interest in "efficient and trustworthy workmanship." The provision of such evidence serves as proof that the employer's requirement(s) is/are nothing more than a simple pretense for discrimination (*Albemarle Paper Co.* v. *Moody* 1975, 425). By giving the plaintiff (or plaintiffs) an opportunity to show there are more racially sensitive options that serve the employer's interests, the *Albemarle* Court not only embraced *Griggs* but also extended its reach beyond "business necessity." Thus, contrary to *Ricci*, which viewed the essential propositions of Title VII as contradictory and therefore sought to contract its reach, *Albermarle* saw no such inherent contradiction and attempted to extend the reach of disparate impact.

Until *Wards Cove Packing Co.* v. *Antonio* (1989), the federal courts used the *Griggs-Albemarle* framework to strike down a plethora of employment practices with racially disproportionate results (*Ricci* v. *DeStefano* 2009, 622-623) (Ginsburg, J., dissenting). In *Wards Cove*, however, a simple majority of the Court altered the *Griggs-Albemarle* framework of adjudication by substantially reducing the burden of proof employers must meet to refute claims of disparate-impact discrimination under Title VII (*Ricci* v. *DeStefano* 2009, 623)(Ginsburg, J. dissenting). According to the Court, employers must produce "evidence of a business justification" for their practices, but they are not required to shoulder the burden of persuasion or to show that the

requirements/procedures under examination are necessary or essential to the job in question; the ultimate burden of persuasion lies with the disparate-impact plaintiff (*Wards Cove* v. *Antonio* 1989, 659). In response to this turnabout in employment law, Congress passed the 1991 Civil Rights Act, which explicitly repudiated the Court's allocation of burdens in *Wards Cove* and, for the first time, expressly codified the disparate-impact standards of Title VII as articulated in *Griggs* (Civil Rights Act of 1991, 1071).

Congress' codification of disparate impact standards based on the core concepts of "business necessity" and job relatedness proffered in *Griggs* militates against the *Ricci* Court's statutory construction of the Civil Rights Act of 1991. Congress openly embraced the *Griggs-Albemarle* framework[41]—a framework that, as noted above, envisaged a harmonious relationship between the disparate impact and disparate treatment strains of Title VII. As such, it is difficult to imagine that Congress would espouse an understanding of disparate impact and disparate treatment that ran contrary to very interpretation which it sought to enshrine formally in law; to do so assumes either a gross error in interpretation on the part of Congress, or a qualified adoption of the standards set forth in *Griggs* (i.e. an adoption of *Griggs* with the qualification that following the edict of disparate impact violates, and is in tension with, the proscription on disparate treatment). There is no language in the statute suggestive of a qualified adoption, however, and to assume such qualification given the absence of supporting statutory language or judicial precedent is overreaching.

[41] One of the purposes of the 1991 Civil Rights Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)" (Civil Rights Act of 1991, 1071).

Above all else, the Court's decision in *Ricci* seems to follow from the majority's wholesale embrace of the individualized interpretation of equal protection espoused in *Wygant*, *Croson* and *Adarand*. To be sure, in *Ricci* the Court limited its decision to the issue of statutory interpretation; it did not rule on the constitutional issue of equal protection. "Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII" (*Ricci* v. *DeStefano* 2009, 584). While the Court did indeed limit its ruling in this way, it also imported the strong-basis-in-evidence standard from its equal protection cases to render this decision. As noted above, the strong-basis-in-evidence standard comes from *Wygant* v. *Jackson Board of Education* (1986), and *Wygant*, *Croson* and *Adarand* all embraced a highly individualized interpretation of the Equal Protection Clause, one that put an emphasis on the closeness of fit between the identification of victims of prior racial discrimination and the determination of the party (or parties) responsible for shouldering the burden of compensatory action. Closeness of fit here is best understood as a method of treating persons as individuals and not members of groups—i.e. ensuring that persons are not evaluated/judged (advantaged or disadvantaged) based on certain types of group membership—and the strong-basis-in-evidence standard limits the circumstances in which employers may deviate from race-neutral policies that treat persons as individuals (even when the purpose of such deviation is to remedy the effects of prior racial discrimination). In other words, it limits deviations from the principles enshrined in the individualized Equal Protection Clause.

This understanding of equal protection associates the negative right of freedom from discrimination with the positive right "to be judged without reference to

characteristics—paradigmatically race—that are considered to be morally arbitrary" (Primus 2003, 553).[42] These morally arbitrary characteristics deal with group attributes; for example, Title VII bans discrimination on "race, color, religion, sex or national origin" (Civil Rights Act of 1991, 1074). In its plurality opinion, the Supreme Court noted this positive equal protection right in *Croson*. "As this Court has noted in the past, the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.' To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking" (*City of Richmond* v. *J.A. Croson Co.* 1989, 493). If the Court derives from the Equal Protection Clause a positive right to be treated with respect as an individual, which it has done on other occasions as well (See, especially, *Adarand Constructors* v. *Pena* 1995; *Grutter* v. *Bollinger* 2003; *Miller* v. *Johnson* 1995),[43] then it follows that statutes requiring an evaluation of person based on their membership in a particular racial group will be constitutionally problematic irrespective of the ends which such classifications purport to achieve; there is constitutional injury in the act of classification itself because one's right to be treated as an individual has been offended. In contrast, when the Equal Protection Clause is not interpreted as rigidly individualistic, such classifications may warrant

[42] It is critical here to note the emphasis on the right "to be judged without reference to characteristics […] that are considered morally arbitrary" (Primus 2003, 553). Equal Protection jurisprudence does not rule out all judgment/evaluation based on group classification; rather, only certain characteristics, such as race, religion, national origin, ethnicity, etc. are especially suspect and therefore legitimate under only the most limited of circumstances. Thus, only certain characteristics are considered morally arbitrary. Especially within the context of economic relations, the Court has paid special deference to legislative classification and the singling out of groups for differential treatment, so long as the there is a rational basis for the classification (Sullivan and Gunther 2010, 641).

[43] In Adarand, the Court concluded, "The three propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups" (*Adarand Constructors* v. *Pena* 1995, 227).

suspicion—due to their odious history and potential for abuse—but do not necessarily cause injury and constitutional issue by virtue of the classification itself. Other conditions, such as impermissible motive, must be met before a constitutional issue arises, and this view of equal protection is more consistent with ensuring equality among groups and the removal of racial (group-based) hierarchy in employment. It is more consistent with the disparate-impact standards of Title VII and the race-conscious legislation of the 39th Congress.

The *Ricci* Court, in construing the disparate-treatment command of Title VII as race-neutral and the disparate-impact command as "race-based," applies logic in the context of disparate impact that comports with the individualized interpretation of equal protection (*Ricci* v. *DeStefano* 2009, 579). The disparate-treatment command of Title VII proscribes race-based decision-making, and thus is consistent with an individualized Equal Protection Clause; it interdicts evaluation/judgment of persons based on their membership in certain groups (e.g. race, sex, religion, national origin, etc.). In contradistinction, the disparate-impact command requires judgments based on one's group membership (i.e. "race-based"), and thus runs counter to, and is in tension with, the disparate-treatment provision of Title VII and, by extension, the Equal Protection Clause of the Fourteenth Amendment. This is the crux of the tension between disparate impact and disparate treatment, and it represents the *Ricci* Court's analytic point of departure. "Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense" (*Ricci* v. *DeStefano* 2009, 579).

There is, however, one important difference between Title VII and the Equal Protection analogues cited by the *Ricci* Court. The disparate-impact standards encapsulated in Title VII and their ostensible application in *Ricci* differ from the policies under consideration in *Wygant*, *Croson*, and *Adarand* insofar as Title VII and *Ricci* do not represent a policy of racially preferential affirmative action. As Justice Ginsburg noted in dissent, "Observance of Title VII's disparate-impact provision […] calls for no racial preference, absolute or otherwise" (*Ricci* v. *DeStefano* 2009, 628)(Ginsburg, J., dissenting). And The *Griggs* Court expressly noted the non-preferential nature of Title VII's disparate-impact standard. "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group […] is precisely and only what Congress has proscribed" (*Griggs* v. *Duke Power Co.* 1971, 430-431). Thus, when appropriately applied, persons are evaluated specifically on relevant job qualifications and not requirements or qualifications impertinent to the position. Because the *Griggs* Court viewed the disparate-impact requirement of Title VII as ensuring persons were judged based on relevant qualifications (and not race, for example), it saw the disparate-impact strain of Title VII as consistent with, and complementary to, the disparate-treatment strain. Both were viewed as removing "artificial, arbitrary, and unnecessary" obstacles to employment when such obstacles served to "discriminate on the basis of racial or other impermissible classification" (*Griggs* v. *Duke Power Co.* 1971, 431). In short, the disparate treatment and disparate-impact prongs of Title VII endeavored to ensure that race was not a factor in employment decisions under

circumstances of intentional discrimination (disparate treatment) and unintentional discrimination due to disadvantaged social position (disparate impact).

All of this begs the following question: If the disparate-impact prong of Title VII did not constitute a racial preference and actually reduced the relevance of race, why, then, did the *Ricci* Court view the disparate impact and disparate treatment prongs as contradictory? The answer cannot lie in actual employment outcomes, which are qualification driven—not race driven. The simple answer is that such a contradictory relationship derives not from a concern with racial preference in employment outcomes, but rather from concern over "race-based decision-making" in any form (*Ricci* v. *DeStefano* 2009, 579). A concern over "race-based decisionmaking," without reference to its purpose or effects, is consistent with the individualized Equal Protection Clause, wherein injury is engendered by any judgment that denies persons their right to be treated as individuals. And the *Ricci* Court simply applied the individualized equal protection mode of analysis to antidiscrimination law, construing Title VII's proscription on disparate treatment as an absolute prohibition on race-conscious decision making; it is thus easy to understand how the Title VII's disparate-impact strain, which requires such race-based decisionmaking, is in conflict with the disparate treatment prohibition. It is therefore unsurprising that the Court remained agnostic in its prognostication for future decisions on the constitutionality of Title VII. "We also do not hold that meeting the strong basis-in-evidence standard would satisfy the Equal Protection Clause in a future case." Whether Title VII's disparate impact standard is constitutional remains an open question, but the fact that it is even a question at all is evidence of a significant change in antidiscrimination law (Primus 2003, 495-496). And it is a change wrought by the

individualized interpretation of the Equal Protection Clause—a change that has put the disparate-impact doctrine on a collision course with the Fourteenth Amendment. As Justice Scalia stated in his *Ricci* concurrence, the Court's decision "merely postpones the evil day which the Court will have to confront the question: Whether, and to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" (*Ricci* v. *DeStefano* 2009, 594)(Scalia, J., concurring).

Conclusion: Two Trends in Equal Protection Case Law

With the case of *Strauder* v. *West Virginia* (1880), the U.S. Supreme Court established a precedent of impermissible discrimination that remains unassailable. Laws motivated by racial prejudice—judgments of class inferiority based on race—are per se unconstitutional; there are no circumstances under which such laws pass constitutional muster, and conservative and liberal jurists undoubtedly concur on this point. This constitutional rule against racial prejudice—what we may term the *Strauder* standard—has applicability across facially symmetrical (c.f. *Loving* and *McLaughlin*) and overtly disadvantaging statutes (c.f. *Strauder*). While jurists unanimously express their acceptance of a per se rule against racial prejudice, they diverge in their interpretation of what the Equal Protection Clause of the Fourteenth Amendment prohibits—and, consequently, permits—outside the range of cases dealing with explicit or implicit racial prejudice. There is a tradition commencing with *Strauder* and running up through cases such as *Washington* v. *Davis* (1976) and Justice Ginsburg's dissenting opinion in *Ricci*[44]

[44] In *Washington* v. *Davis* (1976), the Court held, "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race" (*Washington* v. *Davis* 1976, 239). Through a survey of equal protection case law in various contexts, the Court construed "conducting discriminating on the basis of race" as meaning purposeful or intentional

that exhibits fidelity to the notion that the Equal Protection Clause prohibits only discrimination predicated upon racial prejudice (i.e. purposeful or intentional discrimination). This notion is readily derivable from the *Strauder* precedent, as the Strauder Court concluded that the proscription of discriminatory laws motivated by racial prejudice was the primary reason the Framers of the Fourteenth Amendment granted the Federal Government the power to enforce and ensure compliance with the Equal Protection Clause (*Strauder* v. *West Virginia* 1880, 309). This tradition, while not necessarily granting a constitutional right against disparate racial treatment (c.f. *Washington* v. *Davis*), nonetheless views race-conscious action as permissible under the Equal Protection Clause insofar as it is not grounded in impermissible racial prejudice (purposeful discrimination). Here, to the extent that the Court employs the analytic tool of strict scrutiny, it is only to ferret out illicit motivation and ensure compliance with the *Strauder* standard.

Moving in the opposite direction is an equally discernible trend—one that views the Equal Protection Clause as enshrining a positive right of persons to be judged as individuals: the individualized Equal Protection Clause. This body of case law has expressed hostility toward any race-based (race conscious) policies—regardless of motive or effect—because such policies ultimately betray the positive right of persons to be treated as individuals (c.f. *Ricci*). The ascendancy of this view on the Court has

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discrimination (*Washington* v. *Davis* 1976, 239-242). Justice Ginsburg also referenced this tradition. "The Equal Protection Clause, this court has held, prohibits only intentional discrimination" (*Ricci* v. *DeStefano* 2009, 627) (Ginsburg, J., dissenting). Although Justice Ginsburg and the *Davis* Court refer to this as purposeful or intentional racial discrimination, it aligns with the meaning of impermissible racial discrimination (based upon racial prejudice) outlined in *Strauder*. A statute that displays intentional or purposeful racial discrimination has no purpose or motive independent of racial discrimination; its purpose reduces to race. Persons are singled out solely because of their race, which "is practically a brand upon them […] an assertion of their inferiority" (*Strauder* v. *West Virginia* 1880, 309).

severely circumscribed the instances in which race-based action is constitutionally acceptable—demanding a closeness of fit between identification of victims of prior racial discrimination and the determination of the party (or parties) responsible for shouldering the burden of remedial action. Moreover, this trend has brought a turnabout in antidiscrimination law—putting once sacrosanct policies, such as the disparate impact proscription of Title VII, on the defensive and bringing US public policy closer to the normative vision of colorblindness (King and Smith 2011, 95).

The problem with this trend is it neither has firm roots in the legislative history of the Fourteenth Amendment nor the judicial precedents that guided questions of race and equal protection from the Reconstruction Era to the late Twentieth Century. Not only is this turnabout discontinuous with the *Strauder* standard and its affirmation in *Washington* v. *Davis* (1976)—as well the Court's unanimous ruling in *Griggs* v. *Duke Power Co.* (1971)—it also erects a burden of proof that the race-based laws of the 39th Congress could not meet (Schnapper 1985, 795-796). These laws did not show a concern with closeness of fit between victims of prior racial discrimination and the determination of the party (or parties) responsible for shouldering the burden of remedial action (Schnapper 1985, 796). Recall that the Freedman's Bureau Act of 1866 expressly rejected such restrictions on race-based action (Schnapper 1985, 792). Since the very Congress that adopted the Fourteenth Amendment passed these laws, it is reasonable to conclude that the contemporary Supreme Court has placed far greater limits on race-based action than were contemplated by the Framers of the Fourteenth Amendment.

CHAPTER 4

RELIGIOUS EXEMPTIONS TO "NEUTRAL" LAWS OF GENERAL APPLICABILTY AND THE THEORY OF DISPARATE-IMPACT DISCRIMINATION

Introduction

Building on the conclusions of the previous chapter, in what follows I posit there is a nexus between the disparate impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions for religious persons whose ideals conflict with so-called neutral laws of general applicability. With few exceptions, the literature on equal protection and discrimination, as well the scholarly literature covering the exemptions approach to free exercise and religious equality, overlooks this connection.[45] Though not always expressly stated as such, one can best understand the theory underpinning the exemptions approach to free exercise as a paradigm of disparate impact discrimination. Similar to the case of disparate-impact discrimination in the context of race, the statutory level serves as the domain of execution for religious-based models of disparate impact; just as *Washington* v. *Davis* (1976) relegated remedies for race-based disparate impact to the statutory level, the Court's ruling in *Employment Division* v. *Smith* (1990) served the same function in the context of religion, with the Court determining that there is no constitutional right to religious exemptions. At the same time, however, the Court noted that it was constitutionally unproblematic for legislative bodies to grant such exemptions (*Employment Division* v. *Smith* 1990, 890).

