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THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY

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Groups, Equality, and the Promise of Democratic Politics

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Christopher Kutz

Abstract

Owen Fiss' "Groups and the Equal Protection Clause" appeared at a time when the possibilities of progress seemed boundless in overcoming U.S. racial divisions. The courts had firmly taken on the role of social reformers, redistributing status and privilege in the ways so incisively limned by his article. Since then, however, movement towards residential and educational integration has stalled if not actually retreated, a significant black-white wage gap remains, and affirmative action programs in employment and education have become widely disfavored in both judicial and popular opinion. What happened? I argue that the blame for the changing winds lies, partly and ironically, with the very conception of equal protection that Fiss promotes. His essentially remedial understanding of equal protection, according to which courts ought to block state action that perpetuates the subordination of blacks and other disadvantaged groups, and to permit or even require state action undoing the subordination, both presupposes and promotes a politics that replaces political agency with a struggle for spoils before a superior authority. What we need instead, I suggest, is an interpretation of equal protection that can support a reconstructive and enduring democratic politics. I call this understanding the "equal political agency" interpretation, and describe its implications for race-based social policy.

When Owen Fiss's "Groups and the Equal Protection Clause"¹ appeared in 1976, laying out with its author's characteristic incisiveness its picture of constitutionalized social reform, the world looked very different – not so much in its social realities as in its possible futures. By 1976 the civil rights movement had broken the back of Jim Crow, especially in the areas of educational, residential, and employment discrimination, Fiss' focus in the piece. Black children were enormously more likely to be attending a majority white school in 1976 than in 1954; residential segregation had begun a steep decline, following the 1968 Fair Housing Act; and black-white wage gap was narrowing substantially, particularly in the South, following the 1964 Civil Rights Act.² All trajectories were happily upward, and thus Fiss wrote for a judicial as well as an academic audience that (for the most part) happily envisioned itself in the role of social engineers, redressing centuries of white supremacy systemically, across every social dimension. The nascent counter-revolutionaries he addressed, those who insisted that the Constitution protected only individual rights, and could not be used to affect the status of groups, were only just gathering force, building their ranks within the Nixon administration.

Thus, when it appeared, Fiss seemed to be writing as the Civil Rights revolution gathered steam, consolidating political victories through law. But, as it happens, his article sketched the view from the high-water mark of that revolution, a revolution slowed, halted and even reversed by conservative counter-revolutionary efforts. The residential story is reasonably optimistic, albeit as much a product of market choice as political intervention: after the sharp, probably legally-induced drop in segregation in the 1970's, residential segregation has continued to decline in most metropolitan areas, although significant declines were recorded almost exclusively in high-growth sunbelt areas; the Northeast and Midwest particularly showed little change.³

In education, the Reagan Justice Department's policy of stopping desegregation assistance, coupled with the Supreme Court's shift in the 1990's to treat desegregation as a "temporary" remedy, thus withdrawing judicial supervision, resulted in an actual increase in black segregation in the South: the 32.7% of Southern black children in 1998 attending a majority white school nearly matches the 1970 level of 33.1%, down substantially from the 1988 peak of 43.5% and even from the 37.6% of 1976.⁴ Meanwhile, in the North white flight to the suburbs and private schools accelerated, and current white enrollments in central city schools hover in the low percentages (e.g., 15.5% for New York, 10.1% for Chicago).⁵

¹ Owen M. Fiss, "Groups and the Equal Protection Clause," 5 *Philosophy and Public Affairs* 107-77 (1976) [cited hereafter as "Fiss"].

² Gary Orfield, "Schools more separate: Consequences of a decade of resegregation," Harvard Civil Rights Project (July, 2001), 29, available at www.law.harvard.edu/groups/civilrights/publications/resegregation01/schoolsseparate.pdf; Edward L. Glaeser and Jacob L. Vigdor, "Racial segregation in the 2000 Census: Promising News," The Brookings Institution (April, 2001), 4, available at www.brook.edu/dybdocroot/es/urban/census/glaeser.pdf; and John J. Donohue III and James J. Heckman, "Continuous versus episodic change: The impact of civil rights policy on the economic status of blacks," 29 *J. Econ. Lit.* 1603-43, 1604 (1991).

³ Glaeser and Vigdor, 9-10.

⁴ Orfield, 4, 29.

⁵ Orfield, 25-26. There are two important hopeful signs: the black-white gap in average years of schooling has been closing quickly and constantly since the 1970's, as has the gap in standardized test scores. Orlando Patterson, *The Ordeal of Integration* (Washington, D.C.: Civitas, 1997), 19-20. On the other hand the gap is still significant enough that the most selective universities must, in effect, enhance black applicants' GPAs and SATs for them to compete with whites and Asians for enrollment spaces. William G. Bowen and Derek Bok, *The Shape of the River* (Princeton: Princeton University Press, 1998), 18-39.

Progress and regress in employment is the hardest to quantify, since changing litigation rates reflect many things besides actual employment practices. After the initial, apparently legally-induced surge in black wages from 1965-75, the wage gap between blacks and whites held roughly constant for a year, then widened again during the 1980's, and during the 1990's boom the gap again began to narrow to its 1970's dimensions.⁶ While some of that gap is clearly attributable to a racially divided and disparate school system, statistical studies indicate that a significant portion of the gap cannot be explained by differences in labor productivity or training but only by racial discrimination; this conclusion is further secured by employment audits that continue to reflect very different interview and hiring rates for similarly credentialed but differently skin-toned testers.⁷ Affirmative action programs in employment nonetheless are met by great public skepticism, by blacks and whites alike (albeit divided by sex): according to Orlando Patterson's calculations drawn from a 1994 survey, such programs are "strongly opposed" by 66% of white men and opposed overall by 90% of white men; the figures for black men are, respectively 26% and 24%, with only 31% strongly in favor. Even among women, more sympathetic to such programs, opposition is voiced by 89% of white women (61% strongly) and 40% of black women (20% strongly).⁸ At the same time, voluntary affirmative action programs at elite private colleges and graduate schools are deeply entrenched, and seem to have had a powerful effect in breaking color barriers in both particular firms and professional fields of employment, particularly law and medicine.⁹

