

A Positive Theory of Immutable Characteristics and Discrimination*

J. Atsu Amegashie
Department of Economics
University of Guelph
Guelph, Ontario
Canada N1G 2W1

Email: jamegash@uoguelph.ca
Phone: 519-824-4120 Ext. 58945
Fax: 519-763-8497

March 4, 2009

Key words: conflict, discrimination, immutable, race, gender.

JEL Classification: D72, D74, K41.

*This paper is a *radical* revision of an earlier version that was titled “Socially-Tolerable Discrimination”. My thanks are due to Doug Allen, Bram Cadsby, David Dzidornu, Kjell Hausken, and especially Jörg Franke, Mike Hoy, Mordechai Schwarz, and an anonymous referee for very helpful comments. I thank the Social Sciences and Humanities Research Council of Canada for financial support.

Abstract

History is replete with overt discrimination on the basis of race, gender, age, income, caste, citizenship, nationality, immigration status, ethnicity, marital status, academic performance, health status, volume of market transactions, religion, sexual orientation, criminal record, disability, seniority, etc. However, these forms of discrimination are not equally tolerable. For example, discrimination based on immutable or prohibitively unalterable characteristics such as race, gender, or ethnicity is much less acceptable. In the post-civil rights jurisprudence of the United States Supreme Court, race is a suspect classification and gender is a quasi-suspect classification. In this paper, I develop a simple rent-seeking model in which discrimination that is based on immutable traits is more likely to lead to conflict than discrimination that is based on mutable traits. This is because discrimination that is based on immutable traits has overarching effects on the out-group. However, I argue that immutability of the trait is a necessary but not a sufficient condition for this result to hold. I discuss some complementary conditions and also give reasons why a dominant in-group will design a system of discrimination with the goal of creating overarching effects. Immutable traits like race, ethnicity, and gender satisfy these conditions and, therefore, can explain why discrimination based on such traits is much less tolerated.

1. Introduction

History is replete with overt discrimination on the basis of race, gender, age, income, caste, ethnicity, material status, citizenship, nationality, immigration status, academic achievement, health status, volume of market transactions, religion, sexual orientation, criminal record, disability, seniority, etc. However, these forms of discrimination are not equally tolerable. Discrimination based on immutable or prohibitively unalterable characteristics like race and gender is much less acceptable. In the post-civil rights jurisprudence of the United States Supreme Court, race is a suspect classification and gender is a quasi-suspect classification.

On the preceding point, the Harvard Law Review (1969, p. 1126-1127) observed that "... race and lineage are congenital and unalterable traits over which an individual has no control and for which he should not receive neither blame nor reward. ... This theory may explain why classifications based on alienage – a legal status generally subject to change – and on poverty have received more lenient treatment than those based on race."

In his justification of age discrimination, Swift (2006, p. 231) notes that "... age discrimination legislation does not seek to address the difficulties faced by a discrete group identified by some fixed quality. We are all people 'of age' and in the course of life it is likely that everyone will encounter the benefits and detriments of age ..."

These two statements reflect an arguably influential legal view that determines the justification for a discriminatory practice (i.e., suspect classifications) based, in part or entirely, on the immutability criterion. In *Watkins v. US Army* (1989), a case which

required an answer to the question of whether under the constitutional law of the USA, the Army's policy of discrimination against homosexual and bisexual individuals violated the Equal Protection Clause, the majority noted that "immutability has become a catchphrase in equal protection jurisprudence."¹ And in *Sugarman v. Dougall* (1973) a case, brought before the US Supreme Court, which sought to determine whether a New York Civil Service Law was discriminatory against non-citizens, Justice Rehnquist argued that the Court should deem suspect only those classifications based on "status ... which cannot be altered by an individual." (Harvard Law Review, 1987, note 15).

Not surprisingly, the immutability criterion is a contentious legal doctrine. The Yale Law Journal (1981, p. 912) observed that "[P]roponents of immutability as the major criterion of suspectness have failed to explain how courts should distinguish between legitimate and illegitimate classifications based on immutable characteristics. Immutability therefore cannot serve as a touchstone of suspectness, even though it is not entirely irrelevant."² Indeed, the US Supreme Court has struggled with the immutability criterion and has not applied it uniformly (see, for example, Shapiro, 2002).

The purpose of this paper is to shed light on this issue, although I do *not* claim to present an exhaustive analysis of such a contentious legal matter. In my analysis, I do not assume that classifications based on immutable traits violate equal protection. Nor do I assume that people have an *intrinsic* aversion or moral indignation towards discrimination based on immutability *per se*. I also do not engage in the debate of whether a trait such as race is mutable or immutable. I simply take the immutability of a

¹ Quoted in Gilreath (2006).

² On this point, Ely (1980, p. 150) also notes that "... no one has bothered to build the logical bridge to tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics."

trait such as race or gender as given. I then examine the tolerance for different forms of discrimination from a *positive* political-economy point of view as opposed to a normative, legal, or moral point of view.