In sharp contrast to Title VII and the paradigm of race-based disparate impact, the Supreme Court has not evinced hostility toward disparate-impact legislation in the

[45] I am aware of one exception to this trend in the literature. Bernadette Meyler argues that there is a "distinctive similarity between the structure of free exercise and equal protection claims" (Meyler 2006, 285).

context of religion; it has not found a tension between the positive right to be judged as an individual and the tendency of Congress and other legislative bodies to engage in explicitly religious-conscious decision-making. Based on the conclusions reached in the previous chapter regarding race and equal protection, there is, constitutionally speaking, no tenable method of differentiating between race and religious-conscious decisionmaking such that one form of group-based evaluation should be greeted with incredulity and disapprobation while the other should not even command a modicum of scrutiny. Because there is no legitimate method of differentiation here, and because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, I conclude that the theory undergirding religious exemptions to neutral laws of general applicability represents a viable justification for race-based disparate-impact policies such as Title VII. This justificatory approach has the advantage of employing principles emanating from the conservative wing of the Court—i.e. those moving public policy in the direction of color blindness—to defend a policy of which these jurists have become increasingly skeptical (c.f. *Ricci* v. *DeStefano* 2009). Moreover, it bolsters the defense of Title VII in the face of its impending showdown with the Equal Protection Clause. For "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them" (*Ricci* v. *DeStefano* 2009, 595-596)(Scalia, J., concurring). This chapter is an effort at making such peace.

The History of Religious Exemptions in the United States

During the winter of 1812-1813, Daniel Phillips, a parishioner at St. Peter's—the only Catholic Church in New York City at the time—participated in the Catholic

sacrament of Reconciliation. Pursuant to Church doctrine, Phillips orally confessed his sins and agreed to perform the prescribed penitential acts (penance). According to Roman Catholic ethos, the performance of these acts of reconciliation restored Phillips to a state of grace, and thus allowed him to take part in the highest of Catholic sacraments: Holy Communion. During his confession, Phillips acknowledged that he had, with full cognizance, received stolen property (McConnell 1990a, 1410). Since it was, and remains, a longstanding, sacrosanct practice of the Catholic Church to keep the content of one's confession between him/her and God, Phillips had good reason to believe that the details of his confession would remain confidential and not be divulged to any outside authorities (McConnell 1990a, 1410-1411). After learning of Phillips' illicit act, the priest hearing Phillips' confession, Father Anthony Kohlmann, encouraged him to return the stolen property to its lawful owner. Phillips, presumably operating under the shroud of confidentiality, gave the stolen items to Father Kohlmann, who ensured the safe return of the illegally obtained items to their owner, James Keating. Keating, upon receipt of the property, reported the theft to the appropriate legal authorities; subsequently, the New York Court of General Sessions subpoenaed Father Kohlmann to testify under oath and reveal the germane details of Phillips' confession (McConnell 1990a, 1411).

Father Kohlmann, under questioning from the District Attorney, refused to provide the details of Phillips' confession, and so began the first recorded free exercise case in United States history, *People* v. *Phillips* (1813). *In Phillips*, the central question under examination was whether a government entity could enjoin a priest to divulge information obtained during the sacrament of Reconciliation (during confession), as forcing a priest to reveal such information would unequivocally violate the priest's

conscience, the principles of his church, and the requirements of his position (his oath of office). Furthermore, Father Kohlmann's contravention of the Church tenets under examination here would have most assuredly resulted in his dismissal from the priesthood and, possibly, his excommunication from the church. A Hobson Choice at best, Father Kohlmann had to decide between observing his religious scruples—his identity as a Catholic—and serving jail time for refusing to testify. Fortunately, for Father Kohlmann's sake, the Honorable De Witt Clinton, then mayor of New York City, delivered a unanimous opinion that carved out an exemption to the generally applicable rule under consideration: mainly, "that every man when legally called upon to testify as a witness, must relate all he knows" (McConnell 2006, 105).

After noting several exceptions to this general rule of testifying under oath (e.g. a wife and husband cannot be compelled to testify against one another), De Witt then moved to consider the applicability of the New York State Constitution's free exercise provision to the specific case at hand. The state's free exercise provision called for the allowance of the "free exercise and enjoyment of religious profession and worship" in a non-discriminatory manner, except under circumstances where the allowance of such "profession and worship" ran counter to the "peace and safety" of the state, or resulted in the sanctioning of licentious acts (McConnell 2006, 107). According to De Witt, the excusal of Father Kohlmann from the rule/obligation of general applicability at issue here—the general law that a person must "relate all that he (or she) knows" when compelled to testify in a court of law—did not constitute a breach of the state's free exercise proviso. In other words, exempting a Catholic priest from the general rule of veraciously bearing witness in a court of law, at least in this circumstance, did not result

in state sanctioned "licentiousness" or in the compromised "peace and safety" of its citizens (McConnell 2006, 108).

The overarching conflict presented in *Phillips*, a conflict between seemingly neutral laws/rules of general applicability and the beliefs and/or practices of a particular religious sect, or of particular religious persons, is a conflict that has deep roots in American history—dating back to the colonial and pre-constitutional periods. In fact, several colonies had free-exercise provisions that delimited religious exercise only in circumstances where the actions of adherents jeopardized public safety ("outward disturbance of others") or entailed licentious behavior (McConnell 1990a, 1427). As Michael McConnell notes in his seminal work on the history of free exercise, although not explicitly endorsing the idea of exemptions, these expansive provisions were nonetheless compatible with the notion of religious-based dispensation from laws. They provided requisite space for exemptions to laws of general applicability insofar as the religious practice in question did not run counter to prevention of licentiousness or protection of public safety (McConnell 1990a, 1427-1428). Moreover, the Carolina charter went even further and expressly authorized the use of religious exemptions. The Charter acknowledged that private actions and beliefs would not always comport with the Church of England, and it gave authorities the ability to grant "indulgences" and "dispensations" as they saw "fit and reasonable" (McConnell 1990a, 1428).

In post-Revolutionary (pre-constitutional) America, free-exercise provisions of state constitutions exhibited two common features that were also consistent with the practice of granting religious exemptions. First, state constitutions did not limit the free exercise of religion to conscience or belief; free exercise in pre-constitutional America

subsumed religious beliefs and the actions following from such dictates of conscience (McConnell 1990, 1458-1459). If the early understanding of free-exercise had been limited to conscience or belief, one could not trace the history of religious exemptions back to this period; religious exemptions concern the encroachment of generally applicable, neutral laws on conduct related to religious beliefs. Second, early state constitutions circumscribed free exercise only when it came into conflict with specific state purposes (McConnell 1990a, 1461). These free-exercise limitations, most of which related to ensuring public safety and rectitude, only could have had relevance in situations wherein the actions of religious adherents came into conflict with general laws. In other words, they are nonsensical unless one understands them as creating space for religious exemptions to general laws up until a certain point (McConnell 1990a, 1462). Finally, the actual manner in which states dealt with the conflict between one's religious scruples and neutral laws of general applicability during this period supports the exemptions approach to religious accommodation. Conflict between general laws and religious conviction arose in three areas: military conscription, oath requirements, and religious assessments (McConnell 1990a, 1466). When conflict arose in these areas, "the colonies and states wrote special exemptions into their laws" (McConnell 1990a, 1472).

The early state constitution free exercise provisions, as well as the actual practice of exemptions surrounding oaths, military conscription, and religious assessments, while not providing direct evidence that the Free Exercise Clause of the US Constitution mandates religious-based exemptions to neutral laws of general applicability, show that the idea of exemptions was not foreign to the Framers of the First Amendment. And although the Framers of the First Amendment did not expressly address exemptions in

their debates over free exercise, there is no substantial proof that they considered such exemptions inconsistent with the Constitution (McConnell 1990a, 1511). McConnell points to this indirect evidence, along with writings of James Madison, to argue that the exemptions approach to free exercise is more consistent with the Framer's original intent than the no-exemptions approach (i.e. the idea that laws are consistent with free exercise to the extent that they are facially neutral toward religion). At the same time, however, he acknowledges that this evidence is merely suggestive and not probative (McConnell 1990a, 1512). Although other scholars have called McConnell's original-intent thesis in question, generally their critiques have disputed his finding that religious exemptions are constitutionally mandated, not his evidence of statutory religious exemptions in the colonial and pre-constitutional periods (Hamburger 1992; Marshall 1991). At the very least, then, McConnell provides a cogent defense of the idea that traditional interpretations of religious free exercise incorporated the notion of exemptions to generally applicable laws (Nussbaum 2008, 124-125). To what extent these historic interpretations translate into a right to exemptions readily derivable from the Free Exercise Clause of the US Constitution is far from certain, however (Nussbaum 2008, 125).

The US Supreme Court and Religious Exemptions

Until the case of *Sherbert* v. *Verner* (1963), the US Supreme Court did not interpret the Free Exercise Clause of the First Amendment as granting a constitutional right of exemption from neutral laws of general applicability. Prior to *Sherbert*, the High Court ruled that anti-polygamy statutes did not violate the First Amendment rights of Mormons (*Reynolds* v. *United States* 1879), that child labor laws forbade a minor from

distributing religious materials with her aunt (*Prince* v. *Massachusetts* 1944), that a public university's punitive action against students who refused to participate in ROTC on religious grounds was legitimate (*Hamilton* v. *Regents of the University of California* 1934), and that Sunday closing laws did not infringe upon the free exercise rights of Orthodox Jews (*Braunfeld* v. *Brown* 1961) (McConnell 1990a, 1412). Although the Supreme Court had not established a constitutional right of exemption prior to *Sherbert*, it had ruled that the Free Exercise Clause proscribed intentional discrimination against particular individuals or groups because of their religious beliefs (*Fowler* v. *Rhode Island* 1953), and that it prohibited the regulation (*Cantwell* v. *Connecticut* 1940) and compulsion (*Torasco* v. *Watkins* 1961) of religious beliefs.

At issue in *Sherbert* was whether the state of South Carolina could deny unemployment benefits to a member of the Seventh-Day Adventist Church because of his/her unwillingness to work on Saturdays in observance of the Sabbath. The South Carolina Unemployment Compensation Act conditioned unemployment benefits upon one's willingness "to accept 'suitable work when offered him by employment office or the employer,'" and the Employment Security Commission found that Sherbert's inability to work on Saturdays made her ineligible for benefits under the terms of the statute; in other words, she was unwilling "to accept 'suitable work'" (*Sherbert* v. *Verner* 1963, 400-401). In *Sherbert*, the Court reaffirmed its long-standing precedent that laws intentionally discriminating against certain individuals or groups because of their religious beliefs, or statutes regulating or compelling religious belief, were repugnant to the Free Exercise Clause (*Sherbert* v. *Verner* 1963, 402). At the same time, however, the Court noted that prior cases had not interpreted the Free Exercise Clause as protecting

against government regulations that burdened or inhibited actions impelled by religious belief or conscience (*Sherbert* v. *Verner* 1963, 402-403). In other words, the Court had yet to extend free-exercise protections to religiously motivated actions under circumstances where the state was not discriminating against, or endeavoring to compel or regulate, religious belief.

The circumstances under examination in prior cases of religiously motivated action did not fall under the purview of prohibitions on intentional discrmination or bans on the regulation or compulsion of religious belief; they constituted facially neutral laws of general applicability that fell within the ambit of the state's regulatory powers. The Court had not found regulations of religiously motivated activity constitutionally problematic in these cases because they all entailed "conduct or action" that "posed some substantial threat to public safety" (*Sherbert* v. *Verner* 1963, 403). However, the conduct at issue in *Sherbert*—a refusal to work on Saturdays in observance of the Sabbath—hardly constituted behavior creating a "substantial threat to public safety." Thus, the Court differentiated *Sherbert* from this prior line of cases. What is more, it reasoned that the unyielding application of eligibility requirements and the concomitant denial of benefits to the appellant in *Sherbert* could pass constitutional muster only under certain conditions. Mainly, they could pass constitutional muster if they did not burden the free exercise of religion or the state had a "compelling interest" for implementing such regulations in a uniform fashion (*Sherbert* v. *Verner* 1963, 403).[46]

[46] The *Sherbert* Court did not use the term "uniform" to describe the application of eligibility requirements contained in South Carolina's unemployment law. However, the Court contrasted its ruling in *Sherbert* with that of *Braunfeld* v. *Brown* (1961), asserting that the major difference between the two cases was that, in *Braunfeld*, the state had a compelling interest that could not be achieved if it granted exemptions to the uniform-day-of-rest requirement (*Sherbert* v. *Verner* 1963, 408). "Requiring exemptions for Sabbatarians,

The Court unequivocally viewed the denial of unemployment compensation as burdensome to the free exercise of religion (*Sherbert* v. *Verner* 1963, 403-406). Having established that the eligibility requirements of South Carolina's statute represented a "substantial infringement of the appellant's First Amendment right," (i.e. are burdensome) the Court found no compelling state interest in the enforcement of the eligibility requirements in this case (*Sherbert* v. *Verner* 1963, 407-409). That is to say, it found no "compelling interest" in the uniform application of the statute's requirements sufficient to justify impingement of the appellant's First Amendment rights. As such, the Court held that South Carolina's denial of unemployment benefits in circumstances where a person's religious beliefs make him/her unavailable for work unconstitutionally infringes upon his/her free-exercise rights—forcing him/her to jettison "his religious convictions respecting the day of rest" (*Sherbert* v. *Verner* 1963, 410). As Justice Harlan noted in dissent, the Court's holding means that the state "is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions" (*Sherbert* v. *Verner* 1963, 420)(Harlan, J., dissenting).

Following *Sherbert*, the Court continued to apply the compelling-interest test to "carve out" free- exercise exemptions in the context of unemployment compensation. In

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while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable" (*Sherbert* v. *Verner* 1963, 408-409). In sharp contrast to *Braunfeld*, the state of South Carolina did not present evidence that such religious-based exemptions would undermine its legitimate interest (*Sherbert* v. *Verner* 1963, 407-409). Therefore, what differentiates the two cases is a compelling interest in uniformity that justifies the infringement of rights in *Braunfeld* but not *Sherbert*. The question here is not whether the state has a compelling interest in providing for a uniform day of rest (*Braunfeld*) or ensuring that persons receiving employment benefits are willing to "accept available suitable work" (*Sherbert*). The Court does not question the legitimacy of either of these state interests in regulating behavior (as evidenced by the fact that the Court did not invalidate either law). Rather, the question is, in pursuit of a legitimate interest (i.e. one that falls within the ambit of the state's regulatory powers), does the state have a compelling interest in uniformity—that is, in disallowing exemptions—when the regulation infringes upon the constitutional right of free exercise.

