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SORTING OUT THE ISSUES

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DISCRIMINATION, AFFIRMATIVE ACTION, AND FREEDOM: SORTING OUT THE ISSUES

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The affirmative action debate going on in America today is a product of highly charged forces that have been building for many years now. So charged has the debate become, in fact, especially as we move into the 1996 election year, that it seems at times that reason has no place at all at the table.¹ One can understand that: the history of race relations in this country, after all, is not a pretty picture; and other categories of people too have long had legitimate complaints that only lately have come to be addressed. At the same time, many others feel strongly that they are being asked to bear the burden for old wrongs in which they played no part at all; and in that they see rank injustice.²

The issues that surround this debate will be sorted out through reason alone, of course. My aim in this brief Essay, in fact, is to do just that kind of sorting—to criticize the current debate by taking a dispassionate look at the issues it raises. My method will be analytical, not empirical. I am interested primarily in the right and wrong of the

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1. See, e.g., Michael Barone, *The New America: A New U.S. News Poll Shatters Old Assumptions About American Politics*, U.S. NEWS & WORLD REP., July 10, 1995, at 18 (stating that African Americans and Hispanics are divided on issue of affirmative action); Robert A. Jordan, *Used to Be Discrimination Was the Dirty Word*, BOSTON GLOBE, Mar. 5, 1995, at B4 (explaining changing political climate as it relates to affirmative action); Charles Krauthammer, *Dodging and Weaving on Affirmative Action*, WASH. POST, Mar. 3, 1995, at A25 (editorial) (noting changing affirmative action policies under different administrations); Richard Lacao, *A New Push for Blind Justice*, TIME, Feb. 29, 1995, at 39 (discussing Americans' growing suspicion toward affirmative action); Frank B. Williams, *Groups March for Affirmative Action*, L.A. TIMES, Mar. 24, 1995, at B3 (discussing multiple political positions on affirmative action issue).

2. See John M. Bunzel, *Race Preferences Violate the American Promise of Equal Rights, Equal Treatment Over Affirmative Action*, S.F. EXAMINER, Apr. 16, 1995, at A13 (highlighting "resentment among whites" toward affirmative action policies); Armstrong Williams, *Color-Coded Scholarships*, WASH. TIMES, May 25, 1995, at A27 (equating minority restricted scholarships to "reverse Jim Crow laws").

matter, rather less in the question of what policies have or have not produced what results. (Discussions of the latter kind often assume, wrongly, that we are clear about the former.) In this, I will follow reason where it leads, even if it should lead to conclusions that challenge widely held beliefs. At this point I should say simply that the conclusions I reach will likely disturb many, for the affirmative action debate leads ineluctably to the deeper antidiscrimination debate of which it is a part and hence to the Civil Rights Act of 1964 (1964 Act)³, which gave rise to questions that have yet to be resolved.

I. FIRST PRINCIPLES

We start with first principles, as in America we must. This nation arose from a set of principles that are outlined in our founding documents—the Declaration of Independence, the Constitution, the Bill of Rights, and the Civil War Amendments. And the theme that runs through those documents, however much their principles may have been ignored in practice, can be reduced to a single idea—freedom. Not freedom from want or any of the modern affirmative entitlements that sometimes pass under the rubric of “freedom,” but simple, uncomplicated freedom, as captured by the idea that each of us has a right to be free from the interference of others, free to plan and live his own life, restrained only by the equal right of others to do the same.⁴ The goal of securing that right—whether against slavery, or Jim Crow, or any other form of legal oppression—has animated the civil rights movement from its inception.⁵

But if freedom is our goal—indeed, is our right—and if governments are in fact instituted among men to secure their rights to life, liberty, and the pursuit of happiness, then we cannot pick and choose the freedoms we protect—to say nothing of those we prohibit—for

3. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000(a)-(c) (1994)).

4. I have examined many of the complex issues that surround the idea of freedom in chapter one of my doctoral dissertation. See Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished Ph.D. dissertation, University of Chicago); see also Maurice Cranston, *Human Rights: Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D.D. Raphael ed., 1967) (demonstrating why modern view is wrong).