The policy and jurisprudential horizon is similarly clouded. The Clinton administration's declared policy of "mending, not ending" race-conscious affirmative action programs has been matched in its murkiness by the Bush administration's ambivalence on the subject, manifest in candidate Bush's distinction between disfavored "quotas" and favored "affirmative access." The hardest blow, however, to the happier world envisioned by Fiss, and to the central thesis of his article, was struck by the Supreme Court in 1995.¹⁰ *Adarand v. Peña*, which clarified 1989's *Richmond v. Croson*,¹¹ made clear how very narrow a window was open for race-based ameliorative programs, laid out the logic of the new equal protection jurisprudence starkly: "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited,"—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."¹²

⁶ John J. Donohue, "Discrimination in Employment," *The New Palgrave*. MS. 23-25; Alan B. Krueger, "Equality in hiring remains the key to civil rights goals," *The New York Times* (June 22, 2000), C2 (Krueger, a Princeton economist, is the former Chief Economist for the Department of Labor); Barbara F. Reskin, *The Realities of Affirmative Action in Employment* (Washington, D.C.: American Sociological Assoc., 1998), 26-27. The wage gap decrease during the period is presumably a result of both antidiscrimination enforcement and affirmative action.

⁷ William A. Darity, Jr. and Patrick L. Mason, "Evidence on discrimination in employment: Codes of color, codes of gender." 12 *J. Econ. Perspectives* 63-90, 76 (1998).

⁸ Patterson, *Ordeal*, 151.

⁹ Bowen and Bok, *Shape of the River*, ch. 4.

¹⁰ A strong earlier blow to Fiss' secondary thesis, that laws burdening minorities intentionally or by effect ought to be treated as equivalents for Equal Protection purposes, was delivered shortly after the article's appearance, in *Washington v. Davis*, 426 U.S. 229 (1976) (disparate impact on blacks of employment test for D.C. police officers does not violate equal protection, incorporated through Fifth Amendment).

¹¹ *City of Richmond v. Croson*, 488 U.S. 469 (1989).

¹² *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995).

That the social world and its endemic forms of oppression should be more recalcitrant than one might have hoped is, of course, no reason to gainsay the analytical value of Fiss' brilliant article, which crystallized the issues of race jurisprudence for a generation of scholars. Its failure to predict the future of its era is independent of (or, for the cynical, inversely related to) the logic of its position, and certainly of its brilliant success within the legal academy. Fiss' intellectual bravery consisted in showing that social policy, as mediated through the courts, had to take society as its subject – and therefore had to take seriously the significance of group membership and the forms of collective agency and passivity such membership entails. There are reasonable questions to be asked – and Fiss has asked them – whether courts are the right agencies to engage in systematic social engineering. If the far more conservative judiciary of the 1980s and 1990s should, by and large, have repudiated such goals, that is simply a delayed function of a presidential electoral politics that treats the courts' composition as victory's spoils. And if executives and legislatures, both local and national, have not been as reactionary as the courts, this again is also largely a function of electoral politics, assessments by both parties concerning which votes are there to be lost (automotive workers in 1984) and which to be gained (Hispanic voters in 2000).

All of this is fair. But in the course of celebrating Fiss' article, I think we also need to ask whether the ideal it enshrines is worth our continuing devotion. The worry I express in this essay cannot be proven, but I find it troublesome all the same: the form of social engineering Fiss advocated was worse than a dead-end; it helped to foment a politics of racial spoils, fought in the courts as well as in the legislature, and led to the fearsome resistance in public and in the courts to the goals Fiss seeks. It would be absurd to lay this charge fully at Fiss' feet, for the backlash against affirmative action was no more triggered by his article than the civil rights achievements were triggered by the writings of Gunnar Myrdal. Virtually all the most significant scholarly contributions to social thought have an important element of *Zeitgeist*, reflecting as much as motivating currents of thought. But ideas have consequences, and the scholarly normalization of ideals is a serious business. If we are to gloss the Equal Protection Clause as a means of establishing government under law for a society deeply divided by race, the interpretation we offer must serve as both a tool for overcoming discriminatory systems, and provide a vision for a society we can reasonably aspire towards. Fiss' article gave us only the tool, not the ideal; and our politics, I suggest, has suffered.

Fiss' central claim is that we are confronted with two possible interpretations of the Equal Protection clause. We may interpret it, as the Supreme Court has subsequently endorsed, so as to protect individuals from discrimination directly by state agencies and – as in *Shelley v. Kraemer*, 334 U.S. 1 (1948) – by private actors who rely upon the state to give effect to their discriminatory aims. According to Fiss, the antidiscrimination interpretation is just an extension of the traditional form of equal protection review, which assesses the instrumental adequacy of governmental means to ends. This purely instrumentalist interpretation of the clause is then modified twofold, first by limiting the scope of permissible governmental ends; and second by stipulating that even in pursuit of legitimate ends, certain legislative classifications and laws touching certain fundamental interests will be held to a standard of very close fit between ends and means. At its heart, however, the antidiscrimination clause is a rationality review; indeed, the special inquiry into suspect class-based or fundamental interest-affecting legislation is a function of presuming the irrationality of any broad-brush legislative manipulation of those categories. Under this interpretation, racially discriminatory legislation is *prima facie*

illegitimate under this interpretation because there is no legitimate governmental interest in racial exclusion per se, while any ostensibly legitimate objective (such as hiring the most meritorious candidates) is instrumentally ill served by racial distinctions.