Thomas v. *Review Board* (1981) and *Hobbie* v. *Unemployment Appeals Commission* (1987), the Court ruled that, when religious convictions require behavior that leads to, or is the basis for, the refusal or denial of a benefit, it violates the Free Exercise Clause unless there is a compelling government interest for such a denial (*Hobbie* v. *Unemployment Appeals Commission* 1987, 136). What is more, *Thomas* went even further, establishing that states encroaching upon religious liberty in pursuit of a compelling interest must also choose the "least restrictive means" of pursuing their objective (the least burdensome means) (*Thomas* v. *Review Board* 1981, 718). These cases thus affirmed the standard of review propounded in *Sherbert*; and employing that standard, the Court was not able to find a compelling interest to justify the infringement of First Amendment rights in either of these cases. The Court extended its compelling-interest analysis to the context of public education in *Wisconsin* v. *Yoder* (1972). In *Yoder*, the Court found Wisconsin's compulsory school-attendance law, which mandated attendance until the age of 16, in violation of religious free exercise. Members of the Old Order Amish challenged the state law on grounds that attendance beyond the eighth grade undermined core tenets of the Amish faith and their "way of life" (*Wisconsin* v. *Yoder* 1972, 209). The High Court agreed, contending that the Wisconsin's interest in mandating formal education beyond eighth grade did not meet the compelling-interest requirement; similar to *Sherbert* above, the Court found no "compelling interest" in the uniform application of the statute's requirements sufficient to justify infringement of the free exercise of religion. As such, the Court granted the Old order Amish and "others similarly situated" an exemption to the compulsory education statute (*Wisconsin* v. *Yoder* 1972, 236).[47]

[47] Because the Amish "have carried the even more difficult burden of demonstrating the adequacy of their

Although the free-exercise rulings cited above might lead one to conclude that *Sherbert* ushered in a new epoch of fee-exercise jurisprudence, one in which the Court regularly upheld religious claimants' objections to neutral laws of general applicability, this conclusion does not reflect the bulk of post-*Sherbert* decisions handed down prior to the landmark decision in *Employment Division* v. *Smith* (1990). Following the *Sherbert* decision, religious claimants inundated the Court, seeking exemptions to neutral laws of generally applicability in accordance with the compelling-interest (strict scrutiny) test of *Sherbert* (Sullivan and Gunther 2010a, 539-540). However, the Court, while often adhering to the compelling-interest test in procedure, rarely produced substantive outcomes favoring religious claimants (Sullivan and Gunther 2010a, 540). Michael McConnell describes this post-*Sherbert* trend in free-exercise jurisprudence as a "peculiar consensus," wherein the "free exercise doctrine was more talk than substance" (McConnell 1990b, 1109). In cases covering a panoply of statutes and regulations, the Court consistently rejected constitutional free-exercise claims, usually by determining that the law or regulation in question did not sufficiently burden religion, or that the government had a compelling interest (McConnell 1990b, 1110). For example, it rejected free-exercise challenges to the Social Security Tax (*United States* v. *Lee* 1982), to the requirement that welfare applicants be identified by a Social Security number (*Bowen* v. *Roy* 1986), to regulations prohibiting headgear in the Air Force (*Goldman* v. *Weinberger* 1986), and to prison rules interfering with the ability of Muslims to attend Midday service (*O'Lone* v. *Estate of Shabazz* 1987). Eventually, the Court severely

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alternate mode of education […] it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish" (*Wisconsin* v. *Yoder* 1972, 235-236).

attenuated, if not jettisoned entirely, its commitment to the compelling-interest test in *Employment Division* v. *Smith* (1990).

Smith pivoted on the constitutionality of an Oregon state law that proscribed peyote use without making an exception for religious-based consumption (*Employment Division* v. *Smith* 1990, 876). Oregonians Alfred Smith and Galen Black, both of whom were members of the Native American Church, had their employment at a drug rehabilitation center terminated because they consumed peyote during a religious ceremony of their church. Smith and Black subsequently applied for unemployment benefits, and the state denied their applications because "they had been discharged for work-related misconduct" (*Employment Division* v. *Smith* 1990, 874). In *Smith,* the question before the Court was whether Oregon's blanket criminalization of peyote use and possession was acceptable under the Free Exercise Clause of the First Amendment, thus legitimating the state's denial of unemployment compensation (*Employment Division* v. *Smith* 1990, 874). Smith and Black grounded their free-exercise claims in the unemployment compensation cases of *Sherbert* v. *Verner* (1963), *Thomas* v. *Review Board* (1981), and *Hobbie* v. *Unemployment Appeals Commission of Florida* (1987), all of which sanctioned the carving out of religious-based exemptions to neutral laws of general applicability (i.e. laws that did not intentionally discriminate against religion). These cases established the standard that, when religious convictions require behavior that leads to, or is the basis for, the refusal or denial of a benefit, it violates the Free Exercise Clause unless there is a compelling government interest for such a denial (*Hobbie* v. *Unemployment Appeals Commission* 1987, 136).

In sharp contrast to the established precedent of *Sherbert, Thomas* and *Hobbie*, the *Smith* Court asserted that neutral laws of general applicability burdening religious practices did not have to be justified by a compelling government interest in order to pass constitutional muster (*Employment Division* v. *Smith* 1990, 878-879). The Court sought to differentiate *Smith* from *Sherbert, Thomas* and *Hobbie* based on the legality (or illegality) of the conduct under examination; *Smith* entailed illegal conduct whereas the unemployment compensation cases did not (*Employment Division* v. *Smith* 1990, 876). Moreover, cases outside of the unemployment context in which the Court carved out religious-based exemptions implicated more than one constitutional protection; they were hybrid cases. For example, *Yoder* entailed not only free exercise protections, but also the rights of the parents to "direct the education of their children" (*Employment Division* v. *Smith* 1990, 881). Justice Scalia's majority opinion also contended that the Court did not need to analyze *Smith* through the compelling-interest framework of *Sherbert* because relevant precedent (e.g. *Sherbert, Thomas* and *Hobbie*) had applied this test only to countermand rules governing unemployment decisions. "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation" (*Employment Division* v. *Smith* 1990, 883). The difference here, then, appears to stem from the criminal nature of peyote ingestion; at first brush, *Smith* seems to be a case about unemployment compensation indistinguishable from the others. However, granting a judicial exemption would not only result in the distribution of unemployment benefits, but also an exemption to any criminal penalties meted out against religious offenders. Finally, the Court construed the unemployment compensation cases as special because they involved rules and standards amenable to

individualized consideration. For example, *Sherbert* and *Thomas* allowed for the denial of unemployment compensation if a person had quit his/her job or would not accept available employment "without good cause." The construction of these statutes created space for, and in fact necessitated, "individualized exemptions." A similar amenability is not present when dealing with the uniform criminalization of particular actions, however (*Employment Division* v. *Smith* 1990, 884).

While *Smith* certainly did not champion a constitutional right to religious exemptions, the Court nonetheless put its imprimatur on legislative attempts to accommodate religious practices burdened by neutral laws of general applicability. "A society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use" (*Employment Division* v. *Smith* 1990, 890). The *Smith* decision, having at best circumscribed the *Sherbert* standard of review to a small subset of unemployment compensation cases, left the process of religious accommodation to legislative bodies—noting all the while that this would put minority religions at a "relative disadvantage" *vis-à-vis* majority religions (*Employment Division* v. *Smith* 1990, 890). Seeking to amend this shortcoming of the *Smith* decision by restoring the compelling-interest test of *Sherbert* and *Yoder*, Congress passed the Religious Freedom Restoration Act of 1993 (hereinafter RFRA) with overwhelming bipartisan support (Clinton 1993, 2000-2001; Sullivan and Gunther 2010a, 559). Congress noted that the *Smith* decision eviscerated the compelling-interest standard propounded in *Sherbert* and *Yoder*, and that the compelling-interest standard employed in these judicial decisions is

the appropriate analytical tool for balancing religious freedom, on the one hand, and government interests, on the other. As such, the Act specified that, even when burdens placed on religion are the consequence of a generally applicable law, the relevant governing body "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (RFRA, 4439). Furthermore, the Act applied to all units of government within the jurisdiction of the United States (*City of Boerne* v. *Flores* 1997, 532; RFRA, 4439-4440).

Although RFRA appeared to bring potency back to the standards set forth in *Sherbert* and *Yoder*, this potency was fleeting, as the Court ruled in *City of Boerne* v. *Flores* (1997) that Congress transcended its constitutional power when it enacted RFRA (*City of Boerne* v. *Flores* 1997, 511). Congress depended upon its enforcement powers under Section 5 of the Fourteenth Amendment to render the Act's regulatory framework applicable to state governments (*City of Boerne* v. *Flores* 1997, 516). While Congress undoubtedly possesses the authority to enforce with necessary legislation the protections contained in the Fourteenth Amendment (which subsumes the freedoms enshrined in the First Amendment),[48] the Court reasoned that this power is limited to remedial action. By enacting standards of enforcement that go beyond remedial action and do away "with proof of deliberate or over discrimination and instead concentrate on a law's effects," the *Boerne* Court interpreted Congress' action as fundamentally amending, rather than

[48] The Court ruled in *Cantwell* v. *Connecticut* (1940) "that the 'fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment'" (*City of Boerne* v. *Flores* 1997, 519).

enforcing, the Free Exercise Clause of the Fist Amendment pursuant to its Section 5 of the Fourteenth Amendment (*City of Boerne* v. *Flores* 1997, 519).[49] Thus, the Court concluded that Congress could not apply the regulations of RFRA to the States, and its subsequent decision in *Gonzalez* v. *O Centro Espirita Beneficente Uniao Do Vegetal* (2006) affirmed that RFRA, while unenforceable against the States, nonetheless binds the Federal Government.[50]

> Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrate the application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest" (*Gonzalez* v. *O Centro Espirita Beneficente Uniao Do Vegetal* 2006, 424).

Therefore, the compelling-interest standard of *Sherbert* and *Yoder* applies to the United States Federal Government as a matter of settled law.

By determining that that the Free Exercise Clause of the US Constitution did not imply a right to exemptions, the *Smith* Court's decision represented a setback for those championing religious-based exemptions to generally applicable laws. However, the manner in which the *Sherbert* and *Yoder* standards gained applicability to the Federal

[49] As Justice O'Connor notes in dissent, the Court's determination of whether RFRA falls within the boundaries of Congress' Section 5 enforcement power hinges on one's interpretation of the Free Exercise Clause. The *Boerne* Court embraces *Smith*'s interpretation of the Clause, an interpretation that views the Free Exercise Clause as a mere antidiscrimination principle that prohibits only intentional discrimination (i.e. "only against those laws that single out religious practice for unfavorable treatment"). Justice O'Connor does not espouse this interpretive stance. "Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law" (*City of Boerne* v. *Flores* 1997, 546)(O'Connor, J., dissenting).

[50] "As originally enacted, RFRA applied to the States as well as the Federal Government. In *City of Boerne* v. *Flores* (1997), we held the application to States to be beyond Congress' legislative authority under § 5 of the Fourteenth Amendment" (*Gonzalez* v. *O Centro Espirita Beneficente Uniao Do Vegetal* 2006, 424).

government—i.e. through the legislative process under the auspices of RFRA—is continuous with the long history of religious exemptions in the United States. The States and Federal Government have long maintained a tradition of carving out religious exemptions to "neutral" laws of general applicability. In fact, throughout US history, the majority of religious-based exemptions flowed not from judicial rulings, but rather from Colonial governments, state legislatures and Congress; they were statutory (Fisher 2002, 291). Thus, the Court's approbation of exemptions realized through the "democratic process" in *Smith* only reinforced through dictum the constitutional legitimacy of an extant pattern of legislative and judicial exemptions dating back to the Colonial Era (See McConnell 1990a above); and the Court's abrogation of RFRA as applied to the States in *Boerne* simply meant that exemptions at the state level would have to proceed through the normal political channels without federal statutory mandate.

The Theory of Religious Exemptions to "Neutral" Laws of General Applicability, Title VII Disparate Impact Standards and the Equal Protection Clause

In the foregoing sections, I provided an overview of the US Supreme Court free exercise jurisprudence covering religious exemptions to generally applicable laws; additionally, I offered an adumbration of statutory exemptions at the federal and state levels of government. Omitted from these sections, however, was any discussion of the theory underlying the exemptions approach to the free exercise of religion. Michael McConnell, in his influential work on the history of the Free Exercise Clause, furnishes a succinct explication of the theory undergirding the exemptions approach. Exponents of the exemptions approach to religious free exercise posit that "powerful and influential" religious groups garner sufficient representation and protection in the political domain, whereas "unpopular or unfamiliar" religions do not receive similar indemnification; they

are more vulnerable to free-exercise infringements engendered by "neutral" laws of general applicability (McConnell 1990a, 1419-1420).[51] Inequality and disadvantage obtain here not because of intentional or purposeful discrimination against certain religious groups and/or religious persons, but rather because of insensitivity and ignorance to the demands and needs of these groups (Nussbaum 2008, 116). According to this theory, juridically executable religious-based exemptions are necessary to guarantee that these "unpopular or unfamiliar" religions receive equal treatment and protection in the political domain (McConnell 1990a, 1420). Religious exemptions to "neutral" laws of general applicability serve as an equalizer of sorts, ensuring that there is no hierarchy among religious groups—that adherents of dominant or powerful religious groups and disfavored and/or unpopular groups have an equal opportunity to follow the religious dictates of their conscience. In this way, the state is neutral toward religion; it does not favor particular religions—i.e. the powerful and favorable, etc.—in the political process (McConnell 1990a, 1419). Overall, this is a form of religious accommodation; it eliminates barriers to free exercise on both the individual and institutional levels (McConnell 1992, 686).

McConnell contrasts the exemptions approach to free exercise with the "no-exemptions view," or the idea that the role of government, as it pertains to religious free exercise, does not extend beyond the prevention of intentional discrimination, which is understood as the singling out of particular religious practices—or the singling out of

[51] Martha Nussbaum echoes this sentiment with the use of slightly different terminology. Employing the language of majority-minority relations, she notes that laws in democratic societies often reflect a majoritarian bias and, consequently, do not take into account the demands and needs of religious (and other) minorities. "Majority thinking is usually not malevolent, but it is often obtuse, oblivious to the burdens such rules impose on religious minorities" (Nussbaum 2008, 116).

religion in general—for differential and disadvantageous treatment (McConnell 1990a, 1418). On this interpretation, laws are consonant with free exercise protections when they do not advert to religion and have a secular purpose other than the subjugation of religion; when laws and government actions meet these criteria, they are neutral toward religion (McConnell 1990a, 1419). Here, intentional or purposeful discrimination—much as it was in the context of race—is associated with prejudice, or judgments against particular groups or classes of persons that serve "to deny persons of those classes the full enjoyment of that protection which others enjoy" (*Strauder* v. *West Virginia* 1880, 309). In other words, prejudice in the context of religion constitutes either the denial of protections afforded to secular persons or non-religious groups (i.e. the singling out of religion in general) or the denial of protections afforded to other religious practices (i.e. the singling out of particular religious practices vis-à-vis other religions). The liberal individualist philosophy of John Locke is the fountainhead of the "no-exemptions" understanding of free exercise, and cases such as *Employment Division* v. *Smith* (1990) exemplify this view (McConnell 1990a, 1434-1435).[52]

For example, the *Smith* decision commenced with a discussion of two hypothetical scenarios, both of which indubitably offended the Free Exercise Clause. These scenarios entailed either the singling out of persons for differential treatment based solely on the religious nature of their actions (discrimination against religion in general), or the singling out of persons for differential treatment because of their particular religious practices (discrimination against particular religions/religious practices). "It

[52] In *A Letter Concerning Toleration* (1689), Locke states, "For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation" (Locke [1689] 1950, 48).

would be true […] that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display" (*Employment Division* v. *Smith* 1990, 877). Scalia notes that the issue in *Smith* differs from such scenarios insofar as the prohibition of religious-inspired peyote use is not the particular object of the law under examination (this is not an instance of purposeful or intentional discrimination, as cognized above). Any free-exercise burden placed on religious adherents is therefore incidental to a constitutionally legitimate exercise of state power, and construing such incidental burdens as contrary to the free exercise of religion would constitute a judicial overreach, an over-expansive interpretation of the Free Exercise Clause that is inconsistent with First Amendment jurisprudence (*Employment Division* v. *Smith* 1990, 878). Thus, the Smith decision embodies the "no-exemptions" approach, viewing the Free Exercise Clause as protecting against purposeful discrimination, not the incidental effects of general legislation.

Three years after the Court rendered the Smith decision, it upheld the "no-exemptions" interpretation of the Free Exercise Clause in *Church of the Lukumi Babalu Aye* v. *City of Hialeah* (1993). The City of Hialeah, Florida, enacted three ordinances that had the combined effect of proscribing religious animal sacrifice, and the Court determined that the purpose of these ordinances was the suppression of the Santeria religion (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 534). Invoking *Smith* and its "no-exemptions" view of free exercise, the Court reaffirmed that neutral laws of general applicability do not traduce the Free Exercise Clause; they do not require the establishment of a compelling government interest to pass constitutional muster

(*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 531). However, when a statute affecting the free exercise of religion does not conform to the *Smith* standards of neutrality and general applicability, it can survive constitutional scrutiny only if a compelling government interest is present and the law is narrowly tailored in pursuit of that government objective (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 531-532). That is to say, when a law or regulation singles out persons on the basis of religion for particular disadvantage, it must satisfy compelling interest and narrow tailoring criteria (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 533). For this reason, "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases" (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 546).

