

Who Are Equals?

“Equals ought to have equality. But there still remains a question: equality or inequality of what?”

Aristotle, *Politics*, Bk. III, Chap. 12

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The Fourteenth Amendment to the U.S. Constitution reads in part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” What is the point of this passage? What would a law be like that did not apply equally to those to whom it applied at all? Imagine the law: “All citizens eighteen years of age and over shall have the right to vote.” Under it, the seventeen-year-old and the nineteen-year-old are treated very differently; but all nineteen-year-old citizens are treated in one way (if the law is obeyed) and all seventeen-year-old citizens in another—neither group is denied the equal protection of the law. Suppose, when I went to register to vote, the county clerk responded to my request with an embarrassed smile, saying: “Ah yes, Mr. Cohen, but, you see, you’re Jewish, so—I’m afraid—we can’t register you.” Well—we’d make short work of him.

Now suppose the law were different. Suppose it read: “All citizens eighteen years of age and over—except Jews—shall have the right to vote.” The clerk will not smile when he is handed my application in this case. “I’m sorry, Mr. Cohen,” one can hear the mechanical voice of that bureaucrat, “but the law prescribes that Jews may not vote.” I am stunned as I read the printed act of Congress he puts before me; but there it is: non-Jews (over eighteen) vote, Jews don’t. Suppose the clerk is efficient and incorruptible—all Jews are treated alike with utmost scrupulosity. Then it would appear that all were treated

justly under that law, receiving its equal protection.

Surely we never supposed that the equal protection of the law entails identical treatment for everyone. We know that would be absurd. Employers have legal obligations that employees have not. Students have legal rights (and duties) that teachers have not. Rich people must pay taxes that poor people need not. Our legal codes are replete with distinctions—hundreds and thousands of distinctions determining the applicability of the laws. I may be angered by a distinction drawn—yet I will reluctantly agree that if that is the law, and since I am in a specific category, it is fair for me to be obliged under that law, as others are who are in the same class.

We argue about these distinctions—but in three very different ways. We may argue (lawyers are constantly arguing) about who are and who are not in the same class. When you defend a contested deduction on your income tax against the IRS, or I insist that as a college professor I am not a “public official” in the sense that would require public disclosure of my finances, we are disputing over the application of the legal categories drawn, not over the categories themselves.

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We may argue—as students of political science, or as legislators—that it is wise (or unwise) to introduce certain categorial distinctions. For example, should the law distinguish between large and small entrepreneurs in the application of industrial safety regulations? Should the law distinguish between different categories of employment in establishing minimum wage requirements? (And so on.)

We may argue about whether categories of a particular kind should be permitted in the law at all. Some legislation duly enacted, or administrative regulations duly authorized, may distinguish categories of persons we think ought not be distinguished. Some discriminations are worse than unwise; they are unjust.

Return now to the Fourteenth Amendment and its “equal protection clause.” The prohibition in that clause bears chiefly on arguments of the third sort. It does not bar legislatures from categorizing, but is interpreted so as to require categories used in laws to have a rational foundation. Some categorial distinctions will by that clause be prohibited altogether. Under Hitler’s Nuremberg Laws all Jews were treated alike, but justice in America does not permit that sort of equal protection. The central thrust of the Fourteenth Amendment was, and is, to forbid the use—in law, or by administrators under color of law—of categories intrinsically unfair.

But which categories are unfair? The Amendment itself was clearly designed to insure that blacks, former slaves, were to be as free as whites. The laws were to protect all races equally. Now, more than a century later, seeking to give redress for long-standing racial injustice, we encounter the problem of fairness from the other side. May we, in the honest effort to achieve real equality among the races, distinguish between black and white (and yellow and brown, etc.) giving preference to some over others? Does our commitment to the equal protection of the laws permit it?

