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Antisubordination and Beyond

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1. Introduction

The stature of an intellectual cannot be measured without reference to the importance and complexity of the problems he or she chooses to address. Owen Fiss has devoted his attention to some of the most significant legal problems of the last decades in his community and beyond, such as what the law demands in terms of racial integration, what sort of public intervention is admissible in order to foster a more robust public debate, what the proper role of courts in a constitutional democracy is, and the limits the Government must respect when it fights its latest enemy.

I once heard a colleague of Fiss, himself a central figure in some academic debates of a very different nature, confess that sometimes he felt as if he was just playing a game: the substance mattered very little to him, and was chiefly an excuse for intellectual display; often, he was just replying to his current adversary's last move. Fiss's attitude is quite the opposite. He has not chosen his subjects because they were likely to fit the demands and tastes of the legal academic market, but out of a profound sense of moral duty. Such attitude, his passion and conviction, transpire through every word he writes.

This, I believe, is especially true of the first grand subject he addressed –the Constitutional right to equal protection. His work has been so influential in this matter that even today, when almost 40

years have passed, his understanding of equal protection appears as the main alternative to what then was, and still is, the dominant approach.

The currency of the equal protection debate in which Fiss intervened, and whose terms he largely defined, cannot be doubted. When the hearings before the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* (*Schuette*) took place, the news reported that “[a] lawyer also arguing in support of affirmative action on behalf of the Coalition to Defend Affirmative Action . . . called on the justices to bring the Constitution’s Equal Protection Clause ‘back to its original purpose and meaning, which is to protect minority rights against a white majority, which did not occur in this case.’”¹ It is impossible, today, not to identify that claim with Fiss’s own elaboration of it.

That is the topic on which this paper will focus. I will start by describing in general terms Fiss’s position in opposition to the dominant approach, which conceives equal protection as a prohibition of arbitrary discrimination. I will then turn to how the two approaches address affirmative action in education, in particular with reference to *Schuette*, the Supreme Court’s most recent decision on the subject. I will pause on Justice Sotomayor’s attempt to frame the question as one of political process, which, as such, would warrant the application of the political-process doctrine, but will argue that this approach is not convincing, and will insist that Sotomayor’s preferred outcome is difficult to reach absent a reformulation of equal protection along the lines Fiss proposed. To that extent, Sotomayor’s attempt to dodge the more basic question of whether antidiscrimination is the best understanding of equal protection cannot be successful. Scalia, in turn, does address this more basic question, but only to underline those aspects of antidiscrimination more hostile to affirmative action. He favors a narrow reading of equal protection and of the extent to which it may focus on

¹ NBC News, <http://www.nbcnews.com/news/other/supreme-court-takes-affirmative-action-michigan-ban-case-f8C11399588>.

group status; such reading, I will argue, is untenable. Finally, I will explore the limits of the antistatutory principle, and will suggest an alternative framework under which not only affirmative action, but also the sacrifices it entails, may be viewed through the equal protection lenses. This last part, I am afraid, will be rather tentative and, of course, would greatly benefit from discussion.

2. Two Understandings of Equal Protection

Section 1 of the Fourteenth Amendment to the United States Constitution declares that “[no State shall] deny to any person within its jurisdiction the equal protection of the laws.” The dominant interpretation of this language has been that it entails a protection against arbitrary distinctions made by the State. In his seminal article from 1976, “Groups and the Equal Protection Clause,”² Professor Fiss calls this understanding of equal protection the antidiscrimination principle, which he contrasts with his preferred approach, the group-disadvantage, anti-caste, or antistatutory principle.

Under the antidiscrimination principle, therefore, it is crucial for courts to define when a distinction is arbitrary. The conventional view has been to make this depend on means-end rationality: a state action is against the equal protection clause if it makes a distinction among persons that does not qualify as a rational means to achieve the end it pursues.

This means-end rationality analysis is the core of the antidiscrimination principle, but it does not exhaust it. The analysis must also include an inquiry into (a) the underlying criterion on which the

² 5 *Phil. & Pub. Aff.* 107 (1976). Hereinafter, “Groups.”

distinction is based, and (b) the legitimacy of the state end, since no matter how adequate a distinction applied by the state may be in order to achieve an end, it would still be against equal protection if the end is an illegitimate one. This two-fold inquiry conforms, in Fiss's words, the superstructure of the antidiscrimination principle.³

As a corollary of this approach, some criteria for making a distinction are thought so poorly related to any legitimate state end that they are regarded as suspect classifications. When such criteria are the basis of a distinction, antidiscrimination analysis involves strict scrutiny. A compelling state interest is then necessary to justify such distinction. Only the achievement of such an interest, as Fiss observes, can excuse imperfect means. The same standard applies when the distinction at stake affects fundamental rights.⁴

The paradigm cases under this conception are those where the inadequacy of the distinction is apparent on its own terms, for it cannot serve the purpose for which it is intended. These cases are virtually a matter of logical self-contradiction, and therefore invite a mechanistic conception of equal protection, one that portrays itself as self-sufficient and neutral. Thus, one can see a strong connection between the antidiscrimination principle and a narrow conception of the role of the courts.

Under the antidiscrimination principle, every distinction is received with suspicion, and gives rise to a presumption of unlawfulness of varying strength, which may then be overcome by showing that a state interest of enough importance is being narrowly served. The ultimate value this approach

³ *Id.* at 111-2. But this superstructure is not always easy to accommodate within the infrastructure: see, *id.* at 143 (arguing that the Warren Court's recognition of a second trigger of strict scrutiny—the impingement of fundamental rights—introduced a ranking of ends that exceeded a mere means-end analysis).

