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INTRODUCTION

There is an old story about two businessmen who take a quarrel to the village Rabbi. He listens to the first man tell his side, and says, "Yes, you are right." The second man then gives his version of the affair, and once again the Rabbi says, "You are right." At that point, an onlooker protests, "They can't both be right!" To this the Rabbi responds, "Ah, yes, you also are right." American public administrators increasingly find themselves in the position of that Rabbi, needing to acknowledge the legitimacy of competing claims on the government that are seemingly both correct and but are mutually exclusive. Wanting to be fair, we are torn between programs intended to ameliorate past injustices and complaints that the programs themselves are unjust.

The idea of equality is a bedrock element of the American legal and political systems; we strive for a meritocracy and affirm the government's obligation to treat similarly situated citizens equally. The 'level playing field' is a favorite metaphor

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for politicians and public administrators alike. Whether a playing field is truly level, however, is often a contentious issue. This article analyzes the constitutional requirements of equal treatment against claims arising in the context of affirmative action and charitable choice, programs whose proponents claim that the field must "tilt" if genuine equality is to be achieved. But, if government must treat people differently—that is, unequally—to achieve real equality, what are the implications for public policy, public management and the rule of law? Indeed, how are we to define equality so that, to appropriate Justice Stewart's famous approach to obscenity, I will "know it when I see it"?[1]

I. JUSTICE, FAIRNESS & DIFFERENCE

The notion of the level playing field has been invoked politically as a necessary condition of democracy, a convenient metaphor for saying that a democracy, defined anywhere along the spectrum, presupposes the absence of a wide disparity in the participatory capabilities of the citizenry.[2] Political equality has been deemed present when "the decision rule for determining outcomes at the decisive stage must take into account, and take equally into account, the expressed preferences of each member of the demos as to the outcome."[3] This construct, of course, begs

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[1] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing the difficulty in defining obscenity).

[2] *See, e.g.*, Michael J. Goldberg, *Derailing Union Democracy: Why Deregulation Would Be a Mistake*, 23 BERKELEY J. EMP. & LAB. L. 137 (2002) (discussing the importance of a level playing field as a basic safeguard of democracy).

[3] Robert A. Dahl, *Procedural Democracy, in* PHILOSOPHY, POLITICS AND SOCIETY 97 (Peter Laslett & James Fishkin eds., 1979) (examining the idea of procedural democracy and the problem of inclusion, and examining various solutions to the problem of inclusion, including his own). Procedural democracy is the idea that certain criteria should govern the decision-making process of any human association. *Id.* at 101. Such criteria include political equality (decisions must take into account the preferences of each member equally), effective participation (members must have adequate and equal opportunity to express individual preferences) and enlightened understanding (members must have adequate and equal opportunity to discover and evaluate

the question of equal access to membership, among other things.

Philosophers have gone beyond such narrow rules of political participation in describing the role of equality in a just society. Aristotle defined as a fundamental attribute of justice the principle that equals should be treated equally, begging the questions "who are equals?" and "what constitutes equal treatment?" John Rawls proposes that we construct our legal and political system behind a veil of ignorance: if we do not know beforehand what our personal attributes or social station will be, the theory goes, we will be more likely to construct a system that is fair to all, even where it may be unequal.[4] Amartya Sen argues that, no matter how many rights individuals may have, if material conditions are such that those individuals cannot freely choose their ends—if they are so afflicted by disease or constrained by custom or poverty that they are not truly free to choose their own goals—they are neither free nor equal.[5]

Virtually all political philosophies exalt equality as an ideal, but as Ian Hacking wryly noted, there is a wide variety of

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individual preferences). *Id.* at 101-05. The problem of inclusion relates to the membership of the association, i.e., who has a right to be included in the association and who can properly be excluded. *Id.* at 109.

[4] John Rawls, *Justice as Fairness, Philosophy and Public Affairs*, 3 PHIL. & PUB. AFF. 223, 235 (1985). Specifically, Rawls argues:

> We must find some point of view, removed from and not distorted by the particular features and circumstances of the all-encompassing background framework, from which a fair agreement between free and equal persons can be reached. The original position, with the feature I have called 'the veil of ignorance,' is this point of view. And the reason why the original position must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principals of political justice between free and equal persons must eliminate the bargaining advantages which inevitably arise within the background institutions of any society as the result of cumulative social, historical and natural tendencies.

Id.

[5] AMARTYA SEN, INEQUALITY REEXAMINED 66-69, 102-107 (Harvard Univ. Press 1992). *See also* Ian Hacking, *In Pursuit of Happiness*, N.Y. REV. BOOKS, Sept. 19, 1996, at 40 (reviewing AMARTYA SEN, INEQUALITY REEXAMINED (1992)).

working definitions of the term.[6] Libertarians want equality of rights, or equality before the law. Egalitarians want equality of results in varying formulations.[7] Free market advocates want equal access to markets.[8] Americans speak often of "equality of opportunity" a term often defined as the opportunity to compete on . . . what else? A level playing field. And so we come full circle, having consistently avoided the crucial question, "equality of *what?*"

Unless we are able to define the "what," we will be similarly unable to decide what sorts of differences require recognition if genuine equality is to be achieved. Even if we are talking simply about equal rights before the law, using the narrowest possible construction of that term, a fair and equal system must take note of and allow for differences between children and adults, competent and incompetent persons, motorists and pedestrians, and so forth. All but the most doctrinaire egalitarians will allow for differences in need resulting from a variety of factors, including behavior and effort. As Will Kymlicka noted, in other countries it is "increasingly accepted that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of

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[6] Hacking, *supra* note 5, at 41-42 (noting the different theories of equality and discussing how Sen's focus on "equality of what" deviates from the previous focus on "equality for whom").

[7] Many years ago I read a wonderful science fiction story, the name of which I have unfortunately long forgotten, describing a society so obsessed with the egalitarian version of equality that persons who could run fast were weighted down with sandbags; those with high I.Q.s required to wear earphones playing distracting music, and so forth. For further discussion of egalitarian theories, *see* MICHAEL QUINN, JUSTICE AND EGALITARIANISM vi, 41 (1991) (stating that at the core of egalitarian theories of justice is the notion that society should ensure that individuals have the same ability to make reasoned choices, thus allowing for each person to equally consider his or her choices in life). However, Quinn notes that theorists, including Rawls, Dworkin and Nozick, differ in how this ideal should be accomplished and what stands in the way of accomplishing it. *Id. See generally* JOHN RAWLS, A THEORY OF JUSTICE (1999).

[8] *See generally* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997).

citizenship."[9] These systems recognize that applying the same rules to everyone does not necessarily treat everyone as equal.

