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AFFIRMATIVE ACTION FOR THE NEXT MILLENNIUM

Richard A. Epstein*

I. FOR THE LONG HAUL

The title of this talk contains an ostensible ambiguity. One reading of “Affirmative Action for the Next Millennium” hints that I shall propose some instant fix for the year 2000 or 2001,

* The James Parker Hall Distinguished Service Professor of Law, The University of Chicago. B.A., Columbia College; B.A. (Juris.), Oxford University; LL.B., Yale Law School. L. Rex Sears provided his usual careful research assistance in preparing the revisions of this speech.
depending on when you think we cross over to the next millennium. But alas, since my views have not controlled public opinion, we are not likely to reach, by that early date, the consensus that has eluded the American people for at least two generations. Therefore, my title, with its choice of the word “millennium,” suggests a different take on the problem. When I talk about affirmative action for the next “millennium,” I mean to imply that the struggles will continue unabated for the next thousand years. I choose that reading because I do not think we shall all agree on a solution that magically satisfies the diverse interests that have clashed over this topic. In one sense, our long term “solution” is a series of unhappy short term accommodations.

Now, for me to live up to the title of this talk, I should explain to you exactly how that pattern of future controversy will unfold, what players will emerge, what arguments they will make, and what novel developments will arise in response to either political events or technological changes. Yet whenever people talk about the future of any given field, they really mean to tell you something about its past. They hope to trace the course of evolution to our present impasse and predicament; only then do they offer some modest proposals for improvements from the lessons they have gleaned from our history. I have no Polynesian solutions, but I endorse and follow this approach: we can get a better sense of ourselves by recapping the salient history. In this essay I shall confine my attention to issues of race, although the civil rights revolution encompasses far more.

II. A COLOR-BLIND WORLD

Affirmative action, both as a concept and as a problem, was born in the national debate over The Civil Rights Act of 1964. Its key provisions introduce a very strong color-, sex-, race-, age-, and everything-blind conception of the statutory regime. Thus, its central command reads:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national
Whatever your approach to statutory construction may be, you discover, much to your pleasure or sorrow, that in this instance the intention of Congress, the evils that it sought to correct, and the text that it devised to correct them all spoke and resonated with a single voice. Close reading and detailed research reveal no deep moral ambiguity on a statutory purpose. The drafters said what they meant and meant what they said. They sought to combat the system of explicit racial preferences enshrined under Jim Crow in the South. The drafters were prepared, perhaps with some naive optimism, to stop this evil by simply prohibiting it under a new legal regime that reached both private and government action. So they announced a system that made the law, to use John Harlan's old phrase, "color-blind," that is color-blind over matters on the rights and duties of all individuals. Indeed, and the issue is not one of little importance, the statute took the color-blind theme one step further than at first Justice Harlan would take it. His protest was against the explicit racial classifications embedded in Louisiana law. The drafters of the 1964 Act went one step further. For them it was not sufficient to keep the apparatus of the state color-blind. It was necessary to make employers color-blind as well. They thought they could have the best of both worlds. They could introduce an explicit government command that would help keep irrational economic behavior out of professional and commercial life, both public and private.

The venture was bold in its own terms, and one could easily doubt transition from the older regime to the new. Could we keep to the same color-blind system as we try to engineer the changeover from a long-standing repressive regime, or would we have to bend a bit at the margins to ensure a color-blind system in steady-state? Back in 1964, people gave some answers that sound quaint and archaic today. These deserve at least a momentary recapitulation.

The first response was that any disparities in employment opportunities attributable only to broad social forces could not be laid at the doorstep of the employer, and thus lay outside the scope of the anti-discrimination law. So if black job candidates

came from a bad educational system and white job candidates came from a strong one — too bad — the employer could pass over the weak candidates and hire only the stronger white candidates for the plum positions without running afoul of the law. Equality of opportunity was not equality of results. The former could come immediately in the workplace; the latter would have to await for the reform of the educational system, a task to be solved by other means.

Nor should this narrow focus come as a surprise. Looking at the statute in light of what has happened through 1998 gives a very different perspective from looking at it in light of what had happened in the ten years before its passage — the period that started with Brown v. Board of Education, with its emphasis on de jure segregation. The progressive forces could not have pushed through any statute that embodied the broad ambition to poke and probe into every area of American life. The past was a much more powerful constraint in 1964, but all of those constraints disappeared by 1972 when Congress passed the first round of amendments to the 1964 Civil Rights Act after the old-guard Southerners had disappeared from the scene. Yet at least in the initial round, legislation came through compromise, not with full-throated, unanimous agreement on major overhauls of the private sector. The concerns about unconscious racism lay in the future. The 1964 Congress had its hands filled with the conscious forms.

