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Abstract

This article assesses the economic efficiency of race-based antidiscrimination and affirmative action policies with a view to assessing relevant Canadian and American constitutional law. The article reviews economic arguments about why antidiscrimination laws may be efficient in addressing externalities, in hastening the exit of bigoted employers from the market, and in preventing the potentially inefficient use of race as a proxy for information; affirmative action may be efficient in accounting for differential signaling costs across race. The article concludes that economic analysis supports the approach in section 15 of the Charter which generally bans discriminatory government action, but recognizes that affirmative action is not inconsistent with the pursuit of substantive equality.

Keywords

Discrimination in employment--Law and legislation; Discrimination in employment--Economic aspects; Affirmative action programs--Economic aspects; Constitutional law; Canada; United States

ANTIDISCRIMINATION AND AFFIRMATIVE ACTION POLICIES: ECONOMIC EFFICIENCY AND THE CONSTITUTION©

BY EDWARD M. IACOBUCCI*

This article assesses the economic efficiency of race-based antidiscrimination and affirmative action policies with a view to assessing relevant Canadian and American consitutional law. The article reviews economic arguments about why antidiscrimination laws may be efficient in addressing externalities, in hastening the exit of bigoted employers from the market, and in preventing the potentially inefficient use of race as a proxy for information; affirmative action may be efficient in accounting for differential signaling costs across race. The article concludes that economic analysis supports the approach in section 15 of the *Charter* which generally bans discriminatory government action, but recognizes that affirmative action is not inconsistent with the pursuit of substantive equality.

Cet article évalue l'efficacité économique de la politique anti-discriminatoire basée sur la race et des mesures en faveur des minorités, dans la perspective d'une évaluation du droit constitutionnel canadien et américain y ayant rapport. L'article expose les arguments économiques quant aux raisons pour lesquelles les lois anti-discriminatoires pourraient être efficaces en abordant des problèmes superficiels, en accélérant l'exclusion des employeurs bigots du marché, et en empêchant l'usage potentiellement inefficace de la race comme procuration pour avoir des informations; les mesures en faveur des minorités pourraient être efficaces en rendant compte des indications de coûts différentiels à travers la race. L'article conclut que l'analyse économique appuie l'approche dans la section 15 de la *Charte* qui interdit généralement au gouvernement toute action discriminatoire, mais qui reconnaît que les mesures en faveur des minorités ne sont pas incompatibles avec la poursuite d'une équité substantive.

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I. INTRODUCTION

This article will join the extensive debate about the desirability of both antidiscrimination laws and affirmative action policies, with a view to assessing the Canadian and American constitutions. Specifically, the article will assess the economic efficiency of these laws with respect to discrimination on the basis of race. The analysis is specific to race because it will explore the effects of family background on a person's costs of education. Family background and race are clearly related, while family background may vary considerably across other features that give rise to discrimination, such as sexual orientation. Antidiscrimination laws are defined for the purposes of this article as laws which generally prohibit the use of race as a negative factor in hiring decisions. Affirmative action is defined for the purposes of this article as hiring or accepting for academic placement a member of an historically disadvantaged minority with lower formal qualifications (for example, academic background) than a rejected member of a different race.

While there are many approaches to the treatment of racial discrimination, this article will focus only on an efficiency approach.

This is not the only or even the best approach to the topic,[1] but rather is one that is frequently taken to criticize the existence of these laws.[2] This perspective in part motivates the analysis here. The analysis demonstrates that under plausible assumptions antidiscrimination laws, and indeed affirmative action policies, may be efficient, contradicting the claims of some of these policies' most vociferous critics.

The article will first consider the literature on the effects of discrimination motivated by animus towards particular races. I will review arguments that antidiscrimination laws may be efficient in hastening the exit of bigoted employers from the managerial market. The next section will present and critique an allegedly efficient basis for racial homogeneity in the workplace. The following sections will assess the use by employers of race as a proxy for more extensive information about prospective employees. I will first outline the theory that such discriminatory treatment is efficient, and then will review various theories that suggest otherwise.

In order to provide an empirical frame of reference for the information-based models, the article will generally focus on the case of African-Americans. This context is appropriate for the discussion because African-Americans have undeniably suffered disadvantage historically because of their race. This historical disadvantage will be shown to be relevant to an efficiency assessment of affirmative action. While other groups may also be appropriate in this respect, for example, Aboriginal Canadians, the intensity of the controversy over affirmative action in the United States has given rise to extensive discussion of African-Americans' historical disadvantage and their current situation. Black Americans uncontroversially present a context involving historical disadvantage because of race.

Rather than analyzing empirically a particular context and assessing the efficiency of antidiscrimination or affirmative action laws in that context, I will use the theory to assess relevant aspects of constitutional law in Canada and the United States. The central issue is what efficiency considerations suggest that governments should be constitutionally allowed to do, which can be answered in the abstract, rather than what they should actually do, which requires an empirical assessment of a particular context beyond the scope of this article. The

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[1] For a brief survey of the various possible approaches to discrimination, see M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) c. 9.

[2] See, for example, R.A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981) s. 4; and R.A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992) c. 3.

article concludes that the provisions of section 15 of the *Canadian Charter of Rights and Freedoms*[3] is desirable from an efficiency perspective.

II. DISCRIMINATION MOTIVATED BY ANIMUS

A. *A Static Analysis*

In a pioneering treatise on the economics of discrimination, Gary Becker outlines the effect of bigotry on the market.[4] If white employers, for example, have a distaste for members of a particular race, for example, Black people, then hiring a Black worker imposes a non-pecuniary cost on that employer. The bigoted employer therefore may abandon money-profit maximizing strategies in favour of a money-plus-non-pecuniary income maximizing strategy. Consequently, demand for Black workers is reduced, which in turn implies that fewer will be hired and those that are employed will earn a lower wage than they would earn in the absence of discrimination. Furthermore, even if the productivity of Black and White workers is identical, white workers will earn more than Black workers in equilibrium.

Note that this distaste may not diminish social welfare in the conventional utilitarian sense. The distortion introduced by bigotry causes a loss of money income for the economy (as Black labour will be underutilized) but bigoted White employers do not incur the same non-pecuniary costs of hiring Black workers that would result if they pursued colourblind hiring policies.[5] The equilibrium allowing bigoted employers to discriminate against Blacks may be utility maximizing for a given set of societal preferences.

These conclusions have led some commentators to suggest that any government intervention to reduce or eliminate bigotry in the market is misguided. Any coercion by government requiring pursuit of

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[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4] G.S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1971). Becker discusses a variety of types of marketplace discrimination, including consumer, employee, and employer prejudice. This section discusses Becker's views on the effects of employer prejudice.

[5] This assumption that employers may abandon money-profit maximizing goals if they are bigoted is consistent with other observed instances where people sacrifice money income for non-pecuniary benefits. For example, in a famous remark, J.R. Hicks suggests that "[t]he best of all monopoly profits is a quiet life": "Annual Survey of Economic Theory: The Theory of Monopoly" (1935) 3 Econometrica 1 at 8.

colourblind hiring practices will be socially undesirable as it will force bigoted employers to incur non-pecuniary costs that a market equilibrium avoids. As William Landes states: "[I]f the benefits [of government intervention] are viewed as the added net (monetary plus psyche) income to the community, then the benefits would be negative, because net income is maximized in the absence of fair employment laws."[6]

This conclusion does not necessarily hold if the basic assumptions behind the Becker model are modified, and perhaps made more realistic. Consider now that an act of discrimination implies costs that are not accounted for in Becker's model. For example, consider the situation where there are externalities resulting from an act of bigotry.[7] If a White employer refusing to hire a Black person at the same wage as a White person imposes a harm on other parties not privy to the transaction, such as other people who abhor bigotry, then there is no assurance that private exchange will result in welfare improvements. By avoiding his own non-pecuniary cost of hiring a Black person, the bigoted employer imposes costs on others that may be greater than the cost he himself avoids. In this case, it may be efficient for the government to intervene, as it does in other cases of externalities (such as pollution), and prevent acts of bigotry that serve to reduce social welfare. Externalities challenge the claim that intervention to prevent employers or others from acting on their bigoted tastes is inherently inefficient and therefore undesirable.

B. *A Dynamic Analysis*

The long-run effects of employer tastes for discrimination also have important implications for government policy. Becker and others[8] contend that a dynamic analysis of the market leads to the conclusion that government intervention to prevent or reduce bigotry in the market may be unnecessary even if otherwise desirable; competition itself may ensure that discriminating employers are driven from the market.[9]

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6 W.M. Landes, "The Economics of Fair Employment Laws" (1968) 76 J. Pol. Econ. 507 at 548.

7 See J.G. MacIntosh, "Employment Discrimination: An Economic Perspective" (1987) 19 Ottawa L. Rev. 275 at 306-08; and J.J. Donohue III, "Advocacy Versus Analysis in Assessing Employment Discrimination Law" (1992) 44 Stan. L. Rev. 1583 at 1586.

8 See, for example, Posner, *supra* note 2; and Epstein, *supra* note 2.

9 See Becker, *supra* note 4 at 39-49.

Following Becker, assume now that there are some White employers with a distaste for Black employees, while other employers are indifferent with respect to race. The bigoted employers face some non-pecuniary costs from hiring Black workers that the indifferent employers avoid. There is scope, therefore, for the indifferent employers to increase the value of a firm by purchasing the firm from the bigoted employers; they earn the money return of the bigot without the psychic costs resulting from hiring Black employees. Alternatively, bigoted employers who do not sell their firms will eventually fail, owing to their higher costs. Thus, over time bigoted employers are driven from the market without government intervention.

John Donohue contends that government intervention to prevent discrimination in the marketplace may be efficient, even accepting the premises of the above analysis.[10] If the government bans all forms of discrimination in hiring, then bigoted employers are prevented from reducing the non-pecuniary costs of employing Black workers by hiring fewer of them. If bigoted employers are coerced into hiring in a non-discriminatory fashion, they will earn lower returns (psychic and money) than they would in an unregulated equilibrium. This serves to speed up the adjustment process described above whereby bigoted employers are driven from the market, since bigoted employers will earn less in monetary and psychic income than they would absent government intervention. By hastening the adjustment process, the new, higher social-welfare equilibrium will be reached sooner, which results in a welfare gain relative to the unregulated process. This must be balanced against the lower social welfare that will result immediately after this policy is put into place because of the imposition of non-pecuniary costs on bigoted employers before they leave the market. Donohue's analysis shows that on balance the imposition of government regulation banning discrimination may be efficient. He concludes:

> It is entirely plausible, although ultimately an empirical question, that Title VII [of the *Civil Rights Act of 1964*[11]] can be understood to represent wealth-maximizing legislation rather than as some tyrannical or misguided attempt to disregard private preferences. Indeed, antidiscrimination legislation may be thought of as a tool to perfect the market response to employer discrimination.[12]

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[10] See J.J. Donohue III, "Is Title VII Efficient?" (1986) 134 U. Pa. L. Rev. 1411 [hereinafter "Efficient?"]; R. Posner, "The Efficiency and the Efficacy of Title VII" (1987) 136 U. Pa. L. Rev. 513; and J.J. Donohue III, "Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner" (1987) 136 U. Pa. L. Rev. 523 [hereinafter "A Reply"].

