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EXPANDING OPPORTUNITY FOR ALL: MOVING PAST ZERO-SUM NOTIONS OF AFFIRMATIVE ACTION TO PROMOTE BOTH FREEDOM AND EQUALITY

Stephen Engel*

JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (OXFORD UNIVERSITY PRESS 2016). PP. 288. HARDCOVER \$38.95. PAPERBACK \$31.95.

The concept of equal opportunity—at least as expressed in U.S. legal contexts—perhaps gains its most common expression in affirmative action policy and jurisprudence. Court decisions and popular discourse have framed attempts to promote equal opportunity as a zero-sum endeavor. For example, upon hearing that the Supreme Court upheld the University of Texas’ admission policy in 2016,¹ Abigail Fisher, who claimed that she had been denied the opportunity to attend that institution because of her race, said, “I am disappointed that the Supreme Court has ruled that students applying to the University of Texas can be treated differently because of their race or ethnicity . . . I hope that the nation will one day move beyond affirmative action.”² By contrast, the University of Texas maintained that its policy promoted opportunity and denied the zero-sum calculus put forward by the plaintiff:

Ensuring a diversity of backgrounds within—as well as among—racial groups is one of the best ways to help breakdown racial stereotypes and promote cross-racial understanding, and it underscores that the consideration of race truly is individualized and not based on stereotypes. The point is not to favor applicants with any particular background, but to promote diversity by admitting individuals—of all races—from different backgrounds.³

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1. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

2. Robert Barnes, *Supreme Court Upholds University of Texas Affirmative Action Admissions*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-university-of-texas-affirmative-action-admissions/2016/06/23/513bcc10-394d-11e6-8f7c-d4c723a2becb_story.html.

3. Brief in Opposition to Petition for Writ of Certiorari at 23–24, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/No-14->

One side of the debate viewed the affirmative action in higher education admissions as denying opportunity; the other side contended it promotes opportunity, although this position is carefully articulated so that the opportunity is not framed as a compensatory remedy for histories of discrimination. Instead, the educational benefits that flow from a diverse student body provide opportunity for all.

In his beautifully written, systematically argued, and highly original book, *Bottlenecks: A New Theory of Equal Opportunity*, political and legal theorist Joseph Fishkin cuts through this static, if not stagnant, debate that continues to preoccupy and limit our popular and legal understandings of equality. With passion, Fishkin writes:

[I]t is time to move beyond the assumptions that all are locked in zero-sum struggles for scarce positions, where anyone's gain is someone else's loss [T]his book is a call to move beyond that familiar political terrain—a terrain littered with the detritus of the affirmative action wars—that assumes such zero-sum struggles are an exogenous fact about the world, unaffected by our institutional and policy choices.⁴

Instead, inequality is very much a consequence of both intentional policy decisions and the unexpected or unintended consequences of our decisions. As such, we should feel empowered and compelled to explore how we can redirect our actions. The book carries through on this charge by laying out numerous policy areas in which Fishkin's ideal of opportunity pluralism can be realized.⁵

Fishkin posits that our attempts to promote equality are flawed in at least three ways. First, they are myopic in so far as they are cabined to particular policy domains. Because the concept of equal opportunity can be so vast, we often approach it by examining how it might work out in a particular domain, such as employment or college admissions. Yet doing so engenders multiple problems, not least of which is the flawed notion of considering equality a meritocratic notion rather than a developmental one.⁶

Second, and relatedly, common understandings and approaches to equal opportunity are myopic inasmuch as they are restricted to particular points in the life cycle.⁷ This is made manifest in two ways. We tend to focus on points where access is constrained, like entrance exams such as the SAT or ACT, and we create policies for overcoming systemic bias in those exams rather than focus our attention on understanding (and countering) how those exam outcomes are manifestations of broad and deep institutionalized inequality or why and how we have decided that these exams themselves are indicators of "objective merit." Additionally, because we focus on the singular points in time where opportunities are deliberately constrained, we fail to see how opportunities accumulate and compound over time such that "in the context of the larger opportunity structure, the outcome of every competition is the input for the next competition."⁸ In other words, Fishkin advocates that we see how opportunity is developmental. Opportunities not only give people a chance,

981-Brief-in-Opposition.pdf.

4. JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 23 (2014).

5. *Id.* at ch. 4.

6. *Id.* at 8–9, 83–129.