When the courts, and especially the United States Supreme Court, speak to such questions, they decide not simply what the U.S. Constitution requires, but what (in their view) justice requires. High courts must frame principles to guide the resolution of disputes between real parties, in the case before them and in future cases. Judicial reasoning is often profoundly moral reasoning. Actual cases, faced and decided, are the grist upon which the mill of American justice grinds. We do well to philosophize

with the courts, and as they do, in living contexts.

The context now forcing a deeper understanding of “the equal protection of the laws” is that of racially preferential admissions to law schools and medical schools. Some call the problem that of “reverse discrimination,” others “benign quotas.” Let the name not prejudice the issue. What is *not* before us, or the courts, is the appropriateness of affirmative action. None of the participants in this dispute question the

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pressing need to take vigorous action, affirmative action, to correct long-standing racial injustice. What is at issue is *what* we may justly do to advance this objective—what categories we may (or must not) use, how we may (or must not) apply them.

The case of *The Regents of the University of California v. Allan Bakke*, now before the Supreme Court of the United States, puts this problem in sharp focus. Allan Bakke was twice rejected (in 1973 and 1974) by the medical school of the University of California at Davis. His undergraduate performance was fine, his test scores excellent, his character and interview performance admirable; he ranked very high among the more than 3,000 applicants for 100 seats. But 16 of those seats were reserved for minority-group applicants, who faced admission standards deliberately and markedly lower than did majority-group students like Bakke. The University of California (like many of its sister universities) was determined to enroll a representative proportion of blacks and members of other minority groups in its medical school—however distasteful the double standard believed necessary to accomplish that end.

The Davis medical school established a special committee to fill the reserved slots, and the committee evaluated the minority-group candidates, who competed only against one another. Officially, any disadvantaged person could seek admission under the special program; in fact, all persons admitted under that program, from its

inception in 1969, were minority-group members. Officially, that committee reported to the admissions committee; in fact, the applicants chosen by the special committee were invariably admitted. In each of the years Bakke was rejected, some minority-group admittees had grade-point averages so low (2.11 in 1973, 2.21 in 1974) that, if they had been white, they would have been summarily rejected.

The University of California does not deny that the overall ranking of many of the minority-group applicants who were accepted—after interviews, and with character, interests, test scores, and averages all considered—was substantially below that of many majority applicants who were rejected. Bakke contends that had his skin been of a darker color he would certainly have been admitted. He argues that, refused admission solely because of his race, he was denied “the equal protection of the laws” guaranteed him by the Fourteenth Amendment to the U.S. Constitution.

All sides in this litigation agree that professional schools may properly use, in screening for admission, a host of factors other than test-scores and grade-point averages: dedication or dexterity, compassion or professional aims. All sides agree that persons unfairly injured are entitled to full, appropriate, and timely redress. What remains at issue in this case is one thing only: *preference by race*.

***“If redress is due, let us give it
and give it fully.”***

The advocates of racially preferential systems reason as follows: Equal protection of the laws requires different treatment for people in different circumstances. Minority-group members are in very special circumstances. Preference by race is here a reasonable instrument to achieve, for members of minority groups, objectives both just and compelling.

Such preference (not denied by the medical school) is thus defended by two central arguments. The first is grounded in alleged demands of justice: Only by deliberately preferring minority applicants can we give adequate compensation for generations of oppressive maltreatment. The second is grounded in the al-

leged needs of society: If we do not continue to give deliberate racial preference, our medical and law schools will again become what they long were—white enclaves. *Compensation* is the heart of the first argument, *integration* of the second. Both arguments are profoundly mistaken.

Redress is rightly given for injury—not for being black or brown. Members of minority groups have been cruelly damaged, but whatever damage is rightly compensated for (cultural or economic deprivation, inferior schooling, or other), *any* applicant so unfairly damaged is fully entitled to the same special consideration, regardless of his race or ethnic group. The prohibition of special favor by race—any race—is the central thrust of a constitutional guarantee that all will receive the protection of the laws equally. Classification by race for the distribution of goods or opportunities is intrinsically odious, always invidious, and morally impermissible, no matter how laudable the goals in view.

