

EQUALITY AND DIFFERENCE – THE RESTRAINED STATE

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I. INTRODUCTION

Contemporary American law, culture, and political theory restrain the concept of equality as a tool of social justice. Equality in conjunction with a strong emphasis on personal liberty operates as a mandate for curtailing state action, rather than an aspirational measure of the comparative well-being of individuals. As a check on state involvement, our cramped notion of equality limits the state’s ability to affirmatively address economic, political, social, and structural inequalities.¹

As interpreted in modern Supreme Court jurisprudence, the Equal Protection Clause of the U.S. Constitution actually works to restrict the remedial ability of the state.² Equality is understood as a mandate for

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1. *See, e.g.*, CAROLINE KNOWLES, FAMILY BOUNDARIES 108–09 (1996) (discussing popular constructions of children, women, and minorities as vulnerable, pathological, and in a perpetual state of victimhood).

2. U.S. CONST. amend. XIV, § 1 (referring to the Equal Protection Clause); *see* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1726–27 (2012) (documenting how even a cursory examination of American Supreme Court

formalized equal treatment; it operates as a nondiscrimination ideal. This ideal minimizes existing structural disadvantages and thus impedes a more substantive approach to equality, which would recognize and accommodate differences and consider outcome as well as treatment. This formal version of equality, while appropriate on some levels and in some contexts, is not sufficiently flexible to address contemporary disparities in political, social, and economic well-being in America.³ Any distinctions in the treatment of individuals can raise suspicion about government action, and this is particularly true with distinctions involving personal characteristics that are virtually impossible to constitutionally justify, such as race or gender.⁴ At the same time, the emphasis on discrimination or difference in the treatment of protected individuals or groups has been viewed as the primary affront to the principle of equality, rather than the widespread (but nondiscriminatory) exclusion from the benefits of American prosperity and technological advancement experienced by those who stand outside as well as inside these protected identity categories. That generalized harm and deprivation is not seen as constituting a legally remedial form of inequality, indicates that an adherence to formal equality has seemingly eclipsed our moral and political aspirations for social justice. In effect, this means that the state and its actors and institutions can legally treat individuals poorly, just as long as they treat them the same.

II. EQUALITY AND DIFFERENCE

The emphasis on equal treatment found in contemporary American jurisprudence may be desirable and appropriate when the class or nature of the differences between individuals has been deemed not to matter. This is the case when equality mandates one-person-one-vote or equal pay for equal work.⁵ However, an ideology of equality which concedes that differences exist, but seeks relentlessly to minimize or ignore the implications of such differences, makes it difficult to use law as a remedy for many situations and circumstances. In turn, this makes the attainment of substantive equality difficult, if not impossible, to achieve. *Parents*

jurisprudence reveals a reluctance to articulate additional suspect classes and fundamental rights by the U.S. Supreme Court).

3. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733–34 (2007) (holding that a student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools could not be used to advance racial equality).

4. Concerning the problems with formal equality and equal protection in American jurisprudence, see Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 1–2 (2011) (“The emptiness of U.S. constitutional equal protection doctrine has long been apparent from its lack of reach to its shaky grasp on questions of sex inequality.”).

5. Women working full-time earn approximately 80 cents to one dollar earned by men. *See* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK* 68 (Dec. 2010), <http://www.bls.gov/cps/wlf-databook-2010.pdf>.

*Involved in Community Schools v. Seattle School District No. 1*⁶ is an example of this phenomenon involving voluntary measures undertaken by school districts to desegregate classrooms.

The case involved a series of Seattle-area school districts which had voluntarily incorporated a race-sensitive student assignment plan to determine which public schools certain children could attend.⁷ The goal of the plan was to ensure that the racial balance of each school fell within a predetermined range, calculated based on the racial composition of the entire school district as a whole; the school district thus considered each individual student's race when assigning them to a particular school.⁸ When some students were not allowed to attend particular schools because of their race, their parents brought suit, contending that this race-sensitive allocation to public schools was in violation of the Fourteenth Amendment guarantee of equal protection.⁹

Five of the nine Justices held the assignment plan impermissible based on lack of necessity and due to the absence of a history of intentional discrimination in the districts.¹⁰ Justice Kennedy disagreed with the four more liberal members of the Court that the Constitution *permits* such desegregation efforts, even though it does not *require* them in the absence of prior discrimination.¹¹ Chief Justice Roberts's concluding sentence clearly illustrated the position of the conservative Justices, perhaps marking the future of equality in cases of racial imbalance: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹²

6. 551 U.S. 701 (2007).

7. *Id.* at 709–10.

8. *Id.* at 710.

9. *Id.* at 710–11.

10. Justice Kennedy agreed with the four liberal Justices that there was a compelling interest in avoiding racial isolation and promoting diversity. However, Kennedy concluded that although "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue," he found that "[w]hat the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification." *Id.* at 797–98 (Kennedy, J., concurring). The plurality recognized that a remedial legal injury would exist if there was harm arising from past discrimination. Absent that injury, Kennedy found it necessary to show "necessity" in order to validate state affirmative measures to prevent racial isolation. Necessity indicates there is no other way to remedy possible future harm, a situation rarely likely to occur. Kennedy's perspective seems to view any difference in treatment as presumptively harmful and inappropriate, meaning that any differential treatment must be justified by necessity regardless of the nature of the current and future harm to be addressed. The doctrinal box thus drawn is an exceedingly small one. The backward-looking requirement of prior legal injury (discrimination) is of extremely limited usefulness, while the mandate of necessity in regard to present or future harm significantly impedes the development of affirmative educational policy to address a recognized social problem.