5. In the words of the Reverend Martin Luther King, Jr:
When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.
Martin Luther King, Jr., “I Have A Dream” Speech at Lincoln Memorial (Aug. 23, 1963), reprinted in *LEND ME YOUR EARS* 497 (William Safire ed., 1992).

freedom is a seamless web. Freedom of religion, freedom of speech, and freedom of association⁶ are simply different forms of the basic principle. Nor may we ask whether a religion is true or speech is worthy before we protect it, for value judgments of that kind have no place in a matter of principle. We may ask only whether rights of others are implicated. If not, individuals or groups are free to do whatever they wish. Government in a free society secures rights, leaving it to individuals to pursue whatever values they wish within that legal structure.

A. *Freedom of Association*

Why, then, should we treat freedom of association any differently? Yet today we do—and have ever since the passage of the 1964 Act. Freedom of association has two aspects. It entails the right of individuals or groups to associate with others as against interference by third parties. And it entails the right not to associate with others except on terms that are mutually agreeable. Both aspects reduce to the same thing—freedom from interference. In one case the interference is from third parties. In the other, it is from would-be associating parties. If freedom is the guiding principle, there could hardly be a right to force oneself on others—whether as a third party or as a potential associate—for such a right would amount to the denial of freedom in the name of freedom. The freedom in “freedom of association” is the freedom to be left alone, not the “freedom” to force oneself on another.

In essence, freedom of association is no more complicated than that. And we understand the principle in all manner of contexts. What was slavery, after all, if not an extreme form of forced association? Yet in abrogating the principle with the 1964 Act, we set in motion an entirely predictable chain of events that has brought us to where we are today, with reversed presumptions of innocence and burdens of proof, mandated goals and timetables, endless classifications, and growing classification-based animosity. Given those results, and the confusion that surrounds the debate today, it is worth exploring how the 1964 Act and its progeny have brought that about.

6. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble . . .”).

B. Sovereignty

To do so, we have to go to the root of the matter, by noticing that the principle underlying freedom of association is one of sovereignty. At the outset, each of us is sovereign over what is his—his life, liberty, and property. Although it may be difficult at times to define the boundaries of sovereignty in certain contexts—nuisance and risk, for example—the principle is perfectly clear, and its application is relatively clear in everything from interpersonal to international contexts. The wrong in forced association is simply this: it takes control from another, control that belongs by right to that other, thus violating his sovereignty.

Slavery did that almost completely. But so did Jim Crow laws to a lesser extent, by prohibiting people who wanted to associate from doing so, thus abrogating their freedom of association by overriding their sovereignty with respect to those associations.⁷ “We, not you, are going to regulate your associations,” the state could be heard to say. To the extent that the state said and did that, it controlled the lives of its citizens, black and white alike. That the control was brought about through majoritarian processes—where it was—was neither here nor there to the principle of the matter, for rights of association and personal sovereignty were violated by the tyranny of the majority, a majority that had no such power under a properly interpreted Constitution.⁸

7. Congressman McHenry, in the debates over the Civil Rights Act of 1875, stated: “If a man sees proper to associate with negroes, to eat at the same table, ride on the same seat with them in cars, or sees proper to send his children to the same schools with them, . . . I would not abridge his right to do so.” Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1949 (1995).

8. The Fourteenth Amendment empowers the judiciary, in § 1, and Congress, in § 5, to secure the privileges and immunities of citizens of the United States against state measures that might abridge those guarantees. U.S. CONST. amend. XIV, §§ 1, 5. As the debates that surrounded the writing and ratification of the amendment make clear—reinforced by the Civil Rights Act of 1866, which was reenacted in 1870, one month after ratification of the amendment—“privileges and immunities” included the very rights the Jim Crow laws denied. See, e.g., EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-69*, at 157-58 (1990) (discussing that Fourteenth Amendment was originally thought to go beyond racial discrimination but still be limited by theory of limited absolute equality); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993) (discussing how Declaration of Independence’s principles of equality were not incorporated into Constitution but were added by 39th Congress via Fourteenth Amendment); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (concluding that Congressman John Bingham, author of Fourteenth Amendment, intended to include Bill of Rights through Privileges or Immunities Clause). With the *Slaughter-House Cases*, however, the Privileges or Immunities Clause was effectively lost. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-79 (1872) (distinguishing privileges and immunities of citizens of United States from those of citizens of state and extending federal protection only to former); see also *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J.,

In applying the principle of sovereignty, however, it is crucial to distinguish the private and public sectors. Three conclusions then follow. First, in the private sector, government may not interfere when private parties wish to associate; Jim Crow not only permitted but required such interference. Second, neither may government interfere when a private party wishes not to associate with another private party; the 1964 Act prohibits such refusal, on certain grounds,⁹ and thus interferes with the right not to associate. In both cases—whether to prohibit a private association or to force one—government interference overrides private sovereignty, thus violating the right of the individual to control himself and his associations. But if sovereignty is the principle of control over what is one's own, we are all sovereigns of the public sector because we are all owners of that sector. Thus, third, we must all be equally free to associate with public officials and institutions, save for such restraints as are necessary for those officials and institutions to function as they were meant to function.