What of the school-desegregation cases in which the U.S. Supreme Court has approved the use of racial categories to insure racial integration? Don't these show that racial preference is permissible if the aim is good? Certainly not. In these cases attention to race was allowed in order to ascertain whether school boards that had been discriminating wrongfully by race had really ceased to do so. Racial identification was there permitted—but only to insure that all students, of whatever race, received absolutely equal treatment. The distinction between that use of racial counting, and the use of racial categories to reintroduce special preference, is sharp and profound.

Can the University of California be defended on the ground that its system of racial preference is not injurious but benign? No. Results, not intentions, determine benignity. All racial quotas have injurious results and therefore cannot be benign. When the goods being distributed are in short supply, and some get more of those goods because of their race, then others get less because of their race. There is no escaping that cold logic. Bakke and others like him are seriously penalized for no other reason than their race. Such a system, as even the Washington State Supreme Court in the *DeFunis* case agreed, “is certainly not benign with respect to non-minority students who are displaced by it.”

All this says not an iota against compensation. If redress is due, let us give it, and give it fully. If compensation is to be offered

through special favor in professional-school admissions—a questionable mode of payment but a possible one—then let us be certain we look in every case to the injury for which we give redress, and not to the race of the applicant.

If the requirements of justice cannot support racial preference, perhaps the society's interest in integration can. The Supreme Court of California, while upholding Bakke's claim, allowed, *arguendo*, that integration is a compelling interest. "Integration" has different meanings, of course. That ambiguity invites the university's most appealing complaint. "You have told us to integrate," the university has said, in effect, "and when we devise admissions systems designed to do just that, you tell us we may not use racial preference. But the problem is a racial one. We cannot achieve racial balance unless we give special preference to racial minorities. Do not ask the impossible of us. And do not ask us to do in indirect ways what you will not permit us to do directly."

That argument by the University of California is not sound. A considered reply to it (here much compressed) is fourfold.

First, some of the ends in view are important, some are questionable. That the entire package is "compelling" is very doubtful.

(a) Better medical and legal services for minorities is a pressing need, but it is far from obvious that minority professionals reared in city slums will return to practice there. And it is patently unfair to burden them with this restrictive expectation. If the intention to give service to particular segments of the community is to be a consideration in admission to professional school, let that be known, and let all persons, of whatever race, make their case for establishing such intentions, if they claim them.

(b) Some defend preferential admission on the ground that many persons seeking professional help will be "more comfortable" with a lawyer or a doctor of their own race or religion. Possibly true. But the argument based upon this interest, now to serve as a justification of institutionalized racial preference, has long been used to exclude blacks from white hospitals and Jews from gentile law firms. It is an argument in which bigots of every color will take satisfaction.

(c) Diversity of cultural background in the professional schools, and in the professions themselves, will increase the richness of education and of service, and will provide role-models

for youngsters from cultural groups long oppressed. These are genuine and worthy interests, but are they compelling in the requisite sense? What *is* compelling is integration in the classical sense: the removal of every obstruction to genuinely equal opportunity, the elimination of every racial qualification. Integration in the now fashionable sense—entailing some *de facto* mix of races approaching proportionality—may be desirable in some contexts and undesirable in others, but is in any case certainly not compelling.

Second, the Supreme Court of California emphasized that no party has shown preference by race in admissions (which all agree is objectionable) to be necessary to achieve appropriate social goals. Even if arbitrary numerical ratios are established as the only acceptable standard of success, that cannot be shown. But from whence comes that standard? The entire history of our nation has been one of ethnic layering, in which different interests and activities tend to be pursued by different cultural and ethnic groups. That is not unwholesome. The effort to homogenize society in spite of this natural tendency is already proving to be divisive, frustrating, and unworkable. Substantial increases of diversity in some professions are reasonably sought. With non-preferential forms of affirmative action pursued vigorously, and admissions criteria enlarged and enriched and applied evenhandedly to all applicants, diversity and *de facto* integration may be much advanced. Still more might be accomplished if various compensatory schemes were introduced, but they must be applied in a racially neutral way. Some majority applicants who deserve compensatory preference will also benefit under such programs, but this is entirely fitting.