⁴ *Id.* at 113-6.

appears to pursue is therefore neutrality—and especially *state* neutrality: the Government should not treat people differently based on its own preferences. Certain features, such as race, do not amount to any relevant difference among people, hence the metaphor of “color-blindness” that is at the core of the understanding of the antidiscrimination principle. Therefore, under the antidiscrimination principle in its pure form,⁵ a law that singles out a disadvantaged group in order to deny its members an opportunity enjoyed by others is indistinguishable from one that resorts to the same classification for the purposes of granting preferential treatment to that group. Color blindness cuts all classifications with the same blade.

This, Fiss claims, is not what the equal protection clause was intended to mean, much less what it should be construed to mean today. The main purpose of the clause, he argues, is to protect any disadvantaged group from laws that aggravate or perpetuate their subordinate social position.⁶ This is especially true in the case of blacks —“America’s perpetual underclass.”⁷

Therefore, preferential treatment for blacks is not a problem from the group-disadvantaging perspective.⁸ Not only does it allow it, it may also provide the foundations to *demand* it, should the law evolve in such direction.⁹ Affirmative action operates as a means to reshape a caste structure by

⁵ That is, without extending its scope by redefining the notion of state interest. See Fiss, *Groups* at 124.

⁶ Fiss, *Groups* at 157.

⁷ *Id.* at 150. In *Another Equality*, in *Issues in Legal Scholarship. The Origins and Fate of Antisubordination Theory*, www.bepress.com/ils/iss2/art20 (2004), Fiss clarifies, in response to critics, what he understands by perpetual: not that blacks will remain an under-class forever, but rather that they have been one so far. See *Another Equality* at ____.

⁸ *Groups* at 171-2.

⁹ *Id.*

improving the relative position of members of disadvantaged groups, and consequently of the group itself.¹⁰ As such, it is emblematic of antistatutory.

Under the antidiscrimination framework, in turn, preferential treatment of members of subordinate groups is a conceptual and normative conundrum.¹¹ This does not mean that courts operating within such framework have necessarily rejected affirmative action, but the basis for accepting it, when they did accept it, has tended to be weak and contrived. It is fair to say, in that sense, that the antidiscrimination understanding of equal protection has led courts to address affirmative action through the wrong questions. In *Schutte*, the Supreme Court's latest engagement with affirmative action, this deficit surfaces with singular clarity.

3. Schutte: The Political Process Doctrine and its Shortcomings

In *Schutte*, the Supreme Court analyzed whether Michigan's Proposal 2 was consistent with the equal protection clause of the United States Constitution. Proposal 2 introduces an amendment to Section 26 of the Michigan Constitution prohibiting that state universities pursue affirmative action on the basis of race in their admissions process.

The Court had established in *Regents of the University of California v. Bakke (Bakke)* that universities could take race into account in their admissions process, alongside other criteria, as long as they did not establish a quota for different racial or ethnic groups. Contrary to Fiss's favored

¹⁰ See Fiss, *Affirmative Action as a Strategy of Justice* (hereinafter, "*Affirmative Action*"), 17 Phil. & Pub. Aff. 37 (1997). There, Fiss rejects the idea that what justifies affirmative action is the attempt to compensate for past injustice, since there is lack of identity between the beneficiaries of affirmative and the victims of segregation. As I will further explain below, Fiss also discards diversity as an adequate rationale of affirmative action.

¹¹ See Fiss, *Another Equality* at 3.

approach, in affirming the constitutionality of affirmative action, the Court relied on the importance of diversity –or, rather, on the universities’ ability to judge whether diversity was important and how it should be sought. Thus, affirmative action was not conceived as an instrument of equality; quite the opposite: it was *prima facie* regarded as its enemy, since equality, understood as antidiscrimination, was compromised when persons were distinguished on the basis of their race.

Those who defend affirmative action on the basis of the diversity it brings to the classroom are probably seduced by the fact that this rationale applies to blacks and whites: in theory, both benefit from a more diverse educational environment. But Fiss is not hesitant about the inadequacy of diversity as a justification of affirmative action. This rationale, he says, “seems shallow, for it lacks the normative pull necessary to justify the costs inevitably entailed in a system of preferential treatment.”¹²

Moreover, a justification of affirmative action based on diversity, says Fiss, has little appeal in contexts other than universities, such as the workplace. Even in universities, this justification cannot explain why favor blacks but not members of other under-represented minorities, such as those belonging to a given religious group.¹³

Diversity was found by courts important enough to resist the presumptive harm to equality, but the issue was framed in a manner that, from the standpoint of antistatutory subordination, is both paradoxical – how can a practice designed to foster equality be judged presumptively against it? – and fragile. Equality is a constitutional mandate, but diversity in education is not; therefore, its pursuit, no

¹² *Affirmative Action* at 37.

¹³ *Id.*

matter how compelling university officers may find it, can hardly resist the impetus of an adamant majority.

It did not. In *Schuetz*, the majority of the Court found the amendment introduced by Proposal 2 constitutional. This decision cannot be surprising under the current paradigm. If distinguishing on the basis of race is *prima facie* against equal protection and educational diversity is not backed up by a constitutional right, then a political community may very well choose to prohibit such practice in the context of admissions to state universities.