[11] 42 U.S.C. §§ 2000e1 - 17 (1996).

[12] "Efficient?," *supra* note 10 at 1431.

III. THE EFFICIENCY OF RACIAL HOMOGENEITY IN THE WORKPLACE

Richard Epstein suggests that hiring along racial lines may be an efficient means of promoting informal arrangements between employers and employees.[13] The basic argument runs as follows. The greater the racial homogeneity within a group of people, the greater the likelihood of homogeneous preferences. The greater the harmony in tastes and preferences of employees, the lower the cost of corporate governance. Therefore, racial homogeneity among employees reduces the cost of corporate governance in an efficient way.

Epstein also contends that racial homogeneity helps enforce informal contracts between employers and employees. In any market where long-term relationships are established, with sunk costs on both sides of the contract, there is an opportunity for one side to exploit the sunk costs of the other side. In labour markets, for example, there is a possibility that the worker will shirk in carrying out her duties knowing that termination is costly for the employer. One method of remedying this problem is to rely on informal sanctions to punish such behaviour. Epstein contends that these informal sanctions are more effective if workers and employers are of the same race:

> [I]nformal enforcement becomes more effective when members of a firm are all drawn from the same racial or ethnic group. The party who cheats at work now knows that he faces stricter sanctions, given the strong likelihood that the information will be brought home to him at play, at church, or in other business and social settings.[14]

Epstein concludes that discrimination is thus in some contexts efficient and that Donohue's analysis of the dynamic efficiency of antidiscrimination laws is unconvincing. Indeed, Epstein states that, "[i]n light of my arguments, his conclusion cannot be accepted."[15]

While Epstein's analysis would likely strike many as distasteful,[16] it also contains questionable premises and conclusions. With respect to the racial harmony and corporate governance argument, the minor premise asserts that members of similar races are more likely to have similar preferences in the workplace, yet Epstein provides no theoretical

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[13] Epstein, *supra* note 2, c. 3.

[14] *Ibid.* at 70.

[15] *Ibid.* at 77.

[16] Michael Trebilcock points out that the argument "risks resurrecting a version of the 'separate but equal' doctrine adopted by the U.S. Supreme Court in Plessy v. Ferguson and now almost universally discredited": *supra* note 1 at 200.

or empirical basis for this assertion. Others might not accept this premise as self-evident. Verkerke states: "I doubt the usefulness of racial and ethnic affiliations as a proxy for job-related preferences of workers. The potential for intra-group heterogeneity of preferences seems to me every bit as great as the potential for disagreement between members of different racial or ethnic groups."[17]

With respect to the informal sanction argument, it is far from self-evident that informal sanctions are significantly more effective if workers are hired from only one particular race. Informal and formal sanctions within the firm, such as scoldings or a lack of promotions, are likely to be more relevant to most firms than reliance on sanctions imposed by the racial community from which a worker is drawn.

Epstein's arguments also have a circularity to them. Consider the following characterization of the informal contract argument. Because of past racial segregation, members of different races live in different communities. Because members of different races live in different communities, informal sanctions are more effective where members of a single race are employed together. Employing members of a single race together likely implies some degree of racial homogeneity in communities. Therefore, racial segregation is desirable. Segregation thus justifies segregation. If, on the other hand, segregation were outlawed, perhaps at the employer level, segregated communities are more likely to break down, and racial segregation may no longer be the effective contract enforcement mechanism that Epstein suggests.

Finally, in drawing his policy conclusion that antidiscrimination policies are inefficient, Epstein appears to assume that the efficiency effects of discrimination trump any efficiency effects of antidiscrimination legislation. Donohue argues that antidiscrimination legislation may be efficient in hastening the exit of employers who discriminate simply due to their tastes for discrimination. Moreover, discrimination may entail negative externalities. Epstein's analysis does not affect these conclusions, but simply points out that banning discrimination altogether may entail some inefficiencies. Noting that, "there is nothing which says that Title VII could operate with laserlike precision so as to achieve its goal and nothing more,"[18] he then concludes that banning discrimination is more harmful than allowing it. This is simply an *a priori* assumption without theoretical or empirical support.

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[17] J.H. Verkerke, "Free to Search" (1992) 105 Harv. L. Rev. 2080 at 2088.

[18] Epstein, *supra* note 2 at 77.

Following Epstein's assumption that antidiscrimination laws are blunt instruments (that is, discerning the motivation for discrimination is impossible), it may well be that the efficiency gains from legally prohibiting discrimination outright (that is, race can never be a negative factor in hiring) dominate the efficiencies from legally allowing it outright. This, as stated above, is an empirical question not resolvable by *a priori* assertions. Donohue provides rough estimates of the costs of Title VII, such as litigation costs, compliance costs and productivity costs, as well as "best case," "middle case," and "worst case" estimates of the benefits of Title VII, such as the psychic benefits of the law to those opposed to bigotry, and concludes that only in the worst case would the law be inefficient.[19] Epstein's analysis thus fails to discredit efficiency explanations for antidiscrimination legislation. The following discussion of the potential inefficiencies arising from signaling equilibria strengthens this conclusion.

IV. RACE AND DEFICIENT INFORMATION

A. *Efficient Discrimination*

Various authors have suggested that race acts as a proxy for more detailed information about a person that is costly to gather.[20] In auto insurance markets, for example, firms will base their assessment of the risks associated with a particular driver on characteristics such as age and sex, rather than making a more thorough but more costly examination of the individual's driving ability. Similarly, in making hiring decisions it is argued that firms may rely on race as a proxy for more detailed information about a prospective employee. Richard Posner outlines "statistical discrimination" in the following way:

> If experience has taught me (perhaps incorrectly) that most Mycenaeans have a strong garlic breath, I can economize on information costs by declining to join a club that accepts Mycenaeans as members. To be sure, I may thereby be forgoing a valuable association with some Mycenaeans who do not have a strong garlic breath, but the costs

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[19] "Efficient?," *supra* note 10.

[20] For pioneering work in the area, see A.M. Spence, *Market Signaling: Informational Transfer in Hiring and Related Screening Processes* (Cambridge: Harvard University Press, 1974); and E.S. Phelps, "The Statistical Theory of Racism and Sexism" (1972) 62 Am. Econ. Rev. 659. More recent discussions include, MacIntosh, *supra* note 7; C.R. Sunstein, "Why Markets Don't Stop Discrimination" (1991) 8 Soc. Phil. & Pol'y 22.; and D.A. Strauss, "The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards" (1991) 79 Geo. L.J. 1619 [hereinafter "Numerical Standards"].

> in valuable associations forgone may be smaller than the information costs of making a more extensive sampling of Mycenaeans.[21]

Posner also draws the empirical conclusion that "[i]n recent times, ... the most important factor responsible for discrimination probably has been information costs."[22] This analysis leads him to refer to the assertion that "much discrimination may be efficient" as a "fact."[23]

Posner's notion of efficiency, which I adopt here, is wealth-maximization. While his conclusion is plausible if the market relied only upon proxies that are correlated with the underlying information sought, there should be no confidence that the market will eliminate proxies unrelated to the information sought; that is, rational actors may rely on inaccurate stereotypes. As Michael Spence originally pointed out in his pioneering treatise on market signaling, even if race (the informational proxy) and ability (the underlying information sought) are uncorrelated, the market may nevertheless rely upon race as a proxy, as the next section will discuss.[24] Consequently, wealth might be lower as a result of reliance upon race as a statistical indicator.

B. *Market Signaling*

Consider Spence's model of education, race and hiring. All prospective workers, White or Black, are either of high ability (productivity) or of low ability. All White and Black workers with high ability have exactly the same ability, and all low-ability workers of either race have exactly the same ability. Furthermore, the ratio of high- to low-ability workers is identical in the Black and White populations—race and ability are uncorrelated. These productivities are given; human capital is fixed. Employers cannot observe the ability of a worker until she is hired. For simplicity, it is assumed that workers cannot invest in human capital, but they can invest in signaling activities, specifically, education.[25] The key assumption for Spence's model is that the cost of signaling (obtaining a certain level of education) is inversely related to ability. Thus, a high-ability person has a lower cost of reaching a given

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[21] Posner, *supra* note 2 at 362.

[22] *Ibid.*

[23] *Ibid.* at 363.

[24] Spence, *supra* note 20. See also MacIntosh, *supra* note 7 at 284-85.

[25] It is assumed that education does not contribute to the human capital of a worker. This assumption will be dropped below.

level of education than a low-ability person. By attaining a level of education that differentiates themselves from low-ability workers, high-ability workers signal to employers that they should be paid the high-ability wage. That is, in a separating equilibrium (*i.e.*, a signaling equilibrium which allows employers to distinguish high from low-ability workers), the increase in future wages from signaling a high ability is less (greater) than the cost of the education for the low-ability (high-ability) worker. Note that there is an assumed cost to hiring and adjusting wages after productivity is observed, perhaps, Spence suggests, because it takes some time before productivity is observed and specific on-the-job training is required.

Equilibrium in this model is reached through successive iterations of observing education levels, observing productivity levels of workers (which are perfectly observable only after the worker is hired), modifying employer beliefs about education and ability, and hiring. Eventually, employer beliefs about education and ability are self-confirming; high-ability workers will signal in a manner consistent with employer beliefs about the signal required to infer high ability.

Given the assumption that the distributions of ability over the Black and White populations are identical, one might assume that race would not helpfully inform the employer and she will discard such information. This, however, does not necessarily hold. If, notwithstanding their intrinsic equality, White and Black workers are viewed at some point by employers as distinct groups with respect to ability, the signaling equilibrium that emerges may be entirely different within each group. The signaling equilibrium is reached through the external effects of an individual's education decision; an employer hires the individual and then the employer updates her beliefs about ability and education. If, however, races are viewed as distinct by employers, an individual's education decision will have an external effect only on other members of the race of that individual. For example, suppose that employers consider Black and White people as distinct in ability, and that at some point in time the Black and White population invested in education in different ways, perhaps because of historical prejudice that prevented Black students from attending universities. Since employers view Black and White workers as distinct, beliefs about ability and education are updated separately for each group; there is no external effect from a White worker's investment in education on employers' beliefs about Black workers and education.

In this situation it is possible for distinct signaling equilibria to be reached for Black and White workers, even though there is no inherent difference between them with respect to ability. Indeed, it is possible, as

Spence shows,[26] that members of a race (for example, Black people) will refrain from investing in signaling (the cost to high-ability Black workers of differentiating themselves from low-ability Black workers is greater than the increase in wages that they would earn), while a "separating" equilibrium exists for members of another race (White people) such that high-ability White workers invest in education. In this situation, White and Black workers are treated differently (no Black worker is paid the high-ability wage) by employers who have acted rationally, yet there is no inherent difference in the ability of Black and White workers.