Further complicating the issue of difference, and the importance we should assign to it in an effort to define equality, is the significance of labels or framing. In the introduction to *Making All the Difference* Martha Minow tells the story of animal behaviorist Harold Herzog, Jr., who works in a laboratory at the University of Tennessee and must obtain approval for any experiment on the 15,000 or so mice they use each year.[10] Yet the concern over mouse welfare does not extend to those that escape and are subsequently labeled "pests," nor to field mice that might get into the building.[11] Those mice are routinely captured and destroyed.[12] Similarly, other mice are used as food for other experimental animals, and likewise fall outside the rules governing appropriate treatment.[13] Finally, and ironically, when a pet mouse owned by Herzog's son died the family gave "Willie" a funeral, complete with a tombstone.[14] The moral of the story, as both Herzog and Minow note, is that our sense of equitable behavior depends heavily upon the labels we assign and the language with which we describe the situation and categories before us.[15] Anyone doubting the accuracy of this observation, or

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[9] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 26 (1995) (noting that group-specific rights may better serve to accommodate cultural differences in some societies than universal individual rights).

[10] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 4-5 (1990) (noting that in addition to the approval needed for any experiment using the mice, the United States Department of Agriculture and the American Association for the Accreditation of Laboratory Animal Care maintain control over the standard of care provided to the experimental mice through inspection and monitoring).

[11] *Id*. at 5.

[12] *Id*.

[13] *Id*.

[14] *Id*. As the Herzog family mourned Willie's demise, they were setting up traps each night in an effort to eliminate the mice that infested their kitchen. *Id*.

[15] *Id*. Minow and Herzog conclude that the negative labels humans use to refer to animals dictate the way such animals are treated by humans. *Id*. In a

its relevance to issues of equality, need only look to contemporary political disputes over gay rights or reproductive choice. When the gay community demands equality, the Christian Right responds that what they *really* want is "special rights." When some women talk about "the right to choose" as an element of religious equality, others respond by equating choice with murder and by labeling pro-choice advocates "baby killers." Americans believe in equality; we don't believe in "special rights." We believe in personal autonomy and respect for different religious beliefs; we don't condone baby-killing. He who frames the issue wins the debate. Unfortunately, the competition to be the first to label—to be the side that successfully frames the issue—usually generates more heat than light.

II. FOURTEENTH AMENDMENT EQUALITY

In the United States discussions of equality generally, although certainly not always, begin with examining the role of government and the meaning and application of the Equal Protection Clause of the Fourteenth Amendment, passage of which, as Akhil Reed Amar has persuasively argued, profoundly changed the way in which America defines its constitutional principles, including principles of equality.[16]

The Fourteenth Amendment prohibits states from denying persons within their respective jurisdictions "the equal protection of the laws."[17] The pertinent language reads:

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similar way, the labels often assigned to certain groups of people usually bear a direct relation to the moral judgments made about those people. *Id*.

[16] *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 7 (1998) (introducing his argument that the Fourteenth Amendment has, since its passage, greatly influenced the way in which the Bill of Rights is viewed). To the extent that people think that the Bill of Rights applies directly to state government action, people have come to ignore the Fourteenth Amendment itself. In reality, it underlies everyone's thinking because the Fourteenth Amendment created the avenue for applying the Bill of Rights to the states in the first instance. *Id.*

[17] U.S. CONST. amend. XIV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[18]

The language is straightforward and congressional debate surrounding passage, as well as subsequent arguments for and against ratification, proceeded on the assumption that the amendment would obligate the states to "incorporate" the Bill of Rights—that is, would impose upon the states the same limitations that the original Bill of Rights imposed upon the federal government.[19] Nevertheless, the amendment, and particularly its Equal Protection Clause, were subsequently interpreted by the Supreme Court much more narrowly. The "fundamental rights" protected by the Bill of Rights were applied to the states very slowly, and over a period of many years.[20]

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[18] *Id.*

[19] *See generally* AMAR, *supra* note 16, at 163-74, 197-206 (discussing the politics of ratification and incorporation debate).

[20] For example, in 1833 the Supreme Court held that the rights guaranteed in the first eight amendments did not apply to state governments. *See* Barron v. Baltimore, 32 U.S. 243, 249 (1833) (finding that the Fifth, Sixth and Eighth Amendments to the United States Constitution applied only to the federal government and not to the states). Forty years later, in the now-infamous *Slaughter-House Cases*, the Court held that those same eight amendments were not "privileges and immunities" of citizenship. *See* 83 U.S. 36, 81 (1872) (noting, "we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration"). Subsequently, in a series of cases, the Court gradually read the Due Process Clause of the Fourteenth Amendment as "incorporating" fundamental liberties, making those guarantees that could be deemed fundamental binding on the States. For an overview of the evolution of the incorporation doctrine, *see generally* Twining v. New Jersey, 211 U.S. 78 (1908) (finding the exemption from self-incrimination under the Fifth Amendment to the United States Constitution as not

Even after the Equal Protection Clause was so applied, early notions of equal protection accommodated treatment that was "separate but equal." Not until *Brown v. Board of Education* in 1954 did the Supreme Court conclude that separate was inherently *un*equal.[21]

The equality protected by the Fourteenth Amendment is not the equality proposed by political philosophers. Rather, the amendment is consistent with the founders' belief that liberty is essentially defined in the *negative*, as freedom from state constraints on individuals' beliefs and behaviors.[22] Equality in

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incorporated under the Privileges and Immunities Clause of the Fourteenth Amendment); Palko v. Connecticut, 302 U.S. 319 (1937) (holding that Fifth Amendment immunity from double jeopardy is not incorporated under the Fourteenth Amendment); Adamson v. California, 332 U.S. 46, 54 (1947) (incorporating protection against compulsory self-incrimination by fear of hurt, torture or exhaustion under the Due Process Clause of the Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (finding that the Fifth Amendment right to be free from compelled self-incrimination is incorporated under the Fourteenth Amendment); Benton v. Maryland, 395 U.S. 784, 794 (1969) (applying the double jeopardy prohibition to the states through the Fourteenth Amendment on the grounds that it represents a "fundamental ideal in constitutional heritage").

[21] 347 U.S. 483, 495 (1954) (holding that the doctrine of "separate but equal" holds no place in the field of public education because "separate educational facilities are inherently unequal"). *See also* Gaston County, N.C. v. United States, 395 U.S. 285 (1969) (determining it appropriate to analyze whether a state or county has a history of separate and inferior educational opportunities, as outlined in *Brown v. Board of Education*, when deciding the fairness of a literacy test under the auspice of the Voting Rights Act of 1965 and upholding the lower court's determination that because such a history was present in Gaston County the literacy test was unfair and barred by the Act).