11. *Id.* at 790.

12. *Id.* at 748 (majority opinion).

The approach taken by the majority in this case shows how a focus on discrimination can inevitably result in a narrowed focus on a moment of injury or legal harm rather than on the historical, systemic, and institutional structures that surround that moment. It was not the existence of racial imbalance or isolation that constitutionally justified a response by the school districts, but rather the finding of harm as occurring either in the past in the form of discrimination, or currently as demonstrated by a compelling need for action or a showing of necessity.¹³ The inquiry also focused on individuals and their actions to the exclusion of an institutional and contextual assessment.¹⁴ The inquiry thus remained oriented toward specific acts of past discrimination or proof of current harm, while the extent and nature of general state responsibility to respond to racial imbalance and isolation was left unrecognized and in doubt constitutionally.

Ironically, the plurality opinion in *Parents Involved* also demonstrates how, in many instances, taking contexts and structures into account can reveal that the solution or appropriate response to inequality is *not* the imposition of greater equality through law. Resorting to formal equality in situations marked by existing inequalities of circumstances often serves to reinforce and justify those same inequalities.¹⁵ An approach to equal protection developed in response to blatant discrimination and exclusion now prevents remedial measures designed to address the legacy of that exclusion.¹⁶

A. *Taking Account of Differences*

In my recent work, I have argued for the development of an approach to social justice issues that puts equality aside and brings differences into consideration.¹⁷ The emphasis here is placed not on an abstract and inevitably contested legal principle, such as liberty or dignity, or on an inherently comparative or relative measure, such as equality, but on the ways in which the universal subject who is to be governed by those principles has been constructed in both political and legal discourses. This approach begins with the recognition of universality or sameness among individuals (the fundamental equality position) but also considers the

13. *Id.* at 720–28.

14. *Id.* at 759.

15. *See generally* MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* (1991).

16. Equal protection doctrine initially developed in an era where Jim Crow and de jure segregation were dominant in certain parts of the country. Today, it operates to bar more remedial measures to correct structural disadvantage—disadvantage which in part is a legacy of that initial discrimination.

17. *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

inevitable differences among them.¹⁸ The universality is found in the vulnerability that marks our existence as embodied and finite beings. The differences arise because there are different stages and manifestations of embodiment, as well as from the fact that we are differently embedded in social relationships and within societal institutions.¹⁹ This conceptual approach is what I have called the “vulnerability paradigm.”²⁰ An approach that considers vulnerability would make forms of societally-produced differences a predominant focus because they provide the foundation for the assertion that we need a responsive state—one with a clear duty to effectively ensure realistic equality of access and opportunity to society’s resource-generating institutions for everyone regardless of their individual characteristics. Instead, what equality of treatment has provided is the passive toleration of inequality and complicity in the conferral of often unwarranted privilege on the few.

Importantly, a vulnerability approach does not identify discrimination or difference as the primary evil to be addressed. Rather, it calls attention to the way power and privilege are conferred through the operation of societal institutions and relationships.²¹ The identities under question in this regard are those social identities or functions that confer privilege and power.²² Social identities are manufactured within institutional relationships and prevalent ideologies, not found in the designation of attributes associated with individual characteristics, actions, or affiliations, such as race, sex, religion, or sexual orientation.²³ These social identities and the role of the

18. *See id.*

19. These concepts are explored more fully in *infra* section IV. To explore other legal, social, and political conceptualizations of embodiment as a result of vulnerability, see Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL’Y 45 (2012).

20. *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

21. *Id.*

22. Concerning Vermont’s innovative interpretation of the Common Benefits Clause of its state constitution, see *Baker v. State*, 744 A.2d 864, 876 (Vt. 1999) (“The powerful movement for ‘social equivalence’ unleashed by the Revolution ultimately found its most complete expression in the first state constitutions adopted in the early years of the rebellion.”).

23. This is not to say that these traditional categories do not have historical meaning or incorporate significant memories of past experiences. Those histories may indicate that members of a group are more susceptible to further harm and disadvantage because they have been excluded from certain opportunities or institutions and hence have not been able to build up essential components of resilience. But their heightened susceptibility should not obscure the fact that every person who occupies a social category is similarly vulnerable in regard to the relations of power and privilege that the category establishes. An individual’s position may be the result of discrimination in the form of exclusion, but the potential issue faced by every member of a given social identity would be the misallocation of privilege and disadvantage. Examples would include the relationship and power allocation between employer–employee, teacher–student, and parent–child. We might term these relations of power as sites of structural disadvantage and/or privilege. Indeed, some discussions of structural sexism or racism attempt to get at these institutional relations as well. The problem is that they are still confined within an identity-discrimination and equal protection framework, which ultimately focuses attention on individual characteristics and injury, as well as individual actions. It

state in establishing and maintaining them raise substantial questions about our historic commitment to the idea of a singular and coherent legal and political subjectivity. Ultimately, the vulnerability analysis seeks to incorporate a theory of differences in order to articulate a more complex legal and political subject—the “vulnerable subject,” as well as to make a claim for a more responsive state.²⁴