That the ordinances at issue in *Lukumi* constituted such targeting of religious behavior was clear; the ordinances did not include within their reach other non-religious activities substantially related to the avowed government interests of safeguarding public health and preventing animal cruelty (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 543). Thus, the ordinances were under inclusive—falling short of the requirement of general applicability (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 545-546). Moreover, the actual effect of the ordinances in question, coupled with available contextual and historical evidence, shows that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice" (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 540). The City could have achieved its twin interests of public health promotion and the prevention of animal

cruelty through less expansive and far-reaching means—means that would not have reached Santeria religious practices. Because there was no cogent explanation for the overreaching nature of the regulations, the professed government objectives of the City were dubious at best, lending credence to the notion that the actual object of the regulation was the suppression of certain religious activity (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 538). Finally, recordings of city council meetings revealed a general antipathy for the Santeria religion and its practices on the part of council members, Hialeah denizens, and other government officials (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 541-542). Thus, as these examples show, the City ordinances were decidedly non-neutral, having as their object the suppression of Santeria religious practice (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 542).'

Because city council did not narrowly tailor the ordnances under examination (i.e. they were overly expansive), the discernment of a compelling government interest in this case could not have saved the City's regulations (pursuant to *Smith* above) (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 546). What is more, since there can never be a compelling government interest in suppressing particular religions or their practices (i.e. a compelling interest in purposeful discrimination against religion), the City of Hialeah foundered in passing the compelling-interest test (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 546-547). "Legislators may not devise mechanisms, over or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void" (*Church of the Lukumi Babalu Aye* v. *City of Hialeah* 1993, 547). This is analogous to impermissible discrimination in the context of race; the lack of narrow tailoring—i.e. a

closeness of fit between means and ends—along with supplemental evidence, meant that the discrimination in question reduced to religion and, as such, represented impermissible discrimination rooted in animus or prejudice.[53]

The Theory of Religious Exemptions as a Paradigm of Disparate-Impact Discrimination

As elucidated in previous sections of this chapter, the disparate impact theory of discrimination is primarily concerned with the eradication of hierarchies predicated upon irrelevant characteristics, such as race. The theory does not cognize discrimination in terms of purpose or intent (as in the *Strauder* standard of impermissible discrimination), but rather in terms of the operation or effects of laws and regulations. If a law or regulation does not embody purposeful or intentional discrimination but nonetheless operates in a manner that disproportionately affects persons based on race or other impertinent distinctions (e.g. gender, national origin, religion), the law or regulation constitutes invidious discrimination.[54] There is, however, one exception: if the law or regulation satisfies other conditions, such as the business necessity requirement, it does not constitute a form of invidious discrimination that qualifies for protection under Title VII (See, especially, *Griggs* v. *Duke Power Co*. 1971, 431). One should understand the

[53] Recall the *Strauder* standard of impermissible racial discrimination from chapter three. In *Strauder*, the Court associated discrimination based singularly on race with racial prejudice, or judgments against particular groups or classes of persons that served "to deny persons of those classes the full enjoyment of that protection which others enjoy" (*Strauder* v. *West Virginia* 1880, 309).

[54] The Civil Rights Act of 1964 as amended in 1991 allows for disparate-impact claims based on the following classifications: "race, color, religion, sex, or national origin" (Civil Rights Act of 1991, 1074). Thus, the statute considers these categories or classifications irrelevant for the purposes of employment, with the exception of employment in religious organizations. Section 702 of the Civil Rights Act of 1964 allows for discrimination based on religion in the employment practices of religious organizations (Civil Rights Act of 1964, 255). While section 702 affords religious organizations the latitude to discriminate on religious grounds in hiring, courts have generally granted religious organizations sweeping autonomy in hiring practices and internal operations that far exceeds the exception to religious-based discrimination outlined in Title VII (Corbin 2007, 1975-1976).

disproportionate effect here as a burden placed on certain groups—a burden that creates "artificial, arbitrary and unnecessary barriers to employment" for persons based on their group membership (i.e. the classification of person "*y*" as "*x*").

Even though a law or regulation may be devoid of a discriminatory motive or purpose based on such irrelevant classifications, laws qualifying for judicial relief under Title VII disparate-impact standards are similar in their outcomes to laws that have a discriminatory purpose. In other words, they have outcomes similar to those one would anticipate if, for example, employers used race as a "criterion of selection" or "sorting tool" that effectively distributed opportunities along racial (or other) lines. However, such laws and/or regulations are not "functionally equivalent" to the use of race as a "criterion of selection" for employment because laws qualifying for disparate-impact relief satisfy legitimate government interests in addition to operating in a way that distributes opportunities along racial lines (Perry 1977, 554). Purposefully discriminatory laws, whether overt or covert, do not satisfy any other interest or purpose except racial selection; they reduce to race (c.f. *McLaughlin* v. *Florida* 1964) (Perry 1977, 553). Since the laws and/or regulations qualifying for disparate-impact relief satisfy a purpose other than racial selection, and since they do not make any express racial classifications, they are race-neutral in terms of purpose or intent. They are, to quote the *Griggs* Court, "practices that are fair in form, but discriminatory in operation" (*Griggs* v. *Duke Power Co*. 1971, 431). The practices are "fair in form" precisely because they do not entail intentional discrimination (overt or covert), and they are unfair in operation because they have effects similar to practices based on purposeful discrimination—effects that could be eschewed due to a lack of "business necessity."

Thus, these laws, regulations and practices operate in ways that, although not intending to discriminate, unfairly perpetuate "the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co.* 1971, 430).

They perpetuate "the status quo of prior discriminatory practices" because a history of intentional discrimination has placed blacks at a structural disadvantage relative to whites. It is because of invidious discrimination that a larger share of blacks, as compared to whites, suffers from poverty and inequality. Prior discrimination has engendered social disadvantage in terms of education and economic attainment vis-à-vis whites, and laws, regulations and practices that encumber those afflicted with an educational or economic deficit disproportionately affect blacks in adverse fashion, irrespective of discriminatory intent (Perry 1977, 557-558). That is, certain race-neutral policies exhibit the effects of race-based, invidiously discriminatory policies because of the impediments to employment or promotion (i.e. burdens) they place on those in the "social position" of blacks; these policies give relevance to race, effectively sorting opportunity along racial lines—even though they are devoid of racially discriminatory purpose. And, if such policies do not satisfy the "business necessity" requirement, they create "artificial, arbitrary and unnecessary barriers to employment" (i.e. unnecessary burdens) for blacks that constitute invidious discrimination; it is the absence of necessity, coupled with racial relevance (i.e. racially disproportionate impact), that defines invidious discrimination pursuant to the theory of discrimination expounded in *Griggs*.

In a manner similar to the theory of discrimination expounded in *Griggs*, the theory underlying the exemptions approach to religious free exercise is primarily concerned with the elimination of hierarchy among groups. Instead of racial inequality,

however, the theory focuses upon inequalities that obtain among religious groups and the relative ability of members of these groups to engage in practices that follow from their religious convictions. It is explicitly concerned with the differential treatment accorded to "powerful and influential" religious groups in the democratic process relative to "unpopular or unfamiliar" groups, theorizing that the latter are more susceptible than the former to burdens engendered by neutral laws of general applicability (McConnell 1990a, 1419-1420). Exponents of the exemptions approach to free exercise do not understand this inequality or group disadvantage in terms of intentional or purposeful discrimination, but rather, in terms of insensitivity and ignorance to the demands and needs of these groups (Nussbaum 2008, 116). This ignorance and insensitivity is structural—usually the result of majority-minority relations in democracies—and juridically executable exemptions purport to correct this imbalance of power by ensuring that voice is given to groups otherwise marginalized by the structural inequality.

> Both the exemption and no-exemption views […] insist on neutral, secular laws and government practices, but the no-exemption view makes that judgment exclusively according to the perspective of the government, while the exemption view takes the perspective of the religious claimant, as well as the countervailing interests of the government, into account (McConnell 1990a, 1419).

McConnell associates the "perspective of the government" with majoritarian politics, asserting that "a law or governmental practice is not neutral if it embodies the majority's view of a contested question of religious significance to the minority" (McConnell 1990a, 1419). On contested questions of importance to religious minorities, then, the "majority's view" is not neutral with respect to religion because it does not take into account the "perspective" of the religious persons burdened by the law or action in question.

Although McConnell does not label this incidental disadvantaging of certain religious groups discrimination, the mechanics of disadvantage—its operation—bear an uncanny resemblance to disparate-impact discrimination in the context of race. A failure to consider the effects of laws, regulations and/or government practices on certain religious persons—specifically those affiliated with unpopular faiths—results in outcomes similar to those one would anticipate if, for example, government actors used religion (or particular religions) as the "criterion of selection" or "sorting tool" that effectively distributed opportunities along religious lines. In short, it has effects similar to intentional discrimination against particular religions—even though the practices under examination are devoid of discriminatory intent or motive. However, such laws, regulations and/or practices are not "functionally equivalent" to the use of religion as a "criterion of selection" for disability or disadvantage because laws qualifying for judicial exemption satisfy legitimate government interests in addition to operating in a manner that distributes opportunities along religious lines. In other words, the burden is incidental; it is not the object of the law to discriminate on the basis of religion. In contradistinction to *Lukumi* above, the laws, regulations and/or practices under examination in cases of religious exemption do not reduce to religion; they do not represent impermissible discrimination rooted in animus or prejudice. What is more, the source of disadvantage—while not necessarily traceable to a history of prior intentional discrimination—is nonetheless structural in nature. The normal functioning of democratic institutions and the advantages that accrue to religious majorities are the wellspring of disadvantage here, as opposed to the purposefully discriminatory actions of individuals or institutions.

This structural inequality and the attendant disadvantage of minority religions vis-à-vis more powerful religious groups means that seemingly "neutral" laws of general applicability (i.e. those that are not purposefully discriminatory) are more likely to disadvantage inadvertently certain religious groups even though the laws in question serve legitimate government objectives and are absent discriminatory motives (e.g. such as the interdiction of controlled substances in *Smith*). Analogously, the structural disadvantage of blacks relative to whites means that, at least in the context of employment law, regulations and practices based on "neutral" criteria of general applicability, such as education requirements and testing procedures, will be more likely to disadvantage blacks than whites even though the laws in question serve legitimate interests (such as ensuring the selection of qualified employees) and are absent discriminatory intent. In both contexts, structural disadvantage conditions vulnerability to neutral laws of general applicability. By virtue of ignorance or insensitivity to the impact that such laws, regulations, practices and/or procedures have on socially disadvantaged groups—whether religious or racial in composition—these practices exhibit the effects of invidiously discriminatory policies specifically because of the impediments they place on employment opportunity (in the context of race) and free exercise (in the context of religion). They give relevance to race and religion—effectively sorting opportunity along racial and religious lines in areas of law where such classifications should have no pertinence, and they further perpetuate the condition of social disadvantage facing certain groups. One's particular religious affiliation should not determine the receipt of government benefits (i.e. unemployment compensation as in *Sherbert*), and one's race should not determine employment opportunity (i.e. *Griggs*).

Therefore, if such consequences of laws, regulations, procedures and/or practices are avoidable—that is, if the government does not have a compelling interest in uniformity or could achieve its interest in a less intrusive way (i.e. the compelling-interest test of *Sherbert* and *Yoder* codified by RFRA), or if there is no "business necessity" for employment procedures (i.e. Title VII of the Civil Rights Act)—then there is an obligation to eschew such adverse outcomes. There is an obligation to reduce the relevance of race and religion in the distribution of opportunities, an obligation to reduce morally arbitrary inequalities (See Rawls 1999). And just as the statutory level serves as the domain of execution for disparate impact in the context of race (e.g. Title VII), the legislative arena—post *Smith*—serves as domain of execution for disparate impact as applied to religion (e.g. RFRA).

From the similarities underscored above, it is pellucid that a nexus exists between the disparate-impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions for religious persons whose ideals conflict with so-called neutral laws of general applicability. The mechanics of disadvantage work in the same fashion, with structural inequalities engendering vulnerability to neutral laws of general applicability. This vulnerability has the potential to translate into practices that exhibit the effects of invidiously discriminatory policies through the placement of unnecessary burdens on certain groups. It is this absence of necessity (i.e. lack of business necessity), coupled with racial relevance (i.e. disparate impact) that defines invidious discrimination pursuant to the theory of discrimination propounded in *Griggs* and Title VII. Similarly, it is the absence of necessity (i.e. failure to satisfy the compelling interest and/or narrow tailoring requirements) coupled with religious

relevance (i.e. disparate impact) that defines invidious discrimination pursuant to *Sherbert, Yoder,* and RFRA. Thus, one can best understand the theory underpinning the exemptions approach to free exercise as a paradigm of disparate-impact discrimination.

Although *Sherbert, Yoder* and RFRA do not explicitly refer to the disadvantage facing religious persons as discrimination (as in Title VII), contemporary research on the nexus between equal protection and free-exercise jurisprudence confirms that an understanding of equality rooted in the disparate-impact theory of discrimination forms the basis of the exemptions approach to religious free exercise. In her work exploring the connections between equal protection and free exercise jurisprudence, Bernadette Meyler notes that the equal protection logic of purpose and effects expounded in *Washington* v. *Davis* (1976) is at odds with the compelling-interest test of *Sherbert* (Meyler 2006, 336-337). The *Davis* Court held that race-neutral laws devoid of discriminatory intent or purpose are consistent with the demands of equal protection—even if such laws produce racially disparate results. In short, purpose—not effect—is relevant from an equal-protection standpoint (from the standpoint of what, exactly, equality under the law requires); one should classify this understanding of equality as "formal" or procedural (Meyler 2006, 276). As long as policies do not purposefully discriminate and are fair in procedure or form, they are consistent with the demands of equal protection (equality). In contrast, the *Sherbert* Court embraced a "substantive" notion of equality that was concerned with not only proscribing intentional discrimination, but also ensuring the relative ability of religious groups to follow the dictates of their conscience in the absence of such impermissible discrimination. Equality here deals with the obstacles (burdens) faced by certain groups when they engage in religious exercise—impediments not faced

by other similarly situated groups (Meyler 2006, 276-277). Here, the actual effects of laws on religious practice matter; they are, in contrast to *Davis*, relevant from the standpoint of equality under the law. The *Smith* decision brought these inconsistent interpretations of purpose and effect into alignment, as Justice Scalia's majority opinion used the equal protection logic of *Davis* to countermand the compelling-interest test of *Sherbert* (Meyler 2006 337). Scalia writes:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race […] so too we strictly scrutinize governmental classifications based on religion. But we have held that race- neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause. [Our] conclusion that generally applicable religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents (*Employment Division* v. *Smith* 1990, 886).

From this, it is fair to conclude that *Sherbert* embraces a form of equality that runs counter to the formal concept of equality propounded in *Washington* v. *Davis*. Just as race-neutral laws "disproportionately disadvantaging a particular racial group" do not need to survive the compelling-interest test (heightened scrutiny) to pass constitutional muster, neither do "religion-neutral" laws that burden a particular religion. In other words, the same standard of equality applies in both contexts, and it is a standard inconsonant with *Sherbert* and an effects-based approach to equality under the law. To embrace *Sherbert* would be to champion the compelling-interest test in the context of religion, and this would require a focus on effects of neutral laws of general applicability—something expressly rejected by equal protection case law ("But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis

under the Equal Protection Clause) (*Employment Division* v. *Smith* 1990, 886). Thus, the Court associates the compelling-interest test—the exemptions approach in the context of religion—with disparate-impact discrimination in the context of race. In other words, the Court understood the exemptions approach to free exercise as a paradigm of disparate-impact discrimination; since there is no constitutional right indemnifying against disparate racial impact, there is similarly no right against disparate religious impact.