My approach is consistent with the following view of Balkin's (1997, p. 2365-2366) on the relevance of the immutability criterion:

“[A]nalyzing discrimination in terms of status groups ... helps us understand our objections to discrimination ... Discrimination against blacks, for example, is not unjust simply because race is an immutable characteristic. Focusing on immutability *per se* confuses biological with sociological considerations. It confuses the physical existence of the trait with what the trait means in a social system ... The question is not whether a trait is immutable, but whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people. Any conclusions about the importance of immutability already presuppose a view about background social structure.”

In my analysis, I simply assume that there is differential treatment attached to certain characteristics (e.g., race and age) regardless of their immutability or permanence. Differential treatment has material consequences, so any aversion to discrimination in my model is driven by material considerations. Given that lower status that is based on immutable traits has overarching effects than lower status that is based on mutable traits, I demonstrate that the former type of discrimination is more likely to lead to conflict. Therefore, the reason why discrimination that is based on immutable traits is more likely to lead to conflict is not because of its immutability *per se* but because of its overarching effect. I define overarching effect to mean the exclusion of members of the out-group from benefits in *several* spheres of their lives.

However, I argue that immutability of the trait is a necessary but not a sufficient condition for the trait to have an overarching effect. A related point has been made in

other papers although they do not link immutability to overarching effects.³ In contrast to these papers, I discuss some complementary conditions that must be satisfied for an immutable trait to have an overarching effect. I also discuss why a system of discrimination will be designed with the goal of producing an overarching effect. Immutable traits like race, ethnicity, and gender satisfy these conditions and, therefore, can explain why discrimination based on such traits is much less tolerated.

A difference between my analysis and Balkin (1997) is that his main focus is not a comparison of immutable and non-immutable traits and their effect on conflict. Balkin (1997) does not argue formally or informally that the overarching effect of discrimination that is based on immutable traits will make it more likely to lead to conflict relative to discrimination that is based on non-immutable traits. An implication of Balkin's (1997) analysis is that discrimination that is based on immutable characteristics and have been designed to have overarching effects *must be* treated as suspect classifications. An implication of my analysis is that such discrimination *will be* treated as suspect classifications because not doing so is likely to lead to social conflict. But more importantly, I argue that the combination of a dominant in-group's incentive to create a discriminatory system with overarching effects and the fact that certain immutable traits lend themselves to the goal of producing a discriminatory system that has overarching effects may be a reason why classifications based on such immutable traits should be deemed suspect. I return to this point in section 3.

³ For example, Tribe (1980, note 51) opined that "Immutability by itself is plainly insufficient. Intelligence, height, and strength are all immutable for a particular individual but legislation that distinguishes on the basis of these criteria is not generally thought to be constitutionally suspect." See also Ely (1980) and Sadurski (2005).

It is important to note the following points. First, I use the term discrimination to simply refer to differential treatment. It has no normative connotation. However, if a group has a positive valuation of ending differential treatment, then it must be the case that such differential treatment reduces its welfare. This is generally the case in my analysis. Second, my choice of age as an example of a mutable characteristic in my formal model is *not* crucial to my analysis or results. All that I need is a characteristic that changes *exogenously* with time. Therefore, I could have chosen a mutable characteristic like immigration status without affecting my results. In that case, I would have relabeled the young as immigrants and the old as naturalized citizens and differential treatment would have been based on the legal status referred to as *alienage*. Third and following from the second point, my main goal is not age discrimination *per se*.⁴ I am primarily interested in how discrimination based on immutable characteristics *compares* to discrimination based on mutable characteristics. Finally, I have chosen a mutable characteristic (e.g., age) that changes *exogenously* as opposed to a mutable characteristic that changes *endogenously*. This distinction does not affect my analysis and results.⁵ But, of course, when I refer to age as a mutable characteristic, I mean that it changes exogenously.

My model is undoubtedly simple. For example, I do not consider the fact that the tolerance for and prevalence of different forms of discrimination changes across space

⁴Neumark and Stock (1999) undertake an interesting empirical analysis of age discrimination laws in the USA.

⁵If the mutable characteristic changes endogenously, then this would mean that it only changes if an agent invests resources into doing so. If the cost of this investment is sufficiently high, then this characteristic becomes an immutable characteristic in which case the model boils down to the comparison of discrimination that is based on two immutable characteristics. This will not be consistent with my goal. If the cost of this investment is sufficiently low, then I can show that my analysis and main result will be unaffected.

and time nor do I consider the possibility that some members of the in-group may support the actions of the out-group.⁶

The next section presents a model of conflict that is fuelled by racial and generational discrimination.⁷ Section 2 sketches the solution of the model. I discuss the results in section 3. Section 4 concludes the paper.

2. A model of racial and generational conflict

Consider a two-period society with an overlapping generation structure. In period 1, there are $2N$ young agents and $2N$ old agents distributed equally between blacks and whites, and in period 2, the young of period 1 become old and there is a new cohort of N young blacks and N young whites. The world ends in period 2 after any possible conflict has taken place and payoffs have been realized. Therefore, there are four subgroups of equal size: old whites, young whites, old blacks, and young blacks. Each agent discounts the future at the rate, $\delta \in [0,1]$ and in each period, there is a rent or surplus of size $\Omega > 0$ to share among the $4N$ agents of this society.