C. Discrimination

To recast these conclusions in the more common but less precise idiom of discrimination, if private individuals and institutions are to be free and sovereign, they have a perfect right to discriminate in favor of or against other private individuals or institutions—for any reason, good or bad, or for no reason at all. By contrast, public officials and institutions may not discriminate except on grounds that are narrowly tailored to serve the functions for which they were elected, appointed, or created in the first place; for to permit discrimination on other grounds would be to strip a portion of the public of control over, use of, or opportunity with what are, after all, their officials and institutions.

Clearly, the Civil Rights Act of 1964 and its progeny are inconsistent with all three implications of the principles of sovereignty and freedom of association. To be sure, the 1964 Act abolished what

dissenting) (stating that majority's holding destroyed equality of rights); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 66 (1989) (concluding that Harlan's dissent in *Plessy v. Ferguson* is most explorative and underappreciated exposition of Privileges or Immunities Clause). I have discussed this issue more fully in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 526-29 (1993), and in A *Government of Limited Powers*, in CATO HANDBOOK FOR CONGRESS 17, 26-28 (1995).

9. See Civil Rights Act of 1964, § 703, 42 U.S.C. §§ 2000e to 2000e-17 (1994) [hereinafter 1964 Act]. Title VII of the 1964 Act prohibits private employment discrimination based on "race, color, religion, sex, or national origin." *Id.*

remained of Jim Crow, and not a moment too soon; for that alone, it may have been worth the rest.¹⁰ But the Act went on to prohibit private discrimination on specified grounds, the list of which has expanded over the years.¹¹ That amounts to a straightforward violation of the right not to associate, as noted in point two above. Yet insofar as numerical patterns of association must be preserved, as a practical matter, to avoid litigation under the Act, the Act interferes with the right to associate free from third-party interference, much as Jim Crow did, as noted in point one above. Finally, insofar as public sector discrimination is rationalized under the 1964 Act and its progeny—through affirmative action programs, for example—that too is a straightforward violation of the rights of those who are discriminated against by institutions that belong, in the end, to those people too. Thus, point three above is implicated as well.

D. "Right" and "Wrong"

Starting from first principles, then, the picture of right and wrong that emerges in the matter of discrimination is rather different than the picture ordinarily implicit in the current affirmative action debate. Whereas it is commonly assumed that there is no private right to discriminate against others on certain—but only certain—grounds, it turns out that that is not the case in a truly free society. If private parties are to retain their sovereignty, they have a perfect right to discriminate in favor of or against others—on any ground, "good" or "bad," or no ground at all—and those others have no right to be favored and no right not to be discriminated against—no right to force themselves upon unwilling associates. Public parties, by contrast, have no right to discriminate either in favor of or against others except on grounds that narrowly serve the public function at issue. And the same principle of sovereignty determines the outcome in both domains.

But "right" and "wrong" are systematically ambiguous moral terms. Sometimes they are used with reference to rights, other times with

10. Thus, Richard A. Epstein writes:

So great were the abuses of political power before 1964 that, knowing what I know today, *if given an all-or-nothing choice*, I should still have voted in favor of the Civil Rights Act in order to allow federal power to break the stranglehold of local government on race relations.

RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 10 (1992) (emphasis added).