Ian Ayres describes the possibility of a similar phenomenon in the car sales market in Chicago.[27] After sending various testers out to negotiate car prices, he found that Black buyers of automobiles were on average quoted higher prices than were White buyers even though there was little difference in their presentation to the salespeople. He observes:

> Beliefs that are based on erroneous stereotypes may not be tested by the market equilibrium. If market experience does not teach sellers that their preconceptions are false, disparate treatment that is both inequitable and inefficient will persist. For example, if sellers refuse to bargain seriously with blacks because they believe that blacks generally are too poor to purchase cars, then in equilibrium blacks will continue to fail to purchase cars—because of inflated, nonbargained prices. That failure will only reaffirm the sellers' original mistaken belief.[28]

The assertion by commentators such as Posner that much discrimination is efficient is challenged by this analysis. Employers may rely on inaccurate stereotypes and it is possible for Black and White workers to be treated differently even though there is no inherent difference in their abilities. High-ability Black workers might therefore be underemployed in highly skilled positions because of inaccurate beliefs about their signals. This model creates a justification for legally prohibiting reliance on race in making hiring decisions. If hiring is colourblind, then the educational signaling equilibrium will be identical for both races; the external effects of an individual's education decision in updating employer beliefs will extend to all workers, not just to members of the individual's own race.

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[26] Spence, *supra* note 20 at 36.

[27] I. Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104 Harv. L. Rev. 817 [hereinafter "Fair Driving"]. See also I. Ayres, "Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause" (1995) 94 Mich. L. Rev. 109, which relies on a slightly different methodology from that of the earlier study, but confirms the finding of the earlier study that Black car buyers receive less attractive offers than White buyers. Ayres concludes that statistical discrimination may explain this disparate treatment, at least in part.

[28] "Fair Driving," *supra* note 27 at 850-51.

C. *Human Capital Investment*

Extending Spence's model strengthens this policy conclusion. Following MacIntosh, assume now that individuals are capable of investing in human capital.[29] By assumption, human capital is accumulated outside of formal education (which operates only as a signal). As before, assume that employers use race as an information proxy in making hiring decisions, and, for the moment, assume that no other indicator of ability is available. If, perhaps owing to historical deprivation, Black workers were at some point in time of lower productivity in some occupations, then employers at that time would be reluctant to hire Black workers for highly skilled positions. Consequently, there is little incentive for Black workers to invest in human capital that would allow them to perform highly skilled jobs, as they will not be offered such positions. White workers, on the other hand, are aware that they will be offered these positions, and will invest in human capital so as to ensure that they are capable of performing (and therefore keeping) these jobs. As a result, the beliefs of the employer are self-confirming over time: Black workers will be of lower productivity because they face less incentive to invest in human capital because employers believe them to be of lower productivity. Such a process has been described as "adverse selection"—Black workers will rationally self-select themselves out of the high-ability market.

Now assume that prospective workers may signal ability by investing in education (which by assumption does not add to their human capital; this assumption is dropped below). The possibility of independently signaling ability (which is now a function of innate abilities and the accumulation of human capital) does not change this fundamental conclusion. Even if some signaling of ability is possible, an initial bias against Black workers will have lingering human capital effects so long as employers continue to use race as an informational proxy. As MacIntosh states:

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[29] The discussion that follows draws on MacIntosh, *supra* note 7, which in turn drew on Spence, *supra* note 20; and G.A. Akerlof "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 Q.J. Econ. 488. For early discussions of the adverse effects of discrimination on human capital investment, see S.J. Lundberg & R. Startz, "Private Discrimination and Social Intervention in Competitive Labor Markets" (1983) 73 Am. Econ. Rev. 340; and K. Arrow, "Models of Job Discrimination" in A.H. Pascal, ed., *Racial Discrimination in Economic Life* (Lexington, Mass.: Lexington Books, 1972) 83. More recent discussions include, "A Reply," *supra* note 10; Sunstein, *supra* note 20; "Numerical Standards," *supra* note 20; and L. Audain, "Critical Cultural Law and Economics, The Culture of Deindividualization, The Paradox of Blackness" (1995) 70 Ind. L.J. 709.

> While there is reason to believe that the ability to signal will soften the segmentation of the labour market, there can be no confidence that it will eradicate it. An employer who continues to use race as a proxy for ability, albeit tempered by the use of other proxies, will depreciate the informational content of a signal by a member of Race Y as compared to a member of Race X. ... [E]ven where applicants have an ability to signal their quality, employer beliefs will continue to shape the market of applicants from Race Y in such a manner as to result in a lower average skill level for members of Race Y, confirming initial employer expectations.[30]

This model also creates a justification for legally eliminating the use of race as a proxy for ability in hiring decisions. If race is eliminated as a proxy, there will be, perhaps, initial costs since currently underqualified Black employees will be hired, but the distortion of incentives for human capital investment will be corrected, thereby enhancing long-run efficiency. While it is an empirical question, it is plausible to assume that, on balance, the costs of eliminating racial proxies will be dominated by the social benefits of more efficient human capital investment among high-ability Black workers.[31]

D. *Education as Both a Signal and Human Capital Investment*

Consider now a model where the signaling investment, perhaps years of education, also contributes to human capital. Only in a special case would the adverse selection problem described above (the rational underinvestment in human capital by high-ability Black workers) disappear.

In the special case, human capital investment is the sole determinant of productivity; human capital investment perfectly coincides with signaling investment, and employers know this to be true. For example, productivity is solely determined by education, and employers know this. In this case, proxies such as race, age, or other fixed characteristics ("indices" in Spence's language) would not be used, since productivity is exclusively determined by education. An employer need only examine education to infer productivity.

If, however, the assumptions are changed slightly, this result changes drastically. If there is a residual determinant of productivity other than human capital investment, employers may use proxies in an effort to predict this residual ability. Alternatively, if there are means of investing in human capital other than education, proxies may be used to attempt to predict the likely investment in human capital outside of

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[30] MacIntosh, *supra* note 7 at 287-88.

[31] *Ibid.* at 292.

education. In both cases, the use of proxies may be established. If race is selected as a proxy, then arbitrarily different signaling equilibria between Black and White people may emerge, as shown above. The fact that education itself contributes to productivity does not change this conclusion.

Furthermore, if employers discount Black workers' signals, they will have less incentive to invest in education, and thus will fail to disconfirm the employers' beliefs about their productivity. The overlap of human capital investment and signaling will generally not eliminate either arbitrary differences in treatment of Black and White workers or the adverse selection problem. Thus, the policy conclusion drawn above —that efficiency considerations may justify eliminating the use of race in assessing prospective job candidates—is equally appropriate where signaling investment also contributes to human capital.

V. DIFFERENTIAL SIGNALING COSTS

The above signaling models are driven by the employers' assumption that race and ability are correlated. This falls short of a strictly neutral attitude towards race. Even in the face of signals of ability, such as education, employers in the above signaling models continue to view race as a relevant proxy for ability. While this may be self-perpetuating, particularly where members of a race rationally underinvest in human capital, if for some reason employers came to believe that, starting today, all races were created equally, the efficiency costs of discrimination would disappear. Indeed, this is the justification for the position that employers be compelled legally to ignore race in making hiring decisions. On the other hand, if there are real differences between races, particularly with respect to signaling costs, ignoring race may in fact induce inefficient results, as the following sections will discuss.

A. *Market Signaling with Differential Signaling Costs*

In the above model of market signaling, it was assumed that Black and White workers have identical abilities, and that they have identical signaling costs. Following Spence, consider now a model where Black people have higher signaling costs than White people, but the

groups are in all other relevant aspects identical.[32] In this model, if a Black person of high ability achieves a level of education equal to a White person of the same ability, the Black person has incurred greater costs in reaching this level. Put another way, if a Black person and White person of equal ability incur identical signaling costs, the Black person will have reached a lower level of education.

To provide the differential signaling cost model with an empirical frame of reference, this discussion will consider the case of African-Americans, although other groups in other nations would likely be equally appropriate. As Trebilcock observes: "The statistics on the current economic and social status of Blacks paint a grim picture."[33] Consider the economic and social differences between White and Black people. African-Americans are more than twice as likely than White Americans to be jobless. The median Black family income is 56 per cent of a White family's income. While only 10 per cent of White people live below the poverty line, almost a third of Black people live below the poverty line. Two-thirds of African-American babies are born to unmarried mothers. Black men are six times more likely to be murdered than White men. While Black people comprise 12 per cent of America's population, they constitute nearly half of its prison population. Finally, only 2.5 per cent of America's college students are Black men.[34]

In the face of these statistics, it would be naive to imagine a level playing field in pursuing an education; the economic situation facing Black students would make education difficult enough. On top of economic disadvantage, however, there also may be non-pecuniary costs of education creating further disadvantage for African-Americans, as I will attempt to demonstrate. According to empirical evidence, the influence of culture on a person's pursuit of education is very significant; for example, whether a person's parents were highly educated has an influence (independent of income) on whether that person will succeed academically. Consider the following studies. John Chubb and Terry Moe examined the effect of various factors, such as school organization,

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[32] See Spence, *supra* note 20, c. 5; and MacIntosh, *supra* note 7 at 289-90. MacIntosh suggests that differential signaling costs may result from the adverse selection problem and human capital underinvestment that he describes, noting, for example, that disadvantaged groups may find it difficult to finance an education. In the discussion below, I will focus on the potential for differing psychic costs of obtaining an education.

[33] Trebilcock, *supra* note 1 at 191.

[34] *Ibid.*

resources and family background, on the academic success of high school students in the United States.[35] They stated:

> The strongest and most consistent finding in research on student achievement is that family background is a major influence, perhaps even a decisive one. It is a major influence in the home, where parents establish basic educational values and scholastic work habits.[36]

Eric Hanushek reviewed over one hundred studies on the influence of various factors on academic achievement and finds that the level of education obtained by parents is an important factor.[37] He concluded: "[F]amily background is clearly very important in explaining differences in achievement. Virtually regardless of how measured, more educated and more wealthy parents have children who perform better on average."[38]

Alan Gordon surveyed the literature on the social status of attendees of institutions of higher education and concluded:

> Parents' experiences of post-compulsory education certainly influence their attitudes towards whether their children should continue their studies after the age of sixteen or eighteen. In sixth forms, further education and higher education, students whose parents had themselves continued in full-time education are over-represented. ... [T]he amount of influence parents have over their child's decision to stay on in or leave full-time education was strongly associated with the amount of education they themselves had received. ... [M]ore highly educated parents generally take more interest in their children's schooling.[39]

Alexander Astin conducted an extensive study attempting to predict college performance based on numerous possible explanatory variables.[40] After studying the results of 4,031 men and 3,783 women in American colleges, Astin concluded that the education of a student's parents had a significant effect (holding all other things equal) on academic performance. He stated: "Although race and family income do not appear to affect the student's academic performance directly, the

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[35] See J.E. Chubb & T.M. Moe, *Politics, Markets and America's Schools* (Washington: Brookings Institution, 1990) c. 4.

