

Affirmative Action and the Jurisprudence of Equitable Inclusion: Towards a New Consensus on Gender and Race Relations*

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Abstract

The furor over affirmative action concerns more than a quarrel over remedying past injustices to women and minorities. A crisis of values underlies the rhetoric of affirmative action's supporters and critics. Affirmative action, first expressed in United States law in the Civil Rights Act of 1964 and Executive Order 11246, was premised on the theory of remedying past wrongs. But many decry this premise as punishing the innocent and unjustly enriching its beneficiaries. The reframing of the question from remedying past wrongs to equitable inclusion of all helps balance the competing values of equality and remedial justice. Equity has long been a prominent feature of Western jurisprudence. Rudimentary expressions of equity are found in the writings of Aristotle and in Roman and Medieval jurisprudence. Courts of equity comprised important segments of Anglo-American legal systems for centuries, with equitable principles living on in contemporary American law. The tempering of Western legalism by equity parallels principles, administrative operations, and the approach to jurisprudence in the Bahá'í Faith. The Bahá'í emphasis on unity in diversity may be seen as equitable inclusion or equity as applied to social groups. When the goal is expanded to equitable inclusion of all, while still taking into account past wrongs, the standard objections to affirmative action such as reverse discrimination, stigmatization, and departure from merit lose force.

Résumé

La polémique entourant l'action affirmative constitue plus qu'un débat au sujet de la façon de redresser les injustices du passé commises envers les femmes et les minorités. En fait, une crise des valeurs sous-tend la rhétorique qu'adoptent les partisans et les opposants de l'action affirmative. L'action affirmative, telle qu'instituée dans le droit américain par la loi sur les droits civils de 1964 et par l'ordre exécutif n° 11246, se fondait sur la théorie de la nécessité de redresser les torts passés. Toutefois, nombreux sont ceux qui dénoncent pareil fondement, qui punit les innocents et enrichit injustement ceux qui en bénéficient. Reformuler la question en termes d'inclusion équitable pour tous plutôt que réparation de torts passés aide à rétablir l'équilibre entre les valeurs concurrentes d'égalité et de justice réparatrice. L'équité constitue d'ailleurs depuis long temps un élément clé de la jurisprudence occidentale. Des manifestations rudimentaires de ce concept existaient dans les écrits d'Aristote et dans la jurisprudence romaine et médiévale. Pendant des siècles, les tribunaux d'équité ont figuré parmi les éléments importants du système juridique anglo-américain, les principes d'équité subsistant d'ailleurs toujours dans le droit américain contemporain. Le fait de tempérer la tendance occidentale au légalisme par l'application des principes d'équité n'est pas sans rappeler les principes de la foi bahá'íe, son fonctionnement administratif et son approche face à la jurisprudence. L'accent mis dans les principes bahá'íes sur l'unité dans la diversité peut être vu comme l'expression d'une inclusion équitable, ou comme l'équité telle qu'appliquée à des groupes sociaux. Quand ce but s'étend de sorte à viser l'inclusion équitable pour tous tout en tenant compte des torts passés, les objections actuellement invoquées concernant l'action affirmative, à l'effet qu'elle constitue une discrimination inversée, une stigmatisation et une dérogation au principe du mérite, perdent de leur valeur.

Resumen

El furor con respecto a la acción afirmativa trata de algo más que una disputa buscando sanear las injusticias del pasado hacia las mujeres y las minorías. Una crisis de valores sustenta la retórica de los que apoyan o critican la acción afirmativa. La acción afirmativa, surgida por primer vez en la ley de los EE.UU. en el Decreto de Derechos Civiles de 1964 y en la Orden Ejecutiva 11246, se fundamentó en la teoría de corregir los males del pasado. Pero muchos censuran esta premisa por castigar al inocente e injustamente enriqueciendo a sus beneficiarios. Darle nuevo enfoque a la cuestión pasando de la sola corrección de males pasados hacia la inclusión equitativa de todos, ayuda a

nivelar los valores en competencia de igualdad y de justicia ajustadora. La justicia natural tiene larga trayectoria de ser sobresaliente en la jurisprudencia occidental. Expresiones rudimentarias de la justicia natural se observan en los escritos de Aristóteles y en las jurisprudencias romanas y medioevales. Durante siglos, juzgados de justicia natural formaron segmentos importantes de los sistemas legales angloamericanos con principios equitativos que aun continúan dentro de la ley contemporánea americana. La moderación del legalismo occidental por la justicia natural va en paralelo con principios y procedimientos administrativos comunes al punto de vista de la Fe Bahá'í sobre la jurisprudencia. El énfasis bahá'í relativo a la unidad con diversidad puede verse como inclusión equitativa o como justicia natural aplicada a grupos sociales. Cuando se amplía la meta a la inclusión equitativa de todos, aún teniendo en cuenta los males del pasado, las objeciones en curso hacia la acción afirmativa tales como discriminación invertida, estigmatización, y pérdida de merito pierden fuerza.