The transition also had to address how best to apply color-blind law to institutions with built-in racial prejudices. Here, the 1964 drafters took a position that was both more sensible and more subtle than it receives credit. When Senator Humphrey was pressed about how a color-blind standard applied to a discriminatory world, his basic reply was simple: if racial discrimination is more frequent against blacks than whites, then blacks will more frequently invoke the statute than whites. The standard is neutral; its application is neutral. But its frequency of use depends on what is done in the world, not on what is said in the halls of Congress. So Humphrey did not think that the law had to build any particular preference into the rules to respond to the skewed social and racial attitudes that survived passage of the statute. He felt that neutral princi-

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Affirmative Action

...ple, consistently enforced, would yield disparate enforcement patterns when they were called for, and only when they were called for. He could offer no guarantees about the future, but had no need to offer them. If the distribution and frequency of illicit preferences changed over time, reversing the racial mix ratio of offenders and victims, then the targets of legal action could change with them: more white plaintiffs would be successful than he imagined. The result was one that he welcomed, not feared.

The first and second points together indicate a form of gradualism. Better social institutions remove the barriers to equal opportunity, and consistent enforcement practices root out lingering prejudices. Over the long haul the past recedes and the new environment comes to dominate. The original Civil Rights Act relies on the long-term effects of legal symmetry to eradicate the differential status that social groups occupied at the time of its passage. Taken together, these precepts define the behavior that constitutes both violation of, and conformity with, the main command of Title VII.4 It is not only possible, but also imperative, to distinguish between preferential treatment or affirmative action on the one hand, and the anti-discrimination principle on the other. Any explicit or self-conscious preference for or against any individual was prohibited; and if individuals could not be favored because of their race, neither could groups. The universal and neutral wording of the statute was not any covert effort to smuggle affirmative action into the law: the transgressions of government were as clearly demarcated, in the same coin, as those of private parties. In its expanded domain of public and private life, the color-blind norm was king.

III. LURCHING TOWARD AFFIRMATIVE ACTION

This strong version of the law eroded with time under the pressure of judicial interpretation. Within a decade, it became much more difficult to distinguish between the neutral enforcement of the color-blind norm and affirmative action. The universal anti-discrimination norm was transformed from within, without clear acknowledgment of the change. Whether the transformation took place by inadvertence, eagerness, or guile, I

leave for others to decide. The fact of the change is indisputable. The impulse for that change in legal outlook lay in broader social attitudes. With the passage of the 1964 Act, the initial public optimism waned, and people quickly sensed that the gradual interventions contemplated under the 1964 Act could not move fast enough nor decisively enough to respond to the social unrest of Newark, Detroit, New York, and Los Angeles. Color-blindness became less an aspiration and more a code word for the maintenance of the status quo.

IV. PROTECTED CLASSES

That social disillusionment cashed out in the judicial arena. One question that set the stage for the change asked, “just who is protected by the 1964 Civil Rights Act?” The universal view in 1964 traced its origins to the Civil Rights Act of 1866, but that attitude did not last going forward. No longer did every individual enjoy equal protected status. The protected classes included chiefly blacks and other minorities, and perhaps women, although the issues of course were different with race and sex. “Gender” still lay a few years into the future. By the mid-1970s, *McDonnell Douglas Corp. v. Green* gave voice to a real change. The neutral statute now was held to be designed for the benefit of certain “protected classes.” The typical discrimination claim began first with the proposition that the plaintiff “belongs to a racial minority,” and only after that did a claim proceed to the second issue of whether he was “qualified” for the job. If so, then the inquiry asked whether the employer could advance some justification for the practice. That done, the inquiry proceeded to the fourth stage, to ask whether the proffered justification was just a “pretext” for some forbidden motive. Pass over a member of a protected class and hire someone else, and there is a presumption of illegality. Pass over someone who is not in the protected class and hire a minority, and there is no presumption of illegal conduct.