[22] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). In *Allgeyer* the Court declared that:

> [t]he liberty mentioned in [the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter all contracts which may be proper, necessary and essential to his carrying out to a

that sense is limited to our right to be treated equally by government. Equal protection analysis thus begins with an inquiry as to whether there has been state action, without which there is no violation of the Fourteenth Amendment.[23]

Once it is determined that state action is present, courts apply an elaborate "tiered" analysis that hinges upon the nature of the classification involved and the precision with which the government action has been focused. As Randall Kelso explained:

> [t]he first inquiry is what governmental interests support a statute's constitutionality. Depending upon the standard of review, the governmental interests must be legitimate or permissible; important, substantial, or significant; or compelling or overriding. Of course, the governmental interest may be impermissible or illegitimate, and thus not support the statute under any standard of review.[24]

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successful conclusion of the purposes above mentioned.

Id. *See also* Planned Parenthood v. Casey, 505 U.S. 833, 847, 851 (1992). In *Casey* the Court explained:

> [i]t is a promise of our Constitution that there is a realm of personal liberty which the government may not enter. . . . Our law affords constitutional protection to personal relations relating to marriage, procreation, contraception, family relationships, child rearing, and education. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

Id.

[23] This search is not as simple as it may seem. State action jurisprudence is virtually incoherent, with serious consequences beyond the scope of this article. *See generally* Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Private-Public Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203 (2001) (emphasizing that under the state action doctrine, public invasions of rights are constitutionally prohibited, while the Fourteenth Amendment affords no protection against private conduct).

[24] R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227 (2002).

Subsequent inquiries focus upon the methods employed to advance those governmental ends.[25] Under the rational basis test, if the government's interest is "legitimate" or "permissible," the law must be rationally related to its objective.[26] A second tier, commonly known as intermediate scrutiny, requires that where the interest is "important, substantial or significant" there must be a more substantial nexus, or connection, between the means and the end.[27] If a given law targets a suspect class or impinges upon a fundamental interest, the governmental interest must be "compelling" and a direct relationship must be demonstrated in accordance to "strict scrutiny" standards.[28] Where heightened scrutiny is applied, either intermediate or strict, a final level of analysis focuses upon whether the law in question has been narrowly tailored to achieve its ends—such that it avoids imposing a burden greater than necessary to the achievement of the desired ends.[29]

Most challenges to equal protection are decided under the "rational basis" test and it is an unusual law that fails to pass muster under this standard, which is highly deferential to the state.[30] However, certain classifications have been determined

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[25] *See generally id*.

[26] *Id*. at 227.

[27] *Id*.

[28] *Id*. at 228.

[29] *Id*. at 234.

[30] *Id*. at 230-32. One notable exception is *Romer v. Evans*, in which the Supreme Court struck down an amendment to the Colorado State Constitution, holding that animus toward a particular group of people—here, homosexuals—could never constitute a legitimate state purpose. 517 U.S. 620, 632 (1996). The Court noted:

> [Colorado's amendment] fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.

inherently suspect and require closer examination by the courts. Race, national origin and alienage will trigger strict scrutiny, as will laws burdening a fundamental right. The categories requiring strict scrutiny are those where members of the group share an immutable characteristic, have historically suffered pervasive discrimination, and where efforts to vindicate their rights in the political arena are unlikely to succeed. Categories that will be examined under "heightened," but not strict, scrutiny include, for example, gender and legitimacy.[31]

As the above, somewhat cursory, overview of equal protection analysis illustrates, the Supreme Court has fashioned a highly technical template to determine whether there has been a violation of the Fourteenth Amendment. There is substantial scholarship suggesting that the Court has not hesitated to manipulate this template to serve political or ideological ends.[32] It is certainly the case that equal protection jurisprudence has evolved without the benefit of any overarching, generally accepted theory of equality, negative or positive. It should not come as a surprise, therefore, that equal protection case law is anything but coherent, nor that political constituencies unschooled in the arcane language of legal analysis view much of it as unfair and decidedly unequal. Because the stability of a society depends in large measure upon the extent to which members of that society feel they are treated justly, this popular

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[31] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 681 (13th ed. 1997) (stating that gender, alienage and illegitimacy have evoked "varying, and often unstable" degrees of heightened scrutiny). This remains true even in contemporary society, although the latter seems quaint in these days of celebrity unwed motherhood. When one considers that illegitimacy will trigger heightened scrutiny while the Court has thus far been unwilling to accord even quasi-suspect status to sexual orientation, it would seem past time to revisit the tiers of current equal protection jurisprudence.

[32] *See* Stephen E. Gottlieb, *Tears for Tiers on the Rhenquist Court*, 4 U. PA. J. CONST. L. 350, 371 (2002) (arguing that the tiers of equal protection scrutiny are "a vessel into which the Justices pour their values"); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause*, *supra* note 24, at 226 (2002) (arguing that six or seven different levels of equal protection scrutiny are used, instead of the traditional three, to accommodate the Justices' beliefs).

resentment is no small matter. If the rules promulgated by the state are believed by large segments of the citizenry to differ substantially from their internalized notions of fair play and equal treatment, the consequences for legal legitimacy and voluntary compliance can be quite negative.

The disparity between popular understanding of equality and its legal or constitutional definition takes on added urgency as government becomes a more pervasive element of citizens' everyday experiences. In a society where the operations of the state reach increasingly into areas that were previously entirely private, the ways that state conducts business, uses its power to shape law and provide for the common welfare become critical elements in the formation of that society, and the degree to which that society values or devalues particular notions of equality.[33]

III. NEUTRALITY AND EQUALITY

It is impossible to understand the political passions aroused by affirmative action, charitable choice, or any other government action that specifically recognizes difference in order to achieve equality, without first understanding the importance Americans attach to governmental neutrality. As I have written elsewhere, the one thing most Americans will agree upon, at least publicly, is that our goal is the establishment of a society in which skin

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[33] Not only do contemporary laws and regulations address numerous areas of American life that were hitherto unregulated, government programs such as social security and welfare, and government agencies like the Small Business Administration, the United States Civil Rights Commission, the Equal Employment Opportunity Commission, and many others, are part of the landscape of even the average citizen. *See, e.g.*, D.J. GALLIGAN, ADMINISTRATIVE LAW xi (1992). Galligan posits that:

> [t]he rise of the welfare state and the regulation of social and economic activity have meant a substantial expansion of government in the middle and later years of the twentieth century. New and wide ranging legislative programmes have been developed; a host of new authorities have been created, and the lives of citizens have been much controlled and regulated.