There was, however, a line of precedents that, arguably, could preserve the University Board's capacity to decide whether to pursue affirmative action. Justice Sotomayor, with whom Justice Ginsburg concurred, filed a dissenting opinion basing on those cases, and on the "political process doctrine" she derived from them. According to Sotomayor, the equal protection clause not only prohibits intentional discrimination; it also "secur[es] to all citizens the right to participate meaningfully and equally in self-government." She regards *Schuetz* as the latest attempt by majorities to curtail such right.¹⁴ The historical context, to her, is revealing. In the beginning, some States directly deprived racial minorities of their right to vote.¹⁵ After the court intervened outlawing such restriction¹⁶, majorities insisted by introducing literacy tests,¹⁷ gerrymandering,¹⁸ good character requirements, poll taxes, and other, more subtle mechanisms biased against political

¹⁴ Sotomayor's dissent at 1. (Throughout this paper, I will cite opinions in *Schuetz* following the numbering of each separate opinion).

¹⁵ *Idem* at ____ . Texas, for example, passed a statute preventing racial minorities from participating in primary elections.

¹⁶ On the Texas example, see *Nixon v. Herndon*, 273 U.S. 536.

¹⁷ Thus, Oklahoma passed a statute establishing literacy tests, but with a grandfather clause that, in effect, exempted many whites from taking them. See Sotomayor's dissenting opinion at 7.

¹⁸ Alabama, for example, redrew city limits for such purpose. See *idem* at 8.

participation of racial minorities.¹⁹ In that context, the Supreme Court established the political process doctrine, whose foundations, according to Sotomayor, can be found in two cases: *Hunter v. Erickson* (*Hunter*) and *Washington v. Seattle* (*Seattle*).

In *Hunter*, the amendment in issue established that in order to enact a housing ordinance in the city of Akron, Ohio, against discrimination on the basis of race or religion, the approval of both the City Council and a majority of voters citywide was necessary, whereas in the case of any other housing ordinance, including one which prohibited discrimination on other grounds, approval from the City Council sufficed.

This amendment effectively changed the approval procedure, making it more burdensome to pass certain type of legislation. The Court found that this was against equal protection, and Sotomayor believes that this holding should apply to *Schuette* as well. I think, however, that the analogy is weak. Imagine that, instead of hampering the enactment of antidiscrimination legislation, the amendment to Akron's City Charter had directly declared it permissible to discriminate in housing on the basis of race or religion. Also in this case, one could say that the amendment would make it especially difficult for racial and religious minorities to obtain antidiscrimination ordinances, since they would have to modify the City Charter (which, let's assume, is more difficult than passing an ordinance). However, we would hardly view this case as one concerning the political-process doctrine. In the actual *Hunter* case, the political process was, indeed, being modified, but not in the hypothetical case I am posing. While I am positive that this hypothetical amendment would be unconstitutional, I would be very reluctant to frame such unconstitutionality in political-process terms. The case would concern a certain legal outcome, which, as it is true of probably all legal

¹⁹ Sotomayor's dissent at ____.

outcomes, would make returning to the prior *statu quo* politically more difficult, but that does not make the issue a political-process one.

I believe that the amendment involved in *Schuette* is like the one at stake in the hypothetical *Hunter*, not in the real one. Although, as Sotomayor claims, Proposal 2 makes it more difficult for minorities to advance affirmative action, this is only *trivially* true. Proposal 2 makes it more difficult to advance affirmative action simply because it *prohibits* affirmative action. Then, the issue –the only issue, I think– is whether such prohibition is Constitutional on the merits.

The political process doctrine makes sense only to the extent that it targets laws that attempt to achieve indirectly what the majorities could not, or dared not, establish in more clear terms because of the intervention, actual or foreseeable, of the Federal Court. The political-process doctrine is, typically, a device against “second round” or “second order”²⁰ laws. Gerrymandering is a more subtle way of disenfranchising minorities than directly depriving them of their right to vote; likewise, in *Hunter*, the state local majorities made it more difficult to pass antidiscrimination laws as an alternative to prohibiting such laws, which was more likely to trigger federal contempt. *Schuette* is no such case: Proposal 2 states, quite openly, that universities cannot pursue affirmative action.

It is on the substance that such law must be challenged. To that extent, the amendment in *Schuette* resembles Colorado’s Amendment 2, whose constitutionality was discussed in *Romer v. Evans*²¹.

²⁰ I.e., second attempts to reach an outcome which the Federal Court did not allow when it was framed in a less subtle way. While these second attempts may often be the result of the failure of a first, more direct attempt, I do not mean this in a chronological but in a conceptual sense: second round laws may actually be the first attempt, as long as the failure of more direct, less subtle legislation was foreseeable.

²¹ 517 U.S. 620 (1996).

Sotomayor, in fact, claims that *Romer* falls within the political-process doctrine.²² According to her, banning antidiscrimination legislation affects the political process. That is not, however, how the Court decided to address that case, despite the lower court's framing, which matched *Hunter's*. For the Supreme Court, the crucial issue was that Amendment 2 deprived homosexuals of basic protection enjoyed by everyone else; it violated equal protection in its most basic and direct sense.

A Constitutional amendment that establishes that pro-integration legislation requires a supermajority is different from one that prohibits state officials from engaging in pro-integration practices. By all means, the latter case should be easier than the former, and it would be paradoxical to frame the easier case as an *a fortiori* instance of the more difficult one.