In principle, that four-part test could work regardless of who was aggrieved. Thus, if a qualified white person was passed over for a job subsequently filled by a black applicant, the court could then ask whether that decision was justified or pretextual, just as with the black applicant. But once the notion of a pro-

tected class became salient, the statute came to incorporate the very skew that Hubert Humphrey had disclaimed. So now the definitional inquiry is more cloudy: does the use of protected classes count as a form of affirmative action or just as a vigorous enforcement of the anti-discrimination principle? Reasonable people could easily disagree on the conceptual and definitional question. But I think that the historical question is clear that the very conception of a “protected class” contradicts the proposition that the protection of the Act extends to “any individual.” There was no room under the original Act for a two-tier interpretation. The broad and extensive Senate debates over the 1964 Act do not to my knowledge contain a single reference to the idea that one race was a protected class. That conception was not part of the legislative history; nor was it part of the common vernacular in 1964.

V. COST JUSTIFICATIONS

In addition to the skirmish over protected classes, the second key dispute in the aftermath of the Civil Rights Act swirled over the content of the justifications available to explain an adverse outcome to a member of a protected class. The idea that some reason could justify passing over the qualified black applicant does not tell us what that reason should be. More concretely, the key question is whether to allow “for cause” justifications for discrimination. To back off for a second and see what is at stake, think less about the anti-discrimination laws as they applied to race and more about the anti-discrimination laws as they applied to the pricing of goods and services in the market. For antitrust buffs, one point of reference is the Robinson-Patman Act passed in the 1930s. Another is the requirement of nondiscrimination in rate regulation. In these economic contexts, there is discrimination and there is discrimination. The term bears two very distinct meanings, and it is imperative to distinguish between them.

The first meaning is simply any difference in the prices charged to different customers. You charge more to customer A than to customer B. This price difference can be regarded, pure and simple, as a form of price discrimination. But in the eco-

conomic arena, you are also allowed to show that these price discriminations are justified because it is more costly for you to serve one class of customers than another. Looked at comprehensively, the right question is whether your rate of return for the two distinct classes is the same. If it is, then you are not discriminating; if the rates of return are different, then you are discriminating. But throughout, the charge of price discrimination carries weight only if it is a form of discrimination not tied to differences in cost.

The employment context raises exactly the same interpretive question. Suppose an employer hires two groups of employees, one of which, for one reason or another, costs more money for an employer to train or retain than the other group. Those cost differentials reflect themselves in market wage differentials. Thus, let one group cost two dollars more per hour to train or retain than the other: in equilibrium the market wage for the low cost group should be two dollars higher than it is for the high cost group; a wage ten dollars for the first group implies a wage of eight dollars for the second. The source of the wage differential is not important: it could be, for example, the differentials in educational skills that concerned the supporters of the 1964 Act. The wage differential will survive as long as the differences in performance levels survive. Rational employers will not abandon the differential, because they need to keep the net return per worker constant across the two classes. The worker with the lower level of productivity receives the lower wage.

The issue here is not tied in any necessary fashion to differences in race. And these wage differentials are, to this day, beyond legal challenge so long as that correlation does not correlate with race. But what happens if the observed behavior does correlate with race? One stunning fact about the debates over the 1964 Civil Rights Act is that their dread of preferential treatment action led them to turn a blind eye to this fundamental question: are wage differences that are tied to cost differences justified under the 1964 Act? I am aware of no discussion of the critical question of how cost justifications play out. Its only after somebody actually makes this argument that someone has to figure out whether or not to accept it. The first definition of discrimination treats the point as a dead loser. The second requires an extensive examination to see whether the purported differences in productivity are feigned or real. Thus, in every
case, the question of justification and pretext squarely raised in *McDonnell Douglas* arises.

So the dilemma is complete. The first but inaccurate definition of discrimination is easy to administer, but leads to erroneous results. The second definition, however accurate in principle, opens the door to potential justifications that employers could use to gut the 1964 Act. It is therefore no surprise that the Equal Employment Opportunity Commission (EEOC) and the courts opted for the first account of discrimination if only to preserve the moral clarity of the basic statutory command. Yet that decision created a chasm between the economic and legal accounts of discrimination. Under the new regime the employer is allowed to ask what benefit the worker supplies, but the other blade has been taken from the scissors. He cannot ask whether the collateral costs to train or retain the two workers are the same. Identical titles and identical job descriptions require equal wages for unequally productive workers. Now the rational employer is engaged in illegal discrimination as part and parcel of his routine business. The statute no longer hits only the bigoted employer. It hits every employer.