III. THE VULNERABILITY THESIS—FUNDAMENTAL ASSERTIONS

Often narrowly understood as merely “openness to physical or emotional harm,” vulnerability should be recognized as *the* primal human condition.²⁵ As embodied beings, we are universally and individually constantly susceptible to harm, whether caused by infancy and lack of capacity, disease and physical decline, or by natural or manufactured disasters. This form of dependency, although episodic, is universally experienced and could be thought of as the physical manifestation or realization of our shared vulnerability as human persons, which is constant throughout the life course.²⁶ This realized form of human vulnerability has a social or relational component, as well as physical implications, because we are innately dependent on the provision of care by others when we are infants and often when we are ill, aged, or disabled. In this way, human vulnerability should be understood as providing the compelling impetus for the creation of social relationships and institutions, necessitating the formation of families, communities, associations, and even political entities and nation-states. The social roles defined by and through these relationships and institutions are not universally experienced, nor are their functions inevitable or inherent in the human condition. Rather, they are socially constructed and contingent in nature; built and maintained within institutions such as the family, the school, and the workplace.

There is also a geographical aspect to a vulnerability analysis. For example, the places and spaces where young people must build their

seems to me that it remains problematic to think about social institutions operating against individuals with a discriminatory motivation or intent; rather, it is more productive, and more accurate, to look at the way that legally defined social identities acting in relation to each other actually confer privilege or disadvantage.

24. See generally Fineman, *supra* note 20.

25. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriamwebster.com/dictionary/vulnerability> (last visited Aug. 18, 2014) [hereinafter MERRIAM-WEBSTER]; see also THE FREE DICTIONARY, <http://www.thefreedictionary.com/vulnerability> (last visited Feb. 13, 2014) (defining vulnerability as “[s]usceptible to physical or emotional injury”).

26. The constancy recognizes that there is no position of invulnerability, although the degree of vulnerability is affected by the amount of resources or assets an individual has with which to mediate or compensate for their vulnerability. For an exploration of vulnerability from the global perspective of public health, see Astier M. Almedom, *Profiling Resilience: Capturing Complex Realities in One Word*, 35 FLETCHER F. WORLD AFF. 145 (2011).

resilience are primarily grounded within families, communities, and schools.²⁷ These institutions in both concurrent and sequential interaction form the geography of childhood. Within these systems, idealized social identities such as “parent-child” or “teacher-student” are formed and operate as functional and ideological constructs. There are well-defined expectations and aspirations attached to each of these social identities.²⁸ Many social identities, such as those of parent and child, are also interrelated categories and reflect allocations of social power and privilege between their occupants.²⁹

The social identities fashioned for family and school reflect the fact that these spaces have an important social function to perform in preparing young people to occupy a series of future social identities as adults - identities such as “citizen,” “employee,” and “taxpayer.”³⁰ Idealized social identities and their functions are not static over time, although as archetypes reflecting the values and priorities of society they are relatively stable. Significantly, childhood experiences in these spaces create more than memories carried forward into adulthood. Our experiences with family and school are the initial places where we gather the resources of resilience that we need to take advantage of future opportunities. They also operate to shape the ways in which we understand ourselves, others, and our place in society and within our wider communities.³¹

In practice, our social roles, relationships, and institutions are human constructions, and as such are also inherently vulnerable to change, whether it is negative, such as decline and decay or corruption and capture, or positive, such as enhancement and augmentation or development and enrichment. The state should be among the most powerful and pervasive mediators of institutional change or vulnerability. The state legitimates and then regulates social roles and institutions through its laws and policies. Given this reality, it is hard to understand how human vulnerability has been ignored or marginalized in mainstream legal theory or political

27. See generally Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 Hous. L. Rev. 817 (2009).

28. See Jean-Claude Deschamps, *Social Identity and Relations of Power Between Groups*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 85 (Henri Tajfel ed., 2010) (illustrating that social identity is a concept believed to be dependent and fluid upon an individual's position in society); see also Orly Rachmilovitz, *Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention* 17–20 (Bos. Univ. Sch. of Law Pub. Law & Legal Theory, Paper No. 13–35, 2013) (underscoring how parental assimilationist demands imposes social, familial, and cultural demands on children).

29. See Deschamps, *supra* note 28 (illustrating that social identity is a concept believed to be dependent and fluid upon an individual's position in society).

30. For an exploration of the relationship between employer and employee in terms of the vulnerability analysis, see Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 Sw. L. Rev. 275 (2013).