Consider the status quo. Due to racial discrimination, the surplus of Ω is shared in each period among whites only, where young whites get Ω_y and old whites get Ω_o and

⁶For example, there were whites involved in the civil rights movements on behalf of blacks in the USA and South Africa. Indeed, the abolition of slavery in the USA involved whites fighting each other in the American Civil War.

⁷My formal model is related to but different from Robinson (2001) and Esteban and Ray (2008). In Esteban and Ray (2008), a difference is that in their model, both traits are immutable while in my model one trait is not. In Robinson (2001), ethnicity is an immutable characteristic but economic class is not. However, there are also several differences in assumptions and analysis. But more importantly, the focus of these papers is not on immutability and discrimination.

$\Omega_o + \Omega_y = \Omega$. Therefore, blacks receive nothing.⁸ However, there is also differential treatment of the young and old which favors the old such that $\Omega_o > \Omega_y \geq 0$. I refer to this kind of differential treatment as generational discrimination or *ageism*.⁹ Of course, old age is an immutable characteristic, so if I refer to age as being mutable, I am referring to youthful age.

Conflict can erupt along racial lines (i.e., blacks versus whites) or along generational lines (i.e., young versus old). There is a racial conflict when blacks challenge the status quo (i.e., racial discrimination) and there is a generational conflict when the young challenge the status quo (i.e., generational discrimination). When conflict erupts, it may take the form of lobbying, riots, demonstrations, political activism, litigation, etc. I assume the size of Ω is not affected by racial or generational conflict.

In each period, a racial conflict, if it occurs, precedes status-quo race-based distribution of Ω . Similarly, a generational conflict, if it occurs, precedes status-quo age-based distribution of Ω . This makes sense since there is no point in engaging in conflict if the status quo cannot be changed.

I assume that there are no subsequent racial conflicts after the end of racism (i.e., after blacks are successful in a racial conflict). Similarly, there are no subsequent generational conflicts if the young are successful in a generational conflict. And there is conflict if, at least, one group exerts a positive effort.

⁸The fact that blacks get nothing in the status quo is a normalization of their payoff. One may argue that differential status-quo payoffs based on certain traits (e.g., race and age) are due to differences in human capital or innate abilities, and so need not be discriminatory (e.g., Case and Paxson, 2008). For my purposes, all that I need is that there is some component of these differences in status-quo payoffs that is not due to differences in human capital or innate abilities (e.g., Darity and Mason, 1998; Charles and Guryan, 2008). But even if there are innate differences, such differences will only be average differences. Therefore, members of the group with the lower average innate ability will find it unacceptable that they face discrimination on account of the average characteristics of their group. This could lead to conflict

⁹*Ageism* was originally coined to describe discrimination against old people. However, the term is now routinely used to refer to any form of discrimination that is based on age.

The timing of actions is as follows:

Stage 1: Alliances may form (or not form) along racial or generational lines.

Stage 2: Each side adopts a “hostile” or “peaceful” stance. If either side is hostile, they receive conflict payoffs. Otherwise, they receive “peace payoffs”.

The model described above can be seen as a simple but fairly general model in which an immutable trait (race, ethnicity, gender) and a mutable characteristic (age, immigration status) determine the distribution of a fixed surplus or rent of size Ω in each period.¹⁰ Indeed, any form of discrimination can be seen as a way of distributing rents.¹¹

It is important to note that the only reason for conflict in my model is due to the desire of the disadvantaged group to obtain racial or generational equality and the opposing desire of the privileged group to maintain the discriminatory status quo. That is, there cannot be greater inequality as a result of further discrimination other than the inequality in the status quo. So there are only three possible outcomes: either (i) the young and old are treated equally, or (ii) blacks and whites are treated equally, or (iii) the status quo remains.

2.1 Equilibrium analysis

Looking ahead an alliance will only form if the alliance intends to adopt a hostile attitude. I solve the game backwards beginning in stage 2. Stage 1 is trivial because I do

¹⁰In Esteban and Ray (2008), this fixed surplus or rent is the fixed ethnic budget or class budget.

¹¹In a model with human capital or physical capital investment, discrimination *per se* could affect the size of the rent or surplus (see, for example, Coate and Loury, 1993). Also conflict could reduce the size of the surplus which makes peace more likely. This will affect my results if one assumes that racial conflict is sufficiently more destructive than generational conflict just as one might assume in Esteban and Ray’s model that ethnic conflict is more destructive than class conflict. However, as in Esteban and Ray (2008), I do not consider the effect of conflict on the size of the surplus.

not discuss alliance formation. I simply assume that alliances form if either party wants to adopt a hostile stance. Assuming that the conflicts are mutually exclusive,¹² I am interested in determining which of the two conflicts will occur in period 1.

Let E_b and E_w be the aggregate effort of blacks and whites in a racial conflict. Let P_b and P_w be the conflict success probabilities of blacks and whites respectively. I

assume that the conflict success function is of the ratio-form, $P_b = \frac{E_b + \eta}{E_b + E_w + 2\eta}$ and

$P_w = \frac{E_w + \eta}{E_b + E_w + 2\eta}$, where $\eta \geq 0$ is a parameter which captures the extent to which the

conflict technology or the politico-legal institutions are sensitive to rent-seeking effort (i.e., lobbying, litigation, riots, etc). Status-quo discrimination remains if

$E_b = E_w = 0$. Similarly, if we define E_o and E_y as the aggregate efforts of the old and young in a generational conflict, we can define the probabilities of success in a generational conflict by replacing E_b and E_w with E_o and E_y in the conflict success function.