On this view of the subject, the line between affirmative action and the anti-discrimination norm is further blurred. If the economic account of discrimination is correct, then the demand of equal wages for workers with unequal costs requires an implicit transfer of, in the example given, one dollar per hour from high skilled to low skilled workers. Subsidies of course do not have just distributional consequences. The law now gives the employer a new incentive to steer away from low-skilled workers because he can no longer extract the compensating wage differential. That transfer payment operates as a disguised subsidy for one group of employees and a disguised penalty on the second. Perhaps some fine distinction exists between these penalty/subsidy pairs and affirmative action, but I confess that the categorical separation eludes me. Once cost must be ignored, a form of covert affirmative action has been introduced into the basic anti-discrimination norm. You may be for or against the outcome, but you are hard-pressed to deny the magnitude of the covert transformation.
VI. DISPARATE IMPACT

The implicit transformation of the color-blind norm was given another boost by the rise of disparate impact analysis during the late sixties and early seventies. Even in an all-white population, an employer has strong incentives to know the relative strengths of a group of new workers. The investments in these workers depend on the likelihood of their advancement, which in turn depends on the skills and abilities they bring to the job. Testing was the vehicle used to separate workers within the larger class. In the debates over the 1964 Act, Senator Humphrey, in retreat, introduced into the Act a specific provision to protect professionally developed ability tests from invalidation under the Act, so long as they were not designed, intended, or used as a means to discriminate against any group. The word "used" in this formulation was included in parallel with "designed" or "intended." It meant to cover the employer that chose an available test with the hope that it would yield disparate impact. But in Griggs v. Duke Power Co., the Supreme Court gave "used" a far broader reading: any test that had a disparate impact by race was used for some illicit purpose, and it could survive judicial challenge only by meeting a stringent standard of business necessity.

The upshot was a persistent prohibition against information that would allow employers to avoid the racial stereotypes that the 1964 Act sought to combat in the workplace. No information became, as a matter of law, preferable to imperfect information. Because employers could no longer collect reliable information to allow them to differentiate individual workers within groups, they were given an additional reason to rely on crude racial proxies to decide on matters of job assignment and promotion. Yet once they sought to do that, they could expose themselves to charges of intentional discrimination. In the end, therefore, the restriction on testing was heavily enforced, which in turn intensified the level of cross-subsidies required by the Act. The employer who thought in good faith that A was a better worker than B could not rely on that judgment even if it was correct. The rise of disparate impact tests under Griggs prevented the

9. Id.
individualization of workers. The implicit cross-subsidy of this new regime further blurred the distinction between the nondiscrimination principle and affirmative action.

This backdoor rise of affirmative action was, as I mentioned before, an outgrowth of the keen disappointment of the level of social progress that had taken place under the 1964 Act. I can remember the public uneasiness when I attended Yale Law School from 1966 to 1968, which intensified in my first four years of teaching at the University of Southern California from 1968 to 1972. The early hope that equal opportunity would lead to equal wages and advancement rapidly faded. With the early disappointment came the suspicion that hidden but entrenched practices of discrimination were the source of the difficulty, and these would have to be rooted out with aggressive legal enforcement that looked less to the niceties of intention and more to the potent consequences of current practices. Because the original game plan did not work out as expected, the outcomes did not have to be accepted as fair simply because we thought the process was fair. Rather the argument went in reverse: the process could not be fair because the outcomes were so disparate and unfair. Hubert Humphrey in 1964 might have been prepared to live with bad outcomes in the absence of specific proof of discrimination, but the next generation was not. By the beginning of the 1970s, the debate switched to the explicit need for affirmative action. No one was quite prepared to say that it was a permanent condition. But many thought that the racial ills in our society were so deep that strong social medicine would be needed for a long period of time.

VII. SEARCH AND OUTREACH

One response to the new wave was to seek some way to trim our sails within the broad framework of the antidiscrimination norm. One approach suggests that it might be possible to retain uniform hiring standards, but to require an aggressive search and outreach to bring in black applicants. The employer can advertise in the right newspapers, and make clear the willingness to consider minority candidates who do not have connections through the old-boy, white network. Bring more individuals into the funnel, and the conscientious employer will be able to find black candidates to balance his racial portfolio, notwithstanding the evident disparities in the overall social picture.
Many people have defended this argument as an inexpensive way to skirt full-fledged affirmative action. The outreach program does not force the employer to change its ultimate standards; the employer is just required to make a very strong effort to broaden the applicant pool. Certain groups like the Anti-Defamation League have been hostile to affirmative action, but quite sympathetic to this compromise approach.