A Crisis of Values

The mounting furor¹ over affirmative action² reveals more than a quarrel over remedying historical injustice to women and minorities. Apart from partisan rhetoric and differences of gender, race, ethnicity, culture, and class, there exists a crisis of values.

Supporters of affirmative action recite an enduring and irrefutable record of widespread *de jure* discrimination buttressed by an array of convincing statistics demonstrating unabated *de facto* inequality. Affirmative action becomes the chief redress of past wrongs and discrimination's lingering effects.

Opponents rely on the principle of equality before the law. It is inconceivable, they insist, that a nation could progress from regrettable past discrimination by again perpetrating the very same odious conduct. Moreover, they add, affirmative action does not work, even if justified, because it forever stigmatizes its beneficiaries as recipients of undeserved advantages.³

The aim here is to consider another way to view the problem by reframing the question. Simply put, redressing past wrongs is much too narrow a perspective, however meritorious compensation may be. The more important question is how social unity among diverse groups with such different histories and experiences can best be advanced.

The principle of equity is offered as a much more relevant principle to apply to the social unity challenge. Equity here is treated both as a vital jurisprudential doctrine with a long and distinguished acceptance in Western legal thought and as a more abstract human value or virtue. This perspective was inspired in part by Myrl L. Duncan's article, "The Future of Affirmative Action: A Jurisprudential/Legal Critique,"⁴ considering philosophical issues underlying the affirmative action controversy.

For our purposes, equity may be described as the notion that justice occasionally requires exceptions to general rules. In this case, the general rule is the equality of everyone before the law. Laws are necessarily written in general terms because it is impossible to forecast and legislate every conceivable set of circumstances. Therefore, from time to time in the countless conditions of human life, situations arise where imposition of a generally written law results in manifest injustice.

In strict legalistic terms, many would contend that equity is a departure from absolute equality before the law. However, equity's supporters might say that the purpose of equality is justice, and it therefore makes no sense to sacrifice justice for equality. Others might simply say equity is a different, higher form of equality—it is an equality that the seeing eye perceives between the similarly situated, so that whoever fits within a justifiable exception will be treated the same.

A simple illustration of equity: Assume two motorists are cited for driving far in excess of the permissible vehicle speed limit. All material facts such as the rate of speed, the time, location, and relative dangerousness of circumstances are identical with one exception: Driver A was speeding to determine how fast the vehicle would accelerate. Driver B was rushing a severely bleeding child to a hospital emergency room, resulting in a saved life.

Should a judge impose absolute equality or grant driver B an exception to the speeding law, which is generally written and makes no exceptions? If an exception is granted for driver B, does driver A have a valid complaint that he or she was not treated with equality? If no exception is granted, was driver B treated fairly? What would such a ruling say about the legal system? What kind of conduct would it encourage or reward? What values would it promote? Which values would it discourage?

Ultimately, the purpose here is to engender progress, however modest, toward a new consensus on advancing social unity. Since many passages from the sacred writings of the Bahá'í Faith are considered, it is also hoped that the great significance of equity in the administration of justice will gain the attention of those privileged to serve on local spiritual assemblies within the Bahá'í Administrative Order.

In the second part of the article, affirmative action and the dilemma of remedial or proactive efforts is briefly examined. Part three outlines the well-accepted role of equity in Western legal history. The exalted station of equity in the writings of the Bahá'í Faith is the subject of the fourth part with some conclusions following.

Affirmative or Remedial Action?

Affirmative action first worked its way into the lexicon following passage of the Civil Rights Act of, 1964⁵ and Presidential Executive Order 11246 issued in 1965.⁶ Both of these measures, although ostensibly premised upon the need to rectify the effects of past discrimination, nevertheless raised the prospect of “affirmative,” proactive efforts to integrate U.S. society, particularly at the workplace. Though still tied to the premise of rectification, they were important initial steps toward the promotion of social unity. The turning point⁷ in the integration movement and, indeed, in how the courts viewed the issues, had occurred a decade before in the landmark case of *Brown v. Board of Education of Topeka, et al.*⁸ (“*Brown I*”) where the U.S. Supreme Court found public school racial segregation unconstitutional.

However, it was not until considering the matter of remedying the previously found constitutional wrong that the Court turned to equity. In *Brown v. Board of Education of Topeka, et al.*⁹ (“*Brown II*”), the Court addressed the issue of enforcing public school desegregation by instructing the lower federal courts to be “guided by equitable principles.”¹⁰ “Courts of equity,” the Supreme Court wrote, “may properly take into account the public interest in the elimination of ... obstacles in a systematic and effective manner.”¹¹

The *Brown II* decision was based on constitutional and case law. Although the Civil Rights Act is statutory law and Executive Order 11246 administrative law, they are both similarly tethered to notions of redressing past wrongs.

