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CONTROVERSY, CONSENSUS, AND THE CONCEPT OF DISCRIMINATION

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The fortieth anniversary of the Civil Rights Act of 1964¹ affords us a timely opportunity both to celebrate what it accomplished and to reflect on what we have yet to achieve in seeking racial justice. Professor Days has addressed these issues with the insight and perspective available only to someone who is a distinguished scholar and teacher, a civil rights lawyer and advocate, and a former Solicitor General of the United States. It is a privilege to offer my observations in association with his, both on the occasion of the Childress Lecture and in this issue of the *Saint Louis University Law Journal*.

Any assessment of the Civil Rights Act of 1964 must begin with the recognition that it represents a long step toward fulfilling the promise of *Brown v. Board of Education*² and that much remains to be done to fulfill that promise. The Act represents the democratic endorsement, codification, and commitment to eliminating discrimination from public life: in the words of Alexander Bickel, the principle that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”³ “Discrimination,” as we commonly use the term and as Bickel used it in this passage, refers to any consideration of race in public decisions, whether by government or by private individuals or institutions that control access to employment, housing, or public accommodations. As the Supreme Court said in an early case interpreting Title VII of the Act, an employer violates the law if it “simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”⁴ Or, as Title VII now provides, a plaintiff establishes a violation by proving “that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁵

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964).
2. 347 U.S. 483 (1954).
3. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).
4. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).
5. 42 U.S.C. § 2000e-2(m) (1994).

This is, I submit, our ordinary concept of discrimination—the one that is the most widely accepted and the least controversial—but it is not our only concept of discrimination. Title VII itself also prohibits neutral practices with a disparate impact, provided the employer cannot justify them as “job related for the position in question and consistent with business necessity.”⁶ Title VII also allows affirmative action in some circumstances, for instance when an employer takes account of race, national origin, or sex in order to “break down old patterns of racial segregation and hierarchy.”⁷ These extensions of the ordinary concept of discrimination—and there are others to be found throughout civil rights law⁸—mark the point at which consensus breaks down over what the law requires or permits. Alexander Bickel, for instance, vehemently opposed affirmative action. In a continuation of the passage just quoted, he says, referring to the principle against discrimination: “Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others.”⁹ Where the ordinary concept of discrimination runs out, disagreement and controversy begin.

Let me illustrate this point by more fully considering the provision from Title VII quoted earlier, making proof that race, national origin, sex, or religion was “a motivating factor” for an employment decision sufficient to establish a violation of the statute. The immediate occasion for the passage of this provision was the development of disputes over mixed-motive cases, those in which discriminatory reasons and legitimate reasons combined to result in a disputed employment decision—in the employer’s refusal to hire or to promote the plaintiff or to discharge the plaintiff based both on good reasons and bad reasons. This is a complex issue that is also addressed in a variety of other provisions in the statute, but it implicates other and more profound controversies over Title VII. This definitional provision was thought by some to outlaw affirmative action in employment,¹⁰ but other provisions enacted with this one in the Civil Rights Act of 1991 preserved, and in some respects encouraged, affirmative action.¹¹ In a telling qualification, the statutory

6. *Id.* § 2000e-2(k)(1)(A)(i).

7. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

8. For additional examples, consider the law of sexual harassment and the duty of reasonable accommodation, the latter as it applies to both religious practices and disabilities. For cases illustrating the controversies over these issues, see, for example, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (accommodation of disabilities); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (accommodation of religious practices).

9. BICKEL, *supra* note 3, at 133.

10. *See* 137 CONG. REC. 22,549 (1991) (statement of Sen. Dole).

11. In particular, § 116 of the Act provides that “[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation

definition of prohibited discrimination itself recognizes these limits on its scope. It applies “[e]xcept as otherwise provided” elsewhere in Title VII.¹² This qualification reveals as much about the power of the concept of discrimination as about its limits. It establishes the default condition for proving a violation of the statute: a showing that race, color, religion, sex, or national origin was a motivating factor in a disputed decision. When to allow an exception to this prohibition is invariably a controversial question, as the issue of affirmative action well illustrates. But the prohibition itself provides the common ground on which such disputes arise.