Using l'Hopital's rule it is easy to see, for example, that $P_j \rightarrow \frac{1}{2}$ as $\eta \rightarrow \infty$ regardless of rent-seeking efforts, $j = b, w$. Hence, the politico-legal institutions are completely insensitive to rent-seeking efforts as η gets very large. In general, the higher is η , the less sensitive are the politico-legal institutions to rent-seeking efforts (Amegashie, 2006; Strulik, 2008).

A group's valuation is simply the difference in payoffs between winning and losing the conflict. Let V_m be the valuation of the out-group (i.e., blacks or the young) in

¹² I construct equilibria where this assumption of mutual exclusivity is true.

conflict m , where m denotes racial conflict or generational conflict. Then the out-group chooses its effort E_k to maximize

$$\Pi_k = \frac{E_k + \eta}{E_k + E_j + 2\eta} V_m - E_k \quad (1)$$

$k = y, b$ and k_j is the effort of the in-group, $j = o, w$.

Suppose the effort of the in-group is zero (i.e., $E_j = 0$). Then the out-group will not challenge the status quo if $\partial \Pi_k / \partial E_k \leq 0$ for all $E_k \geq 0$. This holds if $V_m \leq 4\eta$.

Therefore, the out-group will not challenge the status quo if it has a sufficiently low valuation. Otherwise, it will challenge the status quo. This result is insightful in proving proposition 1 below.

Proposition 1: *If and only if $\Omega_y > 0$, then there exists a unique subgame perfect equilibrium in which discrimination that is based on immutable traits such as race, ethnicity, or gender leads to conflict in period 1 while discrimination that is based on mutable characteristics such as age or immigration status does not lead to conflict. The converse result is not possible.*

The formal proof of proposition 1 is tedious. Space limitations do not allow me to present the proof but it is straightforward enough to present an intuitive proof.¹³ First, as argued below, blacks will not participate in a generational conflict. In the racial conflict,

¹³ The formal proof is available at http://www.uoguelph.ca/~jamegash/tolerable_proof.pdf

A two-period model provides a natural mechanism for modeling the change in the mutable trait. However, it makes the proof tedious because of the several scenarios in period 2 that must be taken into account in order to compute the valuations of the players in period 1. Given that the conflicts are assumed to be mutually exclusive in each period, the possible scenarios in period 2 conditional on the outcome of the game in period 1 are (a) racism and ageism, (b) racism with no ageism, (c) ageism with no racism. Each of these scenarios has to be taken into account for the analysis of the generational conflict and racial conflict in period 1. Also, the different possible values of η in period 2 must be taken into account. Finally, the proof is long because I consider free riding within alliances.

blacks and whites are fighting over the total surplus $(\Omega - 0) = \Omega$. If $\Omega_y > 0$, then young whites and old whites are fighting over the surplus $(\Omega_o - \Omega_y) < \Omega$ in a generational conflict. Therefore, the surplus that is being fought over in the racial conflict is bigger than the surplus in the generational conflict. If $\Omega_y = 0$, then $\Omega_o = \Omega - \Omega_y = \Omega$; so racial and generational conflicts will be over surpluses of the *same* size. Notice also that if $\Omega_y > 0$, then young whites have a higher payoff than blacks in the status quo. This means that the negative effect of racial discrimination is worse than the corresponding effect of age discrimination. Therefore, if $\Omega_y > 0$, then the valuations of the victims (i.e., blacks) and beneficiaries (i.e., whites) of racial discrimination in the racial conflict is relative high to the valuations of victims and beneficiaries of age discrimination. This is what drives proposition 1. This higher valuation captures the adverse *overarching effect* of discrimination that is based on an immutable characteristic like race *relative* to discrimination that is based on mutable characteristics. Recall that by overarching effect, I mean that the trait is used to deny a member of the out-group benefits in several aspects of his life (i.e., labor markets, schools, housing market, credit markets, personal relationships, etc).

3. Immutable traits and the complementary conditions for overarching effects

Note that if $\Omega_y = 0$, then there is no difference between young blacks and young whites in period 1 but there is a difference between them in their old age (i.e., period 2). Thus, in this case, there is only, what one might call, *intertemporal* discrimination. With this kind of discrimination, proposition 1 will not hold. Therefore, whether discrimination is based on an immutable trait is not what matters but instead whether the discrimination has an overarching effect. But in this particular case, treating young whites and young

blacks in period 1 as the same will be an incomplete, if not inconsistent, characterization of the history of societies that practise or have practised overt racism, sexism, or ethnic discrimination.¹⁴ For example, such an assumption will be at odds with the historical record of overt racism in apartheid South Africa and in the USA during the era of Jim Crow laws or discrimination against women in certain African and Middle Eastern countries.