Title VII of the Civil Rights Act prohibits employment practices that discriminate on the basis of sex, race, religion, color, or national origin.¹² Both voluntary and court-ordered employment affirmative action plans have been found permissible under the Act's strictures. However, whether conceived willingly or by mandate, plans must first be premised upon a finding of a “manifest imbalance” of the majority over protected groups within the employer's work force. One example of a permissible voluntary plan can be found in a 1987 case where the U.S. Supreme Court held that a statistical disparity alone justified a public employer's voluntary affirmative action plan. The plan set no quotas and considered gender as one of several factors in the hiring decision. The Court rejected a male plaintiff's sex discrimination claim filed when a female was hired even though the plaintiff scored a few points higher on the employment evaluation.¹³

A third major source of affirmative action was Executive Order 11246. This 1967 order required parties contracting with U.S. federal agencies to refrain from discriminating on the basis of race, creed, color, or national origin.¹⁴ Sections 101 and 102 of the Order refer to the promotion of equal employment opportunities through a “positive, continuing program in federal executive departments and agencies.” Section 202 requires a federal contractor to initiate “affirmative action” measures promoting employment without discrimination on the basis of race, creed, color, or national origin.

An Executive Order-based affirmative action program was the subject of a recent noteworthy “reverse discrimination” decision, illustrating the tension between the competing policies of promoting diversity and avoiding invidious discrimination. In *Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation*, a federal general contractor selected a subcontractor because, among other reasons, the latter had been certified as controlled by socially and economically disadvantaged individuals. The certification process, conducted by the U.S. Small Business Administration, included certain race-based presumptions.

A competing and losing subcontractor challenged the entire process as violative of the Fifth Amendment to the U.S. Constitution prohibiting the deprivation of life, liberty, or property without due process of law. On appeal, the U.S. Supreme Court, in a result joined in by five of the nine Justices, held that the lower federal courts had erred in their rulings. The high Court found that the correct legal standard to be applied in such a situation is “strict scrutiny,” well known for its use in reviewing legislation allegedly discriminating against minorities. The standard is, however, controversial as to whether it should be used when the legislation or policy discriminates against the *majority*.

One of the five Justices of the Court majority, Antonin Scalia, found that government can never constitutionally discriminate on the basis of race. On this point he was not joined by the other four of the majority, who indicated a willingness to uphold race-based affirmative action plans even under strict scrutiny, given the right facts.

As a result, it is unclear if affirmative action in federal contracts is deceased or merely on life support. U.S. Assistant Attorney General for Civil Rights, Deval L. Patrick, expressed the Clinton Administration's opposition to proposed legislation that would end racial and gender preferences in his December 7, 1995 testimony before the

U.S. House of Representatives Judiciary Committee's Subcommittee on the Constitution. The bill is known as the "Equal Opportunity Act," H.R. 2168/S. 1805, and also as the Dole-Cannady bill. Patrick added that the U.S. Department of Justice is reviewing all federal affirmative programs following the *Adarand* decision.¹⁵

Together, these three sources of constitutional, statutory, and administrative law created affirmative action's remedial premise. But it is a premise expressly rejected by many, if not the majority, of the U.S. population who assert they should not lose current opportunities for past discrimination. Why should they bear responsibility for wrongs they did not commit? Further, the Supreme Court has never required that only actual victims of discrimination may benefit from remedial measures, increasing the sense of unjust enrichment.¹⁶

The question arises whether the remedial justification of affirmative action is partly to blame for its failure to enjoy widespread consensus. By broadening the goal from merely remedying past wrongs to the equitable inclusion of all the diverse groups of society, does not the objection of the suffering innocent wane? Where the purpose is attaining an inclusive, diverse, and equitably unified society, the inquiry becomes what is needed in any given time and place to promote unity in diversity rather than who has suffered more than whom. Certainly, the history of past discrimination will make it more likely that minorities and women will be needed to promote equitable inclusion. But not always. Not everywhere.

In other words, the issue should be transformed from the current one of just shifting around classifications, to the fundamental need to accommodate diversity, which is another way of expressing the virtue of equity within human society.

Equity in Western Civilization

Equity has long been prominently featured in Western legal thought. Over 2,300 years ago, Aristotle, in the celebrated *Nicomachean Ethics* (after his son, Nicomachus, thought to have been the work's editor), described equity as a higher virtue present in humans.

Aristotle saw justice as a practical virtue, stemming from inner character but expressed in just acts between the extremes. He accepted as a working definition "that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just" (*Nicomachean Ethics* 106). Examining applied justice, he concluded, "there is more than one kind of justice" (*Nicomachean Ethics* 110). Distributive justice is concerned with geometrical proportion rendering "the just" "equal" and "the unjust" "unequal" (*Nicomachean Ethics* 112). Rectificatory justice is based upon "arithmetical progression," such as where "the distribution is made from the common funds of a partnership ... according to the same ratio [by] which the funds put into the business" and "the partners bear to one another" (*Nicomachean Ethics* 114). Political justice may be "natural" or "legal" (*Nicomachean Ethics* 124). Natural justice is, like the "natural law" of the Enlightenment, "universal" and deducible from the rules of nature, Aristotle's example being "as fire burns both here and in Persia." Legal justice stems from the "enactments" of legislators (*Nicomachean Ethics* 124–25).