Id.

color, gender and the like are officially irrelevant.[34] Most of us really do want a society where people are judged by their actions, talents and "the content of their characters," where the same, neutral rules apply to everyone in equal measure.[35]

If one believes that it is profoundly immoral to disadvantage someone on the basis of race, gender, sexual orientation or other aspects of one's fundamental identity, it seems morally and intellectually inconsistent to award advantage on that same basis. Furthermore, programs that single out particular groups for protection or other special treatment raise the specter of misuse of government power: how do we ensure that such programs are based upon a desire to remedy demonstrable inequalities and not on considerations of political or other advantage? If government can "bend the rules" for one group, what is to keep it from advantaging others who are less deserving? How shall we define desert for such purposes?

Of course, legal discourse discussing neutrality runs into many of the same problems encountered in discussions of equality. If African-Americans have been enslaved, stigmatized and segregated over the past three hundred years, how "neutral" is a system that removes legal barriers but does nothing to remedy the personal and structural effects of those experiences?

Because official neutrality, like equality, is highly valued but rarely defined, it is often argued that applying special rules to certain groups actually furthers more general neutrality.[36] As

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[34] SHEILA KENNEDY, WHAT'S A NICE REPUBLICAN GIRL LIKE ME DOING AT THE ACLU? 182-91 (1997) (postulating in part that the approach of traditional Republicanism to questions of equality was similar to that of civil libertarians in that both were suspicious of government intrusions).

[35] *Id*.

[36] *See, e.g.*, Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality and Free Speech Values: A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999). Brownstein criticizes neutrality theory on three bases. *Id*. at 246-47. First, he argues that neutrality theory is a misnomer because it encourages decisions that favor religious choices. *Id*. Second, by focusing solely on government interference with religion and liberty, it ignores other constitutional values affected by charitable choice laws. *Id*. at 247. Third, the theory ignores "the positive role that government should play in promoting

noted by Alan Brownstein, proponents of charitable choice use "neutrality theory" to justify a form of affirmative action for faith-based organizations.[37] Brownstein stated:

> The goal of neutrality theory, according to Esbeck, is to 'maximize [ ] religious liberty.' That objective is best accomplished by the minimization of the government's influence over personal choices concerning religious beliefs and practices. The goal is realized when government is neutral as to the religious choices of its citizens. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or as to equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of government action on personal religious choices. [38]

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religious liberty and equality." *Id*. *See also* Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. L. & REV. POL. 149, 198 (2000) (suggesting that neutrality theory is biased in favoring some religious organizations over others because it will invariably result in greater benefits to larger religious institutions with more resources and political influence).

[37] Brownstein, *supra* note 36, at 246-56. Brownstein advocates a holistic approach to scrutiny of charitable choice proposals. *Id*. at 249. First, he acknowledges the basis for some preferential treatment of religious organizations as "constitutionally justified, if not required." *Id*. Brownstein further recognizes that other decisions that may disadvantage religious organizations, such as access to state benefits, may be warranted as a result of that preferential treatment. *Id*. Brownstein notes that, "[i]f regulatory exemptions result in incentives favoring religion, the granting of exemptions creates an imbalance in the constitutional ledger that may help justify other decisions, creating countervailing incentives, that move the system closer to equilibrium." *Id*.

[38] *Id*. at 245 (quoting Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith Based Social Service Providers*, 46 EMORY L.J. 1, 27 (1997)) [hereinafter Esbeck, *Constitutional Case*]. Esbeck, Senior Counsel to the Deputy Attorney General, participated in drafting the charitable choice legislation and advocated before Congress for its passage. *See* Brownstein, *supra* note 36, at 234; Carl H. Esbeck, *Statement Before the United States House of Representatives Concerning Charitable Choice and Community Solutions Act*, 16 J. NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 568 (2002) [hereinafter Esbeck, *Concerning Charitable Choice*]. Esbeck argues that government should minimize its impact on religious organizations

Neutrality theory implements this integration by "distinguishing between burdens and benefits."[39] Under its operational rules, minimization of government influence is achieved by: "(1) allowing religious providers equal access to [state] benefits, and (2) allowing them *separate relief from regulatory burdens*."[40]

In other words, Esbeck defines "neutrality" in this context as special dispensation from rules of otherwise general application—as tilting the level playing field.[41] As Professor Brownstein notes, however, "granting an exemption from a general law confers substantial material benefits" much as if a particular religious group were excused from payment of an onerous, but generally applicable, tax.[42] Comparing such an approach to the neutrality theory underpinning free speech principles, Brownstein argues that by providing special regulatory exemptions for proponents of a religious point of view, but not for proponents of other, secular viewpoints, programs like charitable choice may distort the marketplace of ideas and run afoul of the First Amendment.[43]

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when determining eligibility criterion for federal funding of social service programs. *See* Esbeck, *Constitutional Case*, *supra* at 24.

[39] Esbeck, *Constitutional Case*, *supra* note 38, at 24. According to Esbeck, religious organizations should be allowed equal access to benefits, but should be granted separate relief from regulatory burdens. *Id*. He suggests that this "best of both worlds" approach is precisely what the First Amendment was designed to encompass. *Id*. at 27.

[40] *Id*. at 24 (emphasis added).

[41] *Id*. at 20-21. *See also* Brownstein, *supra* note 36, at 251 (critiquing Esbeck for ignoring that neutrality of government spending decisions is a sham).

[42] Brownstein, *supra* note 36, at 261.

[43] *Id*. at 271. Other commentators have made similar suggestions as to potential First Amendment concerns and infringements raised by charitable choice initiatives and legislation. *See, e.g.*, Michelle Dibadj, *The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*, 26 S. ILL. U. L.J. 529, 556 (2002) (arguing that Faith-Based Initiatives offer protection for religious organizations resulting in preferential treatment over non-religious organizations); Carmen M. Guerricagoitia, *Innovation Does Not Cure Constitutional Violation: Charitable Choice and the Establishment Clause*, 8 GEO. J. ON POVERTY L. & POL'Y 447, 472-73 (2001) (stating that charitable choice violates any of the three principles of the Establishment

IV. AFFIRMATIVE ACTION AND CHARITABLE CHOICE

Disputes over the nature of fundamental fairness and genuine equality have figured prominently in political debate and litigation over affirmative action programs. One element of that debate centers upon the appropriate level of analysis; that is, to what extent should courts take note of the history of black Americans as a group, and to what extent should judicial remedies address discrimination against discrete, identifiable individuals?[44] The American legal system is uncomfortable with the claims of so-called "identity politics." Unlike the legal systems in countries described by Kymlicka, ours has historically focused on *individual* rights and responsibilities, and Americans are profoundly uncomfortable when individual merit and behavior are not the primary focus of legal analysis.[45] For example, it has been noted that:

[t]he official American vision of equality has been one of

Clause, secular purpose, coercion and endorsement, and is therefore unconstitutional).