11. In addition to the grounds listed in the 1964 Act, *see supra* note 9. Congress has made it unlawful to refuse to hire based on age or physical or mental handicap. *See Age Discrimination in Employment Act of 1967*, 29 U.S.C. §§ 621-634 (1994); and *American With Disabilities Act of 1990*, § 102, 42 U.S.C. §§ 12,101-12,213 (1994).

reference to values. As just used, for example, "right" and "wrong" characterize matters of strict moral principle, drawn from the theory of rights. Thus, we may say that it is wrong to force people to associate when they do not want to; we can say that because those people have a right not to associate. In so speaking, "wrong" is a function of the theory of rights, grounded on first principles of private sovereignty and individual liberty. But we may also say that it would be wrong for a person to discriminate (on certain grounds), even though he has a right to do so. In that case, "wrong" is a function of the values we bring to the matter. Others may disagree with our judgment: presumably, the discriminating party does, at least. There is no inconsistency, however, in saying that people have a right to discriminate, but it is wrong to do so (again, on certain grounds), for the moral terms at issue, as thus used, come from different domains of morality.¹²

For reasons of principle, and for practical reasons as well, we have traditionally used law and legal force to secure our relatively objective rights. Within that framework, we have used moral suasion to encourage individuals to pursue values that, in our subjective assessment, we have thought worthy of pursuit. That distinction—between rights legally secured and values morally encouraged—is at the heart of a free society: we respect differences among individuals regarding values, even as we insist that rights be respected by all. And we understand the distinction and its application in such areas as speech and protest; for we have no difficulty at all, in most cases, in defending the right of a reprehensible speaker, even as we condemn his speech.¹³ We do have difficulty, however, in extending the principle from speech to action generally, in appreciating that the principle is perfectly generalizable—in defending the right to do wrong, even as we condemn the wrong done.¹⁴ The Civil Rights Act of 1964 is a case in point.

12. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 186 (1955) (urging care in use of moral language). For my own thoughts, see Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1193-96 (1979) (distinguishing rights and values, and "ought" and "obligation").

13. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (upholding Ku Klux Klan's right to burn crosses as form of speech while labeling such acts "reprehensible").

14. I have discussed this point more fully in ROGER PILON, *FLAG-BURNING, DISCRIMINATION, AND THE RIGHT TO DO WRONG: TWO DEBATES 1-7* (1990), reprinted in *FIRST AMENDMENT LAW HANDBOOK* 233-38 (James L. Swanson ed., 1991).

II. DEPARTING FROM PRINCIPLE

In 1964, Congress took it upon itself to end at last the forced racial segregation that had characterized southern institutions, both public and private, for almost a century. But it did not stop there. In that year and in the years since, governments at all levels began enacting measures that prohibited not only public but private individuals and institutions as well from discriminating against others on a growing range of grounds and in a wide array of activities.¹⁵

As outlined above, the prohibition of public discrimination is not only perfectly legitimate but morally required, save for the exceptions there noted. The prohibition of private discrimination is another matter. However offensive we may find it, however much we may condemn it, private discrimination is a right entailed by the rights of private sovereignty and freedom of association. Rather than leave the problem of private discrimination to moral suasion, however, Congress sought to remedy it through force of law. That effort—to end through legal force what might have been minimized, over time, through moral suasion—has had predictable results. And only a brief reflection is needed to show why.

A. *The Slide to Affirmative Action*

Discrimination is a mental act. As we use the term today, it is not the act of refusing to associate with someone (or the act of associating with someone else) that constitutes "discrimination": for in itself, that act is unobjectionable. Rather, it is the *reason* for which one refuses to associate (or associates with someone else) that leads us to say that he discriminated against (or in favor of) another. When the reason is "irrational," we speak of discrimination. It is thus the mental component of the act that brands that act "discrimination," for the same act, done for a "rational" reason, would not be so branded.

In truth, of course, all acts are acts of discrimination, for to act is to choose, and to choose is to discriminate, whatever the reason(s) for choosing one way or another. Our normative use of "discriminate," however, places some reasons off-limits, reasons that have grown more

15. See *supra* notes 9 & 11. For current Equal Employment Opportunity Commission prohibitions in the workplace, see 42 U.S.C. §§ 2000e-2, 2000e-3 (1994). For federal prohibitions on discrimination outside the workplace, see 42 U.S.C. § 2000a (1994). I am unaware of any comprehensive collection of the voluminous antidiscrimination statutes that have been enacted by state and local governments, prohibiting discrimination on grounds ranging from sexual orientation to family composition, covering activities ranging from housing to insurance, credit, and much else.

numerous over time. Yet to forbid discrimination on those grounds raises any number of problems, both moral and practical, quite apart from straightforwardly violating rights of sovereignty and association.

