

# The Discriminating Shopper

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## I. INTRODUCTION

Liberals do not agree on much. There are, however, a few settled points on which we seem to have reached consensus. One of these is that racial discrimination is wrong—indeed, one of the paradigm wrongs liberalism sets out to oppose. Differential treatment based upon arbitrary categories such as race is a key injustice, and liberals oppose it at every turn.

Another settled point for liberals is that freedom of association is a fundamental human right. Just as individuals have the right to speak their minds in a liberal society, so do they have the right to seek out and associate with like-minded people. I have the right to allocate my time and energy to others as I see fit; preventing me from associating with others, or forcing me into unwanted association, is a key liberal injustice.

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The problem is that these two settled points are in serious tension with one another. This might not seem apparent on first glance, given the degree to which liberal theory takes employment discrimination as an obvious wrong; we seem to accept that, in the context of hiring decisions, the force of the antidiscrimination principle must limit the associational rights of the employer. This form of discrimination, however, is not the only one we might consider. To see more fully how the tension here might be drawn out, we have only to consider acts of private discrimination—discrimination by private individuals, acting in roles generally understood to be outside the realms of the marketplace and political life. Examples of such discrimination abound: individuals might form civic associations that discriminate on religious grounds; they might socialize with individuals from only certain ethnic backgrounds, or with certain beliefs; they might, indeed, only date or marry individuals with certain racial identities. In all of these cases, I think we feel the pull of both principles identified above. Such actions seem both discriminatory and potentially legitimate examples of free association. How, for a liberal, can the ultimate moral status of such actions be determined?

As a way into this question, this Article examines only one case of private discrimination: the case of discriminatory purchasing decisions. Imagine an individual who decides to spend her money only at businesses owned or operated by members of a specific race.<sup>1</sup> This is easily understood as a case of discrimination if, by that term, no moral conclusions may yet be adduced. We may imagine that individuals of that particular race have no special skills or knowledge that makes their goods and services uniquely good. The fact of racial membership is *itself* taken as a qualification, a reason to prefer the goods and services of one party to those of another. The individual in question might simply feel more comfortable associating with members of one race, and so chooses to allocate her time and money accordingly.<sup>2</sup> There is nothing fanciful about such a case; indeed, people seem to make such discriminatory marketplace choices—and similarly discriminatory choices in private life more generally—on a fairly regular basis.

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1. It is important to notice that the race in question need not necessarily be our own. I might decide to shop only at stores operated by African-Americans, despite not being African-American myself.

2. There are, for instance, clear cases in which manufacturers attempt to foster discriminatory shopping. The clothing line FUBU, for instance, appeals to African-American identity in its name: For Us, By Us. *E.g.*, Ginia Bellafante, *What New Urban Wear Trend Will Step Off the G Train?*, N.Y. TIMES, Aug. 7, 2001, at B8; Josh Sims, *Streets Ahead of the Rest*, THE INDEPENDENT (London), July 18, 2002, at 10. The legitimacy of such appeals, I think, depends upon the legitimacy of discriminatory shopping in the first place.

We might ask several distinct moral questions about such actions. The first set look primarily at the case of individual moral agency. What is the moral quality of such action? Is it fundamentally immoral to behave in such an anti-egalitarian manner? If the individual in question claims to be a liberal, does her action violate her principled beliefs? Such questions, here, are not our primary concern; they will be asked only as a means to answering a different, more political set of questions. Our focus will be on this second set of questions, which begin with political legitimacy. Here, we ask not simply whether an individual may be a discriminatory shopper. We ask, instead, whether the liberal state may legitimately allow marketplace forces to cater to such discriminatory preferences. Is liberal political philosophy committed to free association in the marketplace? Or are such discriminatory acts legitimately the focus of government intervention and coercive force?

The conclusions reached here might help us understand our reactions to a wide variety of cases of private discrimination. Before we can understand how we ought to regard such cases generally, we have to understand what principles might ground our evaluation of such acts. The principles we develop here, that is, might help us understand cases as divergent as racial selection in romance and religious exclusion from civic organizations. But there is also something especially important, I contend, about discriminatory shopping. In particular, understanding this phenomenon is necessary for us to gain a full theory of employment discrimination. The moral permissibility of discriminatory shopping will affect whether and when employment discrimination is wrong. A full theory of the latter therefore requires an inquiry into the moral quality of the former.

This argument proceeds in two parts. Part I attempts to show that there is something special about discriminatory shopping, such that we ought to understand it prior to deriving an overall theory of employment discrimination. Part II then proceeds to analyze the political morality of discriminatory shopping and offers an account of when and how liberalism morally prohibits such discrimination. Part III concludes that such private discrimination is not always contrary to the egalitarian guarantees of liberalism; while there are some cases in which such practices run counter to liberalism's egalitarian guarantees, not all cases of discriminatory shopping have this quality.