For Fiss' purposes, the main peculiarity of the antidiscrimination interpretation is its treatment of race-conscious ameliorative legislation. A state's affirmative action initiative to prefer black candidates in hiring would be deemed just as suspect as a policy of granting preferences to white candidates. This, of course, is a consequence of the interpretation's formalism: racial classifications are judged initially suspect independent of the ends to which they are put, then redeemed (if they are) by both the compelling nature of the state end and the efficiency with which they achieve that end. While establishing the compelling nature of the end is a substantive inquiry, the general process of judicial scrutiny is formalistic, an assessment of the relation of evidence of need and effectiveness to chosen means. Take the minority set-aside policy at stake in *Adarand*: the use of race immediately triggers inquiry into whether the legislative goal is sufficiently compelling, and whether the program is sufficiently narrowly tailored so as not to trammel the interests of non-beneficiaries (in particular, plaintiff *Adarand*'s). A court applying *Adarand* would compare the legislative goal (for example, remedying the effects of past discrimination against minority businesses) against the short menu of compelling state interests, and if the goal checks out, then see whether more narrowly drawn means – in particular, using race-neutral categories – could accomplish the same goal.¹³

The fact that substantive inquiry is inevitable with the antidiscrimination principle brings out what, for Fiss, is a deeper flaw than its peculiar treatment of a welcome mat as like a No Trespassing sign, to paraphrase Justice Stevens.¹⁴ The deep flaw is that the materials for the substantive inquiry are completely unmotivated. If at root the principle is nothing but an expansion of the formal constraint that the state provide sufficient grounds for treating similar groups differently, then there is nothing but the presumption of instrumental irrationality to rule out racially discriminatory laws. But a state with a law aimed squarely and efficiently at maintaining a system of racial discrimination, such as the interracial marriage ban at issue in *Loving v. Virginia*, should survive the strictest scrutiny of the relation of means to end.¹⁵ The fact that equal protection doctrine does not have a problem finding anti-miscegenation statutes unconstitutional is sufficient, according to Fiss, to reveal the inadequacy of the antidiscrimination principle.

The analytical emptiness of the antidiscrimination principle is, for Fiss, matched by a kind of ontological confusion: it expresses an overt individualism in its attention to differences in treatment of individuals, while the only plausible explanation of the emergence of strict scrutiny

¹³ This, in fact, was the inquiry made by the trial court on remand, subsequently reversed by the 10th Circuit, and the case finally dismissed for procedural reasons by the Supreme Court (*Adarand* had shifted arguments in its Supreme Court appeal). *Adarand Constructors, Inc. v. Peña*, 965 F.Supp. 1556 (D.Colo. 1997); *reversed by Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000); *certiorari granted by Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001) (NO. 00-730); and *certiorari dismissed as improvidently granted by Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, (2001).

¹⁴ Fiss, 136-38; *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

¹⁵ The problem facing the antidiscrimination interpretation is closely akin to the problem facing Kant's Formula of Universal Law when dealing with universalizable but intuitively distasteful maxims, such as acts of natural violence. In both cases either of two recourses is available: acknowledge that the principle/Formula is partly substantive, guided in its application by consideration of the kinds of problems it is intended to handle; or acknowledge that it does not exhaust the field of ethical limitations on state or personal action. For discussion of the Kantian problem (albeit to a different conclusion), see Christine Korsgaard, "Kant's Formula of Universal Law," in *Creating the Kingdom of Ends* (New York: Cambridge University Press, 1996), ch. 3.

doctrine involves worries about the status of social groups. At least I think this is what Fiss means. What he actually says is that “The foundational concept – means-end rationality – is individualistic. It is not dependent on the recognition of social groups.”¹⁶ This is unclear: the fact that it doesn’t refer to groups no more makes it individualistic than does the fact that the principle doesn’t refer to the color blue make it green. Certainly means-end rationality is consistent with an ontology of social groups. Indeed, it might be precisely because we suspect that social groups, for all their reality, are not useful predicates for legislation that we engage in strict scrutiny of group-based legislation. What I think is really at stake in Fiss’ criticism is the apparent misdirection of antidiscrimination doctrine: the pretence that the point of the Fourteenth Amendment is principally the fair treatment of individuals, rather than the overturning of a racial hierarchy.

These criticisms lead to Fiss’ preferred interpretation of the clause, which he dubs the “group-disadvantaging” principle, and which might also be called the “antisubordination principle.” As the name indicates, it is first and foremost a substantive inquiry: does the law in question subordinate or emancipate a “social group” whose relations to other, dominant groups, are characterized by perpetual subordination and circumscribed political power?¹⁷ By “social group,” Fiss means a set of people whose lives have together a structure that supports a collective identity – an identity that can remain constant over time even as its composition changes.¹⁸ Fiss also claims that a key feature of social groups is an “interdependence” between the “identity and well-being of the members of the group” and of the group itself.¹⁹ His point is, I think, obscurely expressed in terms of well-being, but his point is plain enough. First, members of a social group have the social identity they do partly in virtue of their membership, and the group they are members of has the identity it does in virtue of the identity of its members. Second, and consequently, the welfare levels of individual members is in part a function of their social identity in relation to other individuals, which is to say that it is partly a function of the relative status of their groups, while the status of the group is, in part, a function of the welfare level of its members. A group composed of the individually wretched will likely have low status, contributing yet further to the wretched state of its members.²⁰

Under Fiss’ preferred interpretation, the point of the Equal Protection clause is to transform the system of white supremacy, ensuring that whites and blacks in particular, and social groups in general, are equals before the law and in relation to one another. The immediate effect of the group-disadvantaging principle is to permit race-conscious remedial programs by the state, as well in addition to ending the kinds of direct and complicitous discrimination also prohibited by the antidiscrimination interpretation. The group-disadvantaging principle would permit – indeed require – the now familiar (if endangered) programs of contractor set-asides, intra- and interdistrict student transfers, race-conscious employment recruitment and promotion,

¹⁶ Fiss, 123.

¹⁷ Fiss, 155.

¹⁸ The analogy is to a nation or a corporation: France or Exxon remain themselves as their populations and employees shift.

¹⁹ Fiss, 148.

²⁰ Fiss’ reference to the group’s independent level of well-being thus seems to me misleading, since for the kinds of groups he’s talking about – groups without internal structure – it is unclear how one might talk about welfare in some collective, irreducible manner. By contrast, structured social groups – states, cults, companies, unions, etc. – might well have levels of welfare (or, better, flourishing) independent of their members’ levels. The Catholic Church might be thriving in Africa, for example, despite (or because of) the immiseration of its members.

preferential admission, and perhaps even more aggressive programs, such as racially-targeted housing assistance.