It is easy to appreciate the point that if there is more at stake due to discrimination that is based on immutable traits, then such discrimination is more likely lead to conflict. However, there is a less obvious point that emerges from the analysis. That is, for some members of the out-groups, the overarching effect of the discrimination based on the immutable traits eliminates any benefits from trying to end the discrimination that is based on the mutable trait. Once an individual is the victim of discrimination along immutable dimensions such as race, ethnicity or gender, several other benefits are out of reach to him or her. Therefore, giving priority to fighting for these other benefits does not make sense if access to them is inextricably linked to race, ethnicity or gender. For example, if there is discrimination against the young and against blacks, then fighting against ageism brings no benefits to young blacks because the benefits that accrue to the in-group (i.e., the old, in this case) will not be available to blacks, regardless of age, so long as racism exists. In contrast, ending racism brings benefits even if ageism exists.

¹⁴On this issue, see Harris' (1993) argument on "whiteness as property". One may argue that differential status-quo payoffs based on certain traits (e.g., race and age) are due to differences in human capital or innate abilities, and so need not be discriminatory (e.g., Case and Paxson, 2008). For my purposes, all that I need is that there is some component of these differences in status-quo payoffs that is not due to differences in human capital or innate abilities (e.g., Darity and Mason, 1998; Charles and Guryan, 2008). But even if there are innate differences, such differences will only be average differences. Therefore, members of the group with the lower average innate ability will find it unacceptable that they face discrimination on account of the average characteristics of their group. This could lead to conflict.

Discrimination that is based on immutable traits like race and ethnicity can lead to alliances that find it easier to solve collective action problems. Easily-identifiable and immutable traits like race and ethnicity are also traits through which the victims of racial or ethnic discrimination seek their *identity* and therefore could imply that the costs of mobilizing collective effort along racial or ethnic lines may be low relative to the cost in the case of mutable characteristics. Therefore, the free-rider effect in racial and ethnic conflicts may not be strong enough to trump the higher valuation effect that stems from the overarching effect of discrimination that is based on immutable characteristics. This may be another reason why such forms of discrimination are more likely to lead to conflict.

Two important questions remain: (1) *how* is it possible that discrimination that is based on immutable traits can be designed to have overarching effect, and (2) *why* is such discrimination designed to have an overarching effect.

Regarding the first question, Balkin (1997, p. 2360) poignantly makes the point about the overarching effect of an immutable trait such as race or gender *relative* to a mutable trait by noting that:

“[T]here may be a status hierarchy between skiers and snowboarders. Being a skier rather than a snowboarder, however, is not a central feature of one’s social identity. It is not something that affects many overlapping aspects of one’s everyday interactions with others, or that has ripple effects in various parts of one life, including wealth, social connections, political power, employment prospects . . . By contrast, being a black person as opposed to being a white person, or being female as opposed to being male, is a central feature of one’s identity, at least in contemporary America.¹⁵ It does affect a large percentage of one’s personal interactions with others, and it has many mutually supporting and overlapping effects.”

¹⁵Of course, discrimination is not only a black-white issue nor is it restricted to the USA. In several parts of Africa, Asia, and Europe there is discrimination based on ethnicity, gender, and nationality. On racial and gender discrimination in the USA, see Darity and Mason (1998) and Charles and Guryan (2008).

A mutable trait cannot be used to create an overarching effect because its mutability means that it cannot be a central feature of one's identity in a social system or affect a large percentage of one's personal interactions with others. It is only an immutable trait that can have such a feature. Yet immutability is only a necessary condition for a trait to create an overarching effect. Other conditions must be met for an immutable trait to create an overarching effect.

It is only an in-group with a dominant economic and/or political power that can create a system of discrimination which has overarching effects on the out-group. Therefore, an implicit but important condition is that the in-group, like whites in apartheid South Africa, must have the economic and/or political power to dominate the out-group.¹⁶

Furthermore, an important complementary key condition is that the trait must be easily observable or identifiable¹⁷ with minimal information. Any other condition will be some variant of this condition. As an example, insurance firms may discriminate against people with immutable genetic dispositions to certain diseases. However, one's gene is not a central or easily visible feature of one's identity. Hence discrimination based on

¹⁶ To be sure, political power as in the ability to make the rules that govern the society is more important. For example, the Chinese in Malaysia and the Jews in Nazi Germany were (are) the victims of discrimination although they had economic power or were perceived to have economic power.

¹⁷ McAdams (1995) makes a similar point but does not link it to the immutability of the trait. This point echoes Balkin's (1997, p. 2366) argument that "[S]ocial hierarchies often assign differential social meanings to immutable traits because they make exit from low status more difficult." In other words, Balkin (1997) argues that the immutability of a trait is not what necessarily makes it bad as a discriminatory trait. However, societies use certain immutable traits as the basis of discriminatory practices because these traits are more efficient markers of discrimination. Here, I am arguing that the trait must also satisfy other properties.

immutable but almost invisible or unidentifiable traits cannot be designed to have overarching effects.¹⁸

Related to the previous point is the observation that identifying members of the in-group is important, among others, for monitoring behavior within the in-group. Therefore, the trait must lend itself to binary classifications (i.e., we versus them). For example, in the Jim Crow era of the USA or apartheid South Africa, it was straightforward to classify a person as white or non-white. While there are different shades of black skin color, what mattered was that the in-group was able to agree on a definition of non-whiteness or whiteness.¹⁹ On this point, an immutable trait like height cannot be used to create an overarching effect because it is difficult to determine who the members of the in-group are. This is because height is a continuous variable.²⁰ For example, suppose ϵ is a *very small* but positive number. If all people with a height of 6ft or more want to form an in-group, how would they know that someone who is $(6 + \epsilon)$ ft tall is a member of their group but someone who is $(6 - \epsilon)$ ft tall is not a member of their group?