To the extent that disparate-impact protections exist, then, they exist on the statutory (not constitutional) level through measures such as RFRA and Title VII. Just as *Davis* relegated remedies for race-based disparate-impact to the statutory level (further legitimating measures such as Title VII), the Court's ruling in *Smith* served the same function in the context of religion. In fact, the *Smith* Court noted that it was constitutionally unproblematic for legislative bodies to grant religious exemptions to generally applicable laws (*Employment Division* v. *Smith* 1990, 890). In recent years, however, the Court has evinced hostility toward disparate-impact legislation in the context of race, but not in the context of religion; it has adhered to its dicta in *Smith* but not *Davis*. For example, the Court's decision in *Ricci* v. *DeStefano* (2009) called into question the constitutionality of race based disparate-impact statutes and severely circumscribed the range of cases in which employers could apply the disparate-impact requirements of Title VII. Above all else, the Court's decision in *Ricci* followed from its embrace of an individualized interpretation of equal protection—an interpretation espoused by affirmative-action rulings such as *Wygant* v. *Jackson* (1986), *City of Richmond* v. *J.A. Croson Co.* (1989), and *Adarand Constructors* v. *Pena* (1995). In these cases, the Court construed equal protection as guaranteeing a positive right to be judged

as an individual, without reference to "morally arbitrary" group attributes (Primus 2003, 553). If the exemptions approach to free exercise is best understood as a paradigm of disparate-impact discrimination (as I have shown above), and if the application of this paradigm of discrimination at the statutory level is unproblematic, why has the Court found this paradigm constitutionally problematic when applied to race (c.f. *Ricci*)? The Court's individualized understanding of Equal Protection should call into question religious based disparate-impact statutes as well, but it has not.

Religion, Race and the Equal Protection Clause: Attempting to Understand the Court's Differential Treatment of Race-Conscious and Religious-Conscious Public Policies

What accounts for the discrepancy between the Court's treatment of religious and race-conscious public policies above? Perhaps there is something peculiar to race that renders the very act of classifying and sorting opportunity based on race deleterious and constitutionally problematic, whereas classifying and sorting opportunity on the basis of religion does not have a similarly pernicious effect. There are at least two reasons why this is an untenable method of reconciling the Court's free exercise and equal protection jurisprudence. First, the Court's opinion in *Smith* belies the notion that racial classifications and race conscious decision-making warrant greater scrutiny than religious classifications and religious-conscious decision-making. For example, Justice Scalia's majority opinion states, "Just as we subject to the most exacting judicial scrutiny laws that make classifications based on race […] so too we strictly scrutinize governmental classifications based on religion" (*Employment Division* v. *Smith* 1990, 886). If the Court treats racial classifications as more problematic than religious ones, it seems to offer an opinion unequivocally to the contrary in its controlling case on free-exercise exemptions. Thus, this argument is dubious at best. Second, despite the Court's retrenchment of race-

conscious public policies in recent years, it has still refused to champion a per se rule against racial classifications (see chapter three). If racial classifications were inherently pernicious and constitutionally problematic regardless of their object, a distinction between invidious and non-invidious forms of discrimination would be misplaced.

If nothing intrinsic to racial classifications and race-conscious decision-making justifies the differential treatment of race and religion in the context of disparate impact and equal protection, perhaps disparate-impact in the context of religion does not involve group classifications (or group-based decision-making) and this alone explains the differential consideration given by the Court. If religious exemptions do not entail group classifications, then religious-conscious policies would not contravene the positive equal protection right to be judged as an individual. As such, this could account for the constitutional distinction between the two applications of the disparate-impact theory of discrimination considered above. This attempt at reconciliation, however, is similarly unviable. While it is true that individuals ultimately exercise the right to religious free exercise, successful claims for judicial relief (exemptions) have required the establishment of a connection to a religious group and its practices. "In bringing free exercise claims […] the challenger is obliged to describe the collectivity to which she belongs, persuasively alleging its religious character and the nature of the accompanying religious beliefs" (Meyler 2006, 285). This is evident in the two cases forming the legal-theoretical foundation of RFRA: *Yoder* and *Sherbert*.

In *Yoder*, the Court went to great lengths to ensure that the respondent's claims were religious in nature, noting that, "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based

on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief" (*Wisconsin* v. *Yoder* 1972, 215). The Court further reasoned that allowing individuals to reject state regulation based on subjective, philosophical judgments—as opposed to religious ones—would run counter to the principle of "ordered liberty" and be akin to anarchy (wherein everyone makes "his own standards on matters of conduct) (*Wisconsin* v. *Yoder* 1972, 215-216). Ultimately, the Court concluded that the claims made by the Old Order Amish were not reducible to individual judgment. "Giving no weight to such secular considerations […] the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living" (*Wisconsin* v. *Yoder* 1972, 216). Thus, the Amish rejected the regulatory authority of the state in *Yoder* because of their religious beliefs; the actual content of their religious beliefs conflicted with the state regulation (*Wisconsin* v. *Yoder* 1972, 218).

Similarly, in *Sherbert* the Court addressed the issues of religious belief and group membership—noting that the appellant was a member of the Seventh-day Adventist Church whose religious beliefs were genuine. Furthermore, it was beyond question that the appellant's religious beliefs ran counter to the conditions placed on unemployment recipients (ran contrary to the regulation at issue). "No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed" (*Sherbert* v. *Verner* 1963, 399). These statements imply that, if the Court were to discover the beliefs were disingenuous, not relevant to the regulation in question, and/or non-religious, the practice under examination would not be eligible for protection under

the Free-Exercise Clause. Thus, the inquiry in *Sherbert* follows the same general form, and to argue that disparate impact in the context of religion (religious exemptions) does not entail group-based decision-making is to ignore the basic logic of these foundational cases. Such an argument is a nonstarter; one cannot coherently defend the position that disparate impact in the context of religion does not entail group-based decision-making when the cases establishing the legal-theoretical framework for religious exemptions follow a group-based analytic.

If none of the possibilities outlined above account for this discrepancy, maybe the privileged position of religion in the United States constitutional system wields some explanatory power. After all, the Bill of Rights explicitly codifies the right to free exercise under the auspices of the First Amendment. While this argument has some superficial plausibility, it lacks explanatory power from a constitutional perspective. After the Court's decision in *Employment Division* v. *Smith* (1990), all cases involving religious exemptions derive their authority from statute—not the constitution. As such, it cannot be the fact of constitutional free-exercise codification that explains the Court's differential treatment of disparate-impact statutes in the context of race and religion. To be sure, legislatures and other governing bodies may be following their interpretations of the religion clauses when they grant exemptions (i.e. it is a legislative attempt at realizing a cherished, constitutional principle), but one could also make a similar argument for race-based disparate impact statutes such as Title VII. In other words, one could argue that Title VII represents a legislative attempt to realize the constitutional principle of equal protection under the laws. Therefore, the privileged position of religion in the constitutional system cannot explain this discrepancy.

Because there is no cogent explanation for the differential treatment accorded to race and religion in these contexts, the legitimacy of statutory disparate impact as applied to religion can serve as a legitimating mechanism for race-based disparate-impact statutes. In other words, since the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, and since the theory underpinning the exemptions approach to free exercise is best understood as a paradigm of disparate-impact discrimination, I conclude that the theory undergirding religious exemptions to neutral laws of general applicability (the understanding of equality it enshrines) represents a viable and robust justification for race-based disparate-impact policies such as Title VII. If disparate-impact statutes in the context of religion (e.g. RFRA) do not offend the positive equal protection right to be judged as an individual, then, by virtue of their consanguinity, neither do race-based disparate-impact statutes. Of course, as my arguments in chapter three show, the contemporary Court's interpretation of equal protection as entailing a positive right to be judged as an individual does not have firm roots in the legislative history of the Fourteenth Amendment or the judicial precedents that guided questions of race and equal protection from the Reconstruction Era to the late Twentieth Century. My arguments in this chapter notwithstanding, then, there is still a persuasive case against construing equal protection on a strictly individual basis and using that individualized interpretation to invalidate disparate-impact statutes. However, the arguments of this chapter have the advantage of meeting the conservative wing of the Court—i.e. those moving public policy in the direction of color-blindness—on its own terms. I show that the individualized Equal Protection Clause cannot explain the Court's disparate treatment of race and religion; this, coupled with the arguments

proffered in chapter three, bolsters the contention that race-based disparate-impact statutes such as Title VII do not offend the Constitution and "the war between disparate impact and equal protection" is overblown. One can best make "peace" between equal protection and disparate impact by realizing that the "war" is chimerical—something revealed in the analysis above.

Conclusion

From the conclusions reached in the preceding sections, it is clear that a nexus exists between the disparate-impact theory of racial discrimination and the legislative and judicial practice of carving out exemptions to neutral laws of general applicability. More specifically, the theory underpinning the exemptions approach to free exercise is a paradigm of disparate-impact discrimination. Despite this theoretical similarity, the US Supreme Court has evinced a general hostility toward race-based disparate-impact statutes, while it has found religious exemptions to generally applicable laws constitutionally unproblematic. In accordance with evidence presented in this and the previous chapter, there is, constitutionally speaking, no tenable method of differentiating religious and race-conscious decision-making such that one form of group-based evaluation should be greeted with hostility and the other open acceptance, if not outright embrace. Because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, and because the theory underpinning the exemptions approach to free exercise is best understood as a paradigm of disparate-impact discrimination, the theory undergirding religious exemptions to neutral laws of general applicability (the understanding of equality it enshrines) represents a viable and robust justification for race-based disparate-impact policies such

as Title VII. This justificatory approach has the advantage of meeting the conservative wing of the Court on its own terms, and it elucidates the fantastical nature of the purported tension between disparate impact and equal protection. As such, this chapter—along with chapter three—contributes to a defense of race-conscious policies such as Title VII and the history upon which they are founded.

CHAPTER 5

CONCLUSION

In this chapter, I argue that the liberal multicultural depiction of liberalism and the liberal state do not hold up when examined in light of the actual policies and procedures of the United States. Because they erroneously portray the US as an exemplar of "Liberalism I," liberal multiculturalists such as Charles Taylor and Will Kymlicka fail to appreciate that many of the tensions intrinsic to liberalism addressed by their theories have a deep history in the US—especially as they relate to questions of religious accommodation and racial equality. Overlooking this history and the theory supporting it misses an opportunity to address one of the major criticisms of liberal multiculturalism; mainly, that it does not incorporate demands for racial justice. If these theorists contextualized their claims and approach as intrinsic to US political history and philosophy, as opposed to portraying it as extrinsic and antithetical to these political-philosophic traditions, liberal multiculturalism would have greater potency and tenability.

Tying it All Together: Chapters Two, Three and Four

As noted in chapter two, liberal multicultural theorists such as Charles Taylor and Will Kymlicka register an empirical assessment of the liberal state—of how things operate in the diurnal administration of justice. These theorists make the general observation that the policies and procedures of the liberal state, while non-neutral and therefore partial in practice, nevertheless endeavor to be neutral with respect to difference. In short, they contend that the liberal state is at least doctrinally neutral—having as the theoretical foundation for its action a conception of neutrality that views citizens in their abstract sameness irrespective of their particular affiliations and/or

identities (what one may call rigorous, or procedural, neutrality). This specific understanding of neutrality, however impossible its realization may be, informs the procedures and public policies of the liberal state, delimiting the range of legitimate policy options and imbuing various elements of the public political culture. What is more, the observations of Taylor and Kymlicka are said to apply primarily to the United States, as the US embraces, at least doctrinally, formal legal and political neutrality toward difference. As such, the United States is the quintessence of rigorous neutrality. However plausible it may appear, the liberal multicultural portrayal of liberalism and the liberal state is highly misleading. In chapter two, I laid the groundwork for substantiating this contention by highlighting how various theorists portrayed the liberal state and liberal political philosophy within the difference literature—focusing my attention specifically on the works of Charles Taylor and Will Kymlicka, the preeminent liberal multicultural scholars. In this chapter, I move on to consider whether the liberal-multicultural depiction of liberalism and the liberal state is accurate when examined in light of the actual policies and procedures of the United States, the so-called archetypal rigorously neutral state.

Liberal Multiculturalism and Equal Protection

Based on the conclusions drawn in chapter two, it is possible to test the empirical claims of liberal multicultural theorists such as Taylor and Kymlicka. For Taylor, the procedurally liberal state, with its unswerving devotion to the principle of non-discrimination and individual rights, does not allow space for the pursuit of collective projects or goals and/or the accommodation of difference—cultural or otherwise. Doing much of the work here is the principle of non-discrimination, which stands as a

proscription against the singling out of individuals based on certain attributes, such as race, sex or ethnicity; it stands for equal treatment (or uniformity) under the law. In accordance with this interpretation of liberalism, collective goals are "inherently discriminatory" because the "pursuit of the collective end will probably involve treating insiders and outsiders differently" (i.e. treating those inside a given group, say, African Americans, differently from those outside of that group) (Taylor 1994, 55). So here, the consideration of particularities (such as race or sex) and the resultant differential treatment—i.e. "treating insiders and outsiders differently" ("singling them out")—constitutes discrimination, and such discrimination runs counter to equality under the law ("equal treatment of citizens"). Simply stated, the principle of non-discrimination represents the absence of differentiation in policy and procedure, and this absence typifies the "equal treatment of citizens" (equality under the law). Ultimately, Taylor identifies this species of liberalism with the political agenda and institutions of the United States (Taylor 1994, 58). Continuing in a similar vein, Michael Walzer contends that the United States exemplifies a doctrinal commitment to "rigorous neutrality"—rejecting collective religious and cultural endeavors in the name of individual rights and uniformity of treatment. He labels this "Liberalism I" (Walzer 1994, 99-102). Finally, Will Kymlicka argues that the decision of *Brown* v. *Board of Education* (1954) transformed the predominant understanding of racial justice and equality in the United States from one of color-conscious decision-making to a color-blind paradigm that associates equality with the principles of non-discrimination and equal opportunity. It was with the Brown decision that the policy of "benign neglect" became an issue of justice (Kymlicka 1995, 58). The underlying logic of *Brown* was eventually extended to other classes of

persons—mainly ethnic and national minorities; the "overgeneralization" of *Brown* (to these other classes) and the ascendancy of color-blind liberalism lead Kymlicka to conclude that the US "is the prototypically neutral state" (Kymlicka 1995, 58-59; 2001, 24).

Given the conclusions of Taylor, Walzer and Kymlicka, one would expect a per-se rule against racial classifications and race-conscious public policy in the United States. Such policies directly violate the principle of non-discrimination or uniformity under the law, as they entail the consideration of certain particularities deemed irrelevant from the standpoint of procedural liberalism. Remember, the procedurally liberal state achieves equality through viewing all citizens in their abstract sameness, irrespective of particular group affiliations and/or identities. Thus, color-conscious policies and procedures should have no place in a procedurally liberal state. As chapter three shows, however, the US Supreme Court has been disinclined to deem all racially classificatory (race conscious) laws unconstitutional—espousing instead a distinction between invidious and non-invidious forms of discrimination, finding the former categorically impermissible (unconstitutional) and the latter suspect, but not necessarily unconstitutional. For years, the post-*Brown* disparate-impact standards of Title VII had the backing of the American High Court and ensured that employers instituted job qualifications on a race-conscious basis (in the name of equality). The Court also countenanced many racially preferential affirmative action policies in pursuit of these same goals. And although the contemporary Court's individualized interpretation of equal protection has truncated the circumstances under which race-conscious practices are acceptable, the disparate-impact standards of Title VII and certain affirmative-action policies still maintain constitutional

legitimacy (See *Ricci* v. *DeStefano* 2009 and *Grutter* v. *Bollinger* 2003, respectively). Even as US public policy comes closer to embracing fully the principle of non-discrimination and its attendant color-blindness, it still does not fit the mold of procedural liberalism (or "Liberalism I"). Therefore, with the example of equal protection and race, the empirical assertion of the liberal multiculturalists does not hold up when examined in light of the actual policies and procedures of the US.

What is more, equal protection in the US does not abide by a principle of non-discrimination or neutrality; it often works in a highly particularized fashion—allowing for the legislative and judicial consideration of particular identities under the law. The extent to which legislators may consider certain particularities of identity varies based on the type of classification or consideration one endeavors to make, as the level of judicial solicitude and scrutiny for certain classifications is higher than others. Racial classifications, for example, receive the highest degree of scrutiny and are thus most likely to pose constitutional problems (but there is no per-se rule against them, as evinced above), whereas economic classifications receive the lowest level of scrutiny and are thus least likely to pose constitutional problems (Sullivan and Gunther 2010b, 641). Some classifications—e.g. gender—receive intermediate scrutiny from the courts. As such, the Court examines these classifications with greater scrutiny than economic regulations, but they do not have to survive the rigors of strict scrutiny to pass constitutional muster (Sullivan and Gunther 2010b, 591-592). In general, then, equal protection policy and jurisprudence in the United States does not jibe with the portrayal of "Liberalism I" in the works of Taylor, Walzer and Kymlicka.