First, any choice about association ordinarily involves not one but numerous, often complex reasons, reflecting a host of further interests and considerations. To suppose, therefore, that such a choice can be reduced and charged to a single, overriding reason is to seriously mischaracterize the act at issue. In most cases, life is just not that simple.

Second, whatever the context—employment, housing, lending, insurance underwriting, academic admissions and athletics, to mention only a few—the reasons that lead eventually to a decision will often be irreducibly subjective, and in the end will be inescapably subjective. Even such putatively objective standards as some of those that are used in academic admissions, for example, presuppose “merit” as a further or underlying rationale for choosing one candidate over another. But merit is only one among several such “ultimate” reasons that may be at play in a given decision. Thus, to brand some reasons “rational” and others “irrational” is to suppose an objectivity that is contextual or, in the end, is simply not there. For that reason at least we have traditionally left it to private individuals and institutions to make those decisions, to decide which associations will serve their interests, since they, not the public, are the best judges of those interests—and will pay the price if they judge wrongly. Many will associate on the basis of merit—as they see it. Others may have other reasons for associating, some of which conflict with merit—again, as they see it. That is their business because, in the end, they are sovereign with respect to such decisions.

Third, and most important for the affirmative action debate, because discrimination is an inherently mental act, the attempt to prohibit it raises practical problems that lead inescapably to the troubles we have today, more than thirty years after the effort began. For again, it is not the refusal to associate that is prohibited but the refusal to associate on one of the forbidden grounds. Yet even assuming that we can reduce a decision to a single ground, how do we know that one of the forbidden grounds determined a given decision? We are up against the problem of “other minds,” which we have understood since at least Descartes. Given the sanctions that attach to violations of the various civil rights statutes, people are simply not going to reveal their grounds for deciding as they do. That means that any proof of discrimination must be by inference. But unlike seemingly similar cases, such as most cases involving proof

of criminal intent, there is no underlying wrong, no tortious act to aid in the proof. Indeed, the underlying act is perfectly legitimate. It is the intent alone that makes it wrong. How then do we show the wrongful intent?

1. *In the private sector*

Recognizing early on that it would have very few enforcement actions if it limited itself to provable cases of intentional discrimination, the Equal Employment Opportunity Commission (EEOC) set about crafting guidelines for private-sector employment discrimination,¹⁶ later approved by the Supreme Court,¹⁷ that opened the enforcement doors wide, even as problems poured through the opening. In a nutshell, those rules enabled plaintiffs to make out a prima facie case against an employer by showing that a selection procedure the employer used—job tests, academic degree requirements, height-and-weight standards—had a “disparate impact” against members of a class protected under the 1964 Act.¹⁸ Essentially, demonstrating disparate impact amounted to showing that members of a protected class were “underrepresented” in the employer’s workforce, which raised endless problems of interpretation regarding the classes to be related—the class allegedly underrepresented and the class of the employer’s workforce from which the plaintiff was allegedly excluded. But assuming that the plaintiff was able to satisfy that initial burden—ordinarily quite easy to do—the burden then shifted to the employer to show that he was not “discriminating,” for he might be hiding behind such “neutral” selection procedures, letting them do the discriminating for him.¹⁹ To carry out that

16. See Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1978); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 n.9 (1971) (quoting text of EEOC guidelines on Employment Testing Procedures).

17. *Griggs*, 401 U.S. at 433-34 (granting administrative interpretation of EEOC guidelines “great deference”).

18. See generally Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353 (discussing *Griggs* decision in relation to similar disparate-impact cases); see also *Connecticut v. Teal*, 457 U.S. 440, 451-52 (1982) (applying statutory language of 1964 Act to find discrimination where blacks passed promotion test less frequently than whites, even though passing exam was necessary but not sufficient for promotion); *Dothard v. Rawlinson*, 433 U.S. 321, 328-31 (1977) (finding gender discrimination in hiring of prison guards because of disparate impact of height-and-weight requirements).