## II. DISCRIMINATION AND ASSOCIATIONAL PREFERENCE: RONALD DWORKIN AND JACKIE ROBINSON

Before we can answer specific questions about discriminatory shopping, we have to ask ourselves what discrimination actually *is*. One starting point, in this analysis, is to ask what the opposite of discrimination might be. Here, we might borrow from John Rawls's principles of justice. His second principle, which details the conditions under which inequalities in primary goods such as wealth and income are legitimate, provides a picture of the nondiscriminatory society.<sup>3</sup> Such a society involves setting up the rules of association such that individuals with equal talents and motivation can expect equal chances of obtaining scarce and desirable positions.

So far, so good: this is a plausible picture of a nondiscriminatory society. Rawls's principle of fair equality of opportunity demands that we make whatever changes are necessary to ensure that people are not disadvantaged illegitimately in their search for scarce positions by unchosen and arbitrary characteristics. The precise contours of what these changes would be need not concern us at present. The important question is more foundational. Just what, in the end, counts as a *talent* for a given position? This question may require questioning the legitimacy of private acts of discrimination—including, most centrally, acts of discriminatory shopping.

To see this, we may note that there are potentially two forms of employer discrimination. There are cases in which employers refuse to hire individuals of a given race or ethnicity for reasons which are economically irrational. Imagine a case in which an employer refuses to hire an African-American individual for a given job, despite the fact that the African-American would be the most efficient and skilled at the job. The reason for the discrimination may be something like simple racial animus or hatred; the employer does not act in his own interests in refusing to hire the individual in question. The employer's discrimination undermines his own interests.

We may call this type of employer discrimination *irrational discrimination*. It comprises the majority of cases of discrimination; employers who discriminate often do so based upon false group-based notions of skills and habits, and thereby restrict the set of individuals they might hire in a manner contrary to their long-term self-interests.

Not all cases of discrimination, however, have this character. Employers may refuse to hire individuals of a given race, not because of animus on the part of the employer, but on the part of potential

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3. See JOHN RAWLS, A THEORY OF JUSTICE 60-61 (1971).

customers. Imagine, here, a case in which an employer refuses to hire African-American salesmen, not because the employer has any racist attitudes, but because the potential customers of his business may be reliably predicted to have discriminatory patterns of shopping.

This form of employment discrimination might be termed *rational discrimination*; economic self-interest gives the employer good reason to engage in this form of discrimination. Alan Wertheimer has termed such arbitrary characteristics *reaction qualifications*; they are qualifications for employment, in that the reactions of potential customers are reliably related to economically rational objectives.<sup>4</sup> An employer who knows that white skin (or great height, or attractive features) will increase the ability to sell cars may take this fact into account, and regard the presence of such a characteristic as a job qualification—a reason to prefer the one who has the characteristic. The employer can do this, moreover, without being accused of harboring any racial hatred in his heart; he is simply doing what the market demands.

Economic rationality, however, is a poor guide to moral behavior. We may still ask whether the individual who engages in rational discrimination is acting in a morally acceptable manner. A full theory of discrimination will require an answer to this question. Our question at present, however, is the more political: when do liberal political communities have reasons for interfering with this sort of market interaction? Most of us accept that there can be cases in which we may legitimately seek to upset patterns of discrimination, even rational discrimination; demonstrating the market efficiency of your discrimination will not always prevent regulation. Employers might, that is, be justly forbidden under some circumstances from pandering to such illegitimate preferences. But what principles can be introduced to determine when such regulation is permissible?

We may begin by returning to the idea of fair equality of opportunity with which we began. Here, scarce and desirable positions ought to be equally available to all who are similarly motivated and talented. The notion of talent, however, is deeply underspecific.<sup>5</sup> We must first ask: Does a racial identity conducive to maximizing sales count as a “talent” for purposes of our principle? There is no simple answer here; we may well feel different pulls in different cases.

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4. Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 100 (1983).