Of course, what explains the attempts to expand the political-process doctrine beyond what seem to be its logical borders is precisely the impression that it is not clear, as a matter of law, that the result in issue is unconstitutional. Whatever their strategic wisdom, I find these attempts unconvincing. The political-process doctrine assumes that the law in issue could not achieve what it tries to achieve in bolder, less subtle ways. Invalidating a law requiring minorities to pass a biased test to vote presupposes that directly depriving those minorities of their right to vote would be unconstitutional. Likewise, targeting a state constitutional amendment that demands a supermajority for antidiscrimination legislation presupposes that prohibiting such legislation would be unconstitutional –it would be the easier case. If the political-process doctrine is, as I said, an attempt to reach “second round” or “second order” law, as such it presupposes that the more direct, less subtle try is or could probably be invalid. If that is not true or not clear as a matter of law, the political-process doctrine seems inadequate; it cannot provide the missing normative bite.

²² Sotomayor's dissent at 36.

Sotomayor tries to present Proposal 2 as a restructuring of the political process, rather than as the outcome of that process, by emphasizing that, prior to Proposal 2, university officers were the ones who decided whether to pursue affirmative action or not, and, arguably, it was easier for minorities to persuade such officers than to change the state Constitution. This line of reasoning is contrived. Every law can be construed as an order or prohibition of some kind to a state official (a point made by Kelsen in *The Pure Theory of Law*). Following Sotomayor, every law, to the extent that it orders or prohibits something to an official, would change the political process, since an official would have to do something she did not have to do, or could no longer do something she used to do. It would apply even if a state Constitution is amended to include a provision which declares that “the Legislature shall pass no law abridging freedom of speech.” To claim that this changes the political process (since groups favoring certain form of censorship, for example, would now have to mobilize to amend the state Constitution) does not seem a particularly meaningful point. It is not, moreover, a fruitful way of analyzing what is right or what is wrong with such law.

I am not denying that the law in *Schuetz* is different because of its racial connotations. That difference, however, is one that must be captured by a standard which focuses on the substance of such law –its impact on the status of minorities, for example—rather than on how it modifies political dynamics.

It is true, however, that Hunter, especially Harlan’s concurring opinion, speaks in broader language. According to Harlan, there is an equal protection violation when “the State allocates governmental power non neutrally, by explicitly using the racial nature of a decision to determine the decision

making process . . . making it more difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest.”

This broader language, for the reasons stated above, is an *obiter* in *Hunter*. But it becomes the holding in *Seattle*. Seattle’s Initiative 350 proscribed busing for racial purposes, in response to school boards intensive use of such instrument as a way of achieving integration. Thus, in *Seattle*, as in *Schuette*, we are dealing with law that prohibits a certain kind of state action aimed at desegregation in public education. The plurality opinion in *Schuette* endeavors to distinguish *Seattle* on the basis that there was “the serious risk, if not purpose” of there being an injury caused on the basis of race²³. They also mention that there might be some evidence of de jure segregation, citing Breyer’s dissent in *Parents Involved in Community Schools v. Seattle (Parents Involved)*²⁴, and claim that today the remedial action –busing—would not be admissible absent such evidence. They then allege that the State in Seattle was complicit to the wrong that busing intended to remedy, and that the State decision in issue was an aggravation of such wrong.

Scalia disregards the plurality’s reference to de jure segregation by noting that *Parents Involved* – the decision in which Breyer, dissenting, brought up such possibility—was from 2007, and could therefore hardly have been taken into account in *Seattle*. I think that Scalia is missing the point here. The plurality’s argument, if I am reading it correctly, seems to be, rather, that today *Seattle* would not be decided as it had been, unless there was evidence of de jure segregation. This reference is part of the argument, made explicit by the plurality later in their opinion, that subsequent precedents make *Seattle* either narrower or inapplicable. Breyer’s dissenting opinion in *Parents Involved* is

²³ Plurality opinion at 9. They also try to distinguish *Hunter* from *Schuette* by arguing that the former involved “demonstrated injury on the basis of race” (Plurality opinion at 8).

²⁴ 551 U.S: 701 (2007).

cited only to suggest that such evidence might exist, thus implying that perhaps, after all, the case was not wrongly decided.

Even if Scalia's point is not correct, it is still true that the plurality's basis for distinguishing *Schuette* from *Seattle* is obscure. The fact that Washington State was complicit to the wrong, as the Court now mentions, does not seem to figure in the holding of *Seattle*, and therefore its relevance is far from evident. It seems to be the case, as both Scalia and Sotomayor remark, that the plurality is reconstructing *Seattle* beyond recognition.²⁵

However, I am less interested in whether *Schuette* could have been decided under the *Seattle* rule, as Sotomayor claims, than in whether *Seattle* is an adequate construction of equal protection. I am not saying that the Court in *Seattle* reached the wrong outcome; but I believe that it reached such outcome in an awkward manner, by forcing a doctrine –the political-process doctrine—which, for the reasons I stated, I do not find suited for this type of case. To that extent, rather than reflecting the importance and breadth of equal protection, the invocation of the political-process doctrine in *Seattle* may speak to the limitations of the antidiscrimination principle. The Court chose to speak in political-process terms as an alternative to declaring that equal protection banned Initiative 350 on its substance, which, arguably, equal protection understood as antidiscrimination did not admit.

Was this way of framing the question the consequence of *Washington v. Davis* and its emphasis on discriminatory intent?²⁶ That is, of course, a possibility. Again, my focus is not necessarily on whether existing precedents dictated this outcome, nor on whether the *Seattle* Court made a strategically sound maneuver around *Washington v. Davis*, but on whether equal protection

²⁵ See Scalia's opinion at ___ and Sotomayor's opinion at ___.