19. Although it is often argued, with substantial evidence from the record, that Congress intended in 1964 to prohibit only intentional discrimination, and that the 1964 Act authorizes the use of “any professionally developed ability test” that is not “designed, intended, or used to discriminate because of race,” *Griggs*, 401 U.S. at 433 (quoting § 703(h) of Civil Rights Act of 1964 (emphasis added by Court)), the word “used” lends itself to ambiguity. It can be read to preclude tests that are used intentionally to discriminate (on a forbidden ground); or it can be read to preclude tests that discriminate (on a forbidden ground) unintentionally, if those

burden, to justify his selection procedures, the employer had to demonstrate some "business necessity," which in practice was often impossible or extremely costly (and still problematic, as with validity studies for job-specific tests)²⁰ or both. Faced with that situation, and with the costs and uncertainty of potentially endless litigation, most employers simply began "hiring by the numbers."²¹

Thus, in the private sector, affirmative action did not have to be explicitly mandated. If it was not implicit in the 1964 Act, it was made so by enforcement procedures that left employers little real choice but to undertake affirmative action in employment decisions. Never mind that the idea of "underrepresentation" was not part of the 1964 Act, or that any number of factors besides discrimination might explain such underrepresentation. Never mind that the EEOC procedures amounted to shifting the burden of proof, to requiring employers to prove their innocence. The fact remains that once we decided in 1964 to prohibit what amounts to a mental act, we were faced with a problem we have never squarely addressed: either we would take something like the road we have taken, with all that that has entailed; or we would have very few enforcement actions, thus making a mockery of the Act and its noble aims.

Today, many conservatives are of the view that we should abolish—indeed, prohibit—affirmative action in the private sector, but continue to prohibit intentional discrimination there. Yet they are silent with respect to the question of how we would enforce such antidiscrimination measures short of something like the procedures just outlined.²² In a free society, of course, employers would be perfectly free to engage in voluntary affirmative action of any kind—and would likely be encouraged to do so in certain circumstanc-

tests cannot be independently justified.

20. See, e.g., Linda S. Gottfredson & James Sharf, eds., *Fairness in Employment Testing*, 33 J. VOCATIONAL BEHAV. 225-40 (1988) (Spec. Issue).

21. In fact, during congressional hearings prior to passage of the Civil Rights Act of 1991, several employers made it clear that they do, in fact, hire by the numbers, simply to avoid litigation. See, e.g., 137 CONG. REC. H9537 (daily ed. Nov. 7, 1991) (discussing *Wall Street Journal* article noting lawyers' practice of advising clients to "hire by numbers" to avoid litigation); *id.* at S15,318 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch) (recognizing fear that disparate impact lawsuits would result in "quotas or hiring by the numbers"); *id.* at H4431 (daily ed. June 12, 1991) (statement of Rep. Schiff) (acknowledging risk of encouraging quota or "hiring by the numbers system").

22. See Clint Bolick, *Questioning the Unquestionable*, REASON, Aug./Sept. 1992, at 58, 60 (reviewing Richard Epstein's *Forbidden Grounds* (1992), but opposing Epstein's call for repeal of laws prohibiting private discrimination, saying that "so long as the legacy of discrimination" persists, prohibition of intentional discrimination is necessary); Nelson Lund, *Reforming Affirmative Action in Employment: How to Restore the Law of Equal Treatment*, Heritage Foundation Committee Brief No. 17 (Aug. 2, 1995), at 13, 16, 17 (arguing that reducing discrimination does not require preferential programs but only a color-blind law).

es—for the discrimination that is entailed by affirmative action is perfectly legitimate as a private act. Those who rest their case on antidiscrimination, however, rather than on private sovereignty and freedom of association, are precluded from such a result. They insist on antidiscrimination, but have no way to stop the slide, as a practical matter, toward effectively forced affirmative action. Their counterparts on the other side of the debate, by contrast, often have no qualms about even mandated affirmative action—notwithstanding the discrimination it entails and their premise of antidiscrimination.²³ For them, discrimination in the name of antidiscrimination is acceptable.²⁴

2. *In the public sector*

In the public sector, the same slide toward affirmative action has taken place, but here the issues are rather more complicated. Recall that “irrational” discrimination must be prohibited in the public sector—on the same principles of sovereignty and freedom of association that apply to *permit* discrimination, rational or not, in the private sector. Yet “irrational,” in the end, remains as irreducibly subjective here as in its private-sector application. Essentially, the idea is to select means—to make decisions about association—that are “reasonably” suited to serve the ends for which public institutions are established in the first place, but to do so in light of the principle that all members of the sovereign public have equal rights to participate in their institutions. Thus, to take an easy case, a public fire department may not discriminate against black applicants for the position of firefighter, but may discriminate against certain handicapped applicants, who presumably would not be suited to the function.