It must also be easy to identify the trait, at least for the in-group, right from childhood. This makes it easier for the in-group to inculcate norms of behavior in its members at an early age and therefore enhances the stability of the discriminatory regime. At the risk of stretching the argument this means that even if one agrees that

¹⁸This is not to justify genetic discrimination. See Hoy and Ruse (2005) for an interesting discussion of the effects of genetic discrimination in insurance markets.

¹⁹ The argument is not that such racial classifications are easy or error-proof. The argument is that relative to other immutable traits such as height, such racial classifications are easier or less prone to error.

²⁰ While there may be discrimination based on an immutable trait like height, it does not seem to have been used as a discriminatory trait with an overarching effect in any known social system. There is some evidence that taller people earn, on average, more than shorter people. However, Case and Paxson (2008) argue that this need not be evidence of discrimination. Based on empirical analysis, they offer an alternative hypothesis to the effect that height is positively correlated with cognitive ability, which is rewarded in labor markets. Hersch (2008) present an alternative view.

beauty, intelligence, physical strength, or height are immutable, they may not be ideal traits for producing a discriminatory system with overarching effects because the exact nature of these traits, at least for some people, is revealed later in life. Indeed, the fact that they are revealed later in life gives them a property that is arguably akin to mutability.

Finally, given that parents are altruistic towards their children, the stability of the in-group is more likely to be undermined if heterosexual couples of the in-group could have biological children who have the primary characteristics of members of the out-group. On this point, race is a trait that is conducive to the stability of the in-group. It is almost impossible that heterosexual couples of the same race could have biological children of a different race. However, gender fails this property because men could have biological children who are women. This argument is consistent with Doepke and Tertilt (2008) who argue that men in England and the United States voluntarily gave some of their power to women. In their argument, men do not care about their wives because they lose from giving their wives a higher bargaining power in the household. But due to altruistic feelings towards their daughters, it is the interest of men that their daughters and the mothers-in-law of their daughters have bargaining power in the household. According to Doepke and Tertilt (2008), if the latter effect dominates the former effect, then men will voluntarily give some power to women. Borrowing from their reasoning, it follows that if the former effect dominates the latter effect, then using gender as the basis of discrimination will not undermine the stability of the in-group.

These complementary factors are required for proposition 1 to hold. The necessity of these factors for creating a discriminatory system with an overarching effect explains

why focusing on immutability *per se* may be misleading and is consistent with Balkin's (1997) point, mentioned in section 1, that "[F]ocusing on immutability *per se* confuses the physical existence of the trait with what the trait means in a social system."

Given that only certain immutable traits have the potential of producing overarching discriminatory effects, it follows that if an in-group wants to discriminate against an out-group with the goal of producing an overarching effect, it will choose an immutable trait that satisfies the conditions discussed above. The next question is "why would the in-group want to discriminate against the out-group with the goal of producing an overarching effect?"²¹ The simple answer is that an adverse overarching effect weakens the ability of the out-group to effectively challenge the discriminatory system.

By excluding the out-group from several aspects of social benefits (i.e., labor markets, credit markets, housing markets, schools, etc), the economic and political power of the out-group is weakened. Yet there is a trade-off. While creating such an overarching effect weakens the ability of the out-group to acquire the economic and political capital needed to fight the status quo,²² it increases the out-group's valuation of ending the discriminatory status quo. This latter effect may imply a higher chance of conflict if it is easier for the out-group to compensate for this disadvantage of the overarching system by investing in cheaper conflict activities like demonstrations. However, the in-group may still use the immutable trait to create a discriminatory system with overarching effects. To see this, suppose that the out-group would have expended an effort of $E_1 > 0$ to challenge the status quo if it were constrained (i.e., the system is designed to have an overarching

²¹ Notice that I am not trying to explain why the in-group chooses to discriminate. Given that they have shown to discriminate, I am interested in why they would choose to design it with the goal of producing an overarching effect. See McAdams (1995) for an interesting analysis of models that try to explain discrimination.

²² For example, this was a reason why Jim Crow laws banned inter-racial marriages.

effect). Suppose also that the out-group would not have challenged the status quo if the discriminatory system was not designed to have an overarching effect. This is because the out-group has a sufficiently low valuation. Then it is easy to show that the in-group may still have a higher equilibrium expected payoff with the overarching system because although there is a higher chance that status quo is challenged, the in-group derives a higher benefit (pecuniary or non-pecuniary) from excluding the out-group from enjoying certain benefits in several spheres of their (i.e., the out-group) lives.