[36] *Ibid.* at 101.

[37] E.A. Hanushek, "The Economics of Schooling: Production and Efficiency in Public Schools" (1986) 24 J. Econ. Lit. 1141.

[38] *Ibid.* at 1163.

[39] A. Gordon, "The Educational Choices of Young People" in O. Fulton, ed., *Access to Higher Education* (Guildford, U.K.: Society for Research into Higher Education, 1981) 122 at 127.

[40] A.W. Astin, *Predicting Academic Performance in College* (New York: Free Press, 1971).

parents' level of education has a positive effect on freshman GPA, particularly for girls."[41]

Finally, an earlier study by Byron Hollinshead reached similar conclusions.[42] He concluded from his study of college students in America that:

> One of the crucial factors in determining college attendance is family attitude. If there is a family college tradition, if there is family respect for learning, then the youngster will go even at considerable sacrifice. ... If there is no such tradition or respect, the youngster is not likely to go, even though there may be plenty of money to send him.[43]

The implications of these studies are clear: it is more difficult for children whose parents did not receive higher education to receive higher education themselves. If a child is not exposed to a culture with an emphasis on education, it is more difficult for that child to break the mould and attend institutions of higher education. Thus, a legacy of discrimination against a particular race will have a lasting impact on the ability of members of that race to gain an education, aside from economic impediments. Fewer children will be exposed to parents who have obtained an education, and, to the extent that race and culture are correlated, children in the disadvantaged group are less likely to be exposed to a culture which is conducive to education. Returning to the question at hand, if Black people have historically been discriminated against in a such a way that their educational opportunities were limited, this will have a lasting impact on future generations. This is consistent with the observation noted above that only 2.5 per cent of the American college population are Black men, and is supported by an article in *The New York Times Magazine*, which stated:

> Every child born in America doesn't have access to good schools and doesn't have parents who encourage study.... To argue that by late adolescence black people have run a fair competitive race and that if they're behind whites on the educational standards they deserve to be permanently barred from the professional and managerial classes is absurd.[44]

It is a reasonable assumption that the costs of education, defined broadly as including the psychic costs of the effort required to attend and succeed at an educational institution, are higher for a Black American than for a White American of equal ability.

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[41] *Ibid.* at 281.

[42] B.S. Hollinshead, *Who Should Go to College* (New York: Columbia University Press, 1952).

[43] *Ibid.* at 37.

[44] N. Lemann, "Taking Affirmative Action Apart" *New York Times Magazine* (11 June 1995) 36 at 62.

The policy implications of a model with differential signaling costs differ sharply from the implications of the above signaling models. In the above models, it was shown that if race was treated as a proxy for ability, arbitrary differences in signaling equilibria could arise; banning the use of race as a proxy may therefore eliminate arbitrary differences, and possible inefficiencies owing to the underutilization of high-ability Black workers and the adverse selection problem, in the treatment of Black and White workers. The implication of differential signaling costs, however, is that such a policy recommendation may be misguided. If the use of race in hiring is banned, Black workers will be unfairly treated and inefficiently underutilized. The reason for this is as follows: because of the higher costs of education, a Black person with lower education levels may signal the same ability as a White person with higher education levels. If they are treated similarly with respect to signaling, they will be treated differently with respect to ability. Therefore, if there are differential costs of signaling for Black and White people, allowing employers to use race as a proxy is appropriate.

Spence suggested that the difference in signaling costs will be recognized and compensated for by the market, if permitted. He stated: "The unprejudiced employer will tend, in making his probabilistic assessments, to compensate for the higher signaling costs facing one group. He will do this automatically in interpreting past market data. He need not be aware that education costs more for B [Black people] than for W [White people]."[45] Thus, in the unregulated market, what appears to be reverse discrimination will result. Black people will be hired for highly-skilled jobs, even though their level of education is below White people who seek highly skilled jobs. Indeed, if education costs vary sufficiently, a Black person could be hired for a highly-skilled job even though his education level is below that of a White person offered an unskilled job. In this case, an efficient sorting of skilled and unskilled labour in the different races results in what this article defines as affirmative action: a Black person with ostensibly lower qualifications may be hired over a White person with ostensibly higher qualifications.[46]

The conclusion that the market will sort out the different equilibria, however, depends on some crucial assumptions. One assumption made by Spence is that in the unregulated market employers view race as a proxy for ability; that is, it is possible for different

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[45] Spence, *supra* note 20 at 38.

[46] See M. Selmi, "Testing for Equality: Merit, Efficiency, and The Affirmative Action Debate" (1995) 42 UCLA L. Rev. 1251 (voluntary affirmative action programs may be efficient for employers as a means of compensating for biases in the testing of prospective employees).

signaling equilibria to be reached since Black and White people are viewed as distinct. If, however, employers do not view Black and White workers as inherently different (perhaps as the result of antidiscrimination campaigns) and all prospective employees are lumped together, then there is a danger that high-ability Black people will again be underutilized. *Ceteris paribus*, the relatively high cost of education implies that Black people will on average attain lower levels of education than White people, which implies that they will be underemployed in high-ability positions. In other words, somewhat paradoxically, colourblind policies in hiring may lead to underemployment of Black workers.

The signaling equilibrium created when the races are treated equally with respect to signaling, but education costs differ, may result in highly educated White workers being hired for high-ability jobs, while Black and lesser-educated White workers are hired for low-ability jobs. In this situation, employers may not be presented with disconfirming evidence of their beliefs that identical education levels signal identical abilities across races.[47] Consequently, beliefs will not be updated, and an equilibrium could result whereby Black and White employees are treated similarly at the signaling level, even though efficiency calls for separate treatment. Spence acknowledges this point and observes, "if education costs more for one group, that group may never appear in the market, and the employers' beliefs are unchallenged."[48]

This possibility suggests that policy should not be as sanguine about the market's ability to recognize differences in education costs as Spence initially suggested. Rather than simply allowing firms to differentiate between Black and White people in hiring, a different policy option may be to compel employers to hire Black workers in highly skilled jobs in order to learn more about the relationship between race, education and ability. As Spence states: "If we were to force some members of the currently excluded group into the market, employers would eventually learn that a given level of education implies more talent for that group, because education costs at given levels of capability are uniformly higher."[49] Thus, differential signaling costs may not simply imply a permissive attitude towards what appears to be reverse

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[47] See "Fair Driving," *supra* note 27 at 850-51; and Selmi, *supra* note 46 at 1294-95.

[48] Spence, *supra* note 20 at 99.

[49] *Ibid.* See also "Numerical Standards," *supra* note 20 at 1650-51; and J.M. Buchanan, "Fairness, Hope and Justice" in R. Skurski, ed., *New Directions in Economic Justice* (Notre Dame, Ind.: University of Notre Dame Press, 1983) 53 (arguing that if employers are ill-informed about the productivity of a particular group in society, temporary mandatory hiring quotas are appropriate).

discrimination, but rather may imply the optimality of a coercive policy towards employers, at least until the market is aware of differential signaling costs.

An alternative policy option, however, is to attack the source of the difference between the races: the costs of education. Thus far the differential costs of signaling between Black and White workers has been taken as a given. If the costs of education for Black workers are lowered to levels facing White workers, education levels for either race will signal the same ability. The above summary of the empirical evidence on culture and education offers one method of lowering disadvantaged groups' education costs: affirmative action programs at colleges and universities, whereby, for example, Black students are admitted with lower formal academic credentials than some rejected White students.[50] If more Black people attend university, their children are more likely to attend university, and the culture will become more congenial for a Black person wishing to attain an education. If, as the above studies suggest, culture is one of the main sources of differential education costs, a more efficient equilibrium might be reached over time through these policies.

B. *Differential Signaling Costs and Human Capital Investment*

Consider now the effect of differential signaling costs on human capital investment, where signaling activities and human capital investment are distinct (that is, human capital is accumulated outside of formal education—this assumption will be dropped below). The problem that may result is similar to the adverse selection problem (rational underinvestment in human capital by high-ability members of a disadvantaged group) described above, except that this problem can result even if employers cease to use race as a proxy for ability. Suppose now that employers do not account for race in making hiring decisions. High-ability Black workers may be underemployed since they will be disadvantaged in signaling their ability. If high-ability Black workers know that they will be underemployed, there is a disincentive for them to invest in human capital. As a result, the underemployment of Black

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[50] MacIntosh, *supra* note 7 at 293-95, makes a similar observation, noting the possibility of differential signaling costs and suggesting that an effective means of combating the adverse selection problem is perhaps to pursue subsidies and lower admission standards with respect to education. The analysis here complements his observations, pointing out that lower admission standards may not only help in the present by compensating for differential signaling costs, but will also help in the future by lowering signaling costs for disadvantaged groups.

workers becomes rational, since they will be less productive. Thus, in this model, an initial assumption by employers that Black workers are less productive is not required for an adverse selection problem to result. Indeed, if Black and White workers are assumed to be identical in all relevant aspects even though there are differential signaling costs, the adverse selection problem may result.

There are, as was true with the basic model of differential signaling costs, two possible policy responses to this problem. First, employers could be compelled to hire Black workers in order to discover the relationship between their education levels and abilities. Once this is learned, the adverse selection problem might disappear. Employers may compensate for the higher costs of signaling and hire high-ability Black workers even though they have lower formal education credentials, and Black workers will anticipate this and invest in human capital so that they will be able to perform highly-skilled jobs.

Alternatively, the signaling cost differential could be eliminated. As suggested above, affirmative action programs in colleges and universities may help eliminate the cost difference in obtaining an education for Black and White students. If this difference is eliminated, Black and White prospective employees will have equal signaling capacities, and colourblind treatment of prospective employees by employers will result in the employment of high-ability Black workers. High-ability Black workers will anticipate this and will invest in human capital (outside of education) so as to be capable of performing highly skilled jobs; the adverse selection problem is resolved.

C. *Differential Education Costs Where Education is Both a Signal and Human Capital Investment*

The policy implications of differential costs of education where education acts both as a signal and as human capital investment are distinct from the policy implications of the above models where education is simply a signal. Assume that education is both a signal and human capital investment, and that Black people face a higher cost of education. Assume also that employers are unaware of this difference and treat Black and White job candidates identically. Higher signaling costs imply that it will be more difficult for Black workers to signal high-ability to employers, and they may consequently be underemployed. This may diminish their incentive to invest in education, which implies a lower level of human capital, which in turn leaves underemployment of Black workers rational.