[44] *See generally* Sandra Levitsky, *Reasonably Accommodating Race: Lessons From the ADA For Targeted Affirmative Action*, 18 LAW & INEQ. 85, 111 (2000) (citing various views on affirmative action). Levitsky notes evidence that most Americans "do not approve of remedies to persistent inequality that grant rewards on the basis of group membership rather than individual merit" and that "[a] successful affirmative action measure will necessarily have to contain then, an individual based remedy." *Id.*

[45] *See generally* KYMLICKA, *supra* note 9, at 57 (attributing a negative attitude toward international protection of national minorities to the League of Nation's minority protection scheme, which facilitated the Nazi aggression in Czechoslovakia and Poland). Kymlicka notes that providing that separation of church and state as a resolution to the growing conflict between Catholics and Protestants in European countries in the sixteenth century resulted in an entrenchment of individual freedom of religion and oppression of religious minorities. *Id.* at 3. Additionally, he notes the uniqueness of Canadian federalism for its accommodation of both individual and "group-specific community rights." *Id.* at 26-27. He also asserts that the instability of the former Soviet Union arising from disputes over boundaries, local autonomy, language, and naturalization could have been resolved by restoring the rights of minority groups, rather than relying solely on general human rights principles. *Id.* at 5.

> a society in which group identity is legally irrelevant, where individual conduct is the only proper concern of government, and individual merit the only determinant of reward in the workplace. In such a system, individuals are rewarded or punished based upon their behavior and performance. Race, religion, sex, and similar markers of group affiliation are unrelated to one's legal or employment status, despite how meaningful those affiliations may be to the individual. The civil rights movement spoke so powerfully to the nation's conscience because the treatment of minorities was blatantly inconsistent with our stated commitment to equality and fundamental fairness.[46]

Both the original 1964 Civil Rights Act and subsequent affirmative action programs begin by recognizing that injustices done to black Americans as a group have harmed individual members of that group in ways courts can neither quantify nor fully identify, and that individualized remedies are inadequate.[47] If institutionalized racism has distorted the operation of economic and educational systems and diminished access and opportunities available to most African-Americans, the simple cessation of discrimination, without more, would leave many without the means to fully enter into American life.[48] To achieve genuine equality and overcome the burdens of past discrimination, affirmative action programs were based upon the belief that achievement of ultimate equality required government to "tilt"

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[46] Sheila S. Kennedy & Richard J. Magjucka, *Reducing Identity Politics in the Workplace: A Modest Proposal*, 17 MID. AM. J. BUS. 33 (2002).

[47] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (2000). *See also* Bernard Grofman, *Civil Rights, the Constitution, Common Decency, and Common Sense*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 226 (Bernard Grofman ed., 2000) (noting that injustices done to black Americans are not easily quantifiable and cannot always be remedied with a lawsuit); Rachel F. Moran, *Diversity Distance and the Delivery of Higher Education*, *in* A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW 297 (Timothy Davis et. al. eds., 2001) (noting that affirmative action laws grew out of the inability of the courts to provide remedies on a case by case basis).

[48] *Id.*

the playing field.[49]

The extent of the tilt—the degree to which racial identity should be a factor in employment or education decisions—has been the subject of considerable litigation.[50] Judicial opinions have been closely divided. Indeed, as Ashutosh Bhagwat noted, three of the most significant affirmative action cases, *Regents of the University of California v. Bakke*,[51] *Fullilove v. Klutznick*[52]

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[49] Academics, practitioners and politicians have offered multiple and various arguments in favor of affirmative action programs. For a description and assessment of the principal traditional arguments in support of affirmative action, *see generally* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 548, 556-67 (2002) (explaining that affirmative action initiatives are necessary for such reasons as that otherwise all but a few black students would attend non-selective colleges, the black-white gap in social conditions would increase, the economic status of black people would decrease and there would be socially disruptive reactions within black communities such as increases in crime).

[50] It should be noted here that a similar analysis could be made with respect to gender, although the application of affirmative action to gender-based initiatives has been less contentious. For a discussion of this phenomena, *see generally* Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 136-38 (1999) (explaining that state laws banning sex-conscious affirmative action directly conflict with the core constitutional principle of equal protection and showing how a proper determination may be made regarding what, if any, sex-conscious affirmative action initiatives are necessary and appropriate).

[51] 438 U.S. 265, 315 (1978) (striking down the University of California's affirmative action policies as requiring illegal racial quotas even though race *may* be used as a factor in admissions decisions). The university's affirmative action policy included a separate admissions committee for economically and/or educationally disadvantaged applicants and applicants who were of a racial minority. *Id*. Such candidates were exempted from the general rule that applicants with a grade point average of less than 2.5 were summarily rejected admission. *Id.*

[52] 448 U.S. 448, 490 (1980) (upholding the "minority business enterprise" provision of the Public Works Employment Act of 1977 because Congress had determined that extensive discrimination occurred within the construction industry and Congress was entitled to judicial deference). The provision required at least ten percent of federal funds granted for public work projects be used to procure services from business owned predominately by racial minorities. *Id.*

and *Wygand v. Jackson Board of Education*,[53] were decided by pluralities; the Supreme Court could not even muster a majority opinion.[54]

In *Adarand Constructors v. Pena*, the Rhenquist Court held that *all* race-conscious programs, state or federal, discriminatory or benign, are subject to strict scrutiny, thus clarifying an area of doctrinal uncertainty about when strict scrutiny was required.[55] As Bhagwat observes, however:

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[53] 476 U.S. 267, 296 (1986) (holding a public teachers' collective bargaining agreement invalid on the ground that there must be convincing evidence of prior discrimination before a public employer can use limited racial classifications to remedy that discrimination). The bargaining agreement protected minority teachers during layoffs and resulted in layoffs of white teachers who had more seniority than some retained black teachers. *Id.*

[54] *See* Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 262 (2002) (noting that the lack of a majority opinion in cases addressing the constitutionality of benign race-conscious governmental actions produced confusion regarding the circumstances under which governments were permitted to engage in race-conscious decision making and the applicable standard of constitutional review in to such cases). It should be noted here, however, that after declining to revisit the issue of affirmative action in the context of education for twenty-four years, the Supreme Court granted certiorari for Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617, 154 L. Ed. 2d 514 (2002). The Sixth Circuit reversed the district court's decision in favor of an unsuccessful law school applicant that the University of Michigan's admissions procedure violated the Equal Protection Clause by giving preference to minority applicants. *Id.* at 735. The Sixth Circuit found that the school had a compelling interest in achieving a diverse student body, and giving minority students a plus in the admissions process for the purposes of fostering diversity does not violate the Equal Protection Clause. *Id.* at 739, 747. The Supreme Court granted certiorari; the Court's decision was pending at the time of publication.