²⁶ For a critique of *Washington v. Davis* and its implications, see Fiss, Another Equality at ___.

doctrine, by relying on antidiscrimination, has led the Court to a an inadequate analytical framework.

Likewise, it could be thought that Sotomayor put the political-process doctrine (rather than, say, antistubordination) at the fore of her analysis in *Schuetz* at least in part for strategic reasons.²⁷ Be it as it may, the fact that she chose to resort to the political-process doctrine is in itself telling of how difficult it is to reconcile affirmative action with the antidiscrimination principle. This, of course, is precisely Fiss's general point. *Schuetz* confirms that point; it exposes the fragility of the attempts to stretch antidiscrimination in a manner its structure does not resist.

4. The limits of the Antistubordination Principle

While the other Justices avoided framing *Schuetz* in such a way that the substantive relationship between affirmative action and equal protection became the issue, Scalia (joined by Thomas) addressed such relationship in a most direct manner. His vision, of course, is very restrictive. Scalia goes out of his way to reject antistubordination and everything it implies. For him, equal protection bars affirmative action, period. The key to understand his rejection of affirmative action, of *Hunter* and *Seattle* (which he would overrule), and of any interpretation of equal protection that suggests the slightest commitment to antistubordination must be found in his defense of color blindness and the formalist, mechanistic approach to adjudication it invites.

²⁷ Section IV A of her opinion suggests that much.

Under this restrictive approach, a measure such as affirmative action that intends to improve the status of a subordinated group is not part of equal protection; to the extent that it resorts to race as a category and affords preferential treatment, it is actually against it. Moreover, Scalia denies that the notion of group status is of any relevance; the focus of equal protection, he insists, is eminently individual in nature.

While I do not find Scalia's position justified, it must be acknowledged that he focuses on a weak spot of antisubordination which is worth exploring. Antisubordination entails an asymmetric conception of equal protection. There is one aspect of this asymmetry that is at the very core of antisubordination, namely, that preferential treatment of a subordinated minority cannot be the same as preferential treatment of a powerful majority. But the asymmetry is broader, and in fact it affects not only the outcome, but the very framing of the analysis: Under antisubordination, excluding a white applicant is not even an equal protection problem. This does not mean that Fiss is blind to the sacrifices affirmative action entails. As we will see, he is fully aware of such sacrifices, but locates them outside the limits of equal protection.

In his early piece "A Theory of Fair Employment Laws,"²⁸ Owen Fiss identified as a central feature of such laws the prohibition against discrimination. This did not necessarily entail, in Fiss's eyes, color blindness –race could be taken into account in many different ways, e.g. for statistical purposes–, but it did mean that what constituted a wrong for blacks, such as not being chosen because of their race, would also constitute a wrong if the victims of such practice were whites. The prohibition of discrimination based on race ruled out both preferential and detrimental treatment of

²⁸ 38 U. Chi. L. Rev. 235 (1970-1971).

blacks for the same reason. “Preferring a black on the basis of his color is as unlawful as choosing a white because of his color...”²⁹

According to Fiss, in either case the practice was against fairness and efficiency, the ultimate values pursued by the standard governing fair employment laws. While he found that the employment laws’ commitment to such standard was beyond dispute, his dissatisfaction with it already showed. It was not until a few years later, however, that he offered an alternative standard, the antistatutory principle. As we saw, he did so not in the specific context of employment laws, but as a gloss to equal protection in general.

There are certain specificities to the employment context that may merit a distinct approach. The first is scarcity. Given a certain unemployment rate, displacing a white applicant from a job may leave her without a job –any job. Such problem is non-existent or less salient in other contexts.³⁰ The second is the text. Fair employment laws use the language of antidiscrimination; the equal protection clause does not.

However, what Fiss found problematic in the case of a white applicant who was not chosen for the job because of her race must have some weight in other contexts as well, even if the scarcity problem is less acute. Fiss is quite sensitive to such loss. In defending affirmative action as a demand of justice, he acknowledges that in “being judged unfavorably on a criterion unrelated to individual merit and over which they have no control”, applicants excluded by virtue of affirmative

²⁹ *Idem* at 265.

³⁰ In in “School Desegregation: The Uncertain Path of the Law”, 4 *Philosophy and Public Affairs* 3 (1974), Fiss claims that scarcity is not a relevant problem in primary and secondary education, but becomes one at the university level.

action suffer “a measure of injustice.”³¹ But Fiss would not characterize such sacrifice using the currency of equality, but rather that of fairness.

Does that mean that, for Fiss, the unfairness of which rejected white applicants are victims must be acknowledged from a moral perspective, but has no constitutional status? Not necessarily. In *Groups*, Fiss suggests that the constitutional location of the unfairness suffered by the rejected white applicant may be the Due Process Clause.³² If so, then we would have to conceive affirmative action as a conflict between two constitutional rights: equal protection and due process. Under such framework, the level of scarcity may be a relevant factor, among others, to determine how to solve the conflict.³³

There is, however, something unsatisfactory about this approach. One may agree with Fiss’s claim that affirmative action is aimed at equality and that antidiscrimination’s failure to capture that is an important flaw; but the position that affirmative action can, at least in some cases, be against equality has obvious intuitive appeal as well, and this appeal does not depend on antidiscrimination’s formalistic notion of color blindness. It seems to me that not only the situation of excluded white applicants, but also many other cases that Fiss would characterize in terms of unfairness and leave outside of equal protection have an equality dimension that needs to be acknowledged.