In the above models with differential education costs, compelling employers to hire Black workers to educate them about race, ability, and signaling will result in employers compensating for greater signaling costs and efficiently hiring high-ability Black workers. In this model, however, the signaling activity itself contributes to ability through gains in human capital. Black workers will therefore be at a disadvantage in competing for highly skilled jobs and may self-select themselves out of this market. Such a result, while inequitable, may or may not be inefficient. In the short run, it might be efficient in that skilled jobs will be allocated to those with lower costs of investing in human capital. On the other hand, it may be desirable in the long term to lower the education costs of Black people such that high-ability Black workers have an incentive to invest in signaling and human capital. To accomplish this long-term objective, the second policy option discussed above is required: affirmative action at educational institutions. If affirmative action programs in colleges and universities lower education costs for Black students as described above, then the underemployment of high-ability Black workers will be diminished over time.

VI. SUMMARY AND IMPLICATIONS FOR CONSTITUTIONAL LAW

In the following sections, I will first summarize the preceding analysis and then will use the theory to assess Canadian and American[51] constitutional approaches to antidiscrimination and affirmative action policies. While the optimality of particular laws will depend on the social context in which they are implemented, the above analysis informs what governments should be constitutionally permitted to enact with respect to antidiscrimination laws and affirmative action, at least from an efficiency perspective.

A. *Summary*

This article began by assessing the efficiency effects of discrimination motivated by employer animus toward particular races. Under this model, antidiscrimination policies may be efficient in reducing negative externalities resulting from acts of racism. Moreover,

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[51] In Part VI(B)(2), below, I will focus only on the recent case law of the United States Supreme Court.

they may hasten the exit of discriminatory employers from the market, and thus allow society to reach a higher level of social welfare sooner than the unregulated market would permit. Under this model, therefore, antidiscrimination policies may be efficient.

The efficiency effects of discrimination motivated not by animus, but by the efficiency of homogeneity were then discussed. Analysis of this theory suggests that it depends on questionable premises, and, even accepting its premises, its conclusion that allowing discrimination is efficient on balance is unwarranted.

The signaling models offer varying policy implications. Posner suggests that banning discrimination is inefficient as it would prevent employers from economizing on information costs by using race as a proxy for other factors such as productivity. As the discussion of the signaling models indicates, however, there is no assurance that the market will efficiently eliminate inappropriate proxies.

The discussion of signaling and human capital investment where signaling costs are the same across races suggests that banning racial discrimination in hiring altogether may be economically efficient. If race is permitted to be used by employers in assessing prospective employees, arbitrary differences in the treatment of the races may emerge. Furthermore, the difference in treatment of a race may have self-fulfilling implications through the adverse selection process. Consequently, high-ability members of a particular race may be underemployed. Thus, according to these models, employers should be prevented from relying on race in making hiring decisions.

This conclusion does not hold if there are differential signaling costs. Under these models, treating races equally results in disadvantage for members of the high-signaling-cost race. Consequently, if hiring policies are colourblind, high-ability members of the high-signaling-cost race will be underemployed. These models suggest that if employers are aware of the differential signaling costs, employers should be permitted legally to treat members of the high-signaling-cost race favourably, in the sense of hiring members of this race with lower formal qualifications. If, however, employers are initially unaware of the differential in signaling costs and treat races identically, inefficient underemployment of high-signaling-cost races may persist, since employers will not necessarily face any evidence disconfirming their beliefs; indeed, rational under-investment in human capital might justify these beliefs. In this case, two policy responses may be appropriate: compelling employers to hire members of the high-signaling-cost race; and eliminating the differential in signaling costs. This latter objective might be accomplished by affirmative action programs in educational institutions. If the signaling

activity—education—also contributes to human capital, eliminating signaling cost differentials may ensure efficient employment of all races in the long run.

B. *Relevant Constitutional Law in Canada and the United States*

This section will draw on the above economic analysis to assess the constitutional laws governing discrimination and affirmative action practiced by government actors in their capacities as legislators and employers in Canada and the United States. As previously stated, whether a particular law or program is efficient will depend on the empirical circumstances; thus, the analysis will generally focus on what governments are constitutionally permitted to do, not a particular law or program itself.[52]

1. Canada

Section 15 of the *Charter* states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(1) sets out the general rule that governments as employers or as legislators cannot make distinctions on the basis of race. Such a general rule is consistent with the economic analysis herein. It clearly allows the government to establish antidiscrimination legislation which may, following John Donohue, serve to accelerate the process whereby bigoted employers are driven from the market. Antidiscrimination legislation and a rule generally preventing the government from legislatively creating distinctions on the basis of race may also help prevent the development of arbitrary differences in

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[52] The exception in the discussion that follows will be a specific assessment of the prohibition of discrimination by the government as employer: see discussion below.

signaling equilibria across races which, as Ayres observes, are "inequitable and inefficient."[53]

In its role as employer, section 15(1) prevents the government from discriminating on the basis of race.[54] While generally I attempt in this article to avoid any firm conclusion on whether a specific rule is desirable in a particular context, but rather set out general reasons suggesting the plausible efficiency of a type of law, the inflexible prohibition in section 15(1) with respect to government's role as an employer invites a firm assessment of whether governments should not be allowed to discriminate as employers.

While the efficiency arguments for and against antidiscrimination laws generally apply equally to government, an important argument does not: the argument that market competition itself will drive out discrimination motivated by animus, and thus the law need not intrude. As MacIntosh points out, governments as employers are typically insulated from marketplace competition; therefore, the argument that the unregulated market will eliminate discrimination motivated by animus since bigoted employers face higher costs does not apply to the government.[55] It is plausible that antidiscrimination laws are justified on an efficiency basis even in the face of Becker's argument, but the failure of this argument with respect to the government helps justify the outright prohibition of employment discrimination by the government.

Particular aspects of section 15(1) case law have developed in ways that are consistent with the framework developed in this article, suggesting the potential efficiency-enhancing property of Canadian law. I will discuss two issues in the case law here: whether discrimination need be intentional in order to attract scrutiny under section 15(1); and whether the person seeking the protection of section 15(1) must be a member of an historically disadvantaged group. After assessing the case law on these topics, I will assess the explicit treatment of affirmative action in section 15(2) and its relationship to section 15(1).

It is apparent under section 15(1) case law that the subsection is relevant even where the state action in question is not intended to

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[53] "Fair Driving," *supra* note 27 at 850.

[54] While s. 15(1) refers only to discriminatory "law," *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*] held that discriminatory policies or practices by a government employer were "law" for the purposes of s. 15(1).

[55] See MacIntosh, *supra* note 7 at 300-301.

disadvantage the group in question.[56] McIntyre J., for the majority on this point, used the phrase "whether intentional or not" in defining discrimination in *Andrews* v. *Law Society of British Columbia*.[57] He also adopted the Court's cases on human rights codes into section 15(1) jurisprudence establishing that discrimination under the codes need not be intentional.[58] From these observations, Peter Hogg concludes that:

> It follows that it is not necessary to show that the *purpose* of the challenged law was to impose a disadvantage on a person by reason of his or her race, national or ethnic origin, etc. It is enough to show that the *effect* of the law is to impose a disadvantage on a person by reference to one of the listed or analogous characteristics.[59]

Aside from other important, equitable considerations, the analysis here suggests that the rule in *Andrews* may have desirable efficiency properties. The intention to disadvantage a race need not be present in order for state action to create inefficient discrimination. Consider a situation where there is no difference in signaling costs between races and members of each race have equal ability. An important insight of signaling theory is that even though there are no fundamental differences between the races, if each race is viewed as distinct, distinct signaling equilibria may result, which in turn may result in the underemployment of high-ability members of a race and a consequent adverse selection problem with respect to human capital investment. The analysis of this article thus supports the Canadian approach: intention to disadvantage a group is not required for state action, either in the state's role as employer or as law-maker in the employment context, to violate section 15(1).

A question that was not resolved as quickly in the history of section 15(1) jurisprudence was whether the person claiming general equality rights under section 15(1) is required to be a member of an historically disadvantaged group.[60] As Hogg discusses, the law has

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[56] See P.W. Hogg, *Constitutional Law of Canada*, 4th ed., (Toronto: Carswell, 1997) s. 52.7(h).

[57] [1989] 1 S.C.R. 143 at 174 [hereinafter *Andrews*].

[58] See, for example, *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

[59] Hogg, *supra* note 56, c. 52 at 41 [emphasis in original].

[60] See O.W. Fiss, " Groups and the Equal Protection Clause" (1976) 5 Phil. & Pub. Aff. 107 (arguing that unequal treatment of members of advantaged races may be unfair, but should not be considered unconstitutional under the Equal Protection Clause in the United States); and Ontario Law Reform Commission, *Study Paper on Litigating The Relationship Between Equity and Equality* by C. Sheppard (Toronto: The Commission, 1993) at 35-48 (discussing equality protection and historically privileged groups).

varied on this question.[61] In *Andrews*, an individual claimed discrimination under section 15(1) on the basis of his status as a non-citizen. Wilson J., in the minority, described non-citizens as "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[62] La Forest J. stated that non-citizens are a group "who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."[63]

The emphasis on pre-existing disadvantage in *Andrews* was echoed in *R.* v. *Turpin*.[64] In that case, Wilson J. for a unanimous Court required the claimant under section 15(1) to establish general, historical disadvantage as well as particular disadvantage from the state action in question. She stated: "A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[65] A claim without association to historical disadvantage would not "advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society"[66] and therefore would be outside the scope of section 15.

Subsequent cases departed from Wilson J.'s approach in *Turpin*. *R.* v. *Hess*; *R.* v. *Nguyen*[67] involved a man's section 15(1) claim of discrimination on the basis of sex. Clearly males have enjoyed historical advantage because of sex, but Wilson J. for the majority appeared to proceed on the basis that men could successfully claim discrimination on the basis of sex. McLachlin J., on behalf of a minority, explicitly rejected the view that historical disadvantage, apart from particular disadvantage from the state action in question, was required, stating "these arguments take the language in *Turpin* further than is justified."[68]

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[61] Hogg, *supra* note 56, s. 52.7(g).

[62] *Andrews*, *supra* note 57 at 152.

[63] *Ibid.* at 195.

[64] [1989] 1 S.C.R. 1296.

[65] *Ibid.* at 1332.

[66] *Ibid.* at 1333.

[67] [1990] 2 S.C.R. 906.

[68] *Ibid.* at 943.

Recently, *Miron* v. *Trudel*[69] rejected more clearly the requirement of historical disadvantage under section 15(1). Eight of nine justices held that general disadvantage, while an indicator of an analogous ground, was not a prerequisite to a claim under section 15(1).