A second reason why the in-group might want the system of discrimination to have overarching effects is to send consistent signals to the members of the in-group. For example, if the goal is to give the impression that members of the in-group are superior to members of the out-group, then creating a system where the members of both the in-group and out-group have equal status in some spheres of life but unequal status in other spheres of life creates conflicting signals in the minds of members of the in-group and undermines the internal cohesiveness of the group.²³ Therefore, a system that uniformly discriminates against members of the out-group in every sphere of life may be promoted in order to strengthen the cohesiveness of the in-group.²⁴

To summarize, I have argued that a dominant in-group has the incentive to create a system of discrimination that has an overarching effect on the out-group. I have also argued that *if* the goal is to create a system of discrimination that has such an overarching

²³Of course, there can be discrimination within the in-group without affecting the stability of the group so long as the subgroup with lower status within the in-group is not the dominant group. For example, during the Jim Crow era, women had lower status within the in-group of whites.

²⁴For a theory of discrimination based on signaling, see Posner (1998). He makes the interesting point that the marker for discrimination may be changed as the original marker becomes less effective in monitoring the actions of the members of the in-group. For example, he argues that in Spain in the 14th century and in Germany in the 19th century, discrimination against Jews using religion as a marker become less effective. Therefore, the leaders of the in-group promoted race as the marker of discrimination against Jews.

effect, then the in-group will use an immutable trait that satisfies certain properties. Examples of these immutable traits are race, ethnicity, and gender. These two arguments imply that discrimination that is based on immutable traits like race, ethnicity, and gender will have overarching effects. Consequently, proposition 1 follows.

The preceding argument implies that classifications based on immutable traits like race, ethnicity, and gender should be treated as suspect classifications because they would tend to have overarching effects. Of course, to treat a classification as suspect does not necessarily mean that differential treatment based on the classification will not be allowed. It only means that the classification will receive a heightened level of scrutiny. Therefore, consistent with my analysis, the level of scrutiny would ensure that the classification does not have an overarching effect. This argument accords well with the requirement of USA federal courts' judicial review standard of *strict scrutiny* wherein policies or laws based on classifications deemed suspect must, inter alia, be *narrowly tailored*.²⁵

If I were to venture into the realm of normative analysis, a controversial implication of my analysis would be that if the in-group is not dominant, then classifications or policies (e.g., affirmative action) that favor the in-group should not be deemed suspect, regardless of the immutability of the characteristic on which the classification is based. However, in the interest of fairness and consistency, this would be an arguably controversial defense. This may be why such classifications are subject to a heightened scrutiny regardless of the political dominance of the beneficiaries.

²⁵ However, my goal is not to necessarily rationalize the jurisprudence of USA federal courts.

4. Conclusion

My analysis of discrimination is primarily a positive analysis. To be sure, there are normative principles like equal protection of the US constitution that informs a society's attitude to discrimination. Indeed, as evidenced in the quote by the Harvard Law Review (1969) in section 1 of this paper, the *intrinsic* aversion to discrimination that is based on immutable traits is driven by the ethical or moral principle that one should not be held responsible for things that are beyond his/her control. From the standpoint of a positive analysis, the legislature and courts may allow certain forms of discrimination if such discrimination is less likely to trigger social conflict. Again, Balkin (1997, p. 2313) makes the point forcefully by noting that “[C]ourts often look to the “political powerlessness” of a group when deciding whether to treat it as disadvantaged and classifications affecting it as suspect.”²⁶ In this regard, one may argue that the courts take an instrumental or utilitarian view of discrimination.²⁷

Of course, the courts and society may also have an intrinsic aversion to certain forms of discrimination such as racial or gender discrimination, and in such instances may take a purely non-utilitarian or Rawlsian position wherein a disproportionate weight is given to the welfare of the victims of such discrimination. To the extent that the aversion to racial or gender discrimination affects the likelihood of social unrest, the actions of lawmakers and the courts in such situations may be a combination of the

²⁶ Indeed, Balkin (1997, p. 2340) makes a stronger point by noting that “... it is unlikely that members of higher status groups (who tend to dominate the legislatures and the judiciary) will even recognize the possibility of a problem until a social movement appears on the scene to demand increased status.”

²⁷ Tribe (1985) presents a critique of the utilitarian or instrumental approach to the law.

utilitarian and non-utilitarian positions.²⁸

If a particular type of discrimination does not lead to conflict, this need not imply that the victims or even all beneficiaries approve of such discrimination. The victims may grudgingly accept such discrimination because the politico-legal institutions are not sufficiently sensitive to efforts to change the status quo (i.e., η is not sufficiently low).²⁹ Some discrimination may be politically feasible or tolerated because the group that is the target of perceived discrimination may accept it on account of religious or cultural beliefs.

My argument is not that conflicts driven by discrimination that is based on mutable characteristics will not be observed in any circumstance. The point is that such conflicts should be observed less frequently relative to conflicts that are driven by discrimination based on immutable characteristics.