³¹ *Affirmative Action* at 38.

³² Fiss, *Groups* at 159, suggests that cases of discrimination that do not constitute group disadvantaging can be considered unfair treatment and addressed through the Due Process Clause rather than the Equal Protection Clause. *See also id.* at 172 (footnote 83), where Fiss says that a stripped down-version of the antidiscrimination principle—one concerned only with means-end rationality—could find its Constitutional place in the Due Process Clause.

³³ Fiss suggests that the appropriateness of affirmative action in different contexts may partly depend on the level of scarcity in “A Theory of fair Employment Laws.” He develops the argument a few years later in “School Desegregation: The Uncertain Path of the Law.”

A few cases may illustrate this point. First, consider *Arenzon*,³⁴ in which the Argentine Supreme Court faced the situation of a person who was denied admission to a professorship program because he was too short. Gabriel Arenzon, who aspired to become a primary school mathematics teacher, was 1.48 meter (4 feet 7 inches) tall, and the applicable regulation required a minimum height 1.60 meter (5 feet 3 inches).

The year is 1984, and this was one of the first equal protection cases of the transitional period.³⁵ The Court found unanimously for the plaintiff, with critical remarks on the regulation, whose alleged justification was that physical strength was necessary in order to impose respect, and therefore authority, over the students.³⁶ This was, by the way, a regulation from 1980, i.e. issued by the military dictatorship. In a memorable passage, Petracchi and Belluscio's concurring opinion states, with the grandiloquence of foundational times, that "[n]o one is taller than the Constitution."

Could the exclusion of the plaintiff from the professorship because he was not tall enough have been challenged through the antissubordination principle? I think not. The short are not a subordinated group in society—they are not even a *group*.³⁷ Being short is probably not the same as being red-haired, as the short may face some social difficulties the red-haired do not; but, still, this is not a case that fits the antissubordination approach.

³⁴ Fallos 306:400 (1984).

³⁵ *Arenzon* was framed as a right to education case, and the issue became whether the restriction of the right to learn and to work was a reasonable one. Today, however, given the evolution of equality jurisprudence in Argentina, the equality aspect of the case will surely figure as the central one in the analysis.

³⁶ The Government did not offer this justification in *Arenzon*, but it had done so in an analogous case, and therefore Justices Petracchi and Belluscio took advantage of this opportunity to expose and criticize such argument.

³⁷ For a discussion of what a group entails, see Fiss, *Groups* at 148.

One could insist that Gabriel Arenzon was treated *unfairly*. Cases like this one, however, involve an equality aspect that unfair treatment cannot fully capture. Although fairness and equality are two concepts that overlap, if something distinguishes them, it is that equality is essentially a relative idea, while fairness need not be so. One can be treated unfairly regardless of how others are treated. Everyone, in theory, could be treated unfairly.³⁸ Unfair treatment is linked to the idea of dignity, which is partly independent from the relative considerations that inform equality. Arenzon was, indeed, treated unfairly, but, in being distinguished from others on the basis of his height, he was treated unequally too.

I believe that the mere fact that the antistatutory principle forces us to wonder how to fit *Arenzon* in the group-status framework is revealing. There are situations in which such an approach invites either contrived analysis or unsatisfactory answers. Under antistatutory, “group” needs to remain a relatively narrow concept to have normative bite, but the question is whether it is capable of capturing all that matters.

Other cases come to mind, such as *Mississippi University for Women v. Hogan (Hogan)*.³⁹ At the University of Mississippi School of Nursing, only women were admitted. Hogan, a male applicant, claimed that he was being discriminated against by this policy. The Court agreed. It rejected the idea that the subordinated or disadvantaged condition of a group could be the basis for resorting to a higher level of scrutiny: “[The fact] that this statutory policy discriminates against males, rather than against females, does not exempt it from scrutiny or reduce the standard of review.” To that extent, *Hogan* stands for a “neutral,” gender blind conception of equal protection, in which being a

³⁸ The system of allocation of major punishments and prizes through a lottery, which Borges imagined in “La lotería de Babilonia,” would be such a system of across-the-board unfairness.

³⁹ 458 U.S. 718 (1982).

woman or a man is of no constitutional significance. One can, with Fiss, reject such conception and insist that gender as well as race can and often must be constitutionally relevant; but it is one thing to reject the applicable standard, and quite another to challenge the use of the equal protection framework altogether, as antistatutory entails.

There is an antistatutory reading of *Hogan*, which in fact the Court itself suggested: the female-only admissions policy was actually detrimental to the social status of women, since it tended to reinforce the social stereotype of nursing as a female profession (male doctor, female nurse). But should this be the way to face a case like *Hogan*, i.e. by looking into the extent to which the exclusion of men actually harmed women? As Justice Powell argued, the relevance of such argument seems problematic in the context of a claim submitted by a rejected male applicant. In other words, how can the impact on the status of women affect the right to equal protection of a man who seeks admission to this program?

Moreover, nursing was just one of several programs the Mississippi University for Women offered, and the status argument could not reach them all. Justice Burger wrote a separate dissent opinion emphasizing that the Court's decision should not be read to apply to an all-women business school or liberal arts program. The question Burger's counterfactual scenario poses is of interest. How would we address, for example, a case concerning a women-only liberal arts program, where applicants are rejected on the basis of their gender but status concerns are absent? Again, I am not asking how that case should be decided, but rather how it should be framed. Equal protection, it seems to me, is the most obvious answer.