In light of these and other cases, Hogg summarizes the law on the requirement of general disadvantage in the following way:

> An individual who invokes s. 15 need show only that a law imposes some disadvantage on him or her, and does so by reason of a named or analogous (immutable) personal characteristic. That is discrimination within s. 15. It is not necessary for the individual to show that he or she is a member of group that is disadvantaged in other respects. Of course, there may be a sound reason for a discriminatory law, especially if the burdened group is one that is generally advantaged in other respects, but that is relevant under s. 1.[70]

The analysis here suggests that historical disadvantage, while clearly relevant to affirmative action as I will discuss below, is not necessary for inefficient discrimination to exist. Thus, the move away from Wilson J.'s apparent view in *Turpin* should be welcomed, at least from an efficiency perspective. Consider two races, each of equal ability and each equally treated historically such that signaling costs are identical across race. Employers use race for a proxy for ability. As discussed above, the signaling equilibria that emerge for each race may not resemble each other, even though there is no intrinsic difference between the races. This differential treatment could lead to an adverse selection problem and rational underinvestment in human capital by a particular race. Requiring historical disadvantage under section 15(1) could permit the creation of distinctions based on racial grounds that could result in separate signaling equilibria for distinct races, with the efficiency losses this entails.[71]

Turning to section 15(2), it is clear that, to some extent, this section of the *Charter* permits affirmative action programs. Thus, to some extent, the government as employer may practice affirmative action, which economic analysis suggests may be efficient in order to compensate for differential signaling costs across races. Moreover,

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[69] [1995] 2 S.C.R. 418.

[70] Hogg, *supra* note 56, c. 52 at 41.

[71] Historical disadvantage, while it should not be a requirement to bring a s. 15(1) claim, may nevertheless be relevant in assessing the claim. As I will argue below, an affirmative action program designed to remedy or account for historical disadvantage pursuant to s. 15(2) may be consistent with s. 15(1). Thus, members of an historically advantaged race seeking to challenge an affirmative action program may fail to show that their substantive equaltiy rights under s. 15(1) have been infringed. He should nevertheless have the right to challenge laws making arbitrary racial distinctions in order to prevent the emergence of inefficient signaling equilibria.

antidiscrimination legislation may permit private actors to practice affirmative action, which may be efficient for the same reasons.

There is continuing debate, however, as to how permissive the section is in accommodating government affirmative action initiatives. One of the important issues in determining to what extent affirmative action is constitutional is whether section 15(2) is an exception to the general prohibition on racial discrimination in section 15(1), or whether it is merely an interpretive guide to section 15(1). That is, is an affirmative action program an infringement of section 15(1), but justifiable under section 15(2), or is such a program consistent with section 15(1) if it satisfies section 15(2)? In what follows I will set out why this issue is important with respect to judicial review of affirmative action, will set out what the economic analysis in this article suggests on the issue, and will review aspects of the case law that indicate the consistency of the theory herein with judicial approaches to the issue.

Whether section 15(2) merely informs section 15(1) analysis or rather is a defence to what is otherwise a violation of section 15(1) is a significant preliminary question in considering judicial review of affirmative action. There are at least two ways in which the issue, which I will call the relational question, will affect judicial review. First, resolving the relational question is important in determining on whom the burden of proof lies.[72] If section 15(2) is a defence to what would otherwise be a violation of section 15(1), the burden presumably would rest on the government to prove that the affirmative action in question, while violative of section 15(1), is "saved" by section 15(2). If, on the other hand, section 15(2) informs section 15(1), then an affirmative action program permitted pursuant to section 15(2) does not violate section 15(1). Consequently, the burden of proof would rest on the challenging party to show that the program is not authorized by section 15(2) and violates section 15(1). If section 15(2) is not an exemption to section 15(1), but rather is an interpretive guide to section 15(1), there is likely greater scope for permissible affirmative action given that the burden of proof will rest on the party challenging the government action.

A second reason why resolving the relational question is important is the standard of review entailed under either the defence approach or the interpretive guide approach.[73] If section 15(2) is a defence to what otherwise would be a violation of section 15(1), it should be construed narrowly. The government faces a significant

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[72] Sheppard, *supra* note 60 at 22.

[73] *Ibid.* at 21-22.

burden in justifying the violation of a right.[74] On the other hand, if section 15(2) merely informs section 15(1), then a liberal approach should be taken. In interpreting constitutional rights, courts must follow a "generous" and "purposive" approach.[75] If section 15(2) is viewed as helping define the equality rights of disadvantaged groups then it should be interpreted generously. Again, the characterization of the relationship between section 15(2) and section 15(1) will be significant in determining the scope of permissible affirmative action under the *Charter*.

Having established the stakes involved in characterizing section 15(2), I turn now to the implications of the economic analysis herein on the question. There are two ways of approaching the question of the optimal view of the relationship between sections 15(1) and 15(2). First, one could characterize the purpose of each section and determine their relationship from a comparison of purpose: if their purposes are identical, then one should not be viewed as an exception to the other. Second, one could take an instrumental, results-oriented approach. If one wishes to restrict the scope of affirmative action, then one would argue in favour of the exception approach to section 15(2), given that such an approach places the burden on the government to justify affirmative action and moreover suggests interpreting the exception narrowly. On the other hand, treating section 15(2) as consistent with section 15(1) opens the door to affirmative action by placing the burden of proof on those challenging such a program and by suggesting a generous, liberal approach to interpretation.

The second approach may be dealt with succinctly. The analysis in this article has suggested the economic efficiency of affirmative action programs in certain plausible circumstances. A restrictive approach to section 15(2) may undermine the ability of the government to establish and authorize such programs,[76] thereby undermining the ability of government to enhance economic efficiency. It raises empirical questions beyond the scope of this article as to whether affirmative action is appropriate in particular circumstances, but the analysis does

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[74] The general standard for justifying a rights infringement under s. 1 is set out in *R.* v. *Oakes*, [1986] 1 S.C.R. 103. Recent discussions of the government's justificatory burden in equality cases may be found in *Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eldridge* v. *British Columbia (A.G.)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*]; and *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).

[75] See *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344.

[76] American experience has tended to confirm that a restrictive approach requiring justification of affirmative action programs undermines the likelihood of finding them constitutional, as I will discuss in the next section.

suggest plausible reasons to suppose its efficiency in the presence of significant historical disadvantage. Severely limiting the government's ability to use affirmative action may therefore present efficiency costs.

I turn now to an approach based on a comparison of the purposes of the two subsections of section 15. This article has argued that affirmative action programs, whereby ostensibly less qualified members of a disadvantaged race are hired in preference to members of a different race because of differences in signaling costs, may be necessary in order to treat the races equally with respect to ability. That is, differential treatment with respect to signaling may be necessary to ensure equal treatment with respect to ability. Moreover, affirmative action in educational institutions may be necessary to lower the costs of obtaining an education (signaling) for historically disadvantaged groups. The affirmative action described in this article has the object of establishing substantively equal treatment of different races with respect to ability, in order to promote efficiency, even if unequal treatment is required with respect to signaling. The object is not to redress past wrongs or any other retrospective goal,[77] but rather to promote equal treatment of races with respect to ability in the present and future.

Given that affirmative action as described herein has as its object the promotion of equality, the economic analysis suggests that section 15(2) should be viewed as entirely consistent with the goals of section 15(1), which is also designed to promote equality. Affirmative action is not an exception to the promotion of equality under this view, but merely a means of pursuing it in contexts where types of equal treatment, such as with respect to signaling, results in significant inequality in other respects, such as with respect to ability.

"Disadvantage" in section 15(2) helps define the relationship between sections 15(1) and (2). Section 15(2) explicitly exempts from section 15(1) scrutiny any "law, program or activity" that seeks to ameliorate the conditions of members of a disadvantaged group. Affirmative action is appropriate, it was argued above, where signaling costs are higher for a particular race. Signaling costs are predictably higher as the result of historical disadvantage. Thus, justifying affirmative action on the basis of historical disadvantage is consistent with the economic analysis herein. Where there is historical

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[77] M.A. Drumbl & J.D.R. Craig, for example, view affirmative action under s. 15(2) as relating not to substantive equality, but rather to a model of "social justice" designed to redress past wrongs done to a group. See "Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997) 4 Rev. Const. Stud. 80.

disadvantage that affects signaling costs, the promotion of efficient, substantive equality may require affirmative action programs.

This analysis provides an interpretation of how sections 15(1) and 15(2) interrelate. Section 15(1) is designed to prevent the emergence of distinct treatment of groups in the future even though there is no inherent difference between the groups. Section 15(2) recognizes, however, that where there has been historical disadvantage, the promotion of equality in substantive matters may require affirmative action programs. Section 15(1) promotes efficiency through equality without regard to history; where historical differences between races have been irrelevant to signaling costs, such an approach is appropriate. Section 15(2), on the other hand, also looks to the past in determining the optimal approach to future equality; if there have been historical differences such that a race may face disadvantage in signaling, affirmative action programs may be required to create future equality.

Colleen Sheppard offers a non-economic analysis of the relationship between sections 15(1) and (2) that bears important similarities to the interpretation invited by the economic analysis of this article. She acknowledges that it is unlikely that courts will find that historical disadvantage is required to bring a section 15(1) claim, but does not treat this as precluding the view of section 15(2) as an interpretive guide to section 15(1):

> The possibility of advancing cogent arguments that the formal equality rights of socially privileged groups have been violated [by an affirmative action programme] should not preclude reaching the legal conclusion that equity initiatives are legally justifiable and essential to the goal of substantive equality for individuals from socially disadvantaged groups. It can be convincingly maintained, therefore, that statutory and constitutional affirmative action provisions give clear direction to adjudicators that if the source of harm to the historically advantaged individual is a special law or program designed to remedy historical and social disadvantage, then it should not violate equality guarantees since equality for socially disadvantaged groups should take precedence over the maintenance of formal equality between individuals.[78]

"Formal equality" in Sheppard's analysis can be interpreted in the context of this article as equality with respect to signaling. Moreover, the economic analysis advanced here sets out a view of how an affirmative action program pursues substantive equality: the program may be necessary to compensate for differences in signaling costs. Thus, Sheppard's analysis resonates with the analysis herein: equality with respect to the treatment of signals, formal equality, may be sacrificed in pursuit of equality with respect to ability, substantive equality. Such

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[78] Sheppard, *supra* note 60 at 46.

analysis does not preclude a finding that where historical disadvantage is not relevant, it is a violation of section 15(1) to treat any group unequally even if the inequality is formal, since differences in formal treatment can give rise to substantive inequality in the future through the emergence of separate signaling equilibria.

In a recent article, Mark Drumbl and John Craig take a different position on the relationship between sections 15(1) and 15(2).[79] They conclude that section 15(2) sets out a defence to a section 15(1) violation. They put significant weight on the following reasoning: given that section 15(1) is itself addressed to substantive equality, section 15(2) must be addressed to something other than substantive equality or it is redundant; therefore, section 15(2) is not about substantive equality.[80] In my view, such an analysis is problematic. The debate is whether section 15(2) *informs* the interpretation of section 15(1), which if true indicates that while section 15(2) is not absolutely necessary to establishing equality rights, it is important in determining the scope of the equality rights set out in section 15(1). Under this view, section 15(2) admittedly does not set out any new rights, but it is not redundant.