Doubtless, some would object to the conclusions in that “easy” case—on either or both counts, race and/or handicap. We can respond in turn that such people are being “unreasonable,” but the means-ends call, in the final analysis, is not a matter of logical deduction, even in an easy case such as that. That is what it means to say that such calls are, in the end, irreducibly subjective.

23. See generally KENT GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* 12-49 (1983) (arguing that law should not be color-blind but should use racially conscious criteria); Terrance Sandalow, *Racial Preferences in Higher Education*, 42 U. CHI. L. REV. 653, 685-86 (1975) (advocating affirmative action as means of achieving diversity).

24. “[I]n order to treat some persons equally, we must treat them differently.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

What we are faced with, then, is a classic problem, pitting the democratic principle against the equal-rights principle. On one hand, we could turn over such decisions to democratic processes, thereby inviting the tyranny of the majority. On the other hand, we could insist upon the equal right of everyone to control what is, after all, his institution, inviting the stalemate that results from the monopoly holdout. Neither result is acceptable. Both could be avoided, be it noted, by leaving firefighting and most other human undertakings to the private sector. But if there is going to be a public sector at all—and there surely is, even if the present effort to reduce the size and scope of that sector continues—a solution must be found.

That solution would be second-best, of course, involving some balance between legislatures exercising majoritarian will and courts securing equal protection—second-guessing the political branches with respect to whether any given decision was “rational.” If courts did their job, majoritarian capture of public institutions would be checked. On the other hand, “irrational” checks by the weakest branch would be subject to public obloquy and, eventually, to the corrections of the appointments process.

But if it is the job of the judicial branch to check the political branches from discriminating, do not the same practical enforcement problems arise as arise in the private sector—leading to *de facto* affirmative action? And if so, does not that affirmative action entail the very discrimination that public institutions are forbidden to engage in?

Setting aside affirmative action for the moment, checking public-sector discrimination does indeed take us down the same road—with all of its practical enforcement problems—yet the measures that mark that road are inevitable if public-sector discrimination is to be minimized. In particular, here the numbers are rightly probative. And here public officials are rightly called to account if those numbers suggest discrimination. But the numbers cannot be dispositive, for again, any number of factors—in addition to the forbidden intentional discrimination—could explain why a given public workforce, say, or set of public contractors does not “look like America.” “Business necessity” may operate somewhat differently in the public than in the private sector; but here at least there is warrant for second-guessing, for having one branch check another. It is for the protection of the owners—in their collective and their individual capacities.

But intentional discrimination is a tricky issue. Does the use, for example, of otherwise neutral selection procedures that are known to

discriminate constitute intentional discrimination? Standardized college admissions tests are well known for discriminating against members of protected classes even as they discriminate in favor of those who are likely to remain in college and be successful there.²⁵ What is a public college to do? Admit by "merit"? Temper that standard with some "representational" considerations? Or take some other course of action? Whatever its course, it will be discriminating. The only difference will be in the criteria for discrimination.

To continue, may the public, by majority vote, select one criterion—say, merit—to the exclusion of all others? Are judges required to sustain that decision against equal-protection challenges from members of a discriminated-against class—who own that college too, after all? If not, is the judge permitted to devise a "neutral" or "nondiscriminatory" purpose for the college and a set of complementary standards for admission—in the name of equal protection? Or must he simply send the case back until the public gets it right, until it develops criteria for admission that treat all equally? Would that lead to something like "open-admissions" (or even assured graduation)? Would fully applying the equality principle—a principle that is perfectly justifiable in itself—render such institutions as public higher education utterly pointless? And is there not a lesson in that—not about applying the equality principle but about undertaking projects such as higher education through the public sector in the first place?

In truth, as a matter of first principles, no clear answers to those questions exist. For once we embark on some public project, equal protection must follow as a matter of right. It is one thing to explain to a handicapped applicant that we are all better off, including the applicant, if he is not permitted to become a public firefighter, quite another to explain to a rejected public college applicant that we are all better off, including that applicant, if he is not admitted to the college. He might rightly respond that he, unlike the handicapped firefighter applicant, is getting no direct benefit from the institution he is forced to support, but is excluded from, whereas others are benefited. And to that, there is no answer.