31. See Deschamps, *supra* note 28.

philosophy in favor of a neoliberal fixation on personal responsibility, buoyed by an insistence that only a severely restrained state can be a responsible one.³²

A. *Reconfiguring the Political Subject*

Traditionally the political (and legal) subject has been conceived of as a universal subject,³³ defining the quality and nature of the relationship between the state and those subjected to its power. This conceptualization of the legal subject encompasses everyone in society. Fundamental principles of democracy require, at least in the abstract, that laws should be applied equally to those who are similarly situated, which supports the slogan that “we are a nation of laws, not men (*sic*),” and that “no man (*sic*) is above the law.”³⁴ Of course, when this principle formed the basis for American democracy, the political subject was a limited or refined one: white, male, property-owning or tax-paying, of a certain age or religion, and free. Over the course of the nineteenth and twentieth centuries, certain qualifiers were removed and political legal subjectivity was enlarged to

32. See generally FINEMAN, *supra* note 17.

33. Law relies on broad categories that are rather entrenched within the law as it has developed over centuries as a coercive tool of the state. Lawmaking relies on classification—the generation of broad generalizations about individuals, groups, or classes of things and people. This classification process occurs initially at the legislative level, which generates systems of rules and norms that are intended to have universal application within categories. Generalizations and aggregation are inevitable in this process. Once the categories are drawn, the foundational principle of equality before the law demands the same treatment be applied to those who fit within the same classification. In other words, the legal or political subject is a universal subject. Individuals may be sexed, raced, and classed, but the whole point of equal protection under the law is to erase differences in treatment. Yet how do we do this and also recognize differences within broad categories on the legislative level? On the other hand, adjudication is the means whereby individual circumstances are fitted into existing classifications; the process whereby individual and specific facts are assigned legal meaning or consequences on a case-by-case basis. Adjudication is not an ad hoc process, however, and the same mandate of equal treatment applies. Courts make decisions using analogies and distinctions within the context of rules such as those governing “precedent” and “stare decisis,” ideally tying like things together in a web of consistent, coherent, and predictable doctrine using classifications. Legal classifications are, of necessity, broad in nature and take legal subjects outside of personal history, universalizing that which might appear as inherently different to scholars in some other disciplines. In order to “speak” to law, legal theory, even of the feminist variety, must to some extent assimilate concrete and material differences into the dominant meta-narratives of law. As a result, it will have only a limited ability to theorize around particulars. Law is too general and reflective of the status quo; it is rule and precedent bound too easily, and quickly absorbs and reflects nonconforming experiences. Operating in society as a dominant structural paradigm and discourse, law both co-opts the experiences of nondominant groups and their politics generally, while also disqualifying and silencing members of those groups who are specifically subjected to law. Co-optation is achieved through classification and tinkering reforms, while disqualification and silencing are accomplished for those individuals caught in legal constructs, such as the adversarial process, rules of evidence, and the structured elements of causes of action and claims for relief, which make it impossible to tell stories outside of legal narratives.

34. Often referred to as a commitment to “the rule of law,” the principle goes back as far as Aristotle. See Aristotle’s *Politics*, 162–65 (Benjamin Jowett trans., 1943); see also James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421 (1999).

encompass previously excluded groups, although the political subject, at least as defined by eligibility to vote, hold office, or serve on juries, remains limited to citizens of a certain age.³⁵

Along the way, however, this subject acquired a number of secondary characteristics through political and policy debates. The contemporary political subject is conceived of as isolated and narrowly focused on his personal well-being, to the exclusion of other members of society, while possessing only minimal needs to be satisfied by the state. The state in turn considers it the personal responsibility of each individual to provide for himself and his family, which is similarly conceived as an autonomous unit. Therefore, it is not surprising that in today's political and policy debates, we find the political and legal subject presented as one that incorporates only the most limited of human characteristics and reflects only some of the circumstances likely to be encountered over the life course. Our contemporary subject is a fully competent and capable adult individual who seeks liberty or autonomy as a primary value and is capable of functioning as a self-sufficient or self-actualizing agent. We need to rethink this subject, broadening it and its potential circumstances, as well as altering the allocation of responsibility for individual well-being beyond the neoliberal model. However, in doing so, we should not reincorporate the identity markers which were the bases for earlier exclusion. Political mobilization around those identities was necessary and effective in gaining the expansion of the political subject so that it was not limited along race, gender, and ethnic lines. However, contemporary equal protection jurisprudence mandates that the legal subject be a formally "neutral" and universal construction, unmodified by characteristics such as race and gender. Thus, an identity-based classification process, when combined with an understanding of equality that refuses to recognize the relevance and significance of differences in constructing social policy, can all too easily lead to a solidification of the status quo. This is certainly one of the lessons to be learned from *Parents Involved*, where the history of racial isolation and exclusion is not considered a sufficient difference to bring race in as a policy objective. Equality demands sameness of treatment, and any racialized distinction, however remedial in nature, is deemed impermissible by the plurality.

Rather, what is necessary today is a way of thinking about political subjectivity and state responsibility that recognizes and incorporates differences in constructing its universal subject. Fundamental to this reconstruction of the political subject are both the incorporation of a life-course perspective and engagement with the institutions and relationships

35. See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (3d ed. 2011) (documenting how political rights and privileges that flowed from religious affiliation were gradually removed, providing additional opportunities for excluded groups of people).

in which social identities are formed and enforced. It is in the recognition of the differences among social identities that we can locate the conferral and perpetuation of privilege and disadvantage and begin to define state responsibility for monitoring those institutions and relationships.