5. For a related analysis, see Iris Marion Young, JUSTICE AND THE POLITICS OF DIFFERENCE 192-225 (1990).

To see this, we may examine two distinct cases of discriminatory shopping. The first of these is derived from Ronald Dworkin in his analysis of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).<sup>6</sup> Allan Bakke sued to be allowed to enter medical school, arguing that his test scores were higher than those of some African-American students who were granted admission.<sup>7</sup> His argument was simply that allocation of such places ought to be done in accordance with simple merit—merit understood here as a talent for being a physician: accuracy of diagnostic services, breadth and depth of medical knowledge, and so on. Dworkin’s rejoinder relies on the legitimacy of discriminatory shopping. He argues that where African-American patients prefer African-American doctors, being an African-American counts as a legitimate talent when it comes to serving the African-American community:

There is no combination of abilities and skills and traits that constitutes “merit” in the abstract; if quick hands count as “merit” in the case of a prospective surgeon, this is because quick hands will enable him to serve the public better and for no other reason. If black skin will, as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token “merit” as well.<sup>8</sup>

Dworkin’s analysis suggests that if African-American patients prefer African-American doctors, then the medical profession ought to cater to their desires. We might imagine cases in which this preference is not retrograde or potentially regrettable; perhaps there are distinct health conditions endemic to one community which make doctors belonging to that community more likely to issue correct diagnoses. But Dworkin’s analysis does not demand that this be so. Imagine, instead, that the hypothetical preference is simply *there*, irrational but powerful. Imagine, that is, that humans from a given group simply prefer to buy products and services offered by members of that group. Is it morally permissible for us to cater to these preferences, by taking membership in the group as a talent for purposes of equality of opportunity? Dworkin’s analysis suggests that liberalism ought to grant such permission.<sup>9</sup>

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6. RONALD DWORKIN, A MATTER OF PRINCIPLE 289 (1985).

7. *Bakke*, 438 U.S. at 276-77.

8. DWORKIN *supra* note 6, at 299.

9. It is not easy to interpret just what Dworkin thinks of such discriminatory preferences. While he identifies them as “regrettable,” it is not clear that his analysis requires us to regard such preferences as themselves subject to political condemnation. If we were to argue that such preferences ought to be altered by political means, Dworkin’s argument now becomes one appropriate for non-ideal theory; we cater to such preferences while they exist, while working hard for a world in which they do not. I am grateful to Dana Nelkin and David Brink for discussion of this point.

The second case we will consider, however, gives us reason to resist the conclusion Dworkin offers. In 1947, Jackie Robinson accompanied the Brooklyn Dodgers to play an exhibition game in Jacksonville, Florida. The Jacksonville Parks Commission voted to cancel the game rather than allow Robinson to play. Robinson and the Dodgers continued to barnstorm throughout Florida, in the face of frequent and virulent opposition. In the face of such pressure for integration, the Jacksonville Beach Chamber of Commerce voted in 1953 to officially ban integrated baseball within the confines of the city. An explanation for this vote was given by the spokesman for the City Council in terms appealing to the rationality of discrimination in the face of discriminatory shopping patterns: “[n]o race prejudice is involved,” went the spokesman’s statement. “It’s just that the patrons of the team felt they would rather have an all-white team.”<sup>10</sup> This argument, it should be clear, appeals to the legitimacy of the discriminatory shopping patterns of the baseball patrons of Jacksonville Beach. If these patrons prefer their baseball to be provided by white players, then whiteness is a reaction qualification. White skin counts as baseball talent—just as black skin might count as medical talent on the analysis offered by Dworkin.

The difficulty, of course, is that the two cases seem to most of us quite distinct. Segregated baseball is understood by most of us as a legacy of both slavery and Jim Crow. The integration of baseball by Jackie Robinson changed both baseball and America for the better. These conclusions seem to stand regardless of the factual truth of the spokesman’s statement. Even if the baseball patrons preferred white players, they should *not* have had such preferences. Segregating owners, more to the point, should not have had a right to discrimination in employment, even when such discrimination would lead to more people’s preferences being satisfied. Sometimes, we think the preferences are so malign that we expect people to change them; and we expect business owners to suffer some financial distress rather than cater to such preferences. Even if segregated baseball maximized profits, integration was required by liberal principles.

Our conclusions are not quite so settled in the case imagined by Dworkin. One response is simply to treat this case as equivalent to that of segregated baseball, and regard both sets of preferences as similarly retrograde. This response is inadequate; the two cases *are* distinct, and

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10. HANK AARON & LONNIE WHEELER, I HAD A HAMMER 50-51 (1991).

ought to be treated as such. The task, of course, is figuring out *how* they are distinct. Divergent reactions to the two cases should lead us to believe that discriminatory shopping is neither always forbidden nor always permissible. We need a theory that helps us distinguish the two cases, by telling us what makes a given case of discriminatory shopping permissible. This theory may enable us to make some headway in determining when an employer may legitimately cater to such preferences in hiring decisions.