The case of the poor presents a similar issue. This has been a recurring issue for antistatutory theory. Fiss has discussed the issue extensively in *Groups and Another Equality*, rejecting the idea

that the poor can be regarded as a group chiefly because of the mutability of this status: A poor person can become rich, whereas a black one is always black. While this approach seems sensible on its own terms, again, one has to wonder whether too much is being left behind. Discrimination on the basis of wealth may very well constitute a denial of equal protection; the fact that it is also unfair, as I said, does not eliminate the relative dimension of the problem, i.e. the type of harm equality typically captures. True, being poor and black is, almost everywhere, worse than being poor and white; it has been a great contribution of antistatutory theory to provide a normative framework to account for this fact, but the point remains that this is not all there is to equal protection.

5. Equality on both sides

Justice Scalia, perhaps the incarnation of the antidiscrimination principle in its most extreme formulation, resorts to a quote from *Bakke* to express his commitment to neutrality: “the Equal Protection Clause cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal.”

But Scalia cannot imply by this that equal protection means that everyone should be treated *literally* in exactly the same way, without any room for contemplating differences among people. Such a conception (nominal equality?) would not even be intelligible, since every law, every state action, bases on distinctions of some kind, be it between the poor and the rich, the criminal and the law abiding, the citizen and the alien, etc.

It is true that someone who takes the metaphors favored by the antidiscrimination principle too seriously may find every distinction *prima facie* anomalous, a necessary evil at best. Such approach is apparent, for example, in an extract from Kennedy's opinion in *Romer*:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. . . . We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Classifying persons is, rather than a “practical necessity”, an inevitable part of law-making. Neutrality in the abstract is no virtue. It is, as I said, not even intelligible as a goal. We cannot, therefore, start from the premise that every distinction is suspect and that the paradigm of equal protection is nominal equality. In order to assure an equivalent amount of protection to two persons who radically differ in some relevant aspect, the State must provide each of them with something different. I am sure that Scalia would not deny this. He cannot sustain the view that the State must do exactly the same thing for every person --he surely would grant that some circumstances are relevant. His appeal to blindness, then, must apply only to certain differences. To be sure, he believes it most emphatically applies to race.

But why would that be so? The fact that there is no intrinsic difference between a white and a black person in terms of intelligence, honesty, tendency to act morally or to work hard is not dispositive. To the extent that social dynamics reflect prejudice built up during a hundred years of slavery and another hundred years of Jim Crow, different circumstances will be faced by members of each group regardless of their intrinsic worth. If we find that the disparity in opportunities derived from

such dynamics is constitutionally relevant, then there is nothing anomalous in the idea that the degree of protection afforded by the state may be different in nominal terms in order to be more similar in actual terms.

As Sotomayor says in *Schuette*, the claim that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” a slogan taken from *Parents Involved*, “is a sentiment out of touch with reality.” If race matters in a society, the implications of this must be registered by a State that wishes to protect its citizens equally. Given certain social facts, being blind to race would entail providing different persons of a very different level of protection.

The idea that certain classifications are suspect is not necessarily antagonistic to this approach. Presumptions are devised to make the analysis easier, reduce administrative costs and the probability of making mistakes. If in 99% of the cases in which race is used as criterion, members of a certain race are further excluded from society, it may be reasonable to presume quite strongly that distinguishing on the basis of race is against the Constitution; even a per se prohibition of such distinction might be justified, since the risk of making a mistake, failing to identify an instance of invidious discrimination, might be larger than 1%.

But that, of course, is a big ‘if’; and the fact that there is an important amount of cases where the effect is the opposite or that such cases are easily identifiable and thus the risk of making a mistake is trivial would argue against a rigid rule. Presumptions are not ends in themselves. They are informed by experience, i.e. history, and are therefore contextual and contingent. In extreme situations, as I suggested, presumptions are turned into per se prohibitions, but even then they can be revised if experience suggests that rigidity is not warranted. Think, in the context of antitrust

law, of the approach to resale price maintenance: first a per se prohibition, later judged under the rule of reason, today almost a per se permission. What changed was the courts' (and the antitrust enforcers) understanding of the effects of this conduct on consumers, to a large extent due to the influence of economic research on the matter.

However, from the general claim that sometimes race must be taken into account in order to protect people equally, it does not necessarily follow that it must be taken into account in university admissions or hiring or in any other specific context. Equal protection does not demand affirmative action per se. But when the opportunities enjoyed by members of a group are significantly diminished by the mere fact of belonging to such group, equal protection does mandate that the Government take reasonable steps to improve such situation. Conceivably, there are situations in which affirmative action or an equally effective alternative to it may have to be included among such steps. In particular, in a context in which (a) there is profound social subordination of minorities, (b) state universities implement affirmative action, and (c) such practice helps improve the social status of subordinated groups, then, yes, equal protection would render the prohibition of affirmative action in state universities admissions unconstitutional. To the extent that the situation in Michigan fits such description, Proposal 2 could not survive scrutiny, unless an alternative measure of comparable effectiveness in terms of integration was simultaneously adopted.