I take a dim view of this strategy, at least as it applies to my own profession. Let me explain its potential sources of mischief. Put aside the question of race, and ask how a conscientious employer should run a job search in my own profession, and, I suspect, in others. What attributes make a candidate a prime employment prospect? One key quality in a job applicant is not only his ability to discharge immediate demands, but also to grow in ability over time. Motivation and initiative are key commodities for success. The people who embody these qualities are those who come knocking on the door, begging to get in. People with a passion for their work offer better prospects than candidates that an employer must pry out of their present positions with a pitchfork. In the simplest terms, the people who aggressively pursue the jobs are the ones the employer wants to hire. The employer that engages in extensive recruitment outreach will pull many candidates who do not pass that motivational threshold into the system. The advantages of the informal sorting mechanism are lost, and much time has to be spent poring over weak candidates, taking away the time that could be spent in wooing candidates whose prospects are far brighter, or in releasing time for other activities. In the end, you could have (even in the all-white workforce) a very different group of employees.

The costs of this approach cascade over time. The first group of employees will not retain their positions forever, but will be promoted over time. I think that there is some implied business covenant to base promotion on the same standards used to assess new hires. If this is true, then over time the mettle of the organization will change as new personalities rise to the top. The changes in firm culture could be quite substantial, and these changes will, in turn, influence the next set of hires that the firm makes.

Of course, consistent with the basic approach, the top firm managers could try to hold the line. Under this approach, inter-
nal promotions are judged by the same standards that applied before the new recruits were hired. But I do not think it will be possible to hold fast to these dual expectations over time. Outreach and recruitment do not stop with the initial hiring. They create a set of expectations that help determine how people are treated once they are hired. In my view, the costs of the broad outreach proposals are quite high, and do not disappear simply because they are used to finesse the line between nondiscrimination and affirmative action. The deviation from the older standard is not as minimal as its proponents claim.

VIII. REMEDIATION OF PAST WRONGS

The second breach in the wall between the anti-discrimination norm and affirmative action comes from our altered responses to the transition question. In the early days, the law took a very cavalier view towards transitions: any disadvantages that people had before the 1964 Act remained thereafter. But once this approach is rejected, it becomes permissible to ask what offsets should be given today for the injustices that took place before the 1964 Act. The lingering vestiges of past discrimination become the spur to and justification for direct government action. And if it takes affirmative action to attack these vestiges, then so be it.

Once these race conscious remedies become permissible, how broadly do they operate? To a naive tort professor like myself, the connection between wrong and remedy should be very tight. If I punch you in the nose and you sue me for the nosebleed, the direct connection between my act and your harm requires no extended commentary: hundreds of years of *vi et armis* do the job. When the discourse shifts to lingering effects, the sense of remediation expands. No longer is it necessary to give relief only to the victim, and only against the wrongdoer. Now the net can be spread much wider.

The consequences of this view are made most evident in the discrimination cases that are brought not in employment, but in education. *Missouri v. Jenkins* 10 is a nominal desegregation case.
that has kicked around in the judicial system since 1977 in its fruitless effort to isolate the lingering effects of pre-1954 discrimination in the Kansas City School system. But what form of intelligent remedy can we impose in 1998 when the population of aggrieved students has long since left the system, and the population that is taxed arrived on the scene after any original wrong was long since concluded? The permanence of a city name should not be allowed to conceal the shifting populations who live there. These cases bear no connection to the process of individual rectification of individual wrongs. Instead, they are a form of social engineering that diverts social energies from the task of improving education overall.

The ceaseless quest for remote remediation is, ironically, freighted with present dangers, even when an astute court seeks to apply the remedy only against entities that engaged in past discrimination against discrete victims. Thus, suppose the current town council wants to run an affirmative action program for minority contractors. If the law holds that this program is permissible only if the town has engaged in past discrimination, then the present council has a powerful incentive to ransack the past to establish the malfeasance of prior councils in order to preserve its own freedom of action. So let us open old wounds and exhume dusty records to show, in the light of hindsight, patterns of racial discrimination that may never have existed at all. In reopening the past, one can easily rekindle ancient grudges and resentments that should have long been put to rest. The 1964 promoters of the spirit of civil rights legislation thought that gradualism would inexorably wean us from the past. The newer vision repeatedly jumps back in time to pave the way for future race-conscious actions. Perhaps we should have affirmative action. But do we need to defame the dead to do it?