Fiss is, to put it mildly, nonspecific about how courts should apply the group-disadvantaging principle. The brunt of the judicial inquiry lies in determining the answers to a range of primarily sociological rather than jurisprudential questions. First, which are the genuine subordinated social groups?²¹ Fiss assumes that black Americans count as such a group, and allows that other ethnic minorities might be entitled to “less” but “some” protection, as might a non-minority group such as women. Presumably almost any non WASP—heterosexual—male group might make some claim for protection, in virtue of its inferior status; and at the margins these questions will be difficult to answer. Second, courts must ask whether the legislation in question “perpetuates the subordination” of that group, intentionally or by effect?²² Interestingly, this inquiry isn’t primarily welfare-oriented. Fiss’ concern is whether the relative status of the group is affected, independent of whether the well-being of group members declines. He gives the example of a sales tax which, though it may disproportionately affect blacks in financial terms, does not affect their status.²³ If a court does find that a law or state-supported practice perpetuates the group’s subordination, it would be prohibited under the principle unless the state can show that the practice delivers a “compelling” “benefit to the polity” with no less group-disadvantaging alternatives available – a modified version of the traditional strict scrutiny test.²⁴ Conversely, a law or practice that works to reverse a subordinated group’s subordination should pass equal protection muster, provided it does not hurt (excessively) other subordinated groups.²⁵ While review of subordinated group-burdening legislation under Fiss’ principle seems very similar to review under the antidiscrimination principle, review of group-benefiting legislation is by design much less intrusive.

Now, a number of criticisms of varying levels of seriousness can and have been launched against Fiss’ proposal, particularly within this Symposium (which has the advantage of twenty-five years’ critical distance). I will take a moment to list these criticisms, though none I think is fully to the point. First, it is surely possible to come up with a version of the antidiscrimination principle that does not suffer from the apparently ad hoc “suspect class” and “fundamental interests” sub-principles that Fiss rightly complains are unmotivated. The incoherence of antidiscrimination jurisprudence, particularly circa 1976, was largely a matter of the Court trying to unify its treatment of race and economic legislation. Scrapping that intermediate history would let an antidiscrimination advocate draw a principle from the pragmatic context surrounding black emancipation. Such a principle would say, for example, that the nation’s and states’ laws must treat each individual as equal in dignity regardless of race, religion, ethnicity

²¹ Fiss says that this is not an independent judicial inquiry, but rather judicial review of a legislative decision about which groups “count.” Fiss, 161. But that is only true in the special case when the legislature has enacted a preferential treatment policy to which other ostensible groups seek access; if a law is challenged as burdensome by a group, the court would have to make its own determination (even if it took judicial notice of the legislative treatment of that group in other contexts).

²² Fiss, 157.

²³ *Ibid.* Apparently, even if their low status is the reason the political process generates the tax, that would not make the tax itself objectionable. But this seems a case where legislative intention matters. While Fiss is surely right that the mere fact that a straight, universal sales tax, say, worst affects the least well-off, the tax would not be considered an assault on constitutional equality even if blacks were disproportionately represented in that group. But a sales tax that targeted a category of consumption favored by blacks probably should be invalidated under any approach that seeks to undo a system of subordination.

²⁴ Fiss, 160, 166-67.

²⁵ Fiss, 160.

(and now sex), and must therefore not condition the receipt of governmental benefits or burdens on these categories. There is no need, in other words, to construct the principle out of purely formal materials, rather than simply to acknowledge its rooting in the historical events that generated it. And even though preferential programs would be treated symmetrically at least *prima facie* under this principle, they might still be justified under the principle as effectuating the goal of a citizenship of equal dignity (provided that the laws do not impinge on the equal dignity of others). I do not claim the superiority of this to the antisubordination principle, but only mean to point out that an individually oriented antidiscrimination principle need not suffer from all the vices of formalism.

Second, Fiss' treatment of the concept of groups is problematic, both conceptually and analytically. Some of this is an effect of a (now) archaically sociologically alienated perspective on "the blacks" and "the whites," but there are a number of other analytical issues, raised particularly in the contributions of both Richard Ford and Peter Schuck, who both note the sociological complexity and lack of integration of anything that might conceivably be called a "black social group" – something that was as true in 1976 as today. There is an initial problem in trying to use the biologically dubious category of race to track an essentially social phenomenon. Moreover, the social phenomenon of race is itself irreducibly multiple and perspectival: insiders and outsiders may have very different conceptions of who is and who is not a member, conceptions that are, furthermore, highly contextual and fluid.²⁶ Once class, generational, and other social divisions are recognized among and between the many black – not to mention multi-racial – communities, it becomes enormously more difficult to determine which practices are subordinating and which liberating. To take an obvious example, police harassment of young black men on street corners is part of that group's subordination – but it may contribute to the ability of older members of the same neighborhood to make use of public spaces, increasing their sense of belonging and hence status.

Next, what is the comparison point for status evaluations? Whites are, of course, no more a discrete group than blacks; hence the status of one group cannot easily be measured relative to the other. More generally, status seems like a particularly intractable metric for judges to take into account, as opposed to more objective measures like arrest rates, voting rates or representation, post-secondary education rates, promotion rates and relative wage scales. Does the high "outlaw" status of rappers, across the race spectrum, affect the status of blacks as a group? Does the current disgrace of white, male CEO's affect the equation? This is not to deny that status is real, that its lack hurts, and that these objective measures are correlated in complex ways. But it does not follow that political and legal institutions ought to focus on status itself, as opposed to these other measures. Status is not itself the sort of good that can be redistributed. What we can do, instead, is redistribute the social *bases* of status – civil rights, meaningful employment, cultural production – and let the social dynamics work from there. For these reasons, among others, Fiss' proposal to deploy the notion of status within equal protection doctrine, rather than as a piece of political theory to be deployed (as he does) in criticizing doctrine, seems to me a non-starter.