Indeed, Drumbl and Craig's analysis of the meaning of substantive equality under section 15(1) perhaps demonstrates the importance of section 15(2) as an interpretive guide. They state:

> Affirmative action only raises constitutional difficulties under section 15(1) (*i.e.*, is "constitutionally problematic") where it allocates a social benefit to individuals on the basis of their membership in a group, although group membership is irrelevant to the issue of whether individuals want or need the benefit. All individuals, regardless of their ethnic origin or gender, desire job training, employment, or contractual opportunities. A governmental affirmative action program which grants social benefits to individuals because of their ethnic origin or gender, and denies it to others on those same bases ... , risks being in conflict with s. 15(1) of the *Charter*, and must be assessed under the terms of s. 15(2).

The economic analysis in this article, which admittedly is only one approach that might lead to a different result from Drumbl and Craig's, would suggest otherwise. Because historical disadvantage can lead to differential signaling costs with respect to race, equal treatment with respect to ability may imply treating races differently with respect to signaling. A benefit may be denied to a member of a particular race and create formal inequality, yet this may be consistent with pursuit of substantive equality under section 15(1). Section 15(2), by emphasizing the importance of historical disadvantage to substantive equality, invites

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[79] Drumbl & Craig, *supra* note 77.

[80] *Ibid.* at 85.

an interpretation of the scope of section 15(1) consistent with the economic analysis discussed in this article. Different treatment with respect to race may promote substantive equality and therefore be consistent with section 15(1).

The analysis in this article perhaps also responds to a different reason why Drumbl and Craig reject a view of section 15(2) as interpretive guide. They conclude that the world is not divided neatly into groups of "haves" and "have-nots." Members of a group may be heterogeneous with respect to actual disadvantage; therefore affirmative action favouring a group may not be consistent with substantive equality. Consequently, they reason, section 15(2) is not about substantive equality.

Sheppard responds to such an argument by stating that "[i]t is virtually impossible for an individual to escape all forms and vestiges of discrimination directed at the social group(s) to which he or she belongs."[81] Signaling analysis provides theoretical support for this conclusion. If employers use race as a proxy for information, then regardless of an individual's circumstances, her race will affect her future prospects. Moreover, it was concluded above that culture is an important determinant of education costs; thus, to the extent that race affects culture, historically disadvantaged races may have higher costs of education as a result of the culture to which they belong. The analysis here does not suggest that individual circumstances will never vary, but it does suggest that it is reasonable to conclude, as Sheppard does, that virtually all members of a race will be affected by that race's historical disadvantage if it exists.[82]

As a matter of precedent, there has been no definitive proclamation by the Supreme Court of Canada on the relationship between sections 15(1) and 15(2). In my view, however, there is substantial jurisprudential support for the view of section 15(2) as an interpretive guide offered here and elsewhere.[83] For example, La Forest J. stated in *McKinney* that "[t]he *Charter* itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for

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[81] Sheppard, *supra* note 60 at 24.

[82] I will point out again that my analysis is directed at a constitutional framework. Consequently, I make no claims about the appropriateness of specific affirmative action programs for particular groups, but rather simply make the claim that the constitution should permit affirmative action as a legitimate means of pursuing substantive equality.

[83] See, for example, Sheppard, *supra* note 60; Canada Commission of Inquiry on Equality in Employment, *Equality in Employment: A Royal Commission Report* (Toronto: The Commission, 1984); and W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242.

dealing with inequality might themselves create inequalities."[84] Mr. Justice La Forest acknowledged that the purpose of affirmative action is to deal with inequality; it is not an exception to a pursuit of equality. There are other arguments based on legal principles that could also be made in support of section 15(2) as an interpretive guide,[85] but the object of this article has been to show how economic efficiency relates to antidiscrimination and affirmative action programs. Consequently, I will restrict my attention to those discussions by the Supreme Court of Canada which touch on the rationale behind affirmative action. In my view, these assessments of the purpose of affirmative action are consistent with the economic analysis in this article and its conclusion on the relationship between subsections in section 15.

Athabasca Tribal Council v. *Amoco Canada Petroleum Co. Ltd.*[86] involved a proposed plan by the Energy Resources Conservation Board of Alberta to require affirmative action programs of parties seeking approval of a tar sands plant. While the Supreme Court unanimously agreed that the Board lacked jurisdiction to make such an order, a minority of four commented on such a program's consistency with legislative equality guarantees:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.[87]

This statement clearly supports the notion that affirmative action is not an infringement of the equality rights of members of advantaged groups, but rather seeks to protect the substantive equality rights of disadvantaged groups. Affirmative action on this view would not need justification as a violation of equality rights.

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[84] *Supra* note 54 at 318.

[85] Consider a basic "statutory" interpretation argument. Section 15(2) states that s. 15(1) does not preclude any law that has as its object the amelioration of conditions of disadvantaged individuals. It does not provide that s. 15(1) does not apply to affirmative action, but rather describes the scope of s. 15(1) by providing that s. 15(1) does not preclude affirmative action. On its face, it appears that s. 15(2) simply informs analysis of s. 15(1).

[86] [1981] 1 S.C.R. 699.

[87] *Ibid.* at 711, Ritchie J.

The characterization of affirmative action by Ritchie J. which led him to these conclusions is consistent with the economic analysis in this article. The proposal was designed with a view to enabling native peoples "to compete as nearly as possible on equal terms with other members of the community ... without regard to the handicaps which their race has inherited."[88] This statement recognizes, as the analysis in this article shows, that historical disadvantage may impede the ability of certain groups to compete for jobs. Perhaps to compensate for differential signaling costs and an adverse selection problem that might have occurred, or to educate employers about the ability of Aboriginal workers, affirmative action programs help Aboriginal workers to compete on an equal basis for jobs. Consequently, such programs promote substantive equality.

In upholding the imposition of an employment equity program on the employer in *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*,[89] Chief Justice Dickson, on behalf of the entire Court, provided reasoning that is quite consistent with an economic analysis of substantive equality and affirmative action:

> I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group .... An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.[90]

It is clear that this passage does not view employment equity programs (which in the case at hand involved hiring a minimum of one in four women employees until women constituted 13 per cent of the total number of employees of the employer) as an exception to equality, but rather as promoting equality. This is consistent with viewing section 15(2) as sharing the goals, and informing the interpretation, of section 15(1). Moreover, Dickson C.J.'s reasons for viewing affirmative action as promoting substantive equality are entirely consistent with the economic analysis of race discrimination in this article. "Stereotyping"

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[88] *Ibid.*

[89] [1987] 1 S.C.R. 1114.

[90] *Ibid.* at 1143.

as mentioned by Dickson C.J. may be interpreted as the treatment of race as a proxy for information, which was shown above to create the possibility of an inefficient signaling equilibrium and an adverse selection problem. As Dickson C.J. later stated, an employment equity program implies that it will become "more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women."[91] This resonates with one efficiency justification for affirmative action outlined above: it may act to educate employers about the abilities of a particular group and the relationship between that group's abilities and their signals.

Historical disadvantage is relevant under Dickson C.J.'s reasons, as under the economic analysis herein, not because of a goal of compensating for past discrimination, but rather as informing what is required to ensure equality in the future. For example, if signaling costs differ across races, higher signaling costs for a disadvantaged race may act, to use Dickson C.J.'s wording, as "insidious barriers" to equal employment. Affirmative action seeks to establish substantive equality by removing those insidious barriers.[92] As Dickson C.J. stated, "[s]ystemic remedies must be built upon the experience of the past so as to prevent discrimination in the future."[93]

Supreme Court jurisprudence on affirmative action programs, while not resolving the question, supports the interpretation of section 15(2) as promoting the aims of section 15(1), not as exceptional to it. Lower courts' decisions on the matter are mixed, but there are a significant number of cases which favour the exception approach.[94] On the other hand, *Lovelace* v. *Ontario*,[95] a recent decision of the Ontario Court of Appeal, drawing upon the Supreme Court's expressions of its views of equality canvassed above, takes an approach to section 15 that is entirely consistent with the views expressed here. In a statement that serves well as a summary of the preceding review of the matter in this article, the court concludes:

> We view s. 15(2) of the *Charter* as furthering the guarantee of equality in s. 15(1), not as providing an exception to it. This view is grounded in our concept of equality and in the

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[91] *Ibid.* at 1144.

[92] *Ibid.* at 1143.

[93] *Ibid.* at 1145.

[94] See, for example, *Shewchuk* v. *Ricard* (1986), 2 B.C.L.R. (2d) 324 (C.A.); and *Apsit* v. *Manitoba (Human Rights Commission)* (1987), 50 Man. R. (2d) 92 (Q.B.), rev'd on other grounds, (1988), 55 Man. R. (2d) 263 (C.A.).

[95] (1997), 33 O.R. (3d) 735 (C.A.).

> Supreme Court of Canada's equality jurisprudence. ... [T]he Supreme Court of Canada has consistently stated that the purpose of the equality guarantee in s. 15(1) is to remedy historical disadvantage, that identical treatment can perpetuate disadvantage and that equality may sometimes require different treatment. Section 15(2) enhances this concept of equality by recognizing that achieving equality may require positive action by government to improve the conditions of historically socially disadvantaged individuals and groups in Canadian society. We therefore read ss. 15(1) and 15(2) of the *Charter* together to embrace this one consistent concept of equality. Treating s. 15(2) as an exception or defence to s. 15(1) is antithetical to this concept.[96]

The section 15 framework in Canada, in summary, is consistent with the efficiency approach in this article.

2. United States

The American constitutional rule with respect to discrimination is found in the Fourteenth Amendment of the Constitution. The "Equal Protection Clause" states:

> Nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.[97]

The clause only mentions state law, as opposed to federal law, but cases have decided generally that the standards under the clause apply equally to the federal government.[98] Due process rights under the Fifth Amendment[99] are violated by the federal government if it violates the standards of the Fourteenth Amendment.[100] In what follows, I will focus on the jurisprudence of the United States Supreme Court.

In order to compare and contrast the Canadian and American approaches, I will consider the specific issues discussed already in the Canadian context: Does discrimination need to be intentional, or is the creation of a distinction on the basis of race sufficient to engage Fourteenth Amendment concerns? Is historical disadvantage required? And is affirmative action an exception to equality guarantees or consistent with equality guarantees?

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[96] *Ibid.* at 752-53.

[97] U.S. Const. amend. XIV, § 1 [hereinafter "Fourteenth Amendment"].

[98] *Bolling* v. *Sharpe* 347 U.S. 497 (1954) [hereinafter *Bolling*].

[99] U.S. Const. amend. V, which states, in part: "No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

[100] See *Bolling, supra* note 98; and *Adarand Constructors, Inc.* v. *Pena* 115 S. Ct. 2097 (1995) [hereinafter *Adarand*].