IV. DIFFERENCES AND THE VULNERABILITY PARADOX

Some concern has been expressed about using vulnerability as a “replacement” for a traditional identities-and-antidiscrimination approach.³⁶ Under a vulnerability approach, however, established identities and antidiscrimination approaches would not disappear. Categories such as sexuality, gender, and race, are central to antidiscrimination laws, and impermissible bias and discrimination based on sexuality, race, and gender differences must continue to be addressed in law and policy. Vulnerability would supplement or complement those approaches.

Traditional identity categories also have an important place in vulnerability theory itself. While it is important to recognize that vulnerability is a fundamental and universal part of the human condition, it is also necessary to simultaneously recognize that vulnerability must be understood as particular, varied, and unique at the individual level. And it is critical to recognize the ways in which individual differences can be the basis for community building and political action and therefore a source of strength and resilience for individuals.³⁷

There are two relevant forms of individual difference in a vulnerability approach—those that arise because we are *embodied* beings and those that arise because we are social beings *embedded* in social relationships.

36. If discrimination is present it may well be the case that an antidiscrimination approach will be appropriate. Certainly, we needed the antidiscrimination protection model to tear down de jure segregation of schools. *See* *Brown v. Board of Educ.*, 349 U.S. 294 (1955). However when facing the problems today in schools that are segregated by residential patterns, or because of the drawing of governmental boundaries, it is clear from cases like *Parents Involved* that a discrimination paradigm will be less effective. Rather, when the existing situation is more a product of history, culture, and entropy, an antidiscrimination analysis is less effective than one that would focus on state responsibility more generally. Instead we might look toward the need to provide remedial measures that allow children who have fallen behind for whatever reason to attain as much equality in educational results as possible. We also have to understand how a diverse and balanced educational environment produces benefits for all children and for society at large. *See* text at notes 58–59, *infra*.

37. Resources provide an individual with resilience. *See generally* PEADAR KIRBY, *VULNERABILITY AND VIOLENCE* (2006). Resources can come in material form, such as accumulated wealth. They also are present in social goods, such as relationships and ties within families, as well as relationships forged along identity or political lines or in social networks. Resources are also found in the “human capital” that comes from an education or professional training. Ecological resources, such as those found in natural or built environments, are central to lives and societies. Existential resources are aesthetic resources, as well as systems of belief that give meaning to our lives. At times of both crisis and opportunity, our accumulated resources define what our realistic options are and consequently limit or enhance our “autonomy,” defining the scope and nature of our ability to exercise agency. These resources do not eliminate our inherent vulnerability, but they can and do mediate, compensate, and lessen the experience of vulnerability.

Consideration of these two forms of difference will inevitably draw attention to distinct facets of social organization and activities. These differences also require distinct legal and policy approaches and suggest specific roles for the state to play regarding its responsibility for citizens.

A. Embodied Differences

Embodied differences include shared biological and developmental stages or events that all individuals will inevitably experience, such as infancy and aging.³⁸ They also include differences that have emerged as the product of social relations and conventions and which remain socially or politically significant. For example, traditional differentiating identity categories such as race, gender, and sexual orientation operate at this level of difference. The constituted differences associated with these identities have led to the creation of hierarchies, bias, and violence.³⁹ Individuals have been subordinated and excluded because their assigned differences are thought to mark them as dangerous or are interpreted as a sign of inadequacy, inferiority, or weakness. On the other hand, differences associated with infancy and old age traditionally have provided the rationale for the imposition of a form of “paternalistic” discrimination based on a lack of capacity and capability.⁴⁰ The exercise of paternalistic discrimination to protect a sympathetically designated “vulnerable population” based on certain developmental differences is also generally considered appropriate.⁴¹

The legal response to discrimination based on specific protected identity categories which have been inappropriately and historically stigmatized as dangerous or inferior has been to punish or try to deter those who would engage in such discriminatory practices. Many would argue that there is a further need to strengthen existing antidiscrimination laws and reform our legal processes toward an enhanced enforcement of antidiscrimination measures.⁴² Some also urge that the law be used to build protective or affirmative action programs or social welfare and educational

38. See Martha Albertson Fineman, “Elderly” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 *ELDER L.J.* 71 (2012).

39. *Id.*

40. Concerning the elderly, see *id.* Concerning children’s rights, see Martha Albertson Fineman, *Taking Children’s Interests Seriously*, in *WHAT IS RIGHT FOR CHILDREN?* 229 (Martha Albertson Fineman & Karen Worthington eds., 2009).

41. Feminists and other critical scholars have often complained about paternalism as violating agency or dignity, creating a dilemma for those who in fact do need some sort of protection. Again, this demonstrates the weakness of a formal equality-antidiscrimination approach to social policy. In fact the designation of specific vulnerable populations is itself a problem. See Fineman, *supra* note 38.

42. See *id.*

programs that would compensate for past discrimination and reduce the probability of future disadvantage.⁴³

Significantly, both forms of embodied difference – socially imposed and developmental -- show the inevitability of human dependence. We inevitably must depend both upon others and upon society and its institutions. As discussed in the section on embodied categories, there are physical, mental, intellectual, sexual, and other variations observed in human beings. Some of these developmental variations can result in physical or emotional dependence on others. This type of dependence is particularly evident in infancy and childhood but is also often found with severe illness, disability, and advanced age.⁴⁴ We could say that dependency is inevitable when we are young, yet the realization of our vulnerability when we are ill, disabled, or elderly is also an inevitable element of the human condition.⁴⁵ This form of dependency is universally experienced when we are young and is also an inherent element of the human condition, even if certain individuals may escape it later in life.