### III. ANTIDISCRIMINATION AND EQUALITY: TWO VARIETIES OF LIBERAL EGALITARIANISM

We might understand liberal equality in two ways. First, we might think of liberalism as a theory in which all arbitrary forms of advantage are to be eliminated. On this account, equality of *something*—in whatever currency or metric it is to be understood—is taken to be a liberal value directly expressing our equal respect for persons. Take, as an example, a simple egalitarian theory like equality of welfare. If we find that one individual has very high welfare, and the other individual quite low welfare, and that the only difference between them is an arbitrary accident of birth, then we have at the very least a *prima facie* reason for redistributing goods. In this example, equality of welfare expresses our equal respect for persons; in principle, no area of human welfare is off limits from liberal political attentions.<sup>11</sup> We may call such theories *broad* theories of distributive equality, in that considerations of distributive justice are not derived from mediated notions like the demands of political life; they result from demands morally relevant at the foundational level of interpersonal behavior.

The alternative approach, in contrast, makes the link between the equality of persons and more specific notions of distributive justice in a mediated way. We may call such theories *narrow* accounts of distributive justice. Such an account does not take distributive equality itself to be morally important; it only becomes morally important under certain circumstances and for certain reasons. Rawls's theory of justice provides a key example of such a narrow theory; it does not purport to range over the entire scope of human behavior, but only over the basic structure of society.<sup>12</sup> It is thus a distinctively political theory, rather than on a

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11. See Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999) (discussing ways in which this demand can seem misguided).

12. See generally Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 257-96 (2001) (discussing reasons for Rawls's decisions). Rawls's decision to limit his focus in this way is criticized in G. A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? 117-33 (2000).



broader form of moral concern. For Rawls, equality of primary goods is never itself morally valuable; the egalitarian guarantees of the difference principle do not emerge directly out of equal concern and respect, but only once Rawls has demonstrated that such egalitarian guarantees are necessary for *political* legitimacy.<sup>13</sup> More generally, a narrow theory such as Rawls's does not take any specific inequality—whether of goods, resources, or welfare—as itself indicating a moral problem. The inequality only becomes relevant for liberal political morality when it can be demonstrated that such inequality violates the equality of persons conceived of as free and equal *citizens*. What is important, on this account, is how much of life is left outside the public sphere. Rawls applies his theory neither to churches, nor universities, nor private relationships—except insofar as these institutions undermine such political guarantees as the fair value of the political liberties. Isolated from such political effects, the inequalities engendered by such institutions are no concern for such an indirect theory of liberal equality.

Here, private discrimination such as discriminatory shopping will not in itself be constrained by liberal principle. Liberalism's principles may still condemn such acts, but only when we can demonstrate that these acts relate to the political standing of persons. Discriminatory shopping must now be understood in virtue of its effects upon *political* relationships, rather than other, more direct notions of the equality of persons.

It is worth noting that the distinction between broad and narrow theory does not mirror the distinction between comprehensive and political liberalism. Political liberalism has two aspects: a restricted domain of application, and a particular epistemic status for the political principles it endorses. Rawls's earlier, comprehensive liberalism, in contrast, had a restricted domain of application—Rawls did not, for instance, apply his full theory globally, nor to private associations—but did not have the epistemic properties he would develop later with *Political Liberalism*. Rawls's later theory represents a narrow form of liberal equality in that it focuses attention on the political domain; so, however, does Rawls's early theory in that its domain of applicability is the basic structure of society, from which Rawls excludes a great many private institutions and associations. Rawls's political liberalism is taken as a key example of a narrow theory later in this Article; it is worth emphasizing, however,

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13. This concern is emphasized in JOHN RAWLS, *POLITICAL LIBERALISM* 137 (1993), but it is present in Rawls's earlier work as well. See RAWLS, *supra* note 3, at 7-8.

that Rawls's earlier comprehensive liberalism might have just as easily served this role.<sup>14</sup>

The direct view of liberalism might be well exemplified by John Stuart Mill's vision of the tolerant society in *On Liberty*. Mill's liberalism demands that individuals ought to foster and tolerate a wide variety of opinions and forms of life. Mill's complex idea of the human good leads directly to distributive conclusions; we are to do what is needed to develop the potential within all human beings. This view, however, does not have any exclusive relationship to the coercive power of the state; it looks, instead, towards the legitimacy of both political and social coercion. We are supposed to achieve this outcome both through our roles as political agents and as private moral agents. Liberalism, on this analysis, directly constrains acts of private discrimination by issuing commands prohibiting people from seeking to coercively cause others to conform to a dominant social way of life. Mill even goes so far as to prohibit such forms of private discrimination as the ostentatious shunning of those we regard as repugnant. We can, Mill famously notes, avoid the company of those we find disgusting, but cannot—upon pain of illiberalism—“parade” our avoidance.<sup>15</sup>