Liberal Multiculturalism and Religious Exemptions

Outside the context of equal protection and race, chapter four shows that, with the example of religious exemptions to "neutral" laws of general applicability, US public policy does not exhibit doctrinal neutrality toward difference. An understanding of neutrality that views citizens in their abstract sameness irrespective of their particular affiliations and/or identities (what one may call rigorous, or procedural, neutrality) does not form the basis of public policy and procedure in the United States (at least as it pertains to religion). In fact, a rejection of this type of neutrality—one that ignores religious difference through benign neglect—represents the theoretical foundation of the exemptions approach to the free exercise of religion. According to the exemptions approach, "neutral" laws of general applicability may disadvantage certain religious groups by virtue of their social position, and religious exemptions endeavor to rectify the disadvantage that obtains. In other words, religious-conscious (group conscious) policymaking serves as the remedy for disadvantage, and such policies do not align with the procedurally liberal commitment to doctrinal neutrality because they are explicitly difference conscious. Even the no-exemptions view, which inveighs against judicially mandated religious exemptions, allows for statutory exemptions. As such, even the most restrictive, conservative approach to religious exemptions does not conform to the principle of neutrality or non-discrimination—a principle wherein the state views citizens in their abstract sameness irrespective of their particular affiliations and/or identities. Therefore, with the example of religious exemptions to generally applicable laws, the empirical assessment of the liberal multiculturalists does not hold up when examined in light of the actual policies and procedures of the US.

The Relevance of Theories of Liberal Multiculturalism

Although the examples of religious exemptions and equal protection and race illuminate the spuriousness of the liberal multiculturalists' empirical claim, one may query as to the purchase of underscoring this problematic classification of the United States. This is to ask, "What is the purpose of highlighting the problematic depiction of the US liberal state through the examples of equal protection and free exercise?" What do we gain from the incorporation of these theoretical paradigms and their misidentifications? Liberal multicultural theorists such as Taylor and Kymlicka erroneously cast the US as an exemplar of "Liberalism I," and, as such, they fail to appreciate that many of the tensions intrinsic to liberalism addressed by their theories have a deep history in the US—especially as they pertain to questions of religious accommodation and racial equality. Overlooking this history and the theory upon which it rests misses an opportunity to address one of the major criticisms of liberal multiculturalism; mainly, that it does not incorporate demands for racial justice and the rectification of racial subordination and disadvantage (See, especially, Dhamoon 2007 and Mills 2007). Neither Taylor nor Kymlicka offers a theoretical blueprint for meeting at least some of the demands of racial justice, and neither shows how his paradigm of difference accommodation relates and responds to the historical and contemporary sources of race-based disadvantage; race is conspicuously absent from their works. In all, their focus on cultural difference causes them to gloss over "histories of racial domination" (Dhamoon 2007, 6-7).

An examination of the history of religious exemptions and the theory undergirding it reveals that one can best understand these exemptions as a species of

disparate-impact discrimination (see chapter four). As chapter three shows, the anti-hierarchy principle of disparate-impact discrimination justifies race-conscious employment policies designed to combat the vestiges of historic racial discrimination and subordination. It changes employment policy in a way that acknowledges and mitigates the deleterious, present-day effects of the history of racial subjugation and white supremacy in the United States. Because the theory of disparate-impact discrimination acts as the connective tissue (nexus) between religious exemptions and race-based disparate impact policies such as Title VII, these policies are mutually reinforcing—meaning that the application of disparate impact in one context can serve as a justification in other similar contexts. Thus, overlooking the connection between religion and race in particular, and the history and theory of disparate impact in the US generally, renders the argument of liberal multiculturalists less potent than it would be if they had contextualized their claims and approach as intrinsic to US political history and philosophy, as opposed to extrinsic and antithetical to these political-philosophic traditions. Reframing liberal multiculturalism in this fashion allows for the acknowledgment of an extant legal-theoretical framework that aligns with the liberal multicultural commitment to cultural recognition, while simultaneously addressing some of the demands of racial justice. In sum, it creates a more potent and, therefore, defensible form of liberal multiculturalism.

In what follows, I offer a two-part substantiation of this thesis. First, I discuss the specific demands of racial justice addressed by the disparate-impact paradigm of discrimination; in so doing, I highlight the concepts of black solidarity and identity presupposed by the disparate-impact framework. This qualifies my argument and

emphasizes some of the limitations of my approach. Second, I show how the framework of disparate-impact discrimination aligns with, and can incorporate, the liberal multicultural commitment to cultural recognition. This requires an analysis of the core liberal concepts implicated in theories of disparate-impact discrimination—concepts realized and brought to life through the promulgation of policies such as RFRA and Title VII.

The Demands of Racial Justice

Thus far, I have elucidated the role that the theory of disparate-impact discrimination plays in employment policy, but I have not generalized to other circumstances in which the theory might play a pivotal role. One could undoubtedly apply the theory to other policy areas in which blacks suffered purposeful discrimination and systematic exclusion from institutional participation. Two examples immediately come to mind: public education and housing. For example, although statutes and judicial rulings have outlawed *de jure* discrimination in housing and education, racial segregation persists in these important policy areas. Rates of residential segregation for blacks are high, and they do not decrease with income; in other words, they do not reduce to class (Anderson 2002, 1199). This trend differs from that of other minority groups, whose levels of segregation tend to decrease as their socioeconomic status increases (Massey and Denton 1993, 11). Additionally, because geography usually determines which public schools one attends, residential segregation affects levels of educational segregation—resulting in a system where "one-third of black students attend schools in which less than ten percent of the students are white" (Anderson 2002, 1199).

While residential and educational segregation have their roots in the sordid history of purposeful discrimination, they also represent an ongoing source of race-based economic and political inequality (Anderson 2002, 1201-1202). Residential segregation insulates blacks from valuable "social networks" that foster access to employment and other opportunities. For example, approximately sixty percent of employers advertise for employment opportunities through "informal social networks" (most often through "word of mouth"), and de facto racial segregation engenders a situation wherein white workers—not having frequent contact with blacks at work, school or in their communities—do not have the opportunity to communicate these job openings to prospective black employees. In short, "Who one knows is at least as important as what one knows in determining one's access to opportunities" (Anderson 2002, 1202). Additionally, trends in residential segregation have disproportionately located blacks in central cities, and this has brought about several adverse economic consequences. Due to phenomena such as "white flight," black homeowners have seen their property values decrease relative to comparable suburban homes; declining property values, along with concentrated poverty, have lead to a decrease in property-tax revenues and affected the quality of inner-city schools (which are funded primarily through property taxes) (Conley 1999, 38-39). Further compounding the disadvantages wrought by diminished educational quality, residential segregation has limited blacks to precisely the geographic areas where economic opportunities are scant and rapidly declining; this imposes the increased cost on blacks relative to whites of commuting to the areas in which rapid job growth and opportunity exist: the white suburbs (Anderson 2002, 1202).

Thus, although the Fair Housing Act (1968) and *Brown* v. *Board of Education* (1954) proscribed intentional discrimination in education and housing, the patterns of discrimination initiated prior to *Brown* and the Fair Housing Act—patterns set in motion by overtly discriminatory government policies—continue to "operate as 'built-in headwinds' for minority groups" (*Griggs* v. *Duke Power Co.* 1971, 432). This occurs even in the absence of intentional discrimination (as in *Griggs* above). Under such circumstances, the racially detrimental effects of neutral (i.e. non-purposefully discriminatory) laws of general applicability warrant the application of the disparate-impact paradigm of racial discrimination to school administration and housing/zoning policy decisions. With school administration, application of the disparate-impact model requires taking stock of the possible racial impact of administrative decisions and, wherever possible, following a path that leads to a diminution of "racial imbalance" in schools (Perry 1977, 575-576). With housing or zoning, government actions restricting the construction of low-income housing to racially homogeneous areas are of particular concern. Given that a disproportionate number of blacks populate the lower rungs on the socio-economic ladder, housing or zoning decisions that foreclose opportunities to construct low-income housing in certain areas have a disparate impact on blacks. "Such decisions have the substantial effect of reinforcing residential racial isolation by fencing the poor, who are disproportionately black, out of predominately white, relatively affluent communities and into racially isolated neighborhoods" (Perry 1977, 580). This has the doubly adverse effect of disadvantaging blacks, disproportionately so, in their quest for suitable employment and economic viability because, as Michael Perry notes, "Economic deprivation and racial isolation are mutually reinforcing" (Perry 1977, 580-581). The

application of the disparate-impact theory of racial discrimination to housing and zoning decisions thus requires those in power to examine the disparate racial impact of laws and regulations, and it demands they pursue actions that do not "'freeze' the status quo" of previous discriminatory housing decisions (wherever possible).

With the examples of employment, housing and education, it is clear that the disparate-impact paradigm of discrimination endeavors to reduce the relevance of race in distributing present-day economic and educational opportunities. In each of the contexts discussed above, legacies of prior intentional discrimination and subordination give race contemporary relevance, thus stifling equality of opportunity for blacks and perpetuating the patterns of racial isolation and subordination. It is in this way that disparate-impact discrimination answers the demands of racial justice; it acknowledges the connection between contemporary conditions of racial disadvantage and a discriminatory past; it endeavors to mitigate the controlling influence of race in determining opportunity—not just in form, but also in substance. This method of ameliorating racial disadvantage presupposes a form of black identity and solidarity based on "pragmatic black nationalism," or the idea that the unfair socio-economic disadvantages accruing to persons ascriptively defined as "black" represent the core interests animating political action. Black identity here is thin and entails the external (societal) and internal (personal/self) recognition of persons as "members of a distinctive social group" (Shelby 2007, 150). This differs from a more robust form of black identity based on cultural authenticity—true or essential "blackness"—that seeks to define the true or real interests of all black persons (Shelby 2007, 151).

Disparate-impact discrimination as applied to race does not require—and, in fact, rules out—such essentialized conceptions of black identity, as they have the potential to exclude from disparate-impact remedies those who would otherwise qualify for relief but do not identify with black authenticity (however defined). In short, one is black "in the sense that racism puts him in the same boat as other people with black skins" (Boxill 1992, 180-181). Embracing "pragmatic black nationalism" is to view black persons as members of a "structural social group"—"a collection of persons similarly positioned in interactive and institutional relations that condition their opportunities and life prospects" (Young 2000, 97). Disparate-impact discrimination addresses "structural inequality," or the limitations and restrictions that obtain based on one's social position relative to other persons who do not face similar circumscriptions and conditions of disadvantage (Young 2000, 98). Therefore, while disparate impact responds to some of the demands of racial justice, it does not—and cannot—countenance a thicker, more robust understanding of black identity as the basis for political action. This is not to say that it foists upon individuals a thinner, but nonetheless homogenizing and assimilative, understanding of blackness. Structural social groups in particular, and one's social position in general, are not constitutive of individual identity; they represent the conditions under which individual agency takes place—the circumstances of identity formation. "Individual subjects make their own identities, but not under conditions they choose" (Young 2000, 99). As such, individuals may wholeheartedly embrace a thicker conception of "blackness" while simultaneously organizing politically based on their similar social position and conditions of disadvantage. This is to argue only that a thicker conception of "blackness" cannot form the basis of collective political action when the purpose of

such actions is to mitigate the disadvantages that result from membership in the structural social group. It does not foreclose opportunities for the embrace of a thicker, more robust black identity on the individual level. Qualifying the disparate-impact approach in this way shows that it is incapable of meeting the demands of those who wish to organize black collective action around cultural or national authenticity.

Disparate Impact and the Liberal Multicultural Commitment to Cultural Recognition

Having discussed some of the specific demands of racial justice addressed by the disparate-impact paradigm of discrimination, as well as having unearthed the concept of black solidarity and identity presupposed by this model, I move on to consider how the framework of disparate-impact discrimination aligns with, and incorporates, the liberal multicultural commitment to cultural recognition. As noted in chapter two, there is a form of liberalism that combines a commitment to the redress of "morally arbitrary inequalities" with the principles of rational revisability and the non-perfectionist state. Will Kymlicka labels this egalitarian or left liberalism. By "morally arbitrary inequalities," left (or egalitarian) liberals such as Ronald Dworkin mean those inequalities that do not result from choice or dessert, but rather follow from chance and circumstances outside the ambit of one's control. These "morally arbitrary inequalities" take variegated forms and may be social (e.g. poverty) or natural (e.g. diminished physical or mental capacity or differing levels of talent), and Kymlicka contends that the left-wing liberal concern with redressing inequality subsumes both forms (social and natural) (Kymlicka 2001, 330).

There is a connection among rational-revisability, non-perfectionism and the rectification of "morally arbitrary inequalities." Rational-revisability implies that

individuals have fluid conceptions of the "good" that can be readily amended when reflective and contemplative processes of thought render them undeserving of attachment and support. Simply stated, there are no immutable, irrevocable attachments to ends or visions of the "good" under this model. Thus, every individual should have the freedom of thought and conscience necessary to reflect upon his/her ends and amend them if necessary, and it is the state's responsibility to conduce conditions favorable to rational revisability (Kymlicka 2001, 329). Such favorable conditions (to rational revisability) are brought about through a commitment to non-perfectionism, or the idea that the state should be neutral with respect to individualized conceptions of the "good" (i.e. those plans and pursuits designed to make one's life worthwhile, fulfilling and rewarding) (Kymlicka 2001, 335-336). The liberal state realizes this neutrality by eschewing hierarchical conceptions of the "good"—or the rank ordering of conceptions of the "good" in accordance with their innate value or worth; such rank ordering inhibits the ability of individuals to render their own valuations and exercise volition. The role of the non-perfectionist state is therefore limited to fostering neutral conditions within which individuals can pursue freely their particular conceptions of the "good," and this requires the enforcement of a fair allocation of rights and resources (Kymlicka 2001, 330).

The ability of the liberal state to foster conditions within which individuals can pursue freely their particular conceptions of the "good" is limited, however, as the state inevitably makes choices that favor some cultures (forms of the "good") over others when it renders decisions on languages, public symbols, holidays and territorial boundaries; rational revisability does not occur in a vacuum (Kymlicka 1995, 108). In other words, the state invariably embodies a spectrum of cultural commitments (it is not

rigidly procedural or neutral to difference) and cannot—strictly speaking—provide a neutral meeting ground for all cultures (Taylor 1994, 62). As such, the state often places at a disadvantage groups outside of the mainstream, dominant culture when making these and other decisions of uniform policy and law (Kymlicka 1995, 108). Culture here refers primarily to national groups, or territorially bound communities that possess a common language and history, as well as shared values, practices and institutions—what Kymlicka labels a "societal culture" (Kymlicka 1995, 11, 76). This cultural form subsumes private and public spheres of action and renders meaningful "the full range of human activities" (Kymlicka 1995, 76). Additionally, Kymlicka applies this concept of culture to ethnic/immigrant groups, or persons who have an affiliation with a "societal culture" but nonetheless voluntarily "leave their national community to enter another society" (Kymlicka 1995, 114). This voluntarism differentiates national minorities from ethnic/immigrant groups, as most immigrants leave their cultures with cognizance of the fact that success in their new homeland at least partially depends upon integration into society. Regardless of the distinction between national minorities and ethnic/immigrant groups, both share a particular vulnerability to the uniform, and ostensibly neutral, policies of the state because such policies ultimately favor the dominant, majority culture. The upshot of this is that "rigorous neutrality" on the part of the state is impossible (Kymlicka 1995, 108).

Certain persons, then, by virtue of their cultural affiliations and attachments, are disadvantaged in their ability to follow their life plans—their visions of the "good." The state, in rendering decisions that engender disadvantage among minority cultural groups, appears to engage in a hierarchical ordering of conceptions of the "good," thus violating

the conditions of rational revisability and non-perfectionism outlined above. Rather than facilitating conditions for rational revisability and eschewing evaluative judgments of culture, the state preempts the very freedom of conscience required to choose one's ends. This inequality between majority and minority cultural groups is the result of chance not choice, as one did not choose for his/her culture to be disfavored; its disfavored status is "morally arbitrary." Therefore, the commitment to remedying "morally arbitrary inequalities," coupled with the twin espousal of rational revisability and non-perfectionism, makes a persuasive case for cultural accommodation within the egalitarian (or left) liberal framework. In other words, it makes a cogent argument for deviations from uniform treatment and for culture-conscious policies that have the capacity for realizing the commitment to rational revisability and non-perfectionism.