7. Throughout the text, Fishkin refers to the "big test" society (e.g., a college entrance exam). *Id.* at 13.

8. *Id.* at 5.

and equal opportunity is a value not only because we are normatively committed to the concept that people should not be unfairly judged or positioned at a deficit *ex ante*. Rather, opportunities or the lack thereof shape who we are and who we conceptualize we can become: “Opportunities matter not only because they affect how high each person reaches on some scale of success, but also because they affect the different kinds of mental and physical capacities and talents a person develops, the ambitions she forms, and the kinds of success she seeks.”⁹

Third, too often policy attempts to promote equality direct attention to the beneficiaries of policies rather than channel our focus on how to grapple with and potentially dismantle the inhibiting structures that foster inequality. Our current approach to higher education admissions, for example, even as it emphasizes the educational benefits of diversity, is too susceptible to charges of “reverse” discrimination and zero-sum competition. Fishkin maintains that his alternative approach “is not about channeling benefits exclusively to the most disadvantaged; rather, it is about altering the shape of the opportunity structure to make it more pluralistic.”¹⁰ By focusing on the overall structure of why opportunities may be experienced as so limited we redirect our analysis and application away from “group-based inequality” and toward whether a barrier is “arbitrary and unnecessary.”¹¹

Fishkin builds upon but ultimately rejects the premise of normative equality theorists, including Rawls and Dworkin among others.¹² Perhaps in the tradition of political theorist Gerald MacCallum, who pushed the analysis of liberty by considering the ubiquitous negative/positive bifurcation to be a fundamental category mistake and instead argued that at stake was less the object to which the freedom was directed, i.e., a right to or a freedom from something, and more so the context in which a freedom could be exercised, Fishkin reorients the foundational concept of equality of opportunity itself.¹³ For Fishkin, at stake is less trying to guarantee some absolute measure of equal treatment for a particular group, and more so attempting, in pragmatic fashion, to provide as much developmental opportunity to lessen systemic inequality. The goal is not to derive some ideal state of equality, but instead to recognize how the individual is always already embedded in a matrix of structures, how these structures construct the individual’s sense of self, and thus explore how best to open these structures as much as possible so that “the full richness of the different, incommensurable goals that people might formulate for themselves” is maximized.¹⁴

Fishkin admits in his introduction, “Opening up a broader range of opportunities to everyone is not the same thing as making opportunities equal.”¹⁵ But he nevertheless suggests that his notion of “opportunity pluralism” provides a “powerful lens through

9. FISHKIN, *supra* note 4, at 88.

10. *Id.* at 211–12.

11. *Id.* at 212.

12. See generally RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2002); JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

13. Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, in 4 PHILOSOPHY, POLITICS AND SOCIETY: 174–93 (Peter Laslett et al. eds., 1972).

14. FISHKIN, *supra* note 4, at 11.

15. *Id.* at 2.

which to view the entire set of problems of social justice with which egalitarians and advocates of equal opportunity are concerned.”¹⁶ The overarching aim of the book is to identify how and where bottlenecks, or “a narrow place in the opportunity structure through which one must pass in order to successfully pursue a range of valued goals,” exist, and to assess whether and how policies can be created that either open them or enable people to have the resources to circumvent them.¹⁷ And, to challenge the critique that all this is purely thought experiments and idealistic thinking, Fishkin highlights how the very ideas he promotes are at the core of some of most cited legal precedents – particularly with repeated reference to *Griggs v. Duke Power Company*.¹⁸ In short, his recommendations could feasibly follow from our existing jurisprudential traditions and political culture.

The innovative emphasis on opportunity structure coupled with a pragmatic approach to lessening or circumventing bottlenecks enables Fishkin to move past the notion that equality and freedom may not reinforce one another, but that instead these two ideals could work against one another.¹⁹ In many ways, Fishkin’s focus on opportunity seems to tilt in favor of freedom and against equality, which he acknowledges at the very beginning of his analysis: “although we are talking about opportunities, equality seems to have dropped out of the equation.”²⁰ But, by zeroing in on why and how we have created different kinds of bottlenecks – developmental bottlenecks, resource bottlenecks – Fishkin contends that maximizing opportunity has the effect of broadening access, which is a form of equalization.

By highlighting the importance of establishing policies to maximize opportunity and reduce or bypass bottlenecks, Fishkin clearly builds on existing scholarship in the normative and policy literature on equality that emphasizes capacity or capability. Fishkin’s analysis aligns with Van Parijs’s endorsement of real freedom for all, defined as having the means to do what one might want to do and explicitly focused on freedom as restricted by a lack of means or opportunity.²¹ Furthermore, Fishkin’s reorientation toward the opportunity structure, i.e., the matrix of conditions that determine the extent to which we can exercise any ability to see and act on an opportunity, toward a critique that parallels Sen’s discussion of equality in which welfare is not just a measure of redistributed goods, but a measure of the capacity to achieve ends or freedom to pursue well-being.²² A much more activist state follows from this conception.