The difficulty of distinguishing between avoidance and shunning indicates the tension between the two liberal ideas with which we began. Mill's liberalism includes both a strong right to free association, and yet constrains behavior such that this freedom cannot be used to cause other individuals to conform. There is some evidence here that Mill's liberalism may have some difficulties adjudicating the moral nature of private discrimination. While other broad theories of equality will be more or less demanding than Mill's, they all regard personal habits of discrimination as potentially within the purview of liberalism in their own rights, rather than in virtue of their effect upon political relationships. This may make it difficult for a broad theory of liberal equality to give us convincing answers to the questions we now ask. This is not to say it is impossible; a broad liberalism might be developed which can adequately account for the differences between segregated baseball and discriminatory medical preferences. But a standing difficulty here will always follow the application of liberalism's egalitarian guarantees to the private realm. On the broad view, liberalism's egalitarian guarantees directly constrain our

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14. The discussion below on two ways of condemning discriminatory shopping depends upon adopting political liberalism; the main point, however—that indirect liberals can refuse to condemn discrimination except insofar as it leads to political exclusion—can easily be accommodated within a comprehensive liberalism such as Rawls's.

15. See generally JOHN STUART MILL, *ON LIBERTY* 94 (Currin V. Shields ed., 1977) (1859).

ability to make private decisions, demanding that such decisions do not violate the specific forms of distributive equality they endorse.<sup>16</sup> Such an extension is unwarranted: there can be some cases of private discrimination that are at the very least morally permissible.

To see this, imagine a truly idiosyncratic form of discriminatory shopping: I decide to shop only at stores owned by red-headed men. The blonde store owner across the way faces a significant drop in his sales as a result of my newfound fetish. My decision may be irrational, but I do not think it can be called *unjust*.<sup>17</sup> A broad liberalism might be developed which will agree with this outcome, but there is a standing pressure within such a liberalism to test such decisions against liberal equality. As such, a broad liberalism is likely to regard such forms of private discrimination as—to at least a *small* degree—unjust. After all, I have done *something* to the blonde storekeeper; I have lowered his economic holdings, or his welfare, or some other metric of egalitarian concern, and I have done that based upon an arbitrary characteristic. He did not choose to be blonde, and yet this unchosen characteristic has led to a reduction in his expectations. If the point of liberal equality is the equalization of some good thing, then the fact that I have reduced his stock of that thing should matter morally, and therefore, matter for political morality.

But why should I have to explain my decisions to the set of blonde-haired storekeepers? None of those individuals had any claim to my business; there is no individual or set of individuals I seem to have *wronged* by my actions. If liberalism extends over the private realm in the manner described, it seems to demand the justifications in all realms of life. It seems, however, that some forms of relationship ought not require *any* justification through liberal norms. If I want to shop only at

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16. A simple hedonic utilitarianism such as Bentham's, for instance, might make all individual behavior—including such private behavior as marital choices—subject to political criticism and control, based upon an overall accounting of social utility. See, e.g., JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 2-4 (Prometheus Books 1988) (1822). Later utilitarians such as Mill would not, but can only reject such conclusions by looking at contingent considerations such as the disutility associated with such violations of privacy. They cannot do what narrow theories do, which is to simply regard such decisions as outside the realm of political life.

17. Similarly, thin fashion models would have no legitimate political complaint if consumer preferences shifted to demand fatter models in magazine ads. Such thin models would be disadvantaged, and disadvantaged for what are probably arbitrary reasons, but the indirect model does not regard this as always a matter for political concern. Thanks to Matt Zwolinski for this example.

stores owned by redheads, it does not seem to me that anyone has even a *pro tanto* right to complain about my action.

This is not intended to definitively disprove the broad vision of liberal equality; such an ambition is beyond the purview of this paper. The only suggestion here is that such a liberalism may tend to extend its reach in an unprofitable direction. If we can develop an alternative approach able to more directly capture our intuitions about cases of discriminatory shopping, we may thereby derive a plausible and attractive theory. This Article argues for a narrow vision indirectly, by showing how such a narrow vision can provide us plausible answers while avoiding the pitfalls described above.

A liberalism focusing upon the demands of political legitimacy is likely to be able to give us what we need. We should therefore see whether such a liberalism gives us convincing answers in the cases under consideration. A good example for our analysis might be Rawls's own political liberalism. This theory is one of the most well-developed forms of indirect theorizing yet produced; it provides us with some ability to determine whether or not an indirect theory is able to aid us in our task.