Take, for example, the question of cultural survival that Charles Taylor addresses in "The Politics of Recognition" (1994). Recall from chapter two that many English Canadians viewed policies aimed at perpetuating the Francophone culture as running counter to individual rights and/or the principle of non-discrimination. In accordance with the English Canadian, or majoritarian, perspective, language laws regulating who could send their children to English-language schools within Quebec, as well as rules governing commercial signage, were said to exemplify a tradeoff between individual rights and the collective good. This is because the state, in each of these examples, placed limitations on individual behavior—limitations that purportedly undermined individual rights—in order to serve the collective good of cultural survival. For example, only certain Quebeckers had the option to send their children to English-language schools, and other laws placed language restrictions on business activities and

commercial signage. Hence, the government of Quebec regulated and circumscribed individual behavior to serve the collective good of cultural survival (*survivance*). Moreover, the Meech Lake accord—specifically its proposal to recognize the "distinctness" of Quebec society and culture—sought to use this "distinctness" to underpin the practice of judicial review and create space for variance in constitutional interpretation by region and culture (Taylor 1994, 52-53). In all, recognizing the cultural distinctness of Quebec through linguistic, judicial and educational policy threatened to violate the principle of non-discrimination (equality under the law). The principle of non-discrimination, as described in chapter two, represents uniformity in the application of law and/or principle, and such non-discrimination stands as a constitutional guarantee against unequal treatment in nearly every facet of law. Positively stated, it constitutes a right to equal treatment under the law—or the non-recognition of certain particularities under the law. Recognizing cultural distinctiveness here requires taking into account certain particularities of identity and treating "insiders and outsiders" differently (i.e. Quebeckers are treated differently than other Canadians, for example). Thus, the consideration of cultural particularities for the purpose of differential treatment violates the procedurally liberal right of non-discrimination (equality under the law).

The problem with adherence to uniformity or non-discrimination in the examples above is that a decision to espouse uniformity in the application of rights, as well as English-only policies in education and commerce, would place those whose vision of the good includes the survival and perpetuation of the Francophone culture at a two-fold disadvantage. First, unlike their English-Canadian counterparts, Francophones in Quebec would not have the backing of the state and its institutions. State backing allows for the

unfettered support of Anglophone customs and linguistic modes, and therefore does not require those in the majority culture to jettison their cultural commitments and assimilate to another identity and way of being. In short, those embracing the Anglophone societal culture can pursue freely their particular conception of the good (at least as it pertains to cultural ends). In contrast, those embracing the Francophone culture must assimilate to the demands of the majority societal culture and this deprives them of the opportunity to pursue freely their particular conception of the good (as it relates to cultural ends). Second, in terms of cultural perpetuation and survival, state adoption of language, customs and practices ensures transmission of cultural forms to the next generation; it guarantees survival. As such, the second way in which a uniform, non-discriminatory policy would place Francophones at a disadvantage is by relegating the processes of survival and perpetuation to the private sphere. This is a major disadvantage vis-à-vis the majority societal culture.

Neither of the disadvantages referenced above is natural (like mental or physical disabilities); rather, these disadvantages are social, as they are the product of state decisions on language, education, etc. What is more, neither disadvantage is the product of individual choice, for those embracing the Francophone culture did not make decisions leading to their disadvantaged position; their disadvantaged status is "morally arbitrary"—the result of social circumstance. Therefore, the liberal egalitarian commitment to remedying "morally arbitrary inequalities," coupled with the twin espousal of rational revisability and non-perfectionism, makes a persuasive case for cultural accommodation of those embracing the Francophone culture. In other words, if the state is to foster conditions favorable to rational revisability through non-

perfectionism, or state neutrality with respect to conceptions of the "good," it needs to deviate from uniformity and the principle of non-discrimination in the application of rights and policies to accommodate the minority culture. Such difference-conscious decision-making jibes with the egalitarian liberal commitment to neutrality insofar as the state does not evaluate claims of the "good" (cultural claims) from a public perspective in the way that one assesses justice claims, or claims of the "right" (Kymlicka 2001, 330). That is to say, if the principles of "right," which are subject to public processes of justification, serve as the foundation for the adoption of such cultural accommodations and difference-conscious policies, then it is consistent with neutrality to endorse such group specific, value-laden claims. The conclusion that difference-conscious policies are consistent with a commitment to neutrality may appear contradictory, as I began this section by noting that Kymlicka and Taylor think cultural neutrality in the liberal state is impossible. This seeming inconsistency is resolved by developing a better understanding of Kymlicka's conceptualization of neutrality in *Politics in the Vernacular* (2001).

Kymlicka is heavily indebted to the later Rawls in his understanding of neutrality. Rawls asserts that the principles of political liberalism are substantive (not procedurally neutral in the sense that there is no appeal to moral values) and endeavor to be the product of an "overlapping consensus"—that is, the product of public justification among persons with commitments to disparate "comprehensive doctrines" (conceptions of the "good"). It is in this "overlapping consensus between reasonable comprehensive doctrines and the principles of political justice (the "right") that neutrality inheres;

neutrality is simply "a common ground […] given the fact of pluralism."[55] This justificatory standard does not apply to visions of the "good" or various comprehensive doctrines, as they could not form the basis for such "overlapping consensus" or common ground (Rawls 2005, 192-193). Thus, to the extent that principles capable of generating an "overlapping consensus" (principles of the "right") among competing visions of the good form the basis of difference-conscious policies (e.g. cultural accommodations), they are consistent with the egalitarian liberal concept of neutrality. More specifically, the implication here is that the principles of rational revisability, state perfectionism and the rectification of "morally arbitrary inequalities" could be the product of public justification, whereas the actual substantive cultural commitments ("comprehensive doctrines") in question could not. The egalitarian liberal commitment to remedying "morally arbitrary inequalities," then, can extend to the remediation of social disadvantages facing cultural minorities in situations where such remedial action is grounded in principles of "right" that can form the basis of an "overlapping consensus."

In the case of Quebec specifically, and cultural accommodations generally, the laws or regulations disadvantaging cultural groups were devoid of a discriminatory motive or purpose. The potential source of disadvantage was the uniform application of linguistic, educational, and judicial policies—or, generally, adherence to the procedurally neutral principle of non-discrimination. However, as in the case of race and religion, such laws or regulations—if implemented—would have outcomes similar to laws with a

[55] Rawls uses the term neutrality with great reluctance to describe "permissible conceptions of the good" (Rawls 2005, 190-191). "I believe […] that the term neutrality is unfortunate; some of its connotations are highly misleading, others suggest altogether impracticable principles. For this reason I have not used it before in these lectures" (Rawls 2005, 191).

discriminatory purpose. In other words, they would have outcomes similar to those one would anticipate if, for example, the state used culture as a "criterion of selection" or "sorting tool" that effectively distributed opportunities along cultural lines—affording only persons with particular cultural affiliations the opportunity to pursue ends of his/her choosing. These laws, regulations and procedures, however "fair in form" and procedure, would be unfair in operation because they would have effects similar to practices based on purposeful discrimination—effects that could be eschewed through difference-conscious, culturally sensitive policies.

Again, the source of disadvantage here—while not necessarily traceable to a history of intentional discrimination—is nonetheless structural in nature. The normal functioning of democratic institutions and the advantages that accrue to cultural majorities are the wellspring of disadvantage, as opposed to the purposefully discriminatory actions of individuals or institutions. This structural inequality and the attendant disadvantage of minority cultures vis-à-vis more powerful cultural groups means that seemingly "neutral" laws of general applicability are more likely to disadvantage inadvertently certain cultural groups even though the law(s) in question may serve legitimate government objectives and are absent discriminatory intent. The cultural disadvantage described by Kymlicka and Taylor thus follows the same pattern as disparate-impact discrimination in the context of race and religion. Laws, regulations and procedures that are "fair in form" are unfair in operation because they have effects similar to practices based on purposeful discrimination. Structural inequalities place racial, cultural and religious minorities at a disadvantage, and this disadvantaged social position means that allegedly "neutral" laws of general applicability are more likely to affect these

particular groups in adverse fashion. In the contexts of culture, race and religion, then, structural disadvantage conditions vulnerability to "neutral" laws of general applicability. Such laws give relevance to race, religion and culture—effectively sorting opportunity along racial, religious and/or cultural lines when such classifications should have no pertinence in the determination of individual and/or group opportunity. If the consequences of these laws, regulations, procedures and/or practices are avoidable, there is an obligation to eschew such adverse outcomes. There is an obligation to reduce the relevance of race, religion and culture in the distribution of opportunities—an obligation to reduce "morally arbitrary inequalities" that follow from group affiliations/attributes deemed irrelevant from the standpoint of distributive justice.

From the parallels drawn above, it is clear that there is a form of liberalism—egalitarian liberalism—that provides a theoretical framework for rectifying "morally arbitrary inequalities," specifically ones that are tied to attributes, such as race, culture and religion, that should not have relevance in the distribution of opportunities. This overarching liberal paradigm incorporates the chief concerns of the theory of disparate-impact discrimination, as it does not embrace a simple, procedural understanding of "morally arbitrary inequalities"—i.e. one that would justify only the proscription of intentional discrimination. Rather, it also views "morally arbitrary inequalities" through the prism of substantive equality, endeavoring to limit, wherever possible, the effective distribution of opportunities along racial, religious and/or cultural lines. It is in this way, then, that the framework of disparate-impact discrimination aligns with, and can incorporate, the liberal multicultural commitment to cultural recognition. Egalitarian liberalism applies the model of disparate-impact discrimination to questions of cultural,

religious and racial disadvantage in order to realize substantive equality, or the elimination of hierarchy among certain social groupings/classifications that should not determine opportunity. Elucidating the manner in which the disparate-impact theory of discrimination aligns with, and incorporates, the liberal multicultural commitment to cultural recognition shows how this theoretical framework can address some of the demands of racial justice. Kymlicka fails to draw the connection between cultural groups and race (or redistributive concerns in general)—even though he outlines many of the same principles encapsulated by the disparate-impact theory of discrimination in his exposition of egalitarian liberalism. Perhaps he failed to delineate this connection because of his inordinate focus on culture (especially "societal culture"). Whatever the reason for this shortcoming, difference theorists such as Kymlicka and Taylor overlook the history and theory of disparate-impact discrimination in the United States, and this oversight constitutes a missed opportunity. Specifically, it represents a missed opportunity to connect the structural disadvantage experienced by minority cultural groups with that of racial and religious minorities, and one achieves this connection under the aegis of an extant legal-theoretical framework: disparate-impact discrimination.

Within the egalitarian liberal framework, then, the disparate-impact paradigm applies to "morally arbitrary inequalities" based on "irrelevant classifications" (Primus 2003, 524-525). In other words, the impulse to rectify inequalities occurring by chance as opposed to choice, combined with the notion that certain classifications should not have relevance in the distribution opportunities, is captured by the disparate-impact model. In the cases examined in this dissertation—race, religion and culture—the specific policy solutions and sources of disadvantage often varied. However, what

remained constant throughout was a commitment to the use of difference-conscious policies to ameliorate "morally arbitrary inequalities"—inequities which were perpetuated not by intentional discrimination, but rather, by the allegedly neutral, generally applicable laws of the liberal state. Such uniform, "neutral" policies disproportionately affected certain persons in adverse fashion, thus freezing hierarchies based on "irrelevant classifications." The disparate-impact paradigm endeavored to eliminate these hierarchies through the implementation of difference-sensitive policies that limited—but did not fully proscribe—the promulgation of difference-blind laws and regulations that had an adversely disproportionate impact on persons subsumed under these "irrelevant classifications." I say limited, not proscribed, because in each case constraints arising from competing interests qualified the reach of disparate impact, therefore making it a flexible and contextually specific (contingent) standard. The contextually specific (or limited) character of disparate impact means that egalitarian liberalism oscillates between the principle of non-discrimination, which is associated with the difference neutrality and uniformity of procedural equality,[56] and substantive equality, which is associated with an interpretation of equality under the law grounded

[56] In chapter two, I discuss Taylor's embrace of a more accommodating variant of liberalism—one in which the state does not presumptively dismiss collective goals when they conflict with the principle of non-discrimination and the uniform application of rights. In cases of conflict, the state examines the significance of pursuing a given collective goal against the benefits and burdens that accrue from the uniform application of rights. To Taylor, equal treatment under the law entails the principle of non-discrimination, or, stated differently, a proscription against the singling out of individuals based on certain attributes such as race, sex, or ethnicity (Taylor 1994, 53-54). The consideration of particularities (such as race or sex) for the purpose of differential treatment constitutes discrimination, and such discrimination runs counter to equality under the law (Taylor 1994, 55). Non-discrimination is simply the absence, or non-consideration, of particularities under the law; it is the absence of differentiation. Moreover, if the absence of differentiation constitutes equality under the law and non-discrimination, then equality/non-discrimination represent uniformity in the application of law and/or principle. Exclusion of relevant particularities from consideration means the raw materials necessary for differentiation among persons are not present, and uniformity follows with strict necessity. This is why the principle of non-discrimination is associated with difference neutrality and uniformity.

the actual effects of policies on certain groups. Therefore, equality under the law here does not represent the invariant application of laws and regulations that define individual rights. This is because the invariant application of laws and regulations defining individual rights follows from an unswerving commitment to the principle of non-discrimination and, as just noted, there is no such commitment to non-discrimination or neutrality within the egalitarian liberal framework; there is an oscillation between difference-neutral and difference-conscious policies.[57] Each of the cases examined in this dissertation exemplifies the aforementioned characteristics and qualities.

For example, in chapter three I presented the disparate-impact theory of discrimination in the context of race by examining Title VII of the Civil Rights Act of 1964. With this example, the profound and long-lasting structural disadvantage facing contemporary blacks in the US had as its root cause generations of purposeful, institutionalized discrimination. This structural disadvantage wielded a great deal of power in explaining why certain race-neutral laws, rules and regulations disproportionately affected blacks in adverse fashion. Because race-neutral laws (i.e. laws devoid of discriminatory intent) had the potential to cement the existing state of affairs and continue conditions of disadvantage in perpetuity, something beyond the principle of non-discrimination was required; that something was Title VII of the Civil Rights Act of 1964 as construed by the US Supreme Court in *Griggs* v. *Duke Power Co*. (1971). Dealing specifically with racial hierarchy and inequality in employment, Title VII forbade employment qualifications and procedures engendering a disproportionate

[57] In chapter two, I explore invariant rights and the invariant application of rights. During this exploration, I conclude that the invariant application of laws and regulations defining individual rights follows from an unswerving commitment to the principle of non-discrimination (Taylor 1994, 60).

racial impact if such procedures were unnecessary from a business-necessity standpoint. The "business-necessity" requirement qualified the application of disparate impact and limited it to only those contexts in which job qualifications did not bear a necessary relationship to the position in question. Therefore, when the interest of "business necessity" was not at stake, employers had a responsibility to calibrate procedures and processes to reduce the relevance of race in hiring outcomes.

Continuing in a similar vein, in chapter four I presented the disparate-impact theory of discrimination in the context of religion by examining the theory and history of religious exemptions to generally applicable laws in the United States. Here, in contrast to the example of race above, a history of intentional discrimination was not the source of disadvantage. Rather, inequality or group disadvantage followed from the normal functioning of democratic institutions and the advantages that accrued to religious majorities. As such, the disadvantage was structural—even though it was not traceable to a history of prior discrimination. This structural inequality and the attendant disadvantage of minority religions vis-à-vis majority religious groups meant that seemingly "neutral" laws of general applicability (i.e. those that were not purposefully discriminatory) were more likely to disadvantage disproportionately certain religious groups even though the laws in question served legitimate government objectives and were absent discriminatory intent. In the contexts of race and religion, then, structural disadvantage conditioned vulnerability to "neutral" laws of general applicability. The method of ameliorating structural disadvantage in the case of religion, however, did not come through the careful calibration and amending of the law or regulation in question (as in the example of race above), but rather through the carving out of exemptions to

generally applicable laws under circumstances where there was no compelling state interest for implementing a given law or regulation in a uniform fashion (See, especially, *Sherbert* v. *Verner* 1963, 403). In a manner similar to the "business-necessity" requirement in the context of race, the "compelling-interest" test qualified the application of disparate impact and limited it only to those circumstances in which the state had no "compelling interest" in uniformity.

