

THE SEPARATION OF RACE AND STATE

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My approach will be somewhat different from that of many of the other contributors. As the title of the panel suggests, much of the discussion has focused on the role of government policy in narrowing socio-economic gaps among the races. My approach will differ from the position that has come to be associated with many conservatives, and indeed with many of the other contributors to this Symposium. Some conservatives argue against current strategies to improve the socio-economic status of African-Americans on the ground that the current policies do not actually help minorities. I must confess that I do not find this line of argument appealing, for surely we could devise *some* set of policies that would effectively transfer wealth to minorities. Rather, I prefer to address a more basic question: What are the consequences of having *any* governmental system of wealth transfers among ethnic groups?

This question arises regardless of the effectiveness of any particular means of making the transfers. Once I have discussed the consequences of having government ethnic transfer policies, I will briefly discuss two related questions: Why have governments intervened so frequently in the non-economic relationships among ethnic groups? And why is it that race is so consistently politicized, even in America, where Martin Luther King's dream of a color-blind society resonates so strongly?

What are the consequences of having any policy of government wealth transfers among ethnic groups? Once there is in place a system that permits redistribution to some ethnic groups from others, the incentives for groups to organize themselves politically in order to obtain such transfers dramatically increase. This follows from the more general principle, demonstrated time and again, that whenever the government announces that one group or another may possibly be eligible to receive some kind of transfer, people will invest effort to obtain the transfers.¹

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1. The following discussion is based upon my article, *Racism as Rent Seeking*, 27 *ECON. INQUIRY* 661 (1989).

This general phenomenon is known as rent seeking. Governments often create situations in which select individuals or groups can receive returns in excess of normal market returns or opportunity costs. These excess returns are known as rents. Once such a situation has been created by the political process, people become willing to invest resources and to compete to obtain the privilege of earning rents.²

The study of public choice has shown that small and narrowly concentrated interest groups are more likely to be effective at organizing to compete for rents than larger and more diffuse groups. This is because no one individual is willing to make the effort and expend the resources to organize the group, even when all the members of the group would benefit from organizing.³ Ethnic groups, however, have certain natural advantages in the rent-seeking