We might therefore begin by clarifying what makes Rawls's political liberalism deserve the name *political*. It is political, argues Rawls, in that it is a moral conception that does not try to cover the entire set of acts and relationships constituting human life. It is instead a moral conception worked out for only one specific subject, that of the political, understood by Rawls as the constitutional system and matters of basic justice.<sup>18</sup> When we argue about these matters, contends Rawls, we ought to argue based upon a restricted conception of justice appropriate for only this site of justice. In this, we do not reference our own comprehensive theories, on which we can expect to disagree with one another; Rawls's contention is that we can expect a diversity of comprehensive doctrines in any free and democratic society. But such agreement is not necessary for a functioning and just society, so long as justice is understood in the political terms Rawls recommends. What matters is that we arrive at principles whose fulfillment gives us reason to regard the political system we inhabit as legitimate. Distributive equality—say, the difference principle—may be an outcome of this process. But distributive equality itself has no claim upon us; we seek political legitimacy, and distributive equality is at best a means to that valuable end.

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18. See generally RAWLS, *supra* note 13, at 3-11; see also John Rawls, *The Domain of the Political and Overlapping Consensus*, in COLLECTED PAPERS 473, 491 (Samuel Freeman ed., Harv. Univ. Press 1999).

This is, of course, only a caricature of Rawls's political liberalism. But it allows us to proceed with our analysis. We might begin by noting that the moral analysis of discriminatory shopping now takes a more complex form than it would under the broad view of liberal equality. In particular, condemning discriminatory shopping might now take one of two distinct forms. We might mean, in the first instance, that one or more particular comprehensive moral theories prohibit discriminatory shopping. These moral theories, we should emphasize, should not be understood as having any secondary or diminished claim to truth; political liberalism is not relativism. Adherents of a given doctrine are not called upon to regard their own doctrine as anything less than the final truth in matters of morality. Political liberalism instead demands that when we reason together about constitutional essentials and matters of basic justice, we refer only to the restricted set of political reasons we can be expected to share. But this does not restrain us from relying upon our own comprehensive doctrines in making moral evaluations in sites other than the public form of deliberation.

When we condemn a given case of discriminatory shopping, then, we might mean one of two things. We might mean that such discrimination is wrong in accordance with our own comprehensive doctrine; or, we might mean that such discrimination is wrong according to the public standards of justice we share. These two forms of analysis have considerably different normative force when applied in the *public* realm as justifying coercive government interference.

To see this, imagine a circumstance in which adherents of a given comprehensive doctrine—say, a particular vision of Christianity—argue over the moral quality of their right to private discrimination. Nothing in Rawls's political liberalism suggests that their moral discussions need make reference to any public standards of political justice; Rawls's inclusionary project insists that such discussions ought to take place, and any theory precluding them is illiberal in a fundamental way. Thus, Christians may discuss whether or not given practices of exclusion comport with the fundamental values of Christianity. We might, on this vision, ask one another whether or not a refusal to shop with non-Christians is itself wrong—where wrongness is regarded, in this example, as a violation of Christian teaching.

We might also, of course, discuss with one another whether such a refusal is wrong in a way that we can expect to motivate both Christians and non-Christians. Such an analysis, for Rawls, must refer to those

standards of justice we could establish as a public conception of justice for a liberal democracy. This conception of justice will refer to the demands of equality within the public sphere. While it is too much to expect unanimity on a comprehensive account of morality, it is reasonable to expect agreement on a public standard for disagreements within the public realm. Such a public conception will refer to the specifically political demands of egalitarianism; in particular, it will mandate equal standing within the political system of constitutional democracy. However much we may disagree in private about matters of fundamental morality, we are obligated to do whatever is necessary to have a public sphere in which people are able to act and speak as equals.

This gives us our first entry into the political morality of private discrimination. First, note that we may regard acts of private discrimination, including acts of discriminatory shopping, as morally permitted or prohibited according to our own comprehensive doctrines. In public deliberation, however, we must refer to a restricted set of reasons we can expect to motivate those who disagree with our comprehensive theories. The appropriate question to ask in such a public forum is not whether this act of discriminatory shopping is morally wrong. Rather, the appropriate question is whether this act of discriminatory shopping is likely to undermine the public political equality of our society.