25. Cf. John Hildebrand, *SAT Scores Rise But Still Lag the 1960s*, *NEWSDAY*, Aug. 19, 1993, at 7 (noting "large gap" in test scores between blacks and whites); Erin McCormick, *SATs Biased Against Women Study Finds*, *S.F. EXAMINER*, Apr. 21, 1995, at A8 (reporting study finding that 200 to 300 more qualified women would be admitted to University of California at Berkeley annually if SAT gender bias were corrected); Elizabeth Shogren, *Testing Called Unfair: Merit Scholars Favor Boys Group Claims*, *ST. LOUIS POST-DISPATCH*, May 27, 1993, at 1C (reporting claims that National Merit Scholarship Qualifying Test is biased toward males).

But to return to the problem of checking "irrational" public-sector discrimination, even in the clear case involving proven discrimination—the all-white fire department in the mixed-race area, for example—by no means does it follow that affirmative action is the right remedy. Assuming, that is, that an individual plaintiff has demonstrated that he was discriminated against on an irrational basis, that victim is entitled to be made whole—through injunctive relief, damages, or whatever else it may take in a given case. Affirmative action, however, is not an individualized remedy like that—aimed at making an individual victim whole—but a "social remedy." As such, it suffers from all the problems that any other socialized scheme suffers from—most especially, the subjugation of individuals and their rights in favor of a class-based scheme. It is one thing to right a wrong by requiring the wrongdoer to make his victim whole—that keeps the parties related by the wrong, related by the remedy—quite another to right a wrong by ordering the wrongdoer to discriminate in favor of non-victims and against non-wrongdoers, which is what affirmative action amounts to as it seeks to bring about "social justice." A form of justice that operates only by creating new victims—only through injustice—can hardly claim the name "justice."

But if affirmative action as a remedy is fraught with problems of injustice, at least it purports to be a remedy to a wrong, not an outright scheme of social engineering, unattached to any prior wrong. Not so the form of affirmative action that aims unabashedly at distributing people in positions according to their proportions in society. Call it "representational affirmative action," call it making institutions "look like America,"²⁶ call it what you will, it amounts to nothing but rank discrimination in service of someone's or some group's social vision. As a private matter, again, such an effort is perfectly legitimate—and may even be commendable in certain situations. But public institutions may not discriminate, except on functional grounds, even to overcome past patterns of discrimination. If that is so, they surely may not discriminate merely to bring about some preferred pattern of the moment.

26. For example, there is a recent controversy over a Montgomery County, Maryland school district's refusal to admit two kindergarten children into a French immersion program because their transfer from their neighborhood school into the new school would upset the ethnic balance at their neighborhood school. The school board's justification for denial was based on the fact that the two students were Asian and the school they were leaving was "deficient" in Asians. See Dan Beyers, *School Board Backs Denial of Transfers: Two Montgomery Families Challenge Race Policy*, WASH. POST, Sept. 1, 1995, at B1; *Montgomery Schools to Rethink Desegregation, Transfer Policies*, WASH. POST, Nov. 15, 1995, at D1.

B. Returning to Principle

There can be no question that discrimination is and has long been a problem in America. We are not alone in this, of course, for all nations experience the problem in one form or another—especially heterogeneous nations—and many have a much worse record on the subject than we.

But if discrimination is a fact of the human condition, by no means does it follow that the only remedy is through the force of law. In fact, once we recognize that discrimination is indeed a product of the mind (and heart), we should acknowledge that only moral suasion will address that condition. Does anyone seriously believe that if prohibitions on private-sector discrimination were ended tomorrow, we would see rampant discrimination in that sector, or that private action—from public ridicule to boycotts—would not immediately arise to isolate and marginalize those who engaged in irrational discrimination? We all know that such discrimination is wrong, even if done by right. We disagree only on how to address it.

The road we have taken to address the problem has put government in a business it should never have been in, has created a legal industry that should never have been created, and has spawned a classification consciousness that should never have been spawned. Far from solving the very real wounds of our history, our approach has only created animosity among the very fair-minded people who should be expected to lead the moral drive against discrimination. We are indeed falling into warring camps, of several complexions, which is exactly what we should expect when we ask government to do what it should never have been asked to do in the first place. We will end that war only when we return to principle, only when we do for ourselves what we should have done for ourselves from the start, only when we truly open the doors to freedom.