The concerted effort to ferret out past discrimination also turns on what entity engaged in racial discrimination. In Hopwood v. Texas,11 the University of Texas' Law School sought to maintain its affirmative action program by showing that it was guilty of past discrimination. Its own discrimination was notorious, insofar as it tried in the years before Brown v. Board of Edu-

to set up an "equal" law school for the black candidates that it tried to exclude from its own ranks — a ploy that the United States Supreme Court rightly slapped down. But these earlier sins had been cured by the law school's strong affirmative action programs that had been in place for at least a generation. Past remediation as of 1996 did not look very promising when confined to the law school. To broaden the inquiry, the Texas Law School assumed responsibility for the lingering effects of discrimination anywhere inside the Texas educational system, from elementary school on up, both before and after Brown was decided. But the eagerness to embrace guilt should be rejected; the law school had to be told that it could be accountable only for its sins, not for misdeeds in Brownsville and El Paso.

In any event, with time, past discrimination becomes an ever-weakening justification for affirmative action. Sitting on our pre-millennium perch, a couple of dates stand out. Plessy v. Ferguson was decided in 1896. Brown v. Board of Education was decided in 1954. Thus, the period in which "separate but equal" held unquestioned hegemony lasted for at most fifty-eight years. Brown was decided forty-four years ago. We are almost at parity in periods of control. But in terms of influence on present policies, the most recent forty-four years should count for more than the previous fifty-eight. And the ratios and the influence will be still more dramatic in ten years time. Pegging affirmative action therefore to the lingering effects of past discrimination is tying one's hope to a wasting asset. You can make the case only by insisting that so long as some lingering effects are detectable, we shall always deem them sufficient. But at this point, the argument is an open fiction that judges will not embrace and a badly divided public will not tolerate. After all, would we blame most of the problems of race on the three-fifths clause of the original Constitution, even though it was abrogated by the Civil War?

14. Hopwood, 78 F.3d at 951.
15. Id. at 948.
16. Id. at 951.
17. 163 U.S. 537 (1896).
As past wrongs offer an ever-weakening justification for extensive affirmative action programs, the modern tendency stresses the future benefits that derive from affirmative action. Rectification thus yields to diversity as the theme around which to rally the forces of affirmative action. But the shift in focus opens up new challenges: what does diversity mean and how does it operate? To some extent, diversity resonates with scholars like myself who incline toward market solutions. In financial markets, diversification of a stock portfolio reduces risk. In political settings, a wise firm acquires assets in many states to diversify against sovereign risk, be it by regulation or confiscation. In both cases, the basic idea is the same: if you cannot predict the future with certainty, do not place all your eggs in one basket. Diversity decentralizes investments by spreading them hither and yonder. By investing in different corporations, and indeed different mutual funds, you place your financial and political well-being in the hands of many individuals; all of whom can hurt you, but none of whom can strangle you. I subscribe to this form of diversity as a fully informed investor, even though I have absolutely no idea what stocks I own, or why I have purchased them. Diversity offers a rational response to necessary ignorance.

How does this conception of diversity carry over from financial and political markets to the academic world or business in general? Let me start in the law school world. If diversity is the institutional imperative, then it becomes critical for each of this nation's two hundred or so law schools to follow its own independent course of action. Some schools will accordingly reach for national markets; others will seek to fill local niches. Some schools will have religious ties and affiliations; others will try to be all things to all people. Still others will lack the resources or inclination to take on the world. Some will specialize in high-minded legal theory; others will see their salvation in business, clinical practice, or international relations. Some schools could specialize in issues of race and gender. There will be night schools, and premier research institutions. Individuals can, therefore, try to match their talents, abilities, and inclinations with a wide array of institutions. Faculties and students will seek favorable alignments and alliances. The mistakes that are made by one will not infect others. Successful strategies will be
imitated, after making appropriate adjustments for local conditions. Trial and error will lead to constant experimentation and improvement.

The task of assembling a faculty or any other kind of team is especially difficult because it requires the pieces to mesh. And getting them to mesh could require a form of diversity, but not that type of diversity prized in today's discussions of the topic. To see the problem, let me return again to my own profession. The first job of any institution is to decide what people to bring in and what people to keep out. That judgment requires judgments to be made about people, and these often require partitioning the evaluation into two halves. The first half tries to measure some intrinsic characteristics of the potential candidate: the candidate's education and skill, speed at learning new tasks, subject matter specializations, and so on.