There are at least two ways in which an act of discriminatory shopping might undermine public political equality, and therefore two ways in which we might understand such an act as illegitimate according to political liberalism's lights. The first of these deals with the issue of public shame and stigmatization.<sup>19</sup> There can be cases in which our refusal sends a message of social inferiority and internalized shame. Imagine, in this context, a refusal to eat food that has been handled by a certain social group. The members of the group in question may understand this practice of refusal as a humiliating denial of full membership in the society. No full theory can predict in advance when this might be so; the cases will vary enormously based upon quite subtle distinctions. But there can be some cases in which it is reasonable to imagine that the members of a given group will regard their standing within the public sphere as diminished by the message of inferiority this form of discriminatory shopping might send.<sup>20</sup>

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19. For the notion of stigma, see ERVING GOFFMAN, *STIGMA* 3 (First Touchstone ed. 1986).

20. What will count as such a message will have to refer to the social meanings implicit in a particular culture. It is not enough that I find a given message stigmatizing; it must be shown that I am right, given the social network of meanings comprehensible to those speaking and listening, to find the message stigmatizing. If I find your refusal to touch your cap upon my approach socially stigmatizing and alienating, that does not give

This contradiction of the demands of a narrow liberalism focused on political life might be seen through reference to the requirements of democratic participation. One of the key prerequisites for acting as a political agent, it seems, is having a conception of oneself as *worthy* to engage in such action. On this point, Amartya Sen's analysis of the ability to show one's face in public without shame is instructive; social shame, on his capabilities approach, undermines a wide variety of human goods and relationships, including the specifically political relationships of democratic justice.<sup>21</sup> Rawls's own idea that the social bases of self-respect form a primary good in their own right reinforces this idea. That is, when discriminatory shopping sends a message of social inferiority and stigmatization, political liberalism prohibits that act of private discrimination.

This first way of examining discriminatory shopping gets us some purchase on the differences between permissible and impermissible forms of private discrimination. We may, however, also look to a second means for understanding these differences. In some cases, acts of private discrimination exacerbate and amplify relationships of injustice. When this is so, the acts of private discrimination lose their status as morally permissible, and become illegitimate according to the principles of political liberalism.

This provides some potential leverage to justify the coercive political interference with such private patterns. Even if it can be demonstrated that many individuals in a given community prefer to buy their cars from white men, we might legitimately seek to interfere in acts of racial discrimination against black men in hiring for jobs as car salesmen. The refusal to buy cars from such men contributes to, and likely stems from, black men's status as economically and politically marginal members of society. Any given car purchase has a negligible effect upon the continued legacy of race hatred and exclusion. Taken as a pattern, such discriminatory forms of shopping help maintain the social marginalization of black males. This marginalization makes the participation of black men in public life more difficult, in a host of ways large and small. Political interference in the process thus seems at least potentially permissible on a narrow theory such as Rawls's political liberalism.

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us a reason to compel you to touch your cap; rather, given the context, I ought to overcome my feelings and learn to live with your apparent lack of respect. These matters are complex, and I can only touch their surfaces in the present context.

21. AMARTYA SEN, *INEQUALITY REEXAMINED* 115-16 (1992).

We might also arrive at these conclusions through the earlier distinction between rational and irrational forms of discrimination. There can be cases in which an act of rational discrimination by a supplier of goods—one which, that is, tracks the shopping preferences of consumers—simply has no bearing on the public status of group members. Imagine, in this context, that enough people enjoy shopping with red-haired men that it becomes rational for an employer to regard red hair as a talent for the job of salesman. We may note, here, that there is no preexisting way in which people without red hair are socially disadvantaged as a group. They are not subject to frequent and persistent economic underdevelopment; they do not have a history of social exclusion; they do not, as a group, suffer a disproportionate amount of exclusion and discrimination in education. On this account, while the arbitrary nature of the red-haired man's increased job chances may bother a blonde man, there is no sense in which this act of rational discrimination represents a wrong to the blonde man. Put simply, there is no history of irrational discrimination making this act of rational discrimination morally impermissible.<sup>22</sup>

Many other cases, however, will not have these rosy contours. Rational discrimination often occurs when consumers prefer a world in which the political and economic exclusion of a given group of people continues. The example of Jackie Robinson is instructive. The preferences of white baseball patrons for white players were not formed in a vacuum; they reflected—consciously or unconsciously—a preference for a world in which white and black were separate and unequal. These preferences, when put in place, gave symbolic emphasis to the inferior status of African-Americans in the South. A refusal to allow integrated baseball had a social message, and a social effect, of political inequality. The case of *Brown v. Board of Education*, after all, noted that the constitutional wrong of separate but “equal” educational facilities was an ingrained message of black inferiority. A similar analysis might well be provided for segregated baseball. Even if the spokesman for the Jacksonville Beach council was being honest, and the discrimination proposed was rational, the discriminatory shopping preferences were politically malign in their effects; neither the consumers nor the producers of baseball, on

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22. It is, of course, always possible that such a pattern of actions may eventually produce the social and political marginalization of blonde-headed men. If this is so, then acts of private discrimination against the blonde-headed now become illegitimate from the political point of view—and potentially subject to political control. I emphasize, here, some historically significant categories such as race, gender, and sexual orientation, but only because these represent clear and powerful forms of social marginalization; they are not the only forms of marginalization we might imagine. A history of exclusion is likely to be found in most actual cases of marginalization, but there is nothing conceptually necessary about such an historical process. I am grateful to David Brink for pressing me to be clearer on this point.



the principles of political liberalism, had a right to have their preferences for segregated baseball respected. These preferences were for a world in which social marginalization was a fact of life, and to respect such preferences violates the political guarantees of a narrow liberal theory.