The above claim rests on a number of potentially controversial factual assumptions. It may turn out that some of them do not obtain. Chief Justice Roberts, in fact, even goes as far as to suggest that affirmative action is actually counterproductive.⁴⁰ That might very well be the arena where the affirmative action debate should be fought, the crucial question being whether affirmative action

⁴⁰ See Roberts concurring opinion at 2.

actually improves the social status of minorities. This question is different from the one about diversity, on which Sotomayor's opinion in *Schuetz* focuses, and it is probably a tougher one too: Social integration is more difficult to evaluate than diversity. Still, the evidence cited by Sotomayor seems to be a solid starting point, and argues in favor of analyzing this empirical question presuming that affirmative action contributes to integration, rather than the opposite. Moreover, in order to accept such a bold measure as the permanent and absolute prohibition of affirmative action in university admissions in a context where such is the common practice, it seems clear that a heavy burden proof must be borne by the defenders of the amendment.

However, the existence of controversial empirical questions should not be an excuse for leaving the decision to political bodies, as Justice Breyer's opinion seems to suggest. Breyer does not frame the issue in terms of integration, but of educational benefit, which has the aura of neutrality antidiscrimination demands. However, he believes that empirical questions whose answer is unclear –there are studies suggesting that affirmative action generates educational benefit, but also others supporting the opposite claim– should be best left for the “ballot box”, not the courts. This is why, he says, Proposal 2, a political decision, should be respected. I find this claim perplexing. Empirical disagreements can hardly be resolved by voting –things either *are* or *are not* in a certain way, regardless of what people might think or want them to be. Thus, when a court is faced with a case that involves empirical issues –say, whether the design of an automobile is defective– and finds conflicting evidence, it may do a number of different things depending whether it is a high or lower court, but deferring to the ballot box is surely not one of them. Breyer's deference to political decision, then, cannot be explained as the result of factual uncertainty; the explanation must be found in the lack normative grip of educational benefits or diversity.

In any case, and leaving empirical controversies aside, I have tried to present a broad understanding of equal protection under which the group one belongs to might or might not be a relevant consideration in order to provide equal protection. It all depends on context, and therefore equal protection is not necessarily restricted to the ideal of protecting groups in order to prevent their subordination, but is sufficiently endowed to so when pertinent.

The connection between equal protection and group status can thus be viewed as instrumental, not *conceptual*: In certain circumstances, when social dynamics are making group membership a crucial factor in determining one's opportunities, the State cannot protect people equally unless it endeavors to improve the status of the group they belong to. But this does not apply to cases where equal protection demands, for example, providing access to education or a different social benefit regardless of height (*Arenzon*), gender (*Hogan*) or wealth. In other words, I think that Fiss does not need to emphasize a conceptual link between equal protection and group status; it is sufficient to show that such link may exist, and that when it does exist, it requires the State to act accordingly. Therefore, there is no necessary dichotomy between a group-based and an individual-based conception of equal protection. Taking group membership into account does not presuppose that groups themselves –rather than individuals– are the subjects of equal protection. The right to equal protection can be conceived as an individual right, yet its realization may require group awareness.

If affording different amounts of nominal protection to different people may not only be permissible but also required in order to honor the State's commitment to equal protection, disparate treatment based on race is not in itself a constitutional breach. But, at least in certain contexts, affirmative action entails more than disparate treatment, namely, excluding certain people from benefits granted by the state for reasons that are beyond their control, paradigmatically race. I have suggested that

the proper constitutional location for this type of unfairness is the right to equal protection, since the relative dimension of the loss seems crucial. Therefore, I would insist that affirmative action is a type of case in which, to paraphrase, we potentially find equality on both sides of the equation.⁴¹

However, once we get rid of the antidiscrimination slogans and understand that nominal equality is not even an intelligible goal, the mere fact that a white applicant is not evaluated under exactly the same standard as a black one does not in itself amount to a breach of equal protection. The analysis needs to be more complex.

Justice Powell's approach in *Hogan* may be illuminating. The case, as I said, deals with the Mississippi University for Women nursing program, where only women were admitted. The majority of the Court found this policy against equal protection. Justice Powell, with whom Justice Rehnquist concurred, filed a dissenting opinion. He emphasized the virtues of "sexually segregated classrooms," which gave women an extra option many of them appreciated. More importantly for our purposes, he insisted that the rejected male applicant "[is not] significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must travel to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of 'inconvenience.'" He is not, therefore, "denied a substantive educational opportunity".

That, I believe, is precisely the standard which should govern affirmative action cases as far as the rights of rejected applicants are concerned. The question should be whether rejected applicants are thereby denied a reasonable opportunity to enjoy education or other fruits of social cooperation, which essentially depends on the available alternatives the state offers. Thus, the question of

⁴¹ See Fiss, *The Irony of Free Speech*.

scarcity, and how it affects the resource at stake, may be crucial in determining the admissible depth of an affirmative action program.⁴²

In fact, if, as Justice Burger suggested, the case did not involve nursing but business school, Justice Powell's reaction could not have been different: as long as reasonable alternatives existed, the rejected applicants would not have been denied equal protection. Moreover, he should have reached the same conclusion even if the rationale for the all-women business school had been to balance the proportion of business women to business men in that particular community –a rather radical form of affirmative action.

Perhaps Justice Powell's labeling of the resulting harm as an "inconvenience" is too dismissive; but it has the virtue of putting the problem in perspective. A policy aimed at significantly enhancing the opportunities of members of a disadvantaged group should not be found against equal protection unless the opportunities of other persons are, as a result of such policy, limited in an unreasonable way. If the currency is one and the same –the goal of providing equal opportunities to all, as a form of providing equal protection– sacrifices and benefits may be easier to understand, and easier to compare.

⁴² As I mentioned above, Fiss's early works on the matter specifically refer to this issue, and conceive scarcity as a limitation to affirmative action.