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equality is still progressing along with society. It is the best way to allow everyone the universal right of life, liberty, and the pursuit of happiness.

The Right to Equal Concern and Respect: 
The Foundation of Affirmative Action

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Affirmative action creates a just society only if its factual realization anchors upon the fundamental principle of the right to equal concern and respect.

President Lyndon B. Johnson originally introduced affirmative action in 1965 when he stated, “we seek . . . not just equality as a right and a theory, but equality as a fact and as a result.” As President Johnson noted, two ideas compose the definition of affirmative action: the principle of equality and the facticity of equality—equality as a fact present in the real world. Affirmative action has within its scope the capacity to bring both ideals of equality and of justice into the American society.

However, the success to which affirmative action produces equality and justice depends upon how closely its enforcement and court rulings remain true to the principle from which affirmative action stems—namely the right to equal concern and respect. Affirmative action creates a just society only if its factual realization anchors upon the fundamental principle of the right to equal concern and respect. First, this essay focuses on the right to equal concern and respect. Second, it focuses on how affirmative action moves from principle to the factual realization of equality and justice in American society.

The Principle of Equal Concern and Respect

Legal philosophers often argue about the origins of law. Some theorists believe that law stems from a social contract and entitlement to protection;

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others hold that law's foundation comes from rules or from language. Whatever the argument, one cannot hide that law intrinsically connects to morality and principles. For example, the laws derived from America's political institution clearly originate from principle-based elements essential to human life.

Principle-based laws protect and liberate people by allowing them to realize their full potential as humans. First, the United States Constitution states the principle that this nation's people hold essential to human life and happiness. Second, the Constitution lists rules to ensure individuals' rights to the aforementioned principle. The American Constitution also sets forth specific rules directly derived from rights and principles that originate in life, liberty, and happiness. Thus, law and particularly American law make as its foundation intuitive notions of what composes a complete human life—or rather what defines a human being. Intuitive notions of individual life, liberty, and happiness make their foundation upon principle and in particular the right to equal concern and respect.

The right to equal concern and respect is the fundamental right of all human beings. Governments which recognize individuals' rights to life, liberty and happiness must uphold and protect the right to equal concern and respect. Therefore, affirmative action has the capacity to assist individuals to enjoy a complete human life. However, affirmative action must hold the right to equal concern and respect foundational to its existence; otherwise, it loses all validity as a means to social equality.

The right to equal concern and respect means each individual has the right "to be treated equally without regard to his person or character or tastes," and it "is enforced by the fact that no one else can secure a better position by virtue of being different in any such respect." The word "equally" in this sense means that each person deserves respect regardless of his or her social position; "equally" does not mean the equal distribution of resources. This differentiation remains the most misunderstood part of affirmative action.

Two different idealizations of affirmative action exist. The first idealization charges affirmative action with the role of distributing resources among minority groups whose income remains below the majority. If affirmative action's role is to equally allocate resources then this law does not base itself on the right to equal concern and respect.

The second idealization charges affirmative action to ensure individuals treated with less respect than the majority of citizens receive the means to raise their social position. The fundamental principle of affirmative action does not concern itself with the allocation of resources to poor citizens but rather concerns itself with ensuring that individuals receive equal treatment and respect. Affirmative action holds validity only if its foundation rests on the right to equal concern and respect.

The right to equal concern and respect acts as the foundation for affirmative action for three reasons. First, the right to equal concern and respect is a condition of the social contract rather than a product of it. Second, equal concern and respect does not come by way of merit or inheritance but simply by being human. Finally, equal concern and respect creates the standard from which political systems judge particular actions as just or unjust.

The right to equal concern and respect must exist as a prerequisite for a viable social contract to operate according to justice. Without this principle, laws skew justice and categorize humans according to individual character, social position, and even others' perceptions. If individuals do not have the right to equal concern and respect, a priori in a society, then they will fail to receive adequate justice.

The United States Constitution bases its laws and government organization primarily as the right to equal concern and respect. This document grounds itself on the principle that "all men are created equal." The

2 The particular legal theorists that I refer to include Jean Jacques Rousseau, H. L. A. Hart, and Jurgen Habermas.
5 Ronald Dworkin, Taking Rights, 76–80, 182.
6 Ibid., 181.
7 Ibid., 181.
8 Ibid., 181–82.
others hold that law's foundation comes from rules or from language.\(^2\) Whatever the argument, one cannot hide that law intrinsically connects to morality and principles.\(^3\) For example, the laws derived from America's political institution clearly originate from principle-based elements essential to human life.

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The right to equal concern and respect is the fundamental right of all human beings. Governments which recognize individuals' rights to life, liberty, and happiness must uphold and protect the right to equal concern and respect.\(^4\) Affirmative action is a rule based on the right to equal concern and respect. Therefore, affirmative action has the capacity to assist individuals to enjoy a complete human life. However, affirmative action must hold the right to equal concern and respect foundational to its existence; otherwise, it loses all validity as a means to social equality.

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\(^5\) Ronald Dworkin, Taking Rights, 181.
\(^6\) Ibid., 179.
\(^7\) Ibid., 181.
\(^8\) Ibid., 181–82.
Constitution also entitles all men to protection of "certain inalienable rights." Although America's political institution holds this principle as its foundation, many areas of American society still do not function according to this principle. Thus, affirmative action helps to provide equal opportunity to an individual whose right to equal concern and respect has been compromised.