But no school builds a great organization simply by hiring people with great intellectual abilities. To make a great institution, people have to cohere; they have to be sensitive to team dynamics; they have to interact on a wide range of administrative and intellectual tasks. The law school that admits students solely on boards and grades may be making a grave mistake. The law school that hires faculties only on the strength of academic distinction and publications makes the same mistake, and here is the rub — or so someone could argue. Athletic coaches are always worried about fit and coordination. The good basketball team needs to build morale, and will not start its five best players if all of them play center. You need to fill each position with a person who brings just the right skills. The same holds true for academic institutions — or so someone could argue. Others might disagree, and say, hire the strongest people and then figure out how to harness their energies after they are in tow.

Alas, it is precisely because you can argue for or against all these sensible propositions that different institutions must be allowed to go their separate ways. The same argument could take place on affirmative action. Those institutions that want affirmative action can adopt it in whatever proportions they so choose. Those that do not adopt affirmative action can follow some other course. Yes, those who want to resegregate can do so as well, if they can find students and faculty and funding to go at it alone.
My libertarian instincts play well with the view of diversity that leads to a decentralization of institutional authority. The standard understanding of diversity, such as that championed by the American Association of Law Schools, cuts sharply in the opposite direction. Now, diversity no longer describes the permitted variations between institutions. Rather, it describes the one indispensable characteristic that all institutions must have: its required mix along lines of race and sex. Diversity ceases to be an option and has become a command. It ceases to become an agent for differentiation and has become a tool for conformity. It ceases to become the rallying cry for competition and has become an expression of the state monopoly control that is enforced by accreditation agencies, by the United States government, and by various state commissions. It stems from the belief that complex social problems have only one right answer and that answer is known by people in positions of public power.

So today we invite the ultimate paradox. In the name of diversity we face the risk of the most monolithic system of hiring imaginable. We allow a centralized elite to set standards that bind us all. Some might say that the elite is democratically elected, but this issue is of no moment. The prior question is not whether democratic processes should control, but whose processes should be in control. Let there be a strong consensus on the need for a given course of action, and all the more reason why the outlier should be allowed to go its own way — to challenge the received orthodoxy by example. The new system uses voting processes to cut off the competition. The concentration of political power now leads to a lack of diversification in, of course, the name of diversity.

I believe that we pay a high price for this new form of uniformity. It is not because I wish my views on affirmative action to govern the behavior of other institutions. I disclaim all such ambitions. But while I have no desire of conquest, I do have desires for territorial defense: I hope that my home institution can grope its own solution to the affirmative action question in ways that satisfy its diverse set of internal constituencies. I am confident that we can do a better job if we do not have to face constant scrutiny from outsiders with vast power, but limited knowledge of our internal conditions.

Decentralization is the right way to proceed precisely because no one has certain knowledge as to the right answers; in-
no one knows whether there is one right answer that fits all institutions within a given class. Jim Crow worked so much of its damage because racial prejudice was institutionalized by state power. The last part of this sentence matters. It is one thing to remove Jim Crow root and branch; it is quite another to impose a new color-blind regime in its place. The moral differences between the aspirations of those two systems seem evident enough to me.

The key mistake of the 1964 Act was to assume that some collective moral vision justified a uniform legal standard — one which did not survive unchallenged for more than a couple of years after it was frozen into law. Whether one wants or opposes a color-blind norm is neither here nor there. The recipe for social disaster comes from having the state impose its norm on private institutions that see fit to march down other paths. The tragedy of the modern civil rights movement is its excessive reliance on state coercion to achieve its moral objectives.

X. AT LAST THE FUTURE

So where do these ruminations lead me? I can give you some flavor of my uneasiness by commenting on the California Civil Rights Initiative, Proposition 209, which has just been upheld in the Ninth Circuit. On this measure, I will claim the following dual distinction. First, I helped the groups and individuals who drafted the initiative. Second, I am far from sure as a matter of first principle, that I would have voted for a measure that after a fashion I helped to draft.

Let me indicate the source of my ambivalence, or, as the less charitable might say, my evasive inconsistency. I begin with first principles. As head of any state institution of higher education, my first objective would be to privatize all the universities. State run universities, including the superb institutions in the

20. Its key command reads: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a). The initiative appeared on the ballot as Proposition 209. Coalition for Econ. Equit v. Wilson, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996), cert. denied, 1997 WL 589411. The operation of the statute was initially stayed in the district court, Coalition for Econ. Equity v. Wilson, 946 F.Supp. 1520, 1520-21, and the stay was dissolved and the motion denied in Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
California system, set up a dangerous dynamic even though different state systems are in vigorous competition with one another over faculty. One reason for this is that legislation and direct supervision, enforced by the power over the budget, can allow political forces to compromise both institutional and intellectual independence. That risk is present in both California and Texas where affirmative action programs are under siege in very different ways. Internally governed institutions, in contrast, are capable of incremental shifts in policy. What is striking about the California and Texas situations is the rapid about-face imposed on these institutions from the outside, over the objections of those who actually run them. That slippage from public command to internal operation promises a form of long-term guerrilla warfare from which no one can profit. The top-down command does not have internal legitimacy.