Aristotle then described equity as "corrective" of "legal justice" (i.e., that justice created by legislation) and noted the apparent contradiction between equity and justice, declaring equity "is better" (*Nicomachean Ethics* 132–33). The problem arises because law is general in a variegated world where "it is not possible to make a universal statement which shall be correct" (*Nicomachean Ethics* 133). The error is not in the lawmaker, nor in the legislation, Aristotle explained, but in the nature of earthly affairs. It is simply neither practical nor desirable, nor even possible, for the lawmaker to anticipate every conceivable set of circumstances and to enact a law to fit the facts.

Equity operates as the "legislator himself would have said had he been present and would have put into his law had he been present." Therefore, equity is a correction of law "where it is defective owing to its universality" (*Nicomachean Ethics* 133). It is merely a case where one "chooses and does such acts," foregoing "his rights," "tak[ing] less than his share, though he has the law on his side" because that is equitable.¹⁷

Ancient Rome incorporated equity into its jurisprudence. The "dual origin" of law and equity in Rome was "comparable to, though certainly not identical with the dualism of English common law and equity" (Wolff, *Roman Law* 70). In 1861, Sir Henry Maine observed the same similarity (see Stein, *The Character and Influence of the Roman Civil Law* 21). In 1911, W. W. Buckland's lectures produced an entire book, *Equity in Roman Law*, presuming with little documentation that "traces in the Roman law of particular doctrines" were "introduced into [English] law" (Buckland, *Equity in Roman Law* 1).

In the early Republic, Roman law was a blend of custom and statute characterized by "technicality and rigidity" (Stein, *Character* 19). The main body of law, the *jus civile*, governed relations between Romans. From the midRepublic era, ca. 2,300 B.P. (ca. 300 B.C.), a parallel legal tradition arose, the *jus praetorium* (praetorian law) or, more properly, the *jus honorarium* (Wolff, *Roman Law* 71). The *jus honorarium* comprised the decisions and procedural rules associated with the *praetor peregrinus*, a special magistrate appointed with jurisdiction over cases involving non-Roman citizens (Stein, *Character* 19; Buckland, *Equity* 1; Wolff, *Roman Law* 79).

Many principles found in the *jus honorarium* are virtually indistinguishable from equitable principles and devices found in contemporary British or U.S. equity jurisprudence. For example, the Roman praetor held parties to their intentions when entering into a transaction (Stein, *Character* 22). The praetor developed a legal device known as the *fidemission*, similar to the modern trust (Stein, *Character* 23–24).¹⁸ Fraud and duress vitiated otherwise legal transactions brought before the praetor, and at one point in Roman history the *jus honorarium* included orders for specific performance so thoroughly associated with modern equity (Stein, *Character* 29).¹⁹

In more recent historic times, the British legal system formalized a role for equity. Though perhaps due as much to political rivalries as to the chancellor's or royal conscience, "[d]uring the late Middle Ages the English chancellors had succeeded in erecting a system of equitable jurisdiction that often stood in conflict with the common law courts" (Horwitz, *Transformation of American Law, 1870–1960* 17).

The British dualism of suits in equity and common law actions under the jurisdiction of the chancery courts and common law judges, respectively, was adopted by the North American English colonists. The U.S. Constitution expressly extends the "judicial Power" of the federal courts "to all Cases, in Law and Equity," arising under the Constitution,²⁰ thus presuming the dual systems.

The tension between the British chancery and common law courts was also imported to the young American union. Horwitz saw the early nineteenth century as a time of increasing legal formalism, epitomized by "the merger of Law and Equity first accomplished in the New York Field Code of 1848."²¹ Horwitz departed from "uncritical legal historians" who saw the merger as the mere growth of modern civil procedure. Instead, he found the merger to be "the final and complete emasculation of equity as an independent source of legal standards" (Horwitz, *Transformation of American Law, 1870–1960* 265). The subjugation of equity to law became "a prominent article of faith within the orthodox nineteenth century movement to conceive of law as science" (*Transformation of American Law, 1870–1960* 265). Equity was "regularly attacked" by legal writers as being too discretionary and political, out of date with the law's transformation from eighteenth century natural justice to nineteenth century positivism (*Transformation of American Law, 1870–1960* 265).

Horwitz concluded the move toward positivism was driven by a desire to render law neutral through developing proper procedures. Such procedures, once in place, could then be used to decide disputes "without resort to the substantive merits of a case, in contrast to an older result-oriented approach" (Horwitz, *Transformation of American Law, 1870–1960* 16–17).

Not all agree with Horwitz's explanation for the merger of law and equity. Friedman found that nineteenth-century lawyers, severely criticizing the rigid formalism of the law, were searching for new flexibility. Far from Horwitz's opinion that equity was "emasculated," Friedman believed "the union of the two systems was a triumph for equity" (*History of American Law* 346). He noted that many of the features of equity, both substantive and procedural, were the source of late nineteenth-century developments such as more liberal procedures for joinder of parties, counterclaims, and injunctions (*History of American Law* 346).