Second, all human beings hold the right to equal concern and respect by virtue of being human. All justice and fairness rests on the assumption that men and women maintain a natural right to equality and respect. When individuals lay claim to a right, they entitle themselves "to protection against the majority even at the cost of the general interest." Affirmative action as an enforced rule helps bring about justice in any society that bases social position wholly or in part upon individual character, race, or preference. Affirmative action, and its fundamental principle, transcends the American political institution and justifies its existence by virtue that it is uniquely human.

Finally, the right to equal concern and respect is fundamental because it is in the actual design of the political institutions themselves; this right is an "intuitive notion" upon which all theories of justice can be tested. Although discernible and unchanging, the principle is intuitive because it does not translate easily from a validity claim into a factual realization. In other words, one cannot point to a particular case in United States history and find the right to equal concern and respect accurately defined as an absolute standard to which all other cases refer back. The principle does not rely on a factual reality, but it identifies with intuition based on human phenomenology. The American political institution designs its court system to allow a human judge to deem certain cases just or unjust based not merely on rules but on principle, although rules do help to guide the decision. Affirmative action as a rule makes its standard the intuitive principle of the right to equal concern and respect from which the courts can claim a case either just or unjust.

After the principle of equal concern and respect as the foundation of affirmative action was established, the problem arises of how to create adequate rules which translate this principle into a factual realization. To properly address this problem, two idealizations need identification to explain the tension between the principle of the right to equal concern and respect and the factual realization of affirmative action. The two idealizations are validity and facticity.

Facticity and Validity

Validity means "the way things ought to be"; facticity means "the way things are—the factual realization in the world." Law deals with this tension between facticity and validity—between what ought to be and the facts. On one hand, the law is a coercive force or facticity; on the other, it needs to exercise coercive force by use of reason or validity. Thus, law accentuates the tension between facticity and validity, and affirmative action is not exempt.

In his address, President Johnson identifies the tension between facticity and validity. Validity refers to President Johnson's claim to "equality," while facticity refers to the "facts and results." If the principle to the right to equal concern and respect forms the foundation for affirmative action, then any justification for an action to ensure equality among individuals must make a validity claim that precisely identifies the individual's circumstance with being denied the right to equal concern and respect. Thus, the validity claim that individuals make in regards to any factual incident of affirmative action must be treated individually. Every situation differs.

Several conflicting Supreme Court rulings on aspects of affirmative action exist. In the Hopwood case, for instance, the justices found an aspect of affirmative action unconstitutional, while in the Michigan court case of 2003 the Supreme Court upheld the case for affirmative action in higher education. The problem that the Supreme Court faces with its contradictory rulings on affirmative action accentuates the tension between validity and facticity. In some situations affirmative action as a factual rule may be just:

15 Bruner & Dworkin, Sovereign Virtue, 387.
Constitution also entitles all men to protection of “certain inalienable rights.” Although America’s political institution holds this principle as its foundation, many areas of American society still do not function according to this principle. Thus, affirmative action helps to provide equal opportunity to an individual whose right to equal concern and respect has been compromised.

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1. Ibid., 181-82.
2. Ibid., 182.
3. Ibid., 146.
4. Ibid., 182.
5. However, oftentimes a case is used as precedent or reference for the very fact that principles have difficulty transferring from an ideal to a factual reality.

in others it may not be. If the practice of affirmative action does not match up to the principle upon which affirmative action bases itself, the Supreme Court would be right in ruling that a particular instance of the facticity of affirmative action is unconstitutional and vice versa.

Reverse discrimination appeals are due to the factual nature of affirmative action. If affirmative action diverges too far from the original validity claim then a resultant facticity will appear that is not representative of affirmative action as a substituent of the right to equal concern and respect. How the validity claim to the right to equal concern and respect operates in the real world is never constant. In the Supreme Court ruling of *Grutter v. Bollinger*, Justice Sandra Day O'Connor stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Justice O'Connor made this statement in 2003, and this statement remains true today. Affirmative action brings about a just society in America. Segments of American society still favor one person over another due to individual character, race, or preference.

Any sound argument against affirmative action has only two options as a main premise. The first argument holds that affirmative action in American society as a fact present in the real world is so far removed from its parent principle that it no longer upholds individuals’ right to equal concern and respect. The second premise attacking affirmative action must argue that American society no longer needs affirmative action because instances of compromising individuals’ right to equal concern and respect are rare or nonexistent. Neither of these arguments is sound—places in our American society still afford less opportunity for social improvement because of individual character, race, or preference. Moreover, the American judicial system still provides accurate rulings on affirmative action that are intuited from the principle of the right to equal concern and respect.

**Conclusion**

Affirmative action illustrates how law depends, not only on rules which strive to realize law within an actual reality, but also on rights and principles. Affirmative action is a valid law because it stems from the basic human principle of the right to equal concern and respect. However, affirmative action as a fact present in real world will bring about justice only if the particular instance of affirmative action bases itself on the principle of the right to equal concern and respect. American society has not yet completely realized the principle of the right to equal concern and respect as a fact. Thus, affirmative action is a legitimate option to help people treated with less equality and respect an opportunity to advance in social position that otherwise would not be available.

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