And yet: Fiss' key insight, the interdependence of individual and group, is more interesting than these objections. For, however the notion of group is properly construed with regard to blacks (or other subordinated groups), there is a deep truth to the claim that individuals' current welfare levels and future possibilities depend on the status of those with whom they are generally grouped by the dominant group/class/power structure. This is in part a function of

²⁶ See Patterson, *Ordeal*, 72-77.

individual psychology, for we function cognitively to an overwhelming degree by interpreting individual incidents in terms of larger blocks or patterns of meaning and expectation. Long before individuals are seen, understood, and known in themselves, they are conceptually seized and assimilated into templates that are themselves only partly aggregated out of individual experience.²⁷ More than this, it is a moral point: our aims, achievements, pathologies and failures are nearly all the product of social interaction, of collective projects worked through together, and supported or frustrated by the projects, institutions, and collective practices of others.

We need to be careful of this point, lest we lose the equally important truth of what can be called “analytical individualism”: groups are, in the end, collections of individuals coordinating their acts with one another.²⁸ Indeed Fiss stresses this point, pointing out that group status depends on the welfare of individuals. Whatever the programmatic and collective elements of our consciousness, all action is, at root, individual action. A moral and political point follows from the analytical point as well: there is way to social change around, but only through, individual agency and personal responsibility. Every policy is necessarily implemented on the micro-behavioral level, through incentives and responses that individuals incorporate into already existing sets of plans and motivations. A group-oriented theory of racial emancipation is, perforce, a theory of individual emancipation as well.

A practical lesson for social reformers follows directly. The analytical interdependence of individuals and groups is mirrored by a bilateral causal structure. We act on groups by acting on individuals; and we act on individuals by acting on groups. If we seek to change the social state of individuals, we can start at either or both ends of the equation. Educational affirmative action is precisely such an attempt to work both ends simultaneously: individuals whose credentials are relatively less competitive partly because of a system of group-subordination, but whose potential for individual professional success is significant, are enabled to achieve positions of significant social status. Their individual success thus raises the status of the group, as well as the status within the group of professional success, transforming both intra- and inter-group relations. So at least it works in theory, and there is evidence that it is also working in fact, according to Bowen and Bok’s research.²⁹ By contrast, the limitation of much workplace-oriented affirmative action – for example, race consciousness in hiring, training, or promotion in blue collar industries, such as the training program at stake in *Weber*³⁰ – is that it fails to operate at both individual and group levels, but only transforms the employment situation of specific individuals. The limited scope of such programs inevitably makes them appear part of a racial spoils system. Even though only a tiny fraction of non-minority workers are, by all accounts, adversely affected by such programs, awareness of their possibility looms dangerously large in the American racial imagination.³¹ There remain, of course, good arguments for such programs, given the old boy systems that otherwise govern workplace practices, but their serious social cost has to be acknowledged, as well as the limited gains to be made by them.

²⁷ See, e.g., Linda Krieger, “The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,” 47 *Stan. L.R.* 1165, 1174-77 (1995); Steven Pinker, *How the Mind Works* (New York: Norton, 1997), ch. 5.

²⁸ I discuss a number of these points in my *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2001), ch. 3.

²⁹ Bowen and Bok, ch. 4.

³⁰ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that Title VII permits private affirmative action programs).

³¹ Patterson, *Ordeal*, 148-49.

This instrumental point raises a larger normative criticism of group-centered equal protection: it threatens to (and does) invite a politics of zero sum, interest group competition, rather than a politics of common aspiration and collective achievement. In part, this is a product of a politics that developed out of, and through, the court system. Courts are, by their nature, agonistics venues for politics, in which all present have clear, and generally adversarial, roles to play. The courts were, nonetheless, a natural venue in the early stages of the civil rights movement for blacks and other minorities, whose political opportunities were blocked by the white supremacy system. To the extent black civil rights activists registered on the radar screen of white politics, they were mainly perceived as adversaries; moving to the courts was a horizontal slide out of an impasse in racial politics. That the Warren Court accepted its designated role as agent of redistribution is surprising, and that it did so is explained by the sheer recalcitrant injustice faced by blacks in America: in 1954, and for at least a decade thereafter, the Court was the only hope for real progress towards racial justice, and it knew this.³²

The legal academy's romance with the Warren Court has ensured that its singular role in the civil rights movement has been deeply celebrated. Fiss' article was written in the afterglow of the Warren Court's achievement; and his neglect of the important contributions and possibilities of legislative and executive action, as well as of black political agency, shows the stirrings of this romance. Fiss' belief in the possibility of court-ordered social transformation – a belief shared across the legal academy, by both liberals who welcomed it and conservative who feared it – is all the more poignant in light of the speed with which the Burger and Rehnquist Courts beat a retreat from this task, restoring the judiciary's traditional role in protecting individual entitlements from structural transformations. By the time Fiss wrote, and for the twenty-five years since, the major civil rights achievements have been legislative, not judicial. The new movement to the courts was initiated not by the politically impotent blacks, but by disappointed whites trying to dismantle private and governmental affirmative action programs. They were lured to the courts not just by the possibility of using the courts to sidestep the political process in order to vindicate individual claims, but by the presentation of affirmative action programs as, in Kenneth Karst's words, a "conscious redistribution of the status of social groups."³³ At the doctrinal level what has emerged is the deracinated antidiscrimination jurisprudence of *Adarand*, a defiant rejection of the anti-subordination theory. And at the political level what has emerged is a particularly ugly competition of race-based interest groups to advance, or more often check, the forms of status redistribution that have survived. It did not have to be this way.

Let me pause, for the story I have been telling is complicated: deep structures of social privilege and power, operating in our nation at both individual and group levels, truly needed to be transformed. Courts were indeed the only feasible institution to begin that process of transformation, and it was a fair, indeed brilliant, interpretation of the Warren Court's race jurisprudence to see it as enacting justice between groups. The trouble comes from extracting an essentially remedial principle from that case law, one whose value is linked to particular institutions, and treating that principle as the constitutional, and more broadly political, meaning

³² The fairly toothless Civil Rights Act of 1957 notwithstanding. This claim is also consistent with Gerald Rosenberg's controversial claim that Court's causal impact in advancing the civil rights agenda was relatively meager, compared to the effect of the 1964 Civil Rights Act and 1965 Voting Rights Act. Between 1954 and 1964, the Court was the only institution to take on the white supremacy system directly. See Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), 40, ch. 2.