[55] 515 U.S. 200 (1995). In *Adarand*, a white subcontractor who was not awarded a portion of a federal highway project brought an action challenging the constitutionality of a federal program designed to provide highway contracts to disadvantaged business enterprises. *Id.* at 210. The subcontractor claimed that a benign racial classification, such as the one at issue, violated the Due Process Clause of the Fifth Amendment. *Id.* The Tenth Circuit affirmed summary judgment in favor of the government, but the Supreme Court remanded the case, finding that racial classifications should be examined under strict scrutiny. *Id.* at 227.

> an examination of recent decisions by the federal courts of appeals reveals widespread disagreement and confusion regarding the constitutionality of race-conscious official action. Despite facial unanimity regarding the applicable standard of review, courts differ widely in how they implement the strict scrutiny standard. In particular, there is an explicit and widening division among the courts of appeals regarding the kinds of governmental objectives that are sufficiently 'compelling' to justify race-based actions that disfavor the majority race, a division the Supreme Court has studiously avoided resolving.[56]

In *Hopwood v. Texas*, the Court of Appeals for the Fifth Circuit determined that diversity of the student body at a state university's law school was not sufficiently compelling to justify an admissions policy that gave preferential treatment to African-American and Hispanic applicants.[57] The court held that, absent a history of discrimination by the school that would justify remedial measures, the program could not survive equal protection scrutiny.[58]

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[56] Bhagwat, *supra* note 54, at 263.

[57] 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, a class of non-minority applicants rejected by a state university law school challenged the law school's affirmative action admissions program as a violation of the Equal Protection Clause of the Fourteenth Amendment. The school utilized a Texas Index (TI) number, a combination of undergraduate grade point average and Law School Aptitude Test score, as a basis for admission. *Id.* at 935. In addition, the school considered factors such as the strength of a student's undergraduate education, the difficulty of his or her major, significant trends in the student's grades and the qualities each applicant might bring to the law school class. *Id.* Applicants with a TI number that exceeded a certain threshold were presumptively admitted, while those below were denied. *Id.* at 935-36. The plaintiffs challenged the admission process, contending that the practice of having lower TI thresholds for black and Mexican applicants violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 938. The Fifth Circuit, finding for the plaintiff class, noted that "[t]he law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body." *Id.* at 934.

[58] *Id.* at 952. Specifically, the court noted that benign racial classifications

Similarly, the Circuit Court for the District of Columbia struck down Federal Communications Committee regulations intended to foster diversity in programming, declining to find any compelling government interest in promoting broadcast diversity.[59] On the other hand, the Seventh Circuit upheld preferential hiring of black officers to staff a boot camp in which the young offenders were predominantly African-American, accepting the state's argument that the presence of black staff members was essential to the program's success and thus a compelling state interest.[60] Additionally, the Ninth Circuit upheld

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must be strictly scrutinized, meaning that "the racial classification must serve a compelling state interest and be narrowly tailored to meet that goal." *Id.* at 941. The school's admission program did not serve a compelling state interest of remedying past discrimination because although Texas state actors had discriminated against minorities in the past, there was no evidence that the law school was an offending actor. *Id.* at 948-49. The court noted that "[b]ecause a state does not have a compelling state interest in remedying the present effects of past societal discrimination, however, we must examine the district court's legal determination that the relevant governmental entity is the system of education within the state as a whole." *Id.* at 949.

[59] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 355 (D.C. Cir. 1998). The Church challenged a FCC order finding that the Church failed to follow the equal employment opportunity guidelines for hiring minorities at the church's radio station. *Id.* at 346. Though other positions in the Church did not require Lutheran training, the radio positions did, thus considerably narrowing the pool of minority applicants. *Id.* The Church challenged the FCC's race-based employment program as a violation of equal protection provided by the Fifth Amendment. *Id.* at 345. The Court found that the FCC did not define "diverse programming" and did not establish how race brings diversity in programming and therefore, the interest it intended to safeguard was too abstract and did not meet the equal protection's compelling standard. *Id.* at 354-55.

[60] *See* Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996). Three white correctional officers who were denied a lieutenant position over a less qualified black applicant challenged the hiring as a violation of equal protection. *Id.* at 917. The boot camp, comprised of seventy percent black youths but only six percent black correction officers, was designed to rehabilitate young criminals as an alternative to prison, and the program's success depended on the inmates taking brutal orders from drill sergeants. *Id.* Using a strict scrutiny standard, the court found that expert evidence supported the state's argument that the correctional program would not succeed unless there were blacks in positions of authority to get the black inmates to respond

an admissions process for an elementary-level university laboratory school that made race and ethnicity a part of the admissions decision, agreeing with the university that research goals required a representative student body.[61] Thus, the interest in safeguarding those goals was sufficiently compelling for purposes of equal protection analysis.[62]

There are numerous additional cases in which federal circuit and district courts have had to determine whether a given interest was sufficiently "compelling" to meet the constitutional standard under the facts of the case.[63] Such determinations are necessarily

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to the drills, therefore, the hiring of the black applicant was a compelling interest. *Id.* at 920. This decision did not intend that the employees mirror the composition of the inmates, just that there is some representation. *Id.*

[61] Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999). The University Elementary School (UES) is a research laboratory that determines the needs of California's change in population through its own experiences with a diverse student body. *Id.* at 1062. To achieve useful results, UES employed a specific admissions process aimed at producing a student population that reflected the population of urban public schools, including consideration of factors such as race/ethnicity, gender and family income. *Id.* The parents of a student applicant who was not admitted to the school based on the race/ethnicity criteria challenged the constitutionality of the admissions process under the Equal Protection Clause of the Fourteenth Amendment, triggering the strict scrutiny standard requiring that the Regents show that race/ethnicity was a narrowly tailored means to serve a compelling state interest. *Id.* at 1063. The circuit court affirmed the district court's holding that "the defendants' interest in operating a research-oriented elementary school is compelling." *Id.* at 1064. The court also found that the use of race/ethnicity in the admissions process was "narrowly tailored to achieve the necessary laboratory environment." *Id.* at 1067.