Whether one sees the disappearance of formal equity courts in the United States as the triumph or the transformation of the common law, the legacy of equity lives on in various forms. As Friedman noted, many now familiar elements of U.S. law, such as injunctions, receiverships, trusts, and duress, derive from equity. In the United States, courts typically refer to themselves as courts of law and of equity. Some states, such as Georgia, still have codified equity rules.

Because of its stress upon fairness in the face of strict law, some expanded the notion of equity to broader themes. For example, Roscoe Pound described "[a] stage of liberalization, which may be called the stage of equity and natural law, succeeds the strict law." Where the "strict law insists on uniformity," "equity and natural law insist on good morals." Strict law looks for forms, remedies and rules, while equity insists on justice in the ethical sense, duties, and reason (Pound, *Jurisprudence* 406–7).

In recent years equity theory has emerged as a research subject among social scientists.²² One study summarized "an equitable relationship" as where "the ratio of one person's outcomes to inputs is equal to the other person's outcome/input ratio" (Walster and Walster, "Equity and Social Justice").²³ That same study noted "scholars and reformers have long been interested in defining 'social justice,'" and that, "for example, Aristotle proposed a primitive 'equity' model of social justice," with such recent "modern social psychologists as Homans ... Adams ... and Walster, Berscheid and Walster" reformulating the equity model (Walster and Walster, "Equity and Social Justice" 1).²⁴

Given the prominent position of equity in Western thought, it is fair to conclude that there is something in social relationships and in the administration of law that makes the concept of equity useful, if not supremely satisfying. Indeed, the basic concept, even its administration, as we have seen is recognizable in ancient Greece and Rome, in the Middle Ages, and in centuries of U.S. and English jurisprudence. Moreover, as we shall see, the concept was taken up again, in language of unsurpassable splendor, by Bahá'u'lláh.

Equity, Justice, and Unity in the Bahá'í Writings

Whatever the cherished status of equity in Western thought, it is likely asking too much of a legal doctrine to change decades of legal assumptions, much less the hearts and minds of the majority of the population. It is equally unlikely that courts will suddenly untether affirmative action from some minimal requirement of finding past discrimination. Ultimately, a transformation of the heart is necessary. For that, let us consider spiritual thought. In particular, I invite the reader to consider the Bahá'í teachings, which have come to inspire the confidence of millions of adherents worldwide.

The importance of equity in the Bahá'í Faith is illustrated in at least three overall areas, including its elevation as a spiritual and practical virtue, the relative equitable nature of Bahá'í procedure, and the marked emphasis upon inclusion and diversity within Bahá'í community functioning. The Bahá'í writings unmistakably link equity to justice and government.²⁵ Equity is lauded as a prerequisite to proper “evaluation,”²⁶ particularly where government²⁷ must act to re-allocate resources to remedy extreme disparities in wealth and poverty.²⁸

Equity is also associated with the central²⁹ Bahá'í principle of the unity of humankind.³⁰ This is particularly relevant to the instant inquiry into affirmative action because the precise meaning of the application of the principle of the unity of humankind to longstanding inequality is a subject upon which reasonable minds differ. Far from a sterile intellectual doctrine, equity is associated in the Bahá'í teachings with an understanding heart or reason balanced by human warmth and emotion.³¹

The frequent coupling of equity with justice in the Bahá'í writings suggests that they are differing yet complementary qualities. It also suggests the very high station of equity since justice is exalted by Bahá'u'lláh as the “best beloved of all things in [his] sight ...” (*Hidden Words of Bahá'u'lláh* 3).³²

Second, apart from the substantive principle of equity, Bahá'í procedures³³ also reflect a shift toward equity compared to other systems. For example, the common law doctrine of *stare decisis*, holding that previous decisions in analogous circumstances are binding precedent in future cases is rejected as too rigid. Instead, a case-by-case analysis is necessary in every instance, according each case consideration on its own merits.³⁴

Third, equity is discernible in social principles and methods of Bahá'í administrative operations. A prime instance is the principle that, owing to an ancient, pervasive, and persistent denial of education, and to the crucial role of mothers in educating succeeding generations, “priority” is affixed to the education of women and girls over males, if a choice must be made.³⁵ Another example is the policy that where a tie occurs in Bahá'í elections, “priority should unhesitatingly be accorded [to] the party representing the minority ...” (Shoghi Effendi, *Advent of Divine Justice* 35),³⁶ should a minority be involved in the tie. Further, Bahá'í communities are to arrange their affairs to accommodate the increased representation of minorities on elected and appointed “representative institutions” (Shoghi Effendi, *Advent of Divine Justice* 35–36).