For example, if freedom depends on creating a more meaningful set of options, then we must consider how best we can create real opportunity. Ackerman and Alstott’s stakeholder society model, which provides citizens with a one-time lump sum dollar amount “stake” upon graduating from high school is one policy attempt to make options

16. *Id.*

17. *Id.* at 13.

18. 401 U.S. 424 (1971).

19. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop, eds., trans., 2000); Ronald Dworkin, *Do Values Conflict? A Hedgehog’s Approach*, 43 ARIZ. L. REV. 251 (2001).

20. FISHKIN, *supra* note 4, at 2.

21. See PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* (1995).

22. See AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); FISHKIN, *supra* note 4, at 194–95 (discussing Sen’s approach).

more accessible and enhance freedom.²³ Roemer's model, which Fishkin directly evaluates and which provides compensation within group "types" such that inequality within type could be accepted as ambition-sensitive, while inequality across type would demand compensation, is another policy recommendation to increase the meaningful options among which individuals can choose thereby enhancing their freedom.²⁴

Indeed, Fishkin's analysis was particularly trenchant insofar as I read it during ongoing discussion of Republican attempts to repeal and (possibly?) replace the Affordable Care Act ("ACA"). It would seem that if the opportunity pluralism that Fishkin advocates is to be realized, then we must create policies that enable people to seize opportunities, to take risks, and to not be kept from potential ways of being because some unnecessary barrier blocks their path. Indeed, it would seem that tethering health insurance to employment is one such bottleneck that Fishkin indicates could be targeted and that the ACA did so, in part, to unleash entrepreneurial potential. In our current political climate, Fishkin's normative theory acquires acute policy relevance:

A society trying to promote opportunity pluralism would attempt to build the kind of social safety net that enables individuals to choose riskier paths—such as quitting a job to start a new business—and more broadly, that enables individuals to formulate goals and choose their paths in life on the basis of pluralistic criteria, not simply a need for money or other such instrumental goods.²⁵

Fishkin's elegant argument is a strong reminder, given the shallowness of our current political discourse, that government provision can promote freedom.

Finally, Fishkin attempts to illustrate how his normative recommendations are in line with and build upon a jurisprudential tradition that exists; in so doing, he reveals the potential for pragmatic realization of his vision. Indeed, he suggests that current anti-discrimination jurisprudence is simply a subset of his broader anti-bottleneck principle. Here, he perhaps over-relies on *Griggs*, and the argument could have been strengthened by pointing to a larger range of cases. Fishkin contends that the anti-bottleneck approach moves our analysis past the thorny issue of group-based identity politics that often is part of the doctrine of scrutiny.²⁶ He writes that we should care about inequality and consequent subordination precisely because

it shapes and limits individual opportunities But in the end, in a more fundamental way than each of us is a member of any group, we are all individual human beings. A strong reason to care about group subordination is because it

23. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

24. See JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (1998); FISHKIN, *supra* note 4, at 61–64 (discussing Roemer's model).

25. FISHKIN, *supra* note 4, at 19. Discussing social welfare, such as unemployment insurance, Fishkin writes:

They make the overall opportunity structure more flexible and pluralistic by decreasing the extent to which employees need to fear the immediate consequences of unemployment. This affects incentives: It makes people more able to say "I quit," to change jobs, to take a less secure job . . . or even to start a new enterprise [A] lack of social insurance results in immobility: the phenomenon that is sometimes called "job lock" [P]rovisions of the Patient Protection and Affordable Care Act ("Obamacare") may finally offer a more effective solution.

Id. at 220–21.

26. See also SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY* (2013).

affects actual human beings—not because the group itself, somehow divorced from its members, experience injustice.²⁷

This claim resonates with some of the most recent Fourteenth Amendment jurisprudence of dignity as developed in the LGBT rights and same-sex marriage Supreme Court rulings, but it also does not totally negate the importance of class-status as perhaps Justice Kennedy's rulings do inasmuch as they shy away from traditional scrutiny analysis.²⁸ Nevertheless, I was left wondering to what extent Fishkin's anti-bottleneck principle is grounded in a concept of human dignity that can prove to be both normatively and legally problematic, even as it is increasingly endorsed in constitutional jurisprudence around the globe.²⁹

27. FISHKIN, *supra* note 4, at 245.

28. See, for example, Justice Kennedy's refusal to employ traditional suspect class and strict scrutiny analysis in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

29. See, e.g., STEPHEN ENGEL, *FRAGMENTED CITIZENS: THE CHANGING LANDSCAPE OF GAY AND LESBIAN LIVES* (2016); Stephen Engel & Timothy Lyle, *Fucking with Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking*, CHI. KENT L. REV. (forthcoming 2018); AHARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* (2015).