The second type of differences arising from variations in human embodiment are those related to specific characteristics or capabilities that have become the bases for social categories with institutional and political significance. This has been particularly true with respect to race, gender, and some forms of disability. However the dependence associated with these social categories is distinct from that associated with biological or developmental categories, in that they are not universal in nature, but are socially imposed. For example, the privatization of inevitable dependency within the family has generated what I call a “derivative dependency” on the part of those who care for the infant, the ill, and the elderly.⁴⁶ Historically this dependency has taken a specifically gendered form, as caretaking of those unable to care for themselves was assigned to women in their roles as wives and mothers (and daughters) within the family.

Social structures and conventions can generate or increase economic and other forms of dependence. Caretakers are dependent on resources in order to adequately care for those for whom they have assumed responsibility.⁴⁷ This is a stigmatized form of dependence in American society, particularly if it cannot be contained within the private “self-sufficient” family structure and the caretaker must ask for public support.

43. As *Parents Involved* indicates with remedial action in the context of education, other affirmative, remedial doctrines such as disparate impact analysis or affirmative action itself are increasingly under question.

44. FINEMAN, *supra* note 17, at 35–38.

45. I developed the concepts of inevitable and derivative dependency in FINEMAN, *supra* note 17.

46. See Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 661 (1992) (discussing women’s roles as caretakers); see also FINEMAN, *supra* note 17, at 34–37 (explaining the notion of derivative dependency).

47. Fineman, *The Neutered Mother*, *supra* note 46, at 661.

Yet this form of dependence does not (any longer) lend itself well to a gender discrimination analysis. While it is undoubtedly true that some social structures were initially fashioned using what we now realize were discriminatory perceptions and stereotypes, they are currently legally perceived to operate independent of those ideas. In fact, race and gender-neutral laws define society's institutions. Those structures may continue to subordinate, but they no longer do so formally because of race or gender.⁴⁸

The disadvantages associated with derivative or structural dependence are not based on personal identity characteristics. Rather, they are burdens allocated to some societal roles or positions that operate to disadvantage the individuals who occupy them. For example, if men become caretakers they also suffer economically and professionally. It is the social role or “identity”—not the sex of the caretaker—that brings disadvantage. Societal structures place responsibility for the inevitable dependency of children and others on the social grouping designated as the “private” family.⁴⁹ Economically, the market is structured so as to assume no responsibility for the reproduction of society. The state concedes it has some responsibility, but only to serve as a highly stigmatized backup when the family “fails.”⁵⁰ All caretakers, regardless of sex, will be subordinated by this structure and the ideologies of autonomy, independence, and self-sufficiency that support it.⁵¹

48. While I still believe in the justness of substantive gender equality, my vocabulary and arguments have changed to become more focused on institutions and relations of power than on identities or individual characteristics like gender. The traditional situation of women as wives and mothers is not inevitably tied to the fact that they are women but to the reality that women have historically been assigned responsibility for dependency and care work. In response, societal institutions have been developed to be unaccommodating, even hostile, to their assigned roles. Thinking in terms of identities and characteristics suggests that the problems women face are the result of discrimination. Therefore, the solution is equality of treatment and correction of the discriminatory behavior. I now understand that while discrimination may sometimes occur and should be addressed, the problems are systemic and structural in nature. The relevant issues in securing gender justice far exceed the reach of an antidiscrimination model. They also exceed the family as an institution and implicate the very basis on which our whole society is organized.

49. In a vulnerability analysis, the role of the state in defining and regulating the family calls into question its designation as private. *See* Fineman, *supra* note 20.

50. FINEMAN, *supra* note 17, at 38–40.

51. *See generally id.* The campaign for marriage equality has forcefully revealed the privilege and subsidy attached to the institution of marriage. Although much of the litigation is framed in antidiscrimination terms, the real message is that marriage confers considerable economic and social benefits on individuals and families. The question a vulnerability analysis raises is why any unmarried person is denied those same benefits, even if they are in analogous relationships of dependency and need. *See generally id.* When it comes to employment discrimination, the vulnerability issues go beyond employer actions based on impermissible discrimination to consider why employers have been granted such overwhelming privilege in defining the nature and conditions of employment in employment law. Comparing the legal and political responses to the vulnerability of employees against the concern and subsidies heaped on employers reveals there is a significant power imbalance. This imbalance is obscured by the language of “contract” in which a fictitious equality is asserted to exist between employers and employees. *See generally* Jonathan Fineman, *supra* note 30.