The second inherent danger of state universities is that they create too many hidden subsidies for students in their below-market tuition rates. I have no question that subsidies are very much a part of how the best private universities operate, and their mere presence in state institutions cannot be a source of rebuke. The key doubts go to the pattern of the distribution of these subsidies. It is surely acceptable to give support to students with the strongest academic credentials, which is what many private institutions do. However, it is far less clear that this financial support should come from general tax revenues, much of which are collected from lower income families whose children cannot meet the academic standards needed to collect these plum scholarships and grants. But in light of the massive shifts in enrollment in the Texas and Berkeley Law Schools, it becomes necessary to ask: "What is the wisdom in having black and Hispanic families pay tax subsidies to upper-middle class children of European and Asian origins?" Yet precisely that distribution arises when color-blind norms determine who gets into state institutions at tuition rates far below either cost or market rate. Would any one favor this distribution of subsidies in a private institution that charges market-level tuition to its students? I doubt it.

But suppose that we cannot privatize state institutions. Then perhaps we can raise overall tuition levels to equal market rates, and thereafter run a separate scholarship program that gives direct aid to needy students who can spend it where they
please under a voucher program at the university level. Vouchers based on need are a sensible form of price discrimination that has some strong positive side effects. Now that the subsidies are distributed in a more rational fashion, the program is in a better position to respond to the criticisms of the affirmative action supporters.

Unfortunately, the in-state political pressures to keep across-the-board tuition low are manifest, so that we are forced to take public institutions as they are, and not as they ought to be. In this context, Proposition 209 presents the conscientious voter on affirmative action with this unhappy dilemma: either you have too much or too little. Too much affirmative action comes from the powerful ability of political groups to push their programs to the limit once they obtain ground level control: demands are made that Hispanics can teach Spanish; only blacks can teach black study programs, or so the stories run. The chancellors, deans, and faculty all line up four-square behind the program without acknowledging or correcting any of its alleged excesses, at least to the satisfaction of the most vocal critics.

In the face of this chorus of support for affirmative action, the opposition becomes so suspicious of the status quo that it insists on cutting out all preferences root and branch. After all, if you cannot monitor and control daily excesses, then affirmative action ends altogether. Lost in the middle are those citizens who think that some modest affirmative action program, for whatever reason, is better than no program at all, and also better than the extensive set of preferences now in place. But in the referendum election, the massive middle is forced to go to one extreme or another, especially after the opponents of Proposition 209 adopt a hard-line defense of the status quo. By not taking the bland Clinton view, "mend it, don't end it," Proposition 209 opponents further polarized the political community and drove just enough voters from the moderate middle to the color-blind end of the spectrum. It is a classic illustration of how public deliberation can backfire: the ballot options nowhere reflect the preferred choice of a substantial fraction located smack in the middle of a fractured political community. The great strength of private institutions is their ability to make incremental adjustments without the discontinuities found in Texas and California. To this day, I do not know how I would have responded if I had been asked to vote in the California election,
but I suspect that the more strident the opposition to Proposition 209, the more likely it is that I would have voted for it.

This failure of the referendum process thus brings us back to my title. Now that we have more state institutions of higher education, we have fewer options on affirmative action. The judicial approach in Texas and the political approach in California shows how high-principled debates on the affirmative action preclude untidy but workable solutions. The reason affirmative action will be with us for the next millennium is not because we are unable to deal with questions of race. Successful low-level accommodations take place every day. Rather, the reason we will struggle with this issue is because both left and right suffer from the collective mindset that important social issues require government solutions that operate on a one-size-fits-all basis. In this sprawling country, with its diverse population, that solution will not work. We have to lower the level of decision-making body to lower the volume of dispute. The problems that look intractable on the wholesale level may admit of some grudging progress on the retail level. To repeat, the great mistake of the 1964 Act lay not in its moral condemnation of Jim Crow, but in its failure to respect the distinction between public and private spheres. Unless we somehow reverse that trend, collective deliberation will never solve the affirmative action problem in the next millennium no matter how hard we try. So long as the foundations of our public policy are insecure, its superstructure will continue to twist and wave in the wind.