³³ Kenneth Karst, Symposium contribution, "Sources of Status Harm and Group Disadvantage in Private Behavior," MS 1.

of equality in our tormented social world. Remediation presupposes a world divided into victims and perpetrators. The remedy it anticipates is principally restitutionary, rendering from perpetrators unto victims. Affirmative action programs perch precariously on this remedial logic, for they require in both the courts and in public opinion the possibility of identifying victims and perpetrators. It is plausible to think that the low public support for many affirmative action programs, stems from the difficulty of making these identifications. An Asian-American college applicant is no more likely to consider himself a perpetrator of the subordination of black college applicants than is the white steelworker aiming for a promotion. Nor are the main beneficiaries of these programs – middle-class college aspirants, fully employed floor workers – obviously compelling victims, taken in individual profile. To be sure, the absence of individual victims and perpetrators is consistent with the presence of deeply entrenched, racially discriminatory practices and institutions. To be sure, there is much still to be remedied. But the remedial understanding of equality cannot help us.

We need to let go of the remedial understanding of equal protection, not because there is nothing to remedy, but because the remaining task of reconstruction requires an interpretation of equality that can project a politics forward, past remediation: towards a world in which race can distinguish, however fluidly, but not further divide. A projective interpretation of equality, as we might call it, is one that stresses political inclusion and collective agency, in particular acts of collective agency through which we citizens together define the terms of equality. Contrast this with the political framework presupposed by the remedial principle: an external administrative system capable of determining groups' relative status positions, calculating what material change will shift those positions, and imposing its judgment on a social and economic system notoriously resistant to command and control. The conception of political action presupposed by the remedial principle is at best litigious, and at worst passive; it is the so-called "pluralist theory" of interest group politics, but with politics displaced by the courts.³⁴ The task, in other words, is to construct an ideal that reflects a collective, not merely distributive, conception of well-being. This is the liberal political tradition inaugurated by Rousseau and fully expressed by Rawls in which we conceive ourselves as members of a cooperative venture, working together to establish a framework within which our individuals lives, loves, and affiliations can run. As Rousseau put it, "the act of association" by which we become a polity "produces a moral and collective body made up of as many members as the assembly has voices, and which receives by this same act its unity, its common self [*moi commun*], its life and its will."³⁵ As Rousseau figured it, this "act of association" was an original contract made by those exiting social isolation and entering political society. But it would not be too much of a stretch to say that this act of association is implicated every time citizens put their voices and their votes to the problem of considering together what is to be done. The "common self" he refers to is not some superlunary being, distinct in its interests and insights from the many. It is, rather, a conception each citizen shares that he or she is part of a common project, a matter of one's fundamental orientation to the possibilities of democratic action. We need not follow Rousseau all the way to his famous

³⁴ See, e.g., Robert Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961). For Dahl and other democratic theorists, a pluralist politics was a good thing, representing an equilibrium in which each group is able to receive something it wants from the commonweal. I do not mean to gainsay the value of a pluralist equilibrium in much of political pork-barrel life, but it has no place in the fundamental conception of equal citizenship.

³⁵ Jean-Jacques Rousseau, "The Social Contract," Bk. 1, ch. 6, par. 10; in *The Social Contract and other later political writing*, ed. and trans. Victor Gourevitch (New York: Cambridge University Press, 1997), 50.

conclusion that dissenters from the correct assessment of collective interests must be “forced to be free,” to take an orientation around collective interests as the dominant ideal of democracy.³⁶

Similarly, Rawls’ famous “Difference principle,” according to which social institutions must be arranged so as to maximize the expectations of the least advantaged, “expresses a conception of reciprocity,” which can motivate and sustain the social cooperation of each.³⁷ At the root of Rawls’ theory of justice, then, is also a conception of citizens as common venturers. Rawls is often misread on this point, for both intelligent and unintelligent reasons. The unintelligent reason stems from the way Rawls designs the thought experiment of the Original Position, from which the principles of justice are initially derived (though not fully justified). The Original Position embodies a conception of persons as selfish and ignorant choosers, each seeking to maximize his or her share of an index of goods under conditions of limited information. And some, notably Michael Sandel, have seen Rawls as using this conception of the Original Position choosers as the preferred conception of democratic citizens.³⁸ This, of course, simply overlooks Rawls’ justification for conceiving the choosers as he does: egoistic motivation and ignorance can function as the equivalent fair-mindedness, without (so Rawls claims) begging any normative questions, and particularly without presupposing an overly altruistic motivation.³⁹

The intelligent reason for underestimating Rawls’ cooperative conception of citizenship comes from, first, the priority of equal liberty over distribution; and second (and relatedly), the way individuals are expected to work out their particular conceptions of the good through the exercise of practical reason – as opposed to, say, immersion in a socio-cultural matrix.⁴⁰ Both of these points lend some support to the view that the Rawlsian social framework is designed primarily to allocate liberties and resources for each to find his own bliss. Nonetheless, Rawls is concerned precisely to reject this conception of what he calls “private society,” in favor of a conception of community “the members of which enjoy one another’s excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all.”⁴¹ The priority assigned to the liberties, and the value Rawls places on choosing one’s conception of the good, reflect a recognition that justice must operate among a people whose religious and cultural schemes of reference are many, and who can, should, and will differ on the best ways to lead one’s life. But they will share much as well, with each other generally, and with groups of each other in both fluid and fixed combinations. Together they will work out the conditions of living good lives together.

To rejoin the concerns of Fiss’ article: I am suggesting that the Rousseauian and Rawlsian conception of democratic citizenship, where membership in a polity is understood as a commitment to the exercise of collective political agency, can supply what the remedial interpretation of equal protection lacks. Linking this conception to the norm of equality, we have the following principle: each citizen ought to be able to participate on equal terms in working out matters of justice and the collective good; and the interests of each, as a constituent of the

³⁶ Rousseau, Bk. I, ch. 7, par. 8, 53. On the other hand, this phrase too may be parsed (somewhat) free of its totalitarian resonances: the phrase can be taken to mean that free riding at the common expense must be prohibited, lest the social conditions of freedom under law be sacrificed.

³⁷ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, rev. ed. 1999), 68, 88.

³⁸ Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 2nd ed. 1998).