These are all examples of equity tempering the general rule of equality to promote harmony, inclusiveness, and unity. But, in order to see the justice, one must have the “understanding heart” of which Bahá'u'lláh spoke.³⁷

It may be argued with some force that these policies are premised upon compensatory or remedial justice rather than equity. Certainly, the historical injustice to women and minorities appears to be at least a partial basis. However, given the fundamental Bahá'í value of promoting unity within diversity, without the requirement of identifying a specific wrong, victim, or perpetrator, equity provides a more all-encompassing explanation. Support for this view comes also from the high station of equity as a virtue. In contrast, the mere fact that one happens to be born a minority, or, for that matter, not a minority, in and of itself, is not so esteemed, other than in relation to achieving unity of the human race. It is the spiritual qualities of unity and equity that are of paramount importance and not accidents of birth.

Indeed, so essential is the notion of equity in the Bahá'í teachings that it is authoritatively associated with the ultimate Bahá'í goal of a new world order “equitable in principle” to which “a harassed humanity must strive” (Shoghi Effendi, *World Order of Bahá'u'lláh* 34). Bahá'u'lláh even refers to God as “the Equitable” (*Gleanings* 102), and ‘Abdu’l-Bahá declares that “the Kingdom of God is founded upon equity and justice, and also upon mercy, compassion, and kindness to every living soul” (*Selections from the Writings of ‘Abdu’l-Bahá* 158).

Conclusion

Underneath the affirmative action controversy are buried fundamentally different conceptions of justice and equality. Affirmative action, resting primarily upon the principle of remedying past wrongs, today stands under such fierce opposition that it may not long survive.

However, when the issue is reframed from remedying past injustice to equitable inclusion of everyone, the objections to affirmative action lose force. The principle of equity, with an ancient yet enduring position in Western

legal thought, may assist as a basis for a new agreement on promoting unity in the vast sea of diverse groups comprising society, enabling us to see that embracing diversity does not contravene equality.

Viewing race and gender relations over the past 150 years we see progress. Yet, whether or not one supports affirmative action, most people would probably agree that four decades of the civil rights movement have only begun to change the heart of the average citizen, however improved public accommodations, educational and employment opportunities may be. Indeed, there is evidence that economic stratification is becoming worse.³⁸

What is needed more than anything as we enter a new century and millennium is a vision of society unified in its diversity. No legal doctrine alone can accomplish that. But if the focus is expanded to include values and virtues, rather than mere allocation of material opportunities and resources, we may find that attitudes and the law will follow. The administrative operations and approach to jurisprudence found in the sacred writings of the Bahá'í Faith offer a new vision for both transformation of the individual's values and unification of social groups without surrendering their distinct heritages. The value and principle of equity is a fundamental part of that vision.

Vision is a particularly meaningful metaphor for those who ponder the words of Bahá'u'lláh linking equity with observation or sight ("observe equity in your judgment ..."). The implication is that virtue enhances perception. Conversely, the absence of virtue decreases the capacity of the human species to perceive its environment, indeed its universe.

Notes

1. See, for example, Klein, "Firm on Affirmative Action"; Uchitelle, "Union Goal of Equality Fails the Test of Time"; Matthews, "Affirmative Action is Working—Sort Of"; and Hall, "Workplace Equality in the Eye of the Beholder."
2. Although lawyers suffer a professional distrust of dictionary definitions of complex legal doctrines, I offer the following description of affirmative action found in *The Constitutional Law Dictionary*: A "policy based on a classification in which one class is disadvantaged in order to remedy past discrimination suffered by another class." It should also be noted at the outset that the scope of this article is confined to affirmative action in the United States. I hastily concede finding the U.S. experience sufficiently intimidating, let alone its intersection with Bahá'í principles, such that there remains no justification for the reader enduring my ignorance of the law of other nations.
3. For a collection of these and similar arguments pro and mostly con concerning affirmative action, see, for example, *Racial Preference and Racial Justice*. For an eloquent rendition of the position on the redress of past wrongs (written, incidentally, by this author's former constitutional law professor), see Sedler, "Beyond Bakke."
4. See Nickel, "Preferential Policies in Hiring and Admissions," focusing on three rationales for affirmative action: compensatory, distributive, and social justice. Another important work examining the philosophical, as distinguished from the legal, bases of affirmative action is Rosenfeld, *Affirmative Action and Justice*. Rosenfeld also rejects as inadequate the usual philosophical justifications for affirmative action and offers a new basis—that of equality of opportunity-based in turn upon his vision of a unification of distributive and compensatory justice (*Affirmative Action and Justice* 284–96). See also Rawls, *A Theory of Justice*.
5. Civil Rights Act of 1964, Pub.L. 88–352, tit. VII, 78 Stat. 241, codified as 42 USC. §§2000e, *et seq.* This historic legislation was introduced by the Kennedy Administration in June, 1963, and, after some Congressional changes, became law when signed by U.S. President Lyndon B. Johnson on July 2, 1964. Approximately thirty pages in length, the Act is divided into eleven "Titles" or parts. Among other measures, it bars race discrimination in public accommodations, in programs receiving federal financial assistance, and in employment. See Schwartz, *Statutory History of the United States*.
6. Exec. Order No. 11,246, 30 Fed. Reg. 12319, 3 C.F.R. 339 (1964–1965 compilation), as amended.
7. See, for example, Horwitz, "The Jurisprudence of *Brown* and the Dilemmas of Liberalism," "The decision in *Brown v. Board of Education* was not only a major event in the history of race relations, it was also a significant moment in American jurisprudence. It represented the beginning of the disintegration of a progressive consensus on the nature and function of law and the role of courts in legislation in our constitutional system" (599).
8. 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
9. 349 US 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).
10. In this context, equity refers to the corpus of discrete equitable principles found in U.S. jurisprudence.
11. Ironically, in their briefs on appeal in *Brown II*, both the plaintiff schoolchildren, 99 L.Ed. 1083 at 1089, and the states of Kansas, *id.* at 1092, South Carolina, *id.* at 1094, Virginia, *id.* at 1096, Maryland, *id.* at 1100, North