That some discrimination is tolerated (i.e., does not lead to conflict) is an indication that the principle of equal protection may not be consistently and uniformly applied. The practical application of the principle by the courts involves a balance of political, economic, legal, moral, social, and historical considerations (Balkin, 1997; Siegel, 1997). On the other hand, the social intolerance for some forms of discrimination

²⁸ On this point, Siegel (1997, p. 1119) notes that "... attempts to dismantle a status regime can discredit the rules and reasons employed to enforce status relations in a given historical era, and so create pressure on legislators and jurists to reform the contested body of law ..." She continues "... it is highly unlikely that the regime that emerges from the reform will redistribute material and dignitary "goods" in a manner that significantly disadvantages the beneficiaries of the prior, contested regime. But if the reformed body of law is to reestablish its legitimacy, it must distribute social goods in a manner that can be differentiated from the prior, contested regime. ... These reforms may well improve the material and dignitary circumstances of subordinated groups, but they will also enhance the legal system's capacity to justify regulation that perpetuates inequalities among status-differentiated groups."

²⁹ This point is also made in Ullmann-Margalit and Sunstein (2001). They refer to this situation as "entrenching law" as opposed to "transformative law".

such as those based on race, gender, and ethnicity implies that the social costs of such discrimination makes them unsustainable in the long run.

In spite of the simplicity of my model, it still sheds some light on the political economy of tolerable discrimination. The overarching effect of discrimination based on immutable and easily identifiable characteristics such as race, ethnicity, and gender partly explains why such discrimination has led to conflict as evidenced in the USA, South Africa, the Middle East, sub-Saharan Africa, and several parts of the world.

References

- Amegashie, J.A. (2006). A Contest Success Function with a Tractable Noise Parameter. *Public Choice* 126: 135-144.
- Balkin, J.M. (1997). The Constitution of Status. *Yale Law Journal* 106: 2313-2374.
- Case, A., and Paxson, C. (2008). Stature and Status: Height, Ability, and Labor Market Outcomes. *Journal of Political Economy* 116: 499-532.
- Charles, K.K., and Guryan, J. (2008). Prejudice and Wages: An Empirical Assessment of Becker's *The Economics of Discrimination*. *Journal of Political Economy* 116: 773-809.
- Coate, S, and Loury, G.C. (1993). Will Affirmative-Action Policies Eliminate Negative Stereotypes? *American Economic Review* 83: 1220-1240.
- Darity, W.A., and Mason, P. (1998). Evidence of Discrimination in Employment: Codes of Color, Codes of Gender. *Journal of Economic Perspectives* 12: 1-29.
- Doepke, M., and Tertilt, M. (2008). Women's Liberation: What's in it for Men? *Quarterly Journal of Economics*, forthcoming.
- Ely, J.H. (1980). *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.
- Esteban, J., and Ray, D. (2008). On the Salience of Ethnic Conflict. *American Economic Review* 98: 2185-2202.
- Gilreath, S. (2006). Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis--with a View toward a Constitutional Moral Imperative. *Wake Forest University Legal Studies Paper* No. 1161247.
- Harris, C.I. (1993). Whiteness as Property. *Harvard Law Review* 106: 1707-1791.
- Harvard Law Review (1969). Developments in the Law: Equal Protection. *Harvard Law Review* 82: 1065-1192.
- Harvard Law Review (1987). Justice Steven's Equal Protection Jurisprudence. *Harvard Law Review* 100: 1146-1165.
- Hersch, J. (2008). Profiling the New Immigrant Worker: The Effects of Skin Color and Height. *Journal of Labor Economics* 26: 345-386.
- Hoy, M., and Ruse, M. (2005). Regulating Genetic Information in Insurance Markets. *Risk Management and Insurance Review* 8: 211-237.

- McAdams, R.H. (1995). Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination. *Harvard Law Review* 108: 1003-1084.
- Neumark, D., and Stock, W.A. (1999). Age Discrimination Laws and Labor Market Efficiency. *Journal of Political Economy* 107: 1081-1125.
- Posner, E.A. (1998). Symbols, Signals, and Social Norms in Politics and Law. *Journal of Legal Studies* XXVII: 765-798.
- Robinson, J.A. (2001). Social Identity, Inequality, and Conflict. *Economics of Governance* 2: 85-99.
- Sadurski, W. (2005). Scrutinizing Discrimination: A Conceptual and Normative Analysis of Legal Equality. *European University Institute Law Working Paper No. 2005/19*.
- Shapiro, M.R. (2002). Treading the Supreme Court's Murky Immutability Waters. *Gonzaga Law Review* 38: 409-445.
- Siegel, R. (1997). Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action. *Stanford Law Review* 49:1111-1148.
- Strulik, H. (2008). Social Composition, Social Conflict, and Economic Development. *Economic Journal* 118: 1145-1170.
- Swift, J. (2006). Justifying Age Discrimination. *Industrial Law Journal* 35: 228-244.
- Tribe, L.H. (1980). The Puzzling Persistence of Process-Based Constitutional Theories. *Yale Law Journal* 89: 1063-1080.
- Tribe, L.H. (1985). Constitutional Calculus: Equal Justice or Economic Efficiency? *Harvard Law Review* 98: 592-621.
- Ullmann-Margalit, E., and Sunstein, C.R. (2001). Inequality and Indignation. *Philosophy and Public Affairs* 30: 337-362.
- Yale Law Journal (1981). Quasi-Suspect Classifications and Proof of Discriminatory Intent: A New Model. *Yale Law Journal* 90: 912-931.