With respect to the first question, it is apparent that where the law makes explicit distinctions on the basis of race, equality concerns under the Fourteenth Amendment arise; an intention to discriminate is not required.[101] A leading case on the question is *Korematsu* v. *United States*.[102] In that case, Black J., for the majority, stated:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[103]

Citing *Korematsu*, the Supreme Court held in subsequent cases that any explicit legal distinction made on the basis of race was suspect and would invite the "strict scrutiny" of the courts: the distinction is only permissible if it is necessary for some legitimate public purpose.[104]

The rule in *Korematsu* obviously depends considerably on interpretations of "public necessity." If "public necessity" is defined broadly, such that effectively any public purpose other than an overtly racist purpose satisfies the standard, then the Equal Protection Clause may effectively establish a requirement of a discriminatory purpose. The case law, however, has set a very high standard in establishing public necessity. Indeed, the law in *Korematsu* itself, which involved the

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[101] To establish a violation of the Fourteenth Amendment, the United States Supreme Court case law does require a discriminatory purpose if the state action in question does not explicitly create a distinction on the basis of race, but rather results in adverse effects for a particular racial group: see *Washington* v. *Davis* 426 U.S. 229 (1976) (a qualifying test for the District of Columbia police force which disproportionately excluded Black candidates did not violate the Fourteenth Amendment given the absence of a discriminatory purpose); *Arlington Heights* v. *Metropolitan Housing Corp.* 429 U.S. 252 (1977) (a zoning decision which was alleged to result in adverse effects for racial minorities did not violate the Fourteenth Amendment given the absence of discriminatory purpose). This contrasts with the approach in Canada, which does not require a discriminatory purpose whre there are adverse effects for groups on the basis of a prohibited ground of discrimination: see, for example, *Eldridge*, *supra* note 74 (a provincial government health program which failed to provide publicly funded interpratation services was unconstitutional as the result of adverse effects on the hearing-impaired, regardless of discriminatory intent). Without discussing all the implications of either approach, I will note that the Canadian rule may more efficiently account for the fact that formally equal treatment may result in substantively different treatment where there are differences across race in factors such as signling costs. The analysis would in some respects be similar to that of affirmative action.

[102] 323 U.S. 214 (1944) [hereinafter *Korematsu*].

[103] *Ibid.* at 216.

[104] In *Bolling*, *supra* note 98 at 499, citing *Korematsu*, the Court stated: "Classification based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence consitutionally suspect." See also *McLaughlin* v. *Florida* 379 U.S. 483 (1964) at 191-92; and *Loving* v. *Virginia* 388 U.S. 1 (1967) at 11.

internment of Japanese-Americans during the Second World War, was the only classification discriminating against minorities that has ever been upheld under "strict scrutiny."[105] As David Strauss says: "Ever since *Brown* [v. *Board of Education of Topeka*[106]], for measures discriminating against minorities, strict scrutiny has been, in a familiar phrase, "'strict" in theory, [but] fatal in fact.'"[107]

Thus, under American law, an explicit legal distinction on the basis of race alone is effectively sufficient to raise equlaity concerns. As discussed in the Canadian context, this is desirable according to the analysis in this article. Regardless of bad faith, an explicit distinction on the basis of race is enough to allow the creation of discriminatory, inefficient signaling equilibria.

American case law is also clear that historical disadvantage, whatever its relevance to affirmative action, is not required to bring an equality claim under the Fifth or Fourteenth Amendment. *Korematsu* and subsequent cases[108] held that any racial distinction would be subject to strict scrutiny, regardless of the race in question and the degree of historical disadvantage involved.

Again, American law and Canadian law both reach the same conlusion, a conclusion which is desirable according to the economic analysis in this article: historical disadvantage is not required to establish an equality claim. Historical disadvantage should be relevant in assessing an equality claim that involves affirmative action, but arbitrary, distinct treatment of races could lead to discriminatory, inefficient signaling equilibria regardless of historical disadvantage and thus should be open to challenge by any race.

The United States Supreme Court's inclination to treat races identically under the law regardless of disadvantage, however, may have led the Court astray with respect to affirmative action, at least according to the analysis in this article. Unlike the Canadian section 15(2), in the United States, there is no constitutional provision directly addressing affirmative action. Consequently, as Hogg states, "there is continuous litigation over the constitutionality ... of affirmative action

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105 D.A. Strauss, "Affirmative Action and the Public Interest" [1995] Sup. Ct. Rev. 1 at 9 [hereinafter "Strauss (1995)"].

106 347 U.S. 483 (1954).

107 "Strauss (1995)," *supra* note 105 at 9, citing G. Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection" (1972) 86 Harv. L. Rev. 1 at 8.

108 See, for example, *Bolling*, *supra* note 98; *McLaughlin*, *supra* note 104; and *Loving*, *supra* note 104.

programmes."[109] The following will briefly survey the most recent leading cases on the constitutionality of affirmative action in the United States Supreme Court[110] and will then assess the law according to the signaling framework set out above.

In *Richmond* v. *J.A. Croson Co.*,[111] the Court, on the basis of a strict scrutiny standard, invalidated the city of Richmond, Virginia's plan for increasing the number of minority-owned businesses that were awarded construction contracts. The majority held that correcting "societal discrimination" was not a sufficiently compelling reason to justify racial classifications and affirmative action.[112] It held that if a state or local government intends to use affirmative action as a remedial tool, it must prove that the racial classification is narrowly tailored to correct past discrimination by public or private actors within the jurisdiction in question. *Croson* thus established a standard of strict scrutiny for state and local governments, whereby affirmative action measures must promote a compelling state interest and must be necessary and narrowly tailored to achieve that objective.

Metro Broadcasting, Inc. v. *Federal Communications Commission*[113] opened the door to a more lenient approach to affirmative action, at least in the federal context. In that case, the Court adopted an "intermediate scrutiny" standard with respect to federal affirmative action programs. A five-member majority held that an affirmative action race classification by Congress would be upheld as long as the classification had a "substantial relationship" to a legitimate Congressional interest. The dissenting justices disagreed that a different standard should apply to the federal government with respect to affirmative action than that applied in *Croson* to state and local governments; this dissent foreshadowed *Adarand*.[114]

In *Adarand*, *Metro Broadcasting* was overruled. The majority held that the standards with respect to affirmative action applying to federal and state and local governments should be the same, following the general principle that the Equal Protection Clause applies equally to

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[109] Hogg, *supra* note 56, c. 52 at 45, note 200.

[110] For an extensive survey, see J.E. Nowak & R.D. Rotunda, *Treatise on Constitutional Law: Substance and Procedure*, 2d ed. (St. Paul, Minn.: West, 1992) § 18.10.

[111] 488 U.S. 469 (1989) [hereinafter *Croson*].

[112] See *ibid.* at 498-507.

[113] 497 U.S. 547 (1990) [hereinafter *Metro Broadcasting*].

[114] *Supra* note 100.

state and federal governments.[115] Consequently, *Adarand* held that strict scrutiny of affirmative action programs applied equally to the federal government as well as to state and local governments. Unfortunately, little guidance as to the meaning of strict scrutiny was given in *Adarand*; the case was remanded, not finally decided.

The import of *Adarand* depends to a considerable extent on the meaning of strict scrutiny with respect to affirmative action. As discussed, outside the context of affirmative action, strict scrutiny has come to mean "strict in theory, [but] fatal in fact;"[116] racial classifications virtually never survive strict scrutiny. Some commentators have thus come to conclude that *Adarand* spells the end of affirmative action in the United States.[117] The cases themselves are clear, on the other hand, in that they are not intended to outlaw affirmative action outright. In *Adarand*, the majority stated, "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[118]

While it is unclear to what extent affirmative action will be permitted in the future, it is clear that the Court has restricted the contexts in which it will be found constitutional. The economic analysis in this article suggests that the Court has restricted it excessively. Rather than taking an approach which would acknowledge that affirmative action promotes substantive equality and therefore is not inconsistent with equality guarantees, the United States Supreme Court has clearly viewed affirmative action as presumptively inconsistent with equality. For an affirmative action program to pass constitutional muster, the onus is on the government to prove that it is a valid exception to equality; specifically, that it corrects past inequalities created by the specific government in question. This is inconsistent with the economically sensible approach that I conclude is taken in Canada. I have argued that section 15 recognizes that affirmative action pursues substantive equality and therefore requires no justification as an exception to equality guarantees.

The American situation demonstrates the potential inefficiencies that may arise from a deeply skeptical approach to affirmative action. The general problem is that, as discussed, recent case law and the "strict

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115 See *Bolling*, *supra* note 98.

116 Gunther, *supra* note 107 at 8.

117 Consider the following titles of case notes: M.A. Sewell, "The Armageddon of Affirmative Action" (1997) 46 DePaul L. Rev. 611; and the more restrained, but less colourful, E.C. Milby, "Signaling the End of Affirmative Action" (1996) 6 Widener J. Pub. L. 263.

118 *Supra* note 100 at 2117.

scrutiny" doctrine may effectively end the possibility of federal government affirmative action programs, which is undesirable from an efficiency perspective. More specifically, viewing affirmative action as inconsistent with equality has led to a restrictive approach to assessing particular justificatory factors. For example, the Supreme Court rejected reliance on "societal discrimination" as a basis for affirmative action.[119] Rather, the discrimination to be remedied must be either caused by the government in question, or within the jurisdiction in question. The signaling approach would not draw such a distinction. If a group is disadvantaged with respect to signaling costs, whether such disadvantage resulted from general societal discrimination or particular discrimination, equal treatment with respect to signaling may lead to unequal treatment with respect to ability. Affirmative action programs may efficiently account for disparate signaling costs and indeed may help reduce the disparity in an efficient manner. The American skepticism of such policy, which has clearly manifested itself in recent cases, may reduce the potential for efficiency-enhancing government action either as employer or as legislator.

VII. CONCLUSION

In conclusion, the above economic analysis supports the Canadian approach. In order to hasten the exit from the market of bigoted employers and to prevent differences in the treatment of different races, which may in turn lead to the underutilization of high-ability members of particular races, the government is clearly permitted to pass antidiscrimination legislation. Moreover, given that it is insulated from market forces, legislation is needed to prevent the government from discriminating as an employer. However, in order to account for the presence of differential signaling costs, and to reduce the difference in signaling costs between races, affirmative action is recognized as consistent with substantive equality. The above analysis does not imply that affirmative action is always efficient in the face of disadvantage; particular circumstances must be analyzed before such a view could be supported. This analysis has shown that affirmative action programs may be efficient in a range of circumstances, which in turn supports the view that constitutional law should empower the government to permit preferential treatment of particular races and indeed compel such treatment in some circumstances. To the extent

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[119] See *Croson*, *supra* note 111 at 505-507.

that an interpretation of the American Constitution forbids governments to encourage or practice affirmative action, it may lead to inefficiencies. An efficiency analysis supports the Canadian approach.