³⁹ Rawls, 104.

⁴⁰ Rawls, §§ 32, 63.

⁴¹ Rawls, 459.

collective good, must be treated by all as of *prima facie* equal worth.⁴² In the variant terms of the Fourteenth Amendment, a state denies the equal protection of its laws when its institutions treat the interests of some in state benefits as less important than others, and when it disables some from participation in collective governance.⁴³ A constraint on subordinating practices falls out of this broader principle of equality, not as its interpretation, but simply as a particular form of inequality.⁴⁴ Moreover, nothing in this principle is inconsistent with judicial (or legislative) notice of the real role of ascriptive group memberships in the practices of subordination: a state practice that contributes to the subordination of a group perforce disables the individual members of that group from equal, active citizenship. The ideal is, if not color-blind, then group-independent, not in the sense that it denies the relevance of group-membership to individual identity, social location, or conception of the good, but in the sense that it rests on a collective and universal conception of welfare as the charge of the state and the task of its citizens.

To reduce the level of abstraction, I want to look briefly, and without claims for the originality of my conclusions, at how this principle of equal political agency would treat the relevant run of cases. First, racially segregated schooling (for example, under Jim Crow) is an obvious twofold violation, for it treated the educational interests of blacks as less important than whites', and by denying an adequate education, thoroughly disabled them from equal political agency. Even the Clarence Thomas fantasy of equally endowed, racially separate schools would fail, because a school system that condones the separation of citizens on racial grounds, especially in the period in which their capacities for democratic citizenship are being shaped, deprives them all – black and non-black alike – of the kinds of social knowledge and mutual understanding necessary to collective political agency. So also fails the current desegregation jurisprudence, according to which school districts may or must stop desegregating practices once direct, intentional segregation has been eradicated. What matters to the aspiration of an ideal of equal political agency is the disabling effect of a separate schooling system, not the motivation. The collapse of the non-affluent public educational system, which is to say the collapse of the system, is a disgrace to this ideal, whether the inequality is measured in race or class terms. More difficult is the question of the permissibility of black-only (or female-only, for that matter) academies. The withdrawal of any particular group from the institution principally charged with the formation of universal democratic citizenship runs sharply against the ideal; defense of these academies would have to rest on a real showing that these costs are outweighed by the costs to black or female students' capacities of maintaining a wholly non-segregated system of education, given the insidiousness of race or sex discrimination in that system. Even at that, such academies would only be permissible until an equal education could be had in a non-segregated setting.

Race conscious affirmative action in elite public university admissions would, by contrast, be permitted under the ideal of equal political agency. Selective universities are not

⁴² The claim of equal weight for interests has to be qualified, for some interests (really, preferences) may be so pernicious that they do not merit equal treatment. Racist preferences are arguably in this category.

⁴³ *Romer v. Evans*, 517 U.S. 620, powerfully exemplifies this statement of the norm. Of particular concern to the Court was the Colorado amendment's withdrawal of the right of homosexuals to seek antidiscrimination protection: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." 517 U.S. at 633.

⁴⁴ What other forms are there? To modify Fiss' example, a tax that singled out a particular occupational category arbitrarily – say, morticians – would treat them unequally because treating their interests as less important, even though the group could not claim generally to be subordinated.

best understood prizes for high-achieving students and test-takers. They are, rather, complex social institutions that serve a variety of purposes, one of which is allocating scarce training resources to those best able to use them; others involve the preparation of a socially and culturally influential cross-section of the state for the demands of democratic citizenship in circumstances of cultural pluralism; preparing a cadre of professionals who are likely to serve underserved communities; transforming a racial status hierarchy that arose under a white supremacy system; and simply maintaining the support of politicians and alumni.⁴⁵ Conventional academic criteria of merit, despite their inherently false precisions of measurement, are one, but only one, fair way to determine admissions. Given this plausible range of goals, they should be used but clearly cannot be the exclusive criteria. If institutions admit intelligently, with an eye to actually realizing these purposes, then the complaint of constitutionally unequal treatment by students who might have been admitted on purely academic grounds has no merit. Their complaint is with an institution that does not exist, one whose purposes could be fully discharged using their preferred admissions criteria.

Here is an instance where the equal agency ideal provides a notably stronger defense than Fiss' alternative. If, under his principle, affirmative action is justified only by reference to the need to redistribute status, aggrieved applicants might well ask why they should be the cost-bearers of the redistributive exercise. Isn't this, in effect, to subordinate their particular interests to the interests of the program's beneficiaries? By contrast, the institutional interests I identified above are genuinely collective interests; they treat the institutions as products of collective political agency. The admissions system serving those interests promotes, rather than derogates, the interests of each, including those not admitted (though that fact is cold comfort).⁴⁶ That said, the deployment of non-academic criteria must be done intelligently, both with respect to institutional purposes and with respect to the dignity of each applicant. So-called "totalizing" admissions policies, which treat race (plus some academic threshold) as sufficient for admissions, operate to reduce the student from citizen to racial place-holder, whether or not de facto racial quotas are part of the mix. But, as Judith Butler has argued, treating race as a salient but not sufficient aspect of the argument for a particular candidate's admission, enlarging the "horizon" for understanding that candidate without compromising the fair treatment of others.⁴⁷ These considerations do not settle the matter, for there are apparent and real costs of implementing any affirmative action program; necessarily any given admissions scheme will compromise some interests and outcomes. It may be, in the end, that the troubled history of race-based allocations makes such a program poor policy in this arena. I am, however, confident that educational affirmative action is consistent with the broad ideal of equality I have sketched.

Race-based employment policies are more complex. Racially discriminatory hiring and promotion obviously directly compromises the ideal of equality, through the direct material disablement of blacks taken both as individuals and as members of a group, and through denying

⁴⁵ These purposes may also be shared by elite private institutions; I assume that however the Equal Protection clause is construed, their right to engage in either affirmative action or discrimination is protected under the First Amendment, even if that right is very costly to them, in forgone tax breaks or government funding. (This is obviously an enormously complex subject.)