The reasons why the prohibition provides the common ground perhaps are obvious, but they are worth recounting because they are so frequently overlooked and their force so frequently underestimated. To speak in strictly categorical terms, these reasons invoke a combination of pragmatic effectiveness with individualism, universality, and limited government—four characteristic, if not defining, features of American government. As an initial matter, prohibitions against discrimination were tailored to the immediate task of dismantling Jim Crow in its most obvious form of explicit segregation on the basis of race.¹³ Once these prohibitions were effectively enforced, such blatant forms of discrimination were soon abandoned.¹⁴

Applying these prohibitions to hidden forms of discrimination has proven to be more difficult, as has their extension to entirely new grounds of discrimination, such as sex, age, and disability. The strategy of the law in all these areas, however, has been basically the same: to narrowly construe exceptions that allow discrimination on otherwise prohibited grounds, such as the exception for bona fide occupational qualifications on the basis of sex,¹⁵ and to engage in detailed case-by-case analysis of claims that otherwise neutral practices and legitimate reasons serve, in fact, as pretexts for discrimination.¹⁶ Both elements of this strategy preserve and enhance the focus of the law on the individual and not on characteristics that he or she is, by and large, powerless to change.

This focus on individuals leads to another attractive feature of laws against discrimination: that anyone can invoke their protection. The legal rule is only against considering specifically identified grounds of discrimination—favoring one race, ethnic group, or sex at the expense of another. The universal

agreements, that are in accordance with the law.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).

12. 42 U.S.C. § 2000e-2(m) (1994).

13. See, e.g., David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1389-90 (2004).

14. *Id.* at 1390-91.

15. *Id.* § 2000e-2(e)(1). E.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200-01 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977).

16. E.g., *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147-49 (2000).

coverage of such laws has been emphasized from the beginning. As early as the Civil Rights Act of 1866,¹⁷ sponsors of such legislation, which in that case protected “all persons” within the jurisdiction of the United States,¹⁸ have appealed for passage on the ground that everyone was protected from discrimination. As Senator Lyman Trumbull said in the debate over that Act, “this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights”¹⁹ The same case was made for the Civil Rights Act of 1964, which, like its predecessors enacted during Reconstruction, protects “any individual” from discrimination.²⁰

With the passage of other laws against discrimination, such as the Age Discrimination in Employment Act (ADEA)²¹ and the Americans with Disabilities Act (ADA),²² the principle of universal coverage has been eroded, but in a manner that confirms rather than undermines the principle itself. The ADEA protects only individuals who are at least forty years old,²³ and as we recently learned from the Supreme Court, the Act does not protect even covered individuals from discrimination on the ground that they are too young, only that they are too old.²⁴ The ADA likewise applies only to a “protected class” of disabled individuals who suffer from “a physical or mental impairment that substantially limits one or more . . . major life activities.”²⁵ Yet neither of these limitations on coverage absolutely excludes any segment of the population. As the Supreme Court pointed out in a decision on age discrimination under the Constitution, a classification based on age does not define a “discrete and insular” minority; instead, the classification in that case, requiring police officers to retire at age fifty, “marks a stage that each of us will reach if we live out our normal span.”²⁶ By the same token, the coverage of the ADA is not confined to individuals disabled from birth. It protects anyone unfortunate enough to become disabled, and indeed, by the estimate of Congress when it passed the statute, the ADA covers 43 million Americans.²⁷ It is only a slight exaggeration to say that both of these statutes provide for

17. 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981(a) (1994)).

18. *Id.*

19. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

20. 42 U.S.C. § 2000e-2 (1994).

21. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–34 (1994)).

22. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213 (1994)).

23. 29 U.S.C. § 631(a) (1994).

24. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

25. 42 U.S.C. § 12102(2).

26. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam).

27. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484–86 (1999).

universal coverage because almost anyone could fall within the scope of their protection.