B. *Embedded Differences*

While it remains attentive to the discrimination and stereotyping which may be directed at embodied differences, a vulnerability approach is primarily focused on exploring the implications of differences that arise from the fact that we are embedded within society and its institutions. Human beings are social beings, and from the moment of birth until we die, we act and react in relation to others and within institutions. As individuals, we are differently situated within webs of economic, social, cultural, and institutional relationships that profoundly affect our individual destinies and fortunes. Those relationships structure our options, creating or impeding our opportunities. Vulnerability theory's focus on institutions and structures recognizes the significance of situational differences in determining who ultimately will be society's winners and losers.⁵²

Understanding human vulnerability in its institutional contexts also allows us to see that a state of dependency is not deviant, but natural and inevitable both on an individual and a societal level. We are all, and always, dependent upon societal structures and institutions, although the degree of dependence and the specific institutions through which dependency is mediated may change over the life course. Our dependence on societal structures and relationships is often characterized as "interdependence,"⁵³ but I prefer to think of this social relationship as one of mutual dependence because it is not produced through negotiation and does not require interaction among constituent members. No one in contemporary America can totally step outside of society nor should they want to, since genuine or complete independence and self-sufficiency are impossible to achieve.⁵⁴

V. THE CONCEPT OF RESILIENCE

Resilience is the critical but incomplete remedy for vulnerability. Although nothing can completely mitigate vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect her or his life.⁵⁵ The degree of resilience an individual has is largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command.⁵⁶

52. FINEMAN, *supra* note 17, at 34–40.

53. *Id.* at 37–40.

54. *See id.*

55. Resilience is defined as "the ability to become strong, healthy, or successful again after something bad happens." MERRIAM-WEBSTER, <http://www.merriamwebster.com/dictionary/resilience> (last visited Aug. 18, 2014).

56. *See generally* KIRBY, *supra* note 37.

Particularly relevant when we think about cases like *Parents Involved* is the role of education in building resilience early in life.⁵⁷ Even though not made in explicitly these terms, perhaps the school boards in the case were responding to a need for the kind of social and cultural resilience that can be provided by a racially balanced educational environment.⁵⁸ Certainly, acquiring experience with those of different races, classes, and backgrounds fosters tolerance as well as respect for difference and is essential to maintaining democracy. This exposure to difference and expectations of tolerance for diversity is particularly significant for children, whose experience with classmates from different backgrounds occurs at a time in their life when they are most open to new ideas.

Resilience is not something we are born with. Instead, it is accrued over the course of our lifetimes within an array of social structures and institutions over which individuals may have little, if any control. This process is the case whether those institutions are classified as public or private, or are called family, market, or state. When individuals have resilience it allows them to take advantage of opportunities knowing that if they take a risk and the desired outcome fails to transpire, they will have the capacity to recover.

Significantly, resilience is cumulative in nature. Especially when dealing with issues and policy concerning children and youth, it is important to understand that interactions with institutions not only can have immediate effects, but also produce determinative outcomes that can significantly affect future opportunities and capabilities. For example, consider the relationship between the family and educational systems in connection to the employment and social security systems. Over the span of the life course, these multiple institutions will provide the resources for consumption and growth in the present, but they will also allow for the accumulation of resources that build and preserve possibilities and opportunities for the future. The failure of one system in this sequence to

57. Comparing the relative values of institutional resilience building efforts across different age groups is beyond the scope of this article. However, a less nuanced comparison confined to drawing distinctions between childhood and other stages of life may be instructive. There is substantial evidence that investments made in childhood are differentially effective than those made in adults. A recent study by James Heckman, a Nobel Prize-winning economist at the University of Chicago, tracks the notion that dollars invested in early childhood yield even greater returns as children grow. This “Heckman Equation” illustrates the role of resilience in improving well-being across the life course and the interactive and sequential implications of an early accumulation of the assets that give us resilience. See Jonathan Cohn, *Leave No Parent Behind*, THE NEW REPUBLIC, July 14, 2014, at 7, 8.

58. The four liberal Justices would not impose such a burden. Instead, they would allow a prophylactic policy response, recognizing that all children can benefit from an educational environment that is inclusive and in which no one group is isolated or excluded. Indeed, one might argue that one of the ways to effectively address the effects of isolation based on race is to ensure a racially balanced school system. The voluntary attempt on the part of the school boards to make this happen should be commended, not condemned as impermissible discrimination under some misguided fetish with formal equality.

provide necessary resources—such as the failure to provide an adequate education—may affect an individual's future prospects in employment, as well as the ability to build and maintain adult family relationships. An individual's quality of life as they age and their possibilities in retirement are also linked to the degree of resilience accumulated in earlier stages of life.⁵⁹ Systems encountered throughout life are constructed in reliance on an individual's successful gathering of necessary resources in earlier systems, and it is often impossible to fully recover from, or compensate for, a history of resource deprivation.⁶⁰ Someone lacking a solid educational foundation typically will have fewer skills and fewer options and opportunities in the workplace, which in turn will make supporting a family more difficult and also likely mean fewer savings to cushion them in the event of accident, injury, or illness.

Yet sometimes privileges conferred in one system can compensate for or even cancel out disadvantages encountered in others. For example a solid, early start in regard to education, such as that provided by Head Start, an effective preschool program, may trump poverty as a predictor of success later in school.⁶¹ This is particularly likely when coupled with the advantages that a social or relational system, such as a supportive family and cohesive social network, can provide for a child.