There is nothing crafty about this reply. The claim that these are but devious ways to reach the same ends is simply false, and betrays an inclination to introduce racial preference somehow, "through the back door" if necessary. That would be ugly. There is no reason to fear or to be ashamed of an honest admissions program, or of an honest compensatory program, honestly applied. The racial count that results may not be the same as that when racial preference is used, but perhaps it ought not be. Even if the count were the same, the individuals (admitted using principles, not race) would be different, and that makes all the difference. It is certain that substantial progress in diversifying

and integrating professional school classes can be achieved without racial preference.

Third, we must see that granting favor on the basis of race alone is a nasty business, however honorable the goal. The moral issue comes in classic form: Terribly pressing objectives (integrated professions, adequate legal and medical service for members of minority groups) appear to require impermissible means. Might we not wink at the Constitution, this once, in view of the importance and decency of our objectives?

“Official favoritism by race or national origin is poison in society.”

Such winking is precisely the hope of every party having aims that are, to that party's profound conviction, of absolutely overriding importance. Constitutional short-cuts have been and will be urged for the sake of national security (e.g., the internment of Japanese-Americans during World War II), for the enforcement of criminal laws (e.g., admission of illegally seized evidence), and in other spheres. But wink we must not! Each party in its turn must abide the restrictions of constitutional process. The single most important feature of a constitution, if it is more than paper, is its preclusion of unjust means. Hence the preciousness and power of the guarantee of equality before the law. When good process and laudable objectives conflict, long experience teaches the priority of process. Means that are corrupt will infect the result and (with societies as with individuals) will corrupt the user in the end. So it is with wire-tapping, with censorship, and with every short-cut taken knowingly at the expense of the rights of individuals. So it is also with racial preference, even when well-intended.

The fourth response to the integration argument is as compelling as the first three, but adds bitter irony. Hating the taste of racial preference in admissions, the advocates of these programs swallow them only because of a conviction that they are so good for us. Bitter but (they

think) medicinal. In this, too, they are mistaken. Racial preference is good for nobody, black or white, majority or minority. It will not integrate the races but will *disintegrate* them, forcing attention to race, creating anxiety and agitation about race in all the wrong contexts, exciting envy, ill-will, and widespread resentment of unfair penalties and undeserved rewards.

It will not serve the minority well if it becomes clear that minority-group students admitted preferentially are less qualified to pursue their studies and to practice their professions. A black psychiatrist at Case Western Reserve University Hospital, Dr. Charles DeLeon, told the *New York Times* in 1974: “I wouldn't hit a dog with some of the minority students I've seen, and I have an idea that you honkies are taking in these dummies so that eight years from now you'll be able to turn around and say, 'Look how bad they all turned out.'”

Above all, racial preference clouds the accomplishments and undermines the reputations of those superbly qualified minority-group professionals who neither need nor get special favor. When, in the minds of everyone, black and white, a physician's dark skin is automatically linked to charity and payoff, who among members of minority groups is served? It is a cruel result.

Racial preference is dynamite. Many who play with such preference are now blinded by honest zeal and hide from themselves the explosions in the sequel. Justice John Marshall Harlan, dissenting in 1896 from the Supreme Court ruling that established the “separate but equal” doctrine, insisted that the U.S. Constitution was and must be color-blind. Some would have the law be color-conscious now so that it can indeed become color-blind in the future. That cannot be. One is reminded of political leaders who “suspend” constitutions to “build a firmer base for democracy.” Once established as constitutionally acceptable grounds for discriminatory distribution, racial categories will wax, not wane, in importance. No prescription for racial disharmony can be surer of success.

Official favoritism by race or national origin is poison in society. In American society, built of manifold racial and ethnic layers, it is deadly poison. How gravely mistaken it will be to take new doses of the same stuff, while still suffering the pains of recovery from the old.