This principle of universal coverage, expanding the number of people who benefit from laws against discrimination, would be intolerable if it imposed equally large burdens on those who must obey these laws. But the legislation's expansive scope in one direction is offset by countervailing limitations in another. Title VII, to take my main example, tells employers only what they may not consider—race, color, national origin, sex, and religion—not what they must consider in making personnel decisions. In hiring, firing, and otherwise dealing with their workers, employers are left free to set their own standards for employment. They are required only to treat all their workers equally according to those standards. As compared to more onerous forms of centralized regulation and control, prohibitions against discrimination leave employers with the freedom to structure their personnel practices and policies as they see fit.

At least, that is the primary constraint on laws against discrimination. It, too, has been eroded as the grounds of prohibited discrimination have increased. Federal law identifies only a handful of such grounds, but this list has grown and is likely to continue to do so. Thus, employers cannot take into account veteran status, union membership, or actions taken as a whistleblower.²⁸ State laws have extended the list still further, to characteristics such as sexual orientation and marital status.²⁹ The longer the list of characteristics that an employer cannot consider, the fewer the factors an employer may consider and the more they function like factors that an employer must consider. An expanded list of prohibited factors threatens to narrow the permissible grounds for employment decisions to a short list of indisputably relevant factors, which an employer might nevertheless evaluate differently than a court, a jury, or an administrative agency. Nevertheless, even this process must come to a halt at some point, and recent decisions have emphasized the difference between disagreeing with an employer's offered reasons and finding them to be discriminatory.³⁰

All four of these features of laws prohibiting discrimination—pragmatic effectiveness in eliminating discrimination, individualized consideration and application, universal coverage of any individual, and inherent limitations on government regulation—stop well short of justifying any form of affirmative

28. See 5 U.S.C. § 2301(b)(9) (1994) (whistle-blowers); 29 U.S.C. § 158(a)(3) (1994) (union members); 38 U.S.C. § 4311 (1994) (veterans).

29. *E.g.*, CAL. GOV'T. CODE § 12940(a) (West 2004 Supp.) (sexual orientation, marital status, and other factors); 775 ILL. COMP. STAT. 5/1-103(Q), 5/2-102(A) (2000) (marital status and other factors).

30. *E.g.*, *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 370–74 (7th Cir. 1992); *Hanchey v. Energas Co.*, 925 F.2d 96, 98 (5th Cir. 1990).

action, and in numerous respects, they argue against allowing it at all.³¹ These arguments have been ably articulated by the critics of affirmative action, and I will not repeat them here. What is surprising is how these arguments are reflected in the contours of permissible affirmative action. Thus, the recent decisions on affirmative action at the University of Michigan both struck down the preference in undergraduate admissions that conferred a numerical advantage on members of designated minority groups and upheld those in the law school based on individualized consideration of race and national origin, along with a variety of other factors that promote diversity in higher education.³² The law school's plan allowed anyone to claim the benefit of the preferences at issue, regardless of whether they fell within the racial and ethnic groups identified for special treatment, so long as they could point to their individual contribution to diversity. In doing so, it echoed the individualist and universalist reasons supporting prohibitions against discrimination. The same point can be made about the voluntary nature of these affirmative action plans: No government regulation forced the university, even if it was a public university, to undertake these programs. And the most fundamental reason for upholding these affirmative plans relies directly on the need to reject the legacy of Jim Crow. As Justice O'Connor frames this reason in her opinion for the Court in *Grutter v. Bollinger*, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."³³ Neutral admissions criteria that result in only token representation of minorities at the elite colleges and universities in this country would be unacceptable. In the terms used under Title VII, colleges and universities can take voluntary steps "to break down old patterns of racial segregation and hierarchy."³⁴

These points, of course, do not add up to a full defense or complete justification of the Supreme Court's decisions on this issue. My point is that these decisions and the preferences on the basis of race and national origin that they uphold are controversial precisely because they contravene the simple command not to take these factors into account. Again, in terms of Title VII, race and national origin would have been "a motivating factor" in the decisions governed by the preference, "even though other factors also motivated the practice."³⁵ Yet the Supreme Court, and other institutions of government as well, have taken steps to minimize the divergence between the affirmative

31. For a recent critique of affirmative action, see generally Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002).

32. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

33. 539 U.S. at 332.

34. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

35. 42 U.S.C. § 2000e-2(m) (1994).

action plans that they uphold and the prohibition against discrimination that these plans violate. The letter of this prohibition might be violated, but the reasons that support its adoption and acceptance remain respected.

Whatever the weakness of these decisions as a matter of logic, much can be said for them in terms of popular appeal and acceptability. Public support for programs of affirmative action is strongest when they are framed in the ambiguous and uncertain terms of that phrase itself. As Owen Fiss wrote some time ago, the phrase itself does not tell employers what to do, only that they must do something.³⁶ In fact, the phrase derives from an implied contrast with an omission or failure to act, most often by government, and has found its way into civil rights law, and indeed, into the literal terms of Title VII, from the law of equitable remedies.³⁷ The statute explicitly confers authority on judges to “order such affirmative action as may be appropriate.”³⁸ For instance, judges may order employers not just to cease discriminating but also to take affirmative steps to compensate for past discrimination and to prevent its recurrence.³⁹ In polls over the past several decades, about fifty percent of all respondents favor affirmative action in these terms: as general support for recruiting and training programs that increase the opportunities available to members of minority groups.⁴⁰ When it is defined more specifically, as a preference on the basis of race or national origin, support declines dramatically, to less than thirty percent.⁴¹ Support falls still further and becomes overwhelming opposition for any preference that is mandatory in any sense and becomes, in effect, “a rigid quota.”⁴²

The account of the overlapping consensus on civil rights that I have offered here fits the contours of disputes across a wide range of issues in employment discrimination law.⁴³ I do not mean, however, to advance the nearly tautological claim that disagreements break out where the overlapping consensus breaks down. My claim is that the prohibition against discrimination, endorsed by that consensus, structures the debate and influences the law on issues outside the area of its immediate application, outside of claims of intentional discrimination. On issues such as affirmative

36. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 310–11 (1971).

37. *See, e.g., Ex parte Young*, 209 U.S. 123, 158 (1908).

38. 42 U.S.C. § 2000e-5(g)(1).

39. *Id.*

40. Charlotte Steeh & Maria Krysan, *The Polls—Trends: Affirmative Action and the Public, 1970–1995*, 60 PUB. OPINION Q. 128, 134 (1996).

41. *Id.* at 130.

42. *Id.* at 132.

43. *See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

action, the prohibition against discrimination affects the outcome of issues that it does not, by itself, resolve. Yet the reasons that support the prohibition—in terms of history, morality, and political appeal—continue to exercise authority beyond the boundaries of the prohibition itself. Its reach, we might say, exceeds its grasp.

Many writers and advocates for civil rights have lamented this state of affairs. It is common practice for academics to decry the prohibition against discrimination as merely a formalistic device that constrains the pursuit of true equality. It is, on this view, a solution to yesterday's problems: to forms of explicit segregation and discrimination. Such problems have largely disappeared from view, only to be replaced by less visible practices with the same result. Critics of this limited concept of discrimination (and I count myself among them⁴⁴) have not, I now think, given sufficient credit to the force and appeal of this principle. If it doesn't solve our problems today, at least it gives us a good indication of what they are and what the acceptable solutions to these problems might be. We might want to go beyond the principle against discrimination—or even go against it—in order to achieve equality in some broader sense. But we must do so with an eye to the values that made that principle acceptable in the first place. Neglecting those values threatens to make any attempt to achieve equality, in any form, ineffective. Taking account of those values, on the other hand, offers us a way to mold the principle against discrimination to the new challenges that we face without losing sight of—and indeed, continuing to draw strength from—the accomplishments of those who supported and enacted the Civil Rights Act of 1964.

44. E.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201; George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117 (1995); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).