[62] *Id.* at 1067. Specifically, the court noted that the California's benefit from the school's development of effective techniques for use in urban public schools was a compelling interest and the use of race/ethnicity in the school's admissions process was narrowly tailored to developing those techniques. *Id.* The court stated that "California has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population. . . . [The admissions process] produce[s] research results which can be used to improve the education of California's ethnically diverse urban public school population." *Id.*

[63] A catalogue of such cases and in-depth analysis of the jurisprudence surrounding "compelling interest" is beyond the scope of this article. For

ad hoc, and the resulting body of equal protection jurisprudence demonstrates—if demonstration were needed—the inherent difficulty of using technical legal formulae as a proxy for equality.[64]

Affirmative action programs geared to racial and gender disparities are not the only administrative or legislative efforts intended to correct prior discrimination. In 1996, Section 104 of the Personal Responsibility and Work Opportunity Act, popularly dubbed charitable choice, addressed a perceived government bias against contracting with religious social service providers.[65]

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thorough review and thoughtful commentary, *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 300 (1997). Bhagwat notes that in *Adarand Constructors v. Pena* the Supreme Court held that any discrimination predicated upon race, including that adopted under affirmative action, is to be analyzed under strict scrutiny and therefore obligates the government to present a compelling justification underlying such practice. *Id*. He also acknowledges that in *Hopwood v. Texas* the Court ruled that a law school admissions policy favoring minority applicants for admission was unconstitutional under the Equal Protection Clause because promoting student diversification "could never qualify as a 'compelling' government interest." *Id*. *See also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988) (discussing that the notion of "compelling interest lacks a strong textual foundation in the Constitution," which never explicitly mandates or defines the term; rather "some governmental interests can be justified on the basis of penumbras surrounding Constitutional rights" while others may be rationalized as "among the purposes for which particular governmental powers were authorized.").

[64] *See* Bhagwat, *supra* note 63, at 308-09 (noting that "[l]egislatures, not courts, have the best institutional ability to identify and assess the efficacy of means. When courts do second-guess legislative choices of this nature, they tend to be either proceeding ad hoc or disguising their true concerns."); Gottlieb, *supra* note 63, at 937. Gottlieb notes that "the Court's treatment of governmental interests has become largely intuitive, a kind of 'know it as I see it' approach. . . In turn, this kind of ad hoc approach is suspect as inconsistent, unprincipled, and lacking the impartiality we require from the Court." *Id*.

[65] 42 U.S.C. § 604a(a)(1)(A)-(B). This section provides "[a] State may administer and provide services . . . through contracts with charitable, religious, or private organizations; and provide beneficiaries of assistance under the programs . . . with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations." *Id*.

Proponents of greater involvement in the complex network of governmental social support by grass roots religious providers argued that Section 104 was necessary to "level the playing field," although religious providers like Catholic Charities, Lutheran Social Services, Jewish Family & Children's Services and the Salvation Army had long histories of partnering with government.[66] Supporters of the legislation argued that confusion over the application of First Amendment's Establishment Clause doctrine caused government officials to disfavor religious bidders in some cases and impose burdensome requirements on those with whom they did business in other cases.[67] Advocates of greater "faith-based" participation in welfare programs encouraged states to reach out to such organizations and encourage their participation.[68] Some states, like Massachusetts, took the position that their playing field was already level and did

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[66] *See* Sheila Kennedy & Wolfgang Bielefeld, *Government Shekels Without Government Shackles? The Administrative Challenges of Charitable Choice*, 62 PUB. ADMIN. REV. 4 (2002).

[67] *See, e.g.*, John J. Diulio Jr., *The New Civil Rights Struggle*, WALL ST. J., June 20, 2002, at A16. Diulio, a professor at University of Pennsylvania, Senior Fellow at the Manhattan Institute and former director of the White House Office of Faith-Based and Community Initiatives, noted that "[o]pponents of President Bush's Faith-Based Initiative [have] rushed to claim that government funding of faith-based organizations providing social welfare services violates the establishment clause of the First Amendment." *Id.* He further argued, "in their purported fidelity to Constitutional values, they have overlooked the implication of an equally important amendment, the 14th." *Id. See also* Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y 265, 267 (2001) (stating that some faith-based advocates believe there should be legislation to level the playing field between religious and secular charitable organizations because as the law stands now religious programs are not treated equally).

[68] *See* Amy L. Sherman, *A Report on Charitable Choice Implementation in 15 States*, (Hudson Institute/Faith in Communities, Charlottesville, VA), 2002, *available at* http://www.hudsonfaithincommunities.org/articles/Final ExecSummBroch.pdf. *See also* Esbeck, *Constitutional Case, supra* note 38, at 26; Solomon & Vlissides, *Faith-Based Charities and the Quest*, *supra* note 67, at 267.

little to specifically implement charitable choice.[69] Others, like Indiana, instituted extensive, and relatively expensive, programs designed to acquaint small religious providers with opportunities for government collaborations.[70] These efforts to include faith-based organizations (FBOs) have raised many of the same questions as traditional affirmative action programs.

Perhaps the thorniest of these issues involves application of bid qualifications: shall the same criteria be applied to FBOs as are applied to secular providers? In an article published in *Commentary*, Leslie Lenkowsky argued for "elimination of arbitrary rules that allow, for example, the use of professional therapy but not pastoral counseling."[71] As with affirmative action, equal treatment is in the eye of the beholder: if the state insists that a responsive bidder employ licensed social workers or credentialed drug therapists, does that requirement discriminate against FBOs whose programs use pastors rather than social workers or trained counselors? On the other hand, if the state relaxes certification requirements for FBOs, does this amount to an unconstitutional preference for religious providers? What is the difference between "equal treatment" and "special rights"?[72]

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[69] *See* Solomon & Vlissides, *Faith-Based Charities and the Quest*, *supra* note 67, at 281, *citing* THE CENTER FOR PUBLIC JUSTICE, CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD (Oct. 5, 2000) (reporting that in addition to Massachusetts, the District of Columbia, Mississippi, and Vermont claim that charitable choice is an option they can ignore), *available at* http://downloads.weblogger.com/gems/cpj/50StateRpt.pdf.

[70] *See* Laureen Fagan, *Indiana Leads in Faith-based Initiatives*, S. BEND TRIB., June 27, 2002.

[71] Leslie Lenkowsky, *Funding the Faithful: Why Bush is Right*, 111 COMMENT. 19, 23 (2001) (rebutting the various arguments that have been advanced in opposition to President Bush's plans for government support of faith-based organizations and offering solutions to alleviate some of the concerns raised).

[72] In testimony before Senate Committee on the Judiciary, John L. Avery of the National Association of Alcoholism and Drug Abuse Counselors (NAADAC) focused upon precisely this issue, saying that "NAADAC's concern is not with who provides care, but rather by what clinical standards that care is provided." *Faith Based Solutions: What are the Legal Issues?: Hearing on S.304 Before the Senate Committee on the Judiciary*, 107th Cong. (2001) (statement of John L. Avery, Director of Government Relations,

Similarly, provisions of Section 104 that allow FBOs to discriminate on the basis of religion in employment have been widely attacked, by secular and religious organizations alike, as special accommodation unwarranted by public policy.[73] Defenders of the provisions respond that a failure to recognize and accommodate the religious nature of FBOs would amount to a special burden on faith and would be discriminatory.[74]

Lost in the arguments about fair play and equal treatment are cautionary notes sounded by social science researchers who warn that competition between groups is more polarizing than competition between individuals:

> [t]aking more for one's group seems to be more legitimate than taking more for oneself, even though one benefits in both cases. Implicit in the act of allocating to one's group

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NAADAC), *available at* http://judiciary.senate.gov/oldsite/te060601jla.htm. As I have written elsewhere, "[i]f FBOs believe insistence on evidence of "clinical competency" is discriminatory, and NAADAC believes that failure to require such evidence is malpractice, it is no wonder that many public administrators feel caught in an untenable situation." Kennedy & Bielefeld, *supra* note 66, at 7.