It should be clear that the role of institutions in providing the assets or resources that give us resilience is central to both the operation of society and the well-being of individuals. The functioning of these institutions actually produces, or may fail to produce, social, political, and economic opportunities. Access can confer privilege on some, while exclusion will disadvantage others. The vulnerability paradigm argues that the failure of these institutions to function in an inclusive, equitable, and just manner should be as important to law and policy as deliberate discrimination against an individual belonging to a protected category. At the same time, understanding the essential role of institutions in resilience building should alter the way we think about individual failure. Such failure is not merely the consequence of an individual's inability to assume personal

59. See Catherine E. Ross & Marieke Van Willigen, *Education and the Subjective Quality of Life*, 38 J. HEALTH & SOC. BEHAV. 275, 276–79 (1997) (documenting how one's lack of education leads not only to low employment status, but also how it affects marital status, a sense of control over one's life, social and emotional support, and economic resources).

60. Jeffrey M. Jenson & Mark W. Fraser, *A Risk and Resilience Framework for Child, Youth, and Family Policy*, in SOCIAL POLICY FOR CHILDREN AND FAMILIES 5, 17 (2d ed. 2011) (emphasizing that child development is a culmination of the interactions between the child and his or her wider environment.).

61. Head Start is a federal program advocating school readiness for children from low-income families up to age five by providing nutrition, health, social services, education, and intellectual development services. See Head Start Services, OFFICE OF HEAD START, <http://www.acf.hhs.gov/programs/ohs/about> (last visited Aug. 18, 2014); see, e.g., Javier C. Hernandez, *Lessons for de Blasio in New Jersey's Free Pre-K*, N.Y. TIMES, Jan. 27, 2014, at A1.

responsibility for her- or himself, but also, and perhaps primarily, represents the failure of society and its institutions.

VI. CONCLUDING REFLECTIONS—THE NEED FOR A MORE RESPONSIVE STATE

One of the strengths of a vulnerability analysis is that it does not direct focus only or even primarily upon a moment of harm or injury, but rather takes a life-course perspective. This perspective means that a focus on the typical functioning of societal institutions and their role in building resilience is as fundamental to a robust ethic of equality as is attention to individual behavior and discriminatory motivation. Through the law the state creates and maintains this network of institutions and the social identities contained within them. The relationship between the state and its institutions is one of mutual dependence, and a failure on the part of an institution to operate in an effective manner should immediately prompt state corrective action.

Returning to the situation in *Parents Involved*, the state has an interest in ensuring that each individual is prepared to become a productive and fully participating citizen. It may resort to the educational institutions it legitimates to accomplish that task, but it should not be able to abandon responsibility for the ways in which such institutions operate. Nor should it be prohibited from addressing and responding to the potential for future harm to individuals and/or society through the imposition of responsive policies upon those institutions. The school boards in *Parents Involved* were trying to live up to that responsibility, not because discrimination or harm had or was occurring, but because their members understood the long-term advantages of children participating in a racially equitable and diverse educational experience. Unfortunately, the way that equality is currently understood and implemented in American jurisprudence severely limited the schools' ability to assume responsibility and act to prevent future harm or disadvantage.

In contrast to the narrow approach undertaken in *Parents Involved*, vulnerability theory would encourage governmental actions that are directed toward responsiveness, recognizing not only the state's role in preventing discrimination, but a role in ensuring that its institutions do not operate in ways that unduly privilege some and disadvantage others.⁶²

62. To be developed in future work is the contrast between the very cramped nature of an equal protection analysis in regard to gender, recently, and the more expansive approach to marriage equality. In the gender cases, it was gender itself and the category of 'woman' or 'man' that is the issue. In the marriage equality cases it is the nature and function of marriage as societal institution. Justice Ruth Bader Ginsburg recently reflected upon a growing divergence in American Supreme Court jurisprudence between same-sex equality and gender equality. Perhaps these cases illustrate the distinction between a discrimination model based on the idea of targeted identities versus a more

Ensuring that societal institutions, such as those which make up the educational system, provide benefits and resilience building opportunities to all individuals equitably should be the responsibility of the state. State recognition of inherent human vulnerability and dependency should also define how it approaches its obligations to individual persons, familial units, and the vast interconnected community of citizens that rely on societal institutions.⁶³ A vulnerability inquiry may also suggest that the state sometimes act in a differential manner to those bound within social identities or past histories that currently operate to their disadvantage. True equity in access and opportunity requires that the state take existing structural differences into account and work toward their neutralization, so that those who have been historically disadvantaged are uplifted to a more level playing field.

My hope is that by taking human vulnerability seriously and placing it at the core of our understanding of state responsibility, we may begin to expand the ways in which we think about regulation and market responsibility. It brings into the discussion not only the possibility of human agency and equality, but also the reality of human need and dependency in the past, present and future. The realities of our universal, constant, and inescapable vulnerabilities argue for a responsive state that ensures equality of opportunity and meaningful, not merely formal, access for individuals to society's institutions.⁶⁴ That might require a recognition and response to difference in varied contexts and circumstances. In *Parents Involved*, this might have meant allowing school districts to direct more educational resources toward those students who are actually disadvantaged and the schools that must educate them, or to support the development of policies that attempt to avoid or prevent disadvantage in the future.

generalized approach involving access to fundamental societal institutions and relationships. See generally Adam Liptak, *Justices' Ruling Advances Gays; Women Less So*, N.Y. TIMES, Aug. 5, 2014, at A1.

63. See generally KIRBY, *supra* note 37.

64. See generally Fineman, *supra* note 20, at 18–19.