⁴⁶ Arguably, public institutions that used only academic criteria run afoul of the demands of equality, since they might seem to serve only the interests of the few at the (tax) expense of the whole. But the argument that academic criteria fairly and efficiently allocate a scarce resource is probably sufficient for any constitutional constraint of equality, even if they serve the ideal less robustly than they might.

⁴⁷ Judith Butler, "An Affirmative Voice," in *Race and Representation: Affirmative Action*, ed. Robert Post and Michael Rogin (Cambridge: Zone Books, 1998), 163.

them the full dignity of labor. One of our principal identities as citizens is as workers; and whatever secondary prestige we attain from specific positions, our status as equals fairly begins with our right to be treated fairly in labor dealings. Racial discrimination at the voting booth compromises political agency directly; but it is no less weakened when the material basis of that agency, our ability to earn a living, is also undermined. The case against discrimination, then, is clear. More troubling is the case for affirmative action in employment and government contracting.

Begin with the easiest: public-sector employees. There is a strong case to be made that police departments, the military, government agencies, and school teachers, simply cannot perform their functions well without an employee population that reflects the demographics of the communities they serve.⁴⁸ If narrowly-tailored job-specific hiring and promotion criteria are inadequate to providing such a population, then race-conscious criteria may be justified. The argument on their behalf parallels the argument in university admissions: the institutions (when operating properly) promote the interests of all citizens on an equal basis; and consideration of race as a relevant factor in hiring and promotion, given the specific charge of the institution, does not compromise the equal citizenship of non-beneficiaries. They are disappointed, to be sure, but there is no other possible bearer of the costs of achieving these collective aims – no one else to share the burden of a promotion denied or deferred in part because of racial considerations. Private firms, however, reflect no collective interest, only their own interest in profit-maximization. If a firm adopts an affirmative action program, it has presumably done so on profit-maximizing grounds, or at least grounds consistent with that. Since no collective interests are implicated, the question is what positive justification can still be offered to the non-beneficiaries, for example the white steel worker in *Weber*. One answer that will sometimes apply is that only race-conscious employment practices can move the firm past race-unconscious discriminatory practices, such as hiring from within a social network. Such claims may well be true, but they need to be supported by more than speculation, for otherwise the apparent unfairness to the non-beneficiaries is palpable. Private firms engaging in such practices must, then, be able to show credibly what the results of a race-neutral employment policy would be, and why those results would be unfair – moreover unfair in a sense that, to paraphrase Thomas Scanlon, would violate principles that blacks and whites would endorse if they were seeking common principles of fair employment.⁴⁹ Otherwise, such programs can represent what I deplored in the antisubordination principle: an act from above to distribute scarce resources according to a redistributive racial logic, not an expression of collective political will. Seen in that light, they are apt to promote resentment at the distribution, instead of support for the aims.

Similar worries dog government contracting programs, such as the program at issue in *Adarand*. The aims of such programs, remedying a market for services distorted by racial discrimination and at the same time creating an entrepreneurial class of minority business owners, represent the ideal of equality. Moreover, a significant share of the costs of such programs is borne by the citizenry as a whole (assuming that the chosen contractors are not the lowest bidders). But significant costs are also borne by particular non-beneficiaries. In this respect they might be seen as in the same position as the disappointed college applicants or

⁴⁸ See Christopher Edley, Jr.'s discussion, *Not All Black and White* (New York: Hill & Wang, 1996), ch. 8.

⁴⁹ Scanlon's particular formulation is that a policy would be wrong "if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced agreement." Thomas Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1999), 153.

public sector employees. When there is evidence of discrimination facing black contractors in the absence of such programs (as the Court currently demands), they are surely permissible. But when that evidence is wanting, the connection between the costs they impose on particular non-beneficiaries and the public good at stake is more attenuated, and accordingly the programs need to offer a stronger justification. Moreover, the risks of corruption, in particular racial-fronting, are great, risks that do not exist, or only in much weaker forms, in education and direct employment.

It seems to me, therefore, that the current legal treatment of race-conscious contracting programs is appropriate: they can be justified when, but only when, there is clear evidence of discriminatory unfairness that they will work to alleviate. To the extent that such programs are mainly an attempt to redistribute social status, in the form of work, we need a more inclusive approach to the problem. Underemployment is not limited to blacks; it affects all those whose skills and training (or lack thereof) don't meet the demands of an increasingly technologically-oriented economy. What we need is not race-based redistribution, but the creation of a system of job security, to match the social security system we have and the health security system we lack.⁵⁰ A set of government programs aiming at full employment would be costly, but the costs of these programs would be borne collectively; and they would represent one of the most potent gestures imaginable at creating a community of political equality. Race-conscious programs might operate subordinately within such a policy framework, but – at least in principle – they would be less likely to inspire resentment and reactive spoils taking, because the losses to particular non-beneficiaries would likely be set off by gains resulting from higher levels of government expenditure.

These are liberal bromides, representing the prejudices of an academic who has little to lose and much (of principle) to gain from all of the programs here. I mention them because they manifest an ideal I regard as the signal achievement of the Enlightenment: a conception of citizens as, in Kant's phrase, lawgiving members of a kingdom of ends.⁵¹ In this conception, our freedom and dignity as individuals rests on our ability to rule ourselves as members of a community in which we attribute no less freedom or dignity to others. The interests we prosecute as self-rulers are interests we have together, in establishing the conditions for leading lives of meaningful thought and action. The first century of American citizenship strained this ideal: it rested on the ruling of some by others. But the promise manifest in the Reconstruction amendments, and realized bit by bit by the Nineteenth Amendment and the judicial and legislative accomplishments of the 1950s and 1960s, is the promise of achieving this community. I fear that the progress we have lost since that time is an effect of falling away from that ideal. Reading the Equal Protection clause projectively, not just remedially, means remembering that we are political agents before we are recipients, and that the terms of equality must be set together.

⁵⁰ Compare William Julius Wilson, *When Work Disappears* (New York: Vintage Press, 1996), 205: "A comprehensive race-neutral initiative to address social and economic inequality should be viewed as an extension of – not a replacement for – opportunity enhancing programs that include race-based criteria to fight social inequality."

⁵¹ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. and trans. Mary Gregor (New York: Cambridge University Press, 1997), 4:438.