[73] Both secular and non-secular groups oppose charitable choice because of fear of discrimination in hiring and provision of services. For example, The Interfaith Alliance has taken a position against charitable choice legislation, in part because of the potential for "discrimination toward members of minority faiths and ethnic traditions who are in need of assistance" and "the potential for employment discrimination against non-believers or members of religions differing from that of the provider." *Position of the Interfaith Alliance on Charitable Choice Legislation*, The Interfaith Alliance, *available at* www.interfaithalliance.org/Initiatives/ccpos.html (last visited Feb. 4, 2003). The American Civil Liberties Union has also issued statements against faith-based initiatives. *See Latest Government Funding of Controversial Religious Programs One More Reason Not to Pass Faith-Based Plan Without Protections*, American Civil Liberties Union, Oct. 9, 2002, (noting that "[t]he Bush Administration seems determined to ignore Congress and continues to argue that faith-based organizations should have the right to discriminate in hiring against people based on their religion in publicly funded programs."), *available at* www.aclu.org/news/NewsPrint.cfm?ID=10854&c=37.

[74] *See* Paul Taylor, *The Costs of Denying Religious Organizations The Right to Staff On a Religious Basis When They Join Federal Social Service Efforts*, 12 GEO. MASON U. CIV. RTS. L.J. 159, 169-74 (2002) (defending discrimination on the basis of religion in hiring practices).

> is the justification that other people will benefit: there exists the possibility that taking more for one's group may reflect the individual's genuine concern with the welfare of fellow group members and not just greedy behavior. . .The problem arises when one's opponent in the negotiation is also representing his/her group.[75]

Whatever one's position on the merits of particular affirmative action programs or versions of charitable choice, the controversy each has aroused is indisputable.[76] No matter what rules the courts ultimately impose, some will feel betrayed—and unequal. Further restrict or eliminate affirmative action, and those who have borne the brunt of America's racist history will say that they do not have equal access to the playing field. Confirm those same programs and others will complain that special efforts to redress past injuries that benefit an entire group are too broad and inherently unequal. Tell religious organizations that they must meet the same standards as secular service providers, and they will argue that such a position fails to take into account their essential nature and is discriminatory. Make special rules for such organizations and their secular competitors will protest that the playing field has been unfairly tilted. Where you stand, as the saying goes, depends upon where you sit.

V. IMPLICATIONS FOR PUBLIC ADMINISTRATION

What are the implications for government legitimacy and the

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[75] Kristina A. Diekmann, Ann E. Tenbrunsel & Max H. Bazerman, *Fairness, Justification, and Dispute Resolution*, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY 196 (Sandra E. Gleason ed., 1997) (arguing that although fairness constrains decision-making and negotiation, a person will nevertheless maximize his or her personal outcome if it can be justified and that the presence of a group may make the self-serving motivation less obvious, allowing for even more self-interested behavior).

[76] Regardless of one's personal opinion on the relative strengths or ills of affirmative action and charitable choice initiatives, the one assertion upon which all groups can agree is that all groups do not agree. *See generally supra* notes 43, 49, 72, 73 (setting forth various argument both for and against the programs).

rule of law if significant constituencies experience government programs as biased or unfair? A few come to mind. First, democratic deliberation becomes problematic. We have already seen how proponents and opponents of affirmative action and charitable choice "talk past each other." In a very real sense, they are inhabitants of different realities. But democracies require common ground to function, and some agreement on the nature of equality would seem to be a precondition for finding that common ground. Second, compromise becomes difficult, if not impossible. If different people see different realities, how can we formulate policies that all will consider to be fair and equal? Third, social stability is jeopardized. If government is to be seen as legitimate, it must live up to its own principles. In America, equality is a—perhaps *the*—foundational precept. When a significant segment of our society believes that it is being marginalized, devalued or treated in a discriminatory manner, or that others are being unfairly privileged, there is a real potential for social upheaval.

What, if anything, can public administrators—those on the front lines—do to foster public perceptions of fair play by the state? While it falls to policymakers to fashion laws that attempt to bridge very different perceptions of equal treatment, administrators are not without tools of their own. At a minimum, those charged with administering the laws must take care to do so in as evenhanded a fashion as possible. Where rules prescribe different treatment for members of different groups, administrators must clarify that they are acting pursuant to the law, and not on the basis of personal bias. Whenever possible, they should explain the purpose of laws that may be perceived as favoring some groups over others.

These actions, of course, are all aspects of the professionalism that we expect from public administrators.[77] But

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[77] *See generally* Anthony M. Bertelli & Laurence E. Lynn, Jr., *A Precept of Managerial Responsibility: Securing Collective Justice In Institutional Reform Litigation*, 29 FORDHAM URB. L.J. 317 (2001). The authors note that "[professionalism] allows a cadre of professionals—public administrators of human service agencies—to interpret the laws that govern them, and to work towards collective justice—providing adequate services to most beneficiaries at

administrators can and should do more: they should give policymakers the benefit of their street level experiences. If programs are not working, no matter how well intentioned, they need to be modified. If misconceptions are rampant, those must be addressed through public education. Most importantly, public administrators need to remind citizens and policymakers alike of the importance of maintaining the principle of government neutrality toward those who are similarly situated. It is one thing to engage in outreach to identify those who may be wary of working with government or build to help potential bidders meet a legitimate professional standard. It is quite another to relax the standard. The first path adds substance to public resources, the second sows distrust and discord.

CONCLUSION

Eventually, if America manages to eradicate the vestiges of slavery and segregation, the nation may no longer need affirmative action. Even ardent proponents of charitable choice have suggested that replacing direct contracts with vouchers allowing program recipients to choose their own social service provider might ease both the First Amendment and fairness issues, although such policies raise substantial concerns about the marketization of public goods. But the need to define the nature of equality and equal treatment, to sketch the landscape of truly level playing field and provide clear guideposts for the public officials who must administer government programs, will remain—a daunting but absolutely essential task of liberal democracy.

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the expense of the constitutional rights of a few." *Id.* at 332.