Our principle, then, might be as follows: for a narrow theory of liberal equality such as Rawls's political liberalism, we are permitted to engage in acts of private discrimination so long as such acts do not exacerbate or contribute to a pattern of social marginalization leading to political exclusion and injustice. We are allowed, for example, to seek out our barbers based upon any number of arbitrary characteristics—their hair color, their linguistic capacity, their height—so long as our choice of characteristic does not contribute to the process that excludes individuals with such characteristics from those goods needed for full citizenship in a legitimate state.<sup>23</sup>

This principle gives us the right answer in the cases we have so far discussed. White doctors do not have significant worries over their status as political equals; accordingly, preferences for black physicians may be legitimately catered to by markets in liberal societies. African-Americans in the southern United States in 1947, in contrast, were marginalized in a particularly extreme manner; the preference for white ballplayers continued a social process of exclusion by sending a message of separation, inferiority, and stigma. The integration of baseball was not only compatible with liberal equality, but demanded by it.

This means, however, that the burden of proof rests to some degree on the person insisting that a given act of private discrimination is unjust. A case of private discrimination is not, in itself, necessarily contrary to liberal principles of justice. Only when we demonstrate that a given case of discrimination contributes to an existing political injustice may we condemn that case of discrimination from the standpoint of political liberalism. The African-American preference for African-American

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23. Harriet Baber has criticized this position with reference to a male who applies for a traditionally female job and is rejected for his gender. If a man applies to be a secretary and is refused because being female is taken by employers as a reaction qualification, is he not treated unjustly? The answer, I think, is no—so long as men do not face so much difficulty in finding paid employment that it is legitimate to regard them as members of a marginalized social group. This is, I think, unlikely to be the case. Until men face such difficulty in finding employment that they are legitimately so regarded, I believe the example of such a man is best understood as analogous to the blond-haired storekeeper's reduced wages described above—regrettable, perhaps, but not a matter of liberal political concern.

doctors may be a case in point. We might condemn this preference from one or more comprehensive doctrines; it may be un-Christian, perhaps, or contrary to the demands of a Millian liberalism. But from the standpoint of political liberalism, it hardly seems possible for us to regard this as unjust. There is no standing political or economic exclusion for white physicians in the United States. That they might be, to some degree, excluded from the African-American market is perhaps unwelcome; it is hard to see this as a case of injustice. Whether or not the preference for African-American doctors is grounded in any reasonable set of beliefs, it does not exacerbate any existing social process of exclusion. A political liberalism, then, can distinguish between the case of the African-American baseball player and the white physician, by noting the divergent political circumstances faced by these two representative individuals. In sum, not all cases of private discrimination have the same moral quality for a theorist of political liberalism.

#### IV. CONCLUSION

Two points warrant attention in closing. First, this Article suggests modest conclusions. The approach given here is not the only solution to the moral evaluation of private discrimination generally. Divergent cases of private discrimination may have different moral elements; similarly, a comprehensive liberalism might be described to deal with the cases discussed here in a productive way. I aim only to show that narrow liberalism is able to give us attractive and plausible answers to such cases. Rawls's political liberalism provides a theory that is, at the very least, a profitable avenue for future inquiry in this area.

The second notable point is an irony about what this Article presents. The analysis given suggests that private discrimination such as discriminatory shopping is generally permissible, except when it exacerbates an existing social injustice. This means, in the end, that we are largely free to discriminate, except when such discrimination contributes to a pattern of social exclusion comprehensible as such on an indirect theory such as political liberalism. The analysis suggests that, in the end, even racial preferences in private association might be morally permissible—except, of course, when such preferences contribute to the maintenance of preexisting forms of racial hierarchy. The irony is that even private cases of racial discrimination might be permissible in many cases, were it not for the history of public racial exclusion and domination found throughout much of our history. In the end, private discrimination might have been more legitimate in a world without racial hierarchy; we might well have been able to discriminate to our heart's content, if it were not for all the racists.