Finally, earlier in this section I showed how the disparate-impact theory of discrimination applied to culture by examining the case of Quebec. As in the case of religion above, a history of intentional discrimination was not the source of disadvantage; the normal functioning of democratic institutions and the advantages that accrued to cultural majorities were the source of disadvantage. This structural inequality and the attendant disadvantage of minority cultures vis-à-vis more powerful cultural groups meant that seemingly neutral laws of general applicability were more likely to disadvantage inadvertently certain cultural groups, even though the laws in question were devoid of discriminatory intent. Therefore, in the contexts of race, religion and culture, structural disadvantage conditioned vulnerability to neutral laws of general applicability. However, in contrast to the cases of race and religion above, the method of rectifying structural disadvantage in the case of culture (at least "societal culture") entailed an affirmative response—mainly, the state adoption of particular cultural practices that were consonant with the principles of justice (or right). That is, the principles of right qualified the application of disparate impact in the case of culture, thus limiting its application. This method of remediation differed from the case of religion insofar as the state, in endeavoring to accommodate religious persons, did not espouse the values of a

particular religious sect (or particular sects) to remedy disadvantage; it did not propose an affirmative solution. Rather, it simply granted an exemption to generally applicable laws. Additionally, this departed from the method of remediation in the context of race, as the disparate impact strain of Title VII did not demand an affirmative response that would have guaranteed employment to blacks or other persons disadvantaged by race. To the contrary, this policy simply removed unnecessary barriers to employment qualifications that had a racially disproportionate impact.

Notwithstanding the important distinctions among these cases, pervasive throughout was a commitment to the use of difference-conscious policies to ameliorate "morally arbitrary inequalities"—inequities that were perpetuated not by intentional discrimination, but rather, by the allegedly neutral, generally applicable laws of the liberal state. Such uniform, "neutral" policies disproportionately affected certain persons in adverse fashion, thus freezing hierarchies based on "irrelevant classifications." In each of the examples above, the disparate-impact paradigm endeavored to eliminate these hierarchies through the implementation of difference-sensitive policies; these policies limited—but did not fully proscribe—the promulgation of difference-blind laws and regulations that had an adversely disproportionate impact on persons subsumed under these "irrelevant classifications." With race, religion and culture, constraints arising from competing interests qualified—but did not categorically trump—the reach of disparate impact, thus rendering it flexible and contextually specific (contingent). Whether adverting to the "business-necessity" requirement (race), the "compelling-interest" standard (religion), or the principles of right or justice (culture), disparate impact did not represent the invariant application of the principle of substantive equality. Again, the

contextually specific character of disparate impact means that egalitarian liberalism alternates between the principles of non-discrimination (procedure) and substantive equality (effects).

This delimitation of disparate impact and the alternation between procedure and substance closely hews to the more hospitable and accommodating variant of liberalism that Charles Taylor and Michael Walzer champion: "Liberalism II" (see chapter two). Under the more accommodating variant of liberalism, the state does not presumptively dismiss collective goals—or policy goals in general—when they conflict with the principle of non-discrimination and the uniform application of rights; rather, in cases of conflict, it examines the significance of pursuing a given collective goal against the benefits and burdens that accrue from the uniform application of rights. This form of liberalism leaves open the possibility that collective public policy goals—i.e. those that intrinsically violate the principle of non-discrimination/equality under the law—may take precedence over the principle of non-discrimination and the uniform application of rights. In advancing the more accommodative model of liberalism, then, it is clear that Taylor repudiates the invariant or uniform application of rights; he rejects the principle of non-discrimination. In propounding an alternative model of liberalism that rejects the uniform application of rights, Taylor's solution maintains fidelity to a scheme of invariant individual rights while also creating space for collective pursuits that require differential treatment under the law. Because Taylor's work stands as a rejection of the principle of non-discrimination/equality under the law, this principle obviously cannot serve as an invariant, fundamental right within the alternative liberal model.

Instead of understanding equality under the law/uniformity as a "fundamental liberty" or right within the alternative paradigm (as it was conceived in the procedural/restrictive paradigm), Taylor theorizes it as a privilege or immunity that, while important, may be infringed or rescinded in pursuit of public policy goals. In Taylor's words, "One has to distinguish the fundamental liberties, those that should never be infringed […] from privileges and immunities that are important, but that can be revoked or restricted for reasons of public policy" (Taylor 1994, 59). Thus, one must differentiate fundamental liberties such as due process, freedom of religion, and freedom of speech—all of which Taylor deems inviolable—from the "immunities and presumptions of uniform treatment" that pervade the modern institution of judicial review; for uniform treatment, in contradistinction to these fundamental rights, may be assailed in pursuit of a public policy goal (Taylor 1994, 59-61). Because deviations from uniform treatment are acceptable under "Liberalism II," it is possible to differentiate between invariant rights and the invariant application of rights (See my discussion in chapter two on invariant rights versus the invariant application of rights/non-discrimination). Consider the case of *People* v. *Phillips* presented in chapter four. With *Phillips*, the right to religious free exercise did not vary in accordance with context; rather, variation was manifest in the policies and procedures employed to implement a general, invariant right. The right to free exercise did not differ for Catholics as opposed to Protestants; the application of the right to free exercise in the context of legal proceedings required a deviation from uniformity to ensure substantive equality among religious persons and to remedy "morally arbitrary inequalities" (the elimination of hierarchy in religious practice). In other words, since equality under the law (the

principle of non-discrimination) is not a fundamental, invariant right, it is possible for a schedule of immutable rights to be applied in a non-uniform fashion. More specifically, it is possible that legislative and judicial applications of the right to free exercise will vary contextually in order to realize the goal of eliminating hierarchy and attaining substantive equality among religions (the Religious Freedom Restoration Act of 1993 is a perfect example of this).

This is fundamentally distinct from a policy that would treat certain religions or religious persons differently for the singular purpose of suppressing their practices (creating hierarchy and inequality). This type of deviation from uniformity cannot be justified as a legitimate public policy measure because its explicit purpose is to deny the right of free exercise to certain persons, whereas the exemption granted in *Phillips* did nothing other than to ensure that members of a minority religion were not incidentally burdened. It did not place any religious group or person at a disadvantage; if anything, it reduced disadvantage. A law or regulation purposefully suppressing a particular religion therefore violates the individual right to free exercise, and, in cases where suppression is the clear and sole aim of the policy, the principle of non-discrimination (uniformity) holds sway (here we see the oscillation between non-discrimination/uniformity and substantive equality). Moreover, such a law or regulation does not conform to the principle of neutrality within the liberal egalitarian framework. Recall that neutrality within the liberal egalitarian framework resides in the "overlapping consensus" between reasonable "comprehensive doctrines" (conceptions of the good) and the principles of right or justice. The ability to form a common ground among persons with disparate conceptions of the good—public justification—differentiates the principles of right from

conceptions of the good. A policy that intentionally suppresses free exercise only for a specific group (or specific groups) could not form the basis of such public justification, as one would be asking certain groups to accept willingly conditions that those proposing suppression would not apply to themselves and their religious affiliations. Public justification entails reciprocity or reasonableness, an inclination to follow the principles one proposes insofar as others agree to do the same (Rawls 2005, 49-50).

Given the distinction between difference-conscious policies that violate individual rights and those that do not (e.g. RFRA), it is clear that the difference-sensitive policy solutions used to ameliorate "morally arbitrary inequalities" must eschew violations of individual rights. It is in this context that the principle of non-discrimination and uniformity serve as a safety valve, preventing purposeful discrimination (such as religious or racial oppression). Furthermore, these difference-sensitive policies must also conform to the principles of right or justice and their publicity (reciprocity) requirements; a failure to do so would violate the principle of neutrality within the egalitarian liberal framework. Working within these parameters, then, the disparate-impact paradigm endeavors to rectify "morally arbitrary inequalities" based on "irrelevant classifications." It does this by weighing the significance of pursuing a given collective goal against the benefits and burdens that accrue from the uniform application of law. With race and disparate impact, "business necessity" outweighs the benefit of deviating from difference-neutral uniformity; with religion and disparate impact, narrowly tailored compelling interests on the part of the government outweigh the benefits derived from deviations in uniformity. Finally, with culture, adhering to the principles of right trump the gains one garners from cultural-specific policies. As noted, however, principles of

right have systemic applicability; all disparate-impact policies must conform to this standard.

Overall, the framework of disparate-impact discrimination aligns with, and incorporates, the liberal multicultural commitment to cultural recognition. There is a form of liberalism—egalitarian liberalism—that provides a theoretical framework for rectifying "morally arbitrary inequalities," specifically ones that are tied to attributes, such as race, culture and religion, that should not have relevance in the distribution of opportunities. This overarching liberal paradigm incorporates the chief concerns of the theory of disparate-impact discrimination, as it does not embrace a simple, procedural understanding of "morally arbitrary inequalities"—i.e. one that would justify only the proscription of intentional discrimination. Rather, it also views "morally arbitrary inequalities" through the prism of substantive equality, endeavoring to limit, wherever possible, the effective distribution of opportunities along racial, religious and/or cultural lines. It is in this way, then, that the framework of disparate-impact discrimination aligns with, and can incorporate, the liberal multicultural commitment to cultural recognition.[58] Egalitarian liberalism applies the model of disparate-impact discrimination to situations of cultural, religious and racial disadvantage in order to realize substantive equality, or the elimination of hierarchy among certain social groupings/classifications that should not determine opportunity ("irrelevant classifications").

[58] Some might contend that a form of liberalism capable of such variation and malleability is more communitarian than liberal, but this assertion overlooks the individualist foundation of this variability; mainly, the principle of "rational revisability" is the source of culturally accommodative, difference-sensitive policies. Given that communitarians often view identities as constitutive and not easily revisable, it is unlikely that they could support accommodations rooted in the principle of "rational revisability."

The Necessity of Liberalism II and the Relevance of Difference Theorists

In addition to illuminating the manner in which theories of liberal multiculturalism answer some of the demands of racial justice, acknowledging the history and theory of disparate-impact discrimination in the US contributes to the endeavors of difference theorists in general and liberal multiculturalists in particular by showing that "rigorous neutrality" and the principle of non-discrimination have often been insufficient on their own in meeting the demands of racial and religious justice. This history shows not only the desirability of "Liberalism II" (or egalitarian liberalism), but also its necessity within the liberal state. For example, chapter three showed the inadequacy of a rigidly procedural liberalism—i.e. one that limited remedial action to instances of intentional discrimination. Limiting remedial action to instances of intentional discrimination overlooks the profound and long-lasting structural disadvantages that blacks face relative to whites because of generations of purposeful discrimination. These structural disadvantages explain why certain race-neutral laws disproportionately affect blacks in adverse fashion, and focusing only on intentional discrimination allows for the continuation of race-neutral policies that freeze the status quo and stifle equality of opportunity. The theory of discrimination proffered in *Griggs*, a theory derived from the statutory language and legislative history of Title VII of the 1964 Civil Rights Act, displayed a concern not simply with racially discriminatory motives (c.f. *Strauder* and its progeny), but also with the discriminatory effects of such neutral laws (at least in the context of employment law). The spirit of Title VII, as construed by the *Griggs* Court, not only aligns with the more accommodative variant of liberalism (egalitarian liberalism), but also is continuous with the intentions of the Framers of the Fourteenth Amendment. I presented evidence in chapter three bolstering the contention that the

Framers of the Fourteenth Amendment did not conceive of race-based measures as limited to instances of identifiable deliberate discrimination. Such limitations on race-based measures run counter to the character of the 1866 Freedman's Bureau Act and its application to all blacks—not just blacks who suffered injustice at the hand of purposeful discrimination.

In a manner similar to disparate-impact in the context of race, chapter four showed the inadequacy of a rigidly procedural liberalism—one that limited remedial action to instances of intentional discrimination against religious adherents. Limiting remedial action to instances of intentional discrimination overlooks the structural disadvantages that minority religions often face vis-à-vis majority religions, as minority religions do not always receive adequate protection through the legislative process. The history and theory undergirding the exemptions approach to free exercise showed that a rigidly procedural liberalism—one that only protected religious adherents against purposeful discrimination—was incapable of providing adequate protection to religious exponents, especially those professing "unpopular or unfamiliar" faiths. In situations of conflict between generally applicable laws and religious free exercise (practices of particular adherents), protection beyond the principle of non-discrimination came from judicial and statutory exemptions to neutral laws of general applicability. This religious-conscious, difference-based solution to the disadvantages afflicting certain religious observers had deep roots in American history—roots dating back to the colonial and pre-constitutional periods—and the practice of judicial and statutory exemptions continues widely to this day (e.g. RFRA).

What is more, one can best understand the theory underpinning the exemptions approach to free exercise as a paradigm of disparate-impact discrimination. This is critical because the Supreme Court has not evinced hostility toward disparate-impact legislation in the context of religion; it has not found a tension between the positive right to be judged as an individual (i.e. the principle of non-discrimination) and the tendency of Congress and other legislative bodies to engage in explicitly religious-conscious decisionmaking. Based on the conclusions reached in chapter three regarding race and equal protection, there is, constitutionally speaking, no tenable method of differentiating between race and religious-conscious decisionmaking such that one form of group-based evaluation should be greeted with incredulity and disapprobation while the other should not even command a modicum of scrutiny. Because there is no legitimate method of differentiation here, and because the Court has not interpreted the legal-theoretical model of religious exemptions as offending the Equal Protection Clause, I concluded that the theory undergirding religious exemptions to neutral laws of general applicability represented a viable justification for race-based disparate-impact policies such as Title VII. This justificatory approach has the advantage of employing principles emanating from the conservative wing of the Court—i.e. those moving public policy in the direction of color blindness—to defend a policy of which these jurists have become increasingly skeptical (c.f. *Ricci* v. *DeStefano* 2009).

Although the examples of disparate impact in the contexts of race and religion contribute to the efforts of liberal multiculturalists, ignoring the history of disparate-impact discrimination in the United States, as well as the theory undergirding it, is problematic for several reasons. In addition to missing an opportunity to bolster the

argument of liberal multiculturalists, ignoring this history also reinforces the position of conservatives and their individualized reading of equal protection. An environment where once sacrosanct—and quite frankly, moderate—policies such as disparate impact are construed as violating equal protection comes about only through a disavowal of history and original intent. In such an environment, highlighting the actual history of Title VII and its relation to equal protection (as I did in chapter three) plays an important role in informing the debate over the individualized Equal Protection Clause; it shows the inability of the individualized Equal Protection Clause to make sense of Title VII and, more generally, the history of race-conscious policies in the US. Furthermore, elucidating the connections between disparate impact in the contexts of race and religion brings to the fore the inconsistencies of the Court and shows that there is a viable justification for race-based disparate-impact policies that jibes with principles emanating from the conservative wing of the Court.

Conclusion

In conclusion, overlooking the connection between religion and race in particular, and the history and theory of disparate impact in the US generally, renders the argument of liberal multiculturalists less potent than it would be if they had contextualized their claims and approach as intrinsic to US political history and philosophy, as opposed to extrinsic and antithetical to these political-philosophic traditions. Reframing liberal multiculturalism in this fashion allows for the acknowledgment of an extant legal-theoretical framework that aligns with the liberal multicultural commitment to cultural recognition, while simultaneously addressing some of the demands of racial justice. Ultimately, this makes for a more potent and defensible form of liberal multiculturalism.

What is more, acknowledging the history and theory of disparate-impact discrimination in the US contributes to the endeavors of difference theorists in general and liberal multiculturalists in particular by showing that "rigorous neutrality" and the principle of non-discrimination have often been insufficient on their own in meeting the demands of racial and religious justice. This history shows not only the desirability of "Liberalism II" (or egalitarian liberalism), but also its necessity within the liberal state. Finally, ignoring the history of disparate-impact discrimination in the United States, as well as the theory undergirding it, is problematic not only because it misses an opportunity to bolster the argument of liberal multiculturalists, but also because ignoring this history reinforces the position of conservatives and their individualized reading of equal protection.

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