- Carolina, *id.* at 1101, and Texas, *id.* at 1101-2, argued that equity supported their respective positions. The schoolchildren contended there was no equitable justification for postponement of the enjoyment of their constitutional rights. The states contended that equity favored a “gradual adjustment” from segregation to a system not based on distinctions of color.
12. 42 USC. §2000e-2(a)-(c).
 13. *Johnson v. Transportation Agency, Santa Clara County*, 480 US 616 at 631-637, 107 S.Ct. 1442 at 1451-1454, 94 L.Ed.2d 615 at 630-634 (1987). Court-ordered affirmative action plans have long been granted as relief where violations of Title VII race discrimination prohibitions are found. See, for example, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 US 950 (1972).
 14. Gender discrimination was not mentioned in Executive Order 11246. In December, 1967, President Lyndon B. Johnson issued an Executive Order adding similar provisions concerning gender discrimination in federal contracts. Exec. Order No. 11,375, 30 Fed. Reg. 12985, 3 C.F.R. 684 (1966-1970 compilation).
 15. U.S. Department of Justice, Civil Rights Division, Civil Rights Forum, 2.
 16. See, for example, Harvey, Senko, and Goree, “Affirmative Action and Promotions: The Alabama and California Cases,” for a discussion of this point. For case law examples, see *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Servo Comm’n*, 482 F.2d 1333 (2d Cir. 1973), and *Carter V. Gallagher, supra*, note 13. See also Larson, “Race Consciousness in Employment after Bakke.”
 17. For the reader weighing the relevance of Aristotle, consider a lead article in the 1995 *Harvard Law Review* by Kyron Huigens setting forth a theory of criminal responsibility based primarily upon the concept of virtue and *The Nicomachean Ethics*.
 18. For the view that the Anglo-American equitable trust may have originated following the influence of the Crusades and the introduction into Europe of the *waqf* found in Islam’s Shari’ah, see Comment, “Influence of the Islamic Law.”
 19. See Stein, *Character* 22-36 for a more detailed description of other examples. See, generally, Buckland, “Praetor and Chancellor.”
 20. U.S. Const., Art. III, Section 2. See also U.S. Const., Amend. XI.
 21. After David Dudley Field, the primary compiler (Horwitz, *Transformation of American Law* 265).
 22. See, for example, *Equity Theory—Psychological and Sociological Perspectives*.
 23. Note the similarity with Aristotle’s rectificatory justice.
 24. See also Deutsch, “Equity, Equality and Need,” hypothesizing that the purpose of a given social group influences the group’s choice of its governing principles. The attraction of social scientists to equity and equality is no surprise for “we can virtually define the core of sociology as an inquiry into the origins, characteristics and consequences of social inequality” (Turner, *Equality, A Social Inquiry* 30).
 25. “Justice and equity are twin Guardians that watch over men” (Bahá’u’lláh, *Epistle to the Son of the Wolf* 13). See also, for example, Bahá’u’lláh, *Epistle* 111 (“the manifestations of justice and equity”) and 131 (“the exponents of justice and equity”). It should be noted that in most instances the original term translated as “equity” is ‘insaf’ deriving from the Arabic *nasf* meaning “equal” or “fair.” The reader is left to assess the resemblance or dissimilitude between equity in the Western historical and legal sense, and in the Bahá’í writings. The subject is outside the scope of this work, which is primarily concerned with applying equity to race and gender relations. It should be noted in passing, however, that although there may be etymological differences, it can be argued that the Western legal notion of equity may derive in part from biblical sources and that the spiritual and the legal are not so far apart in origin. For example, Psalms 75:2, translated in the Revised Standard Version, refers to God judging humankind “with equity” and in the King James Version as “uprightly.” Psalms 98:9 refers to the “Lord” judging the “peoples with equity,” translated the same in both the Revised Standard and the King James Versions. The original Hebrew term in both instances is *masharim* or *meysarim* probably meaning something akin to “straightness.” Psalms 55:13 may be considered in contrast, translating, in both the Revised Standard and King James Versions, the Hebrew *errakh* as “equal.” *Errakh* also has the connotation of “equivalent” and may be associated with Israelite Temple pledges. Hence, it might be that the modern Western legal principle of equity and its philosophical ancestor are descendants of spiritual principles predating both. Another possibility is that as Western legal traditions evolved, a recognition of the need for a remedy to strict law’s occasional injustices arose. Biblical principles were then either deliberately seized upon for justification or the power of such spiritual principles simply influenced the evolution of Western law.
 26. Upon equity, Bahá’u’lláh declared, “The evaluation of all things must needs depend ...” (*Gleanings from the Writings of Bahá’u’lláh* 203).
 27. In his historic tablet to the Ottoman Sultan ‘Abdu’l-’Azíz, Bahá’u’lláh enjoined the Sultan “to rule with equity among men ...” (*Gleanings* 236). Further, ‘Abdu’l-Bahá in 1875 encouraged the Persian Shah “to establish equity

- and righteousness” and questioned why certain government officials had “absolute authority” instead of being “limited to equity” (*Secret of Divine Civilization* 11, 15).
28. Bahá'u'lláh adjured Sultan ‘Abdu'l-'Azíz not to overstep “the bounds of moderation,” to allocate resources to the population “according to their needs” and to avoid enabling some to acquire extreme riches, property, and “things that are of no benefit unto them,” thereby encouraging extravagance (*Gleanings* 235). Shoghi Effendi further linked equity with a fairer distribution of wealth, looking forward to a time when “the economic resources of the world will be organized, its sources of raw materials will be tapped and fully utilized, its markets will be coordinated and developed, and the distribution of its products will be *equitably regulated*” (*World Order of Bahá'u'lláh* 204, emphasis added).
 29. “Of such cardinal importance is this principle of unity [of humankind] that it is expressly referred to in the Book of [Bahá'u'lláh's] Covenant, and He unreservedly proclaims it as the central purpose of His Faith” (Shoghi Effendi, *God Passes By* 217).
 30. After noting the inequity of baseless attacks upon him, Bahá'u'lláh urged the “establish[ment of] the unity of all mankind” (*Gleanings* 203).
 31. Bahá'u'lláh enjoined all to “observe equity in your judgment, ye men of understanding heart,” exclaiming that “Justice is, in this day, bewailing its plight, and Equity groaneth beneath the yoke of oppression.” “Equity,” he further decried, “is rarely to be found, and justice hath ceased to exist,” even though it is “the most fundamental among human virtues” (*Gleanings* 203–4, 92; *Epistle* 131).
 32. The high station of equity does not mean that the more general principle of equality before the law is abandoned. To the contrary, “All men are equal before the law,” “Kings must rule with wisdom and justice, prince, peer and peasant alike have equal lights to just treatment, there must be no favour shown to individuals.” A judge must “administer the law with strict impartiality in every case brought before him” and “A humble workman who commits an injustice is as much to blame as a renowned tyrant” (‘Abdu'l-Bahá, *Paris Talks* 154, 160).
 33. At this point some caveats are necessary. First, “Bahá'í procedure” is somewhat misleading. Bahá'í Administration is seen as gradually unfolding commensurate with the progressive receptivity and development of a global society, passing from a transitional age toward global cooperation. Second, Bahá'ís anticipate a future time when there will be fully developed courts of Bahá'í law. See, for example, Shoghi Effendi, *Advent of Divine Justice* 14; *World Order of Bahá'u'lláh* 12, 200; *God Passes By* 411. No attempt is here made to forecast future development, but simply to consider the importance of equity within the Bahá'í teachings.
 34. The case-by-case nature of Bahá'í procedure was characterized as an expression of equity in *The Development of Local Spiritual Assemblies* 82–83. The National Spiritual Assembly of the Bahá'ís of the United States provided the following guidance for Bahá'í local Spiritual Assemblies concerning Bahá'í procedure: “c. Equity: The Basis of Justice: Just as varying social conditions call for wisdom in applying Bahá'í laws, each individual case requires careful consideration so that true justice may be ensured. Every case has a unique set of circumstances and must be judged on its own merits. *Judging each case on its own merits is the essence of equity*, upon which ‘the evaluation of all things must needs depend ...’ (Bahá'u'lláh, *Gleanings* 203). According to the principle of equity, basing decisions on precedent—a practice common to American and English judicial systems—is by itself an inadequate approach to making just decisions [A]n Assembly is still obligated to consider all the facts of each case ...” (emphasis added).
 35. See, for example ‘Abdu'l-Bahá quoted in *Women* 20. However, this principle must be taken in the context of another Bahá'í principle that education should be universal and compulsory for everyone. (“The education of each child is compulsory ...” *Women* 22.) 36. In this context, “party” refers to individuals. There are no “political parties” within the Bahá'í Faith.
 37. Recall also Aristotle’s portrayal of equity involving the forbearance of one’s rights under the law.
 38. The United States Census Bureau released figures in June, 1996, confirming that the gap between the high- and low-income U.S. households has greatly expanded in recent years. The average income for the year 1994 grew by twenty percent for the top twenty percent of households, by five percent for the second fifth, by one percent for the third fifth, remained unchanged for the fourth fifth, and fell three percent for the bottom fifth (Wilson, “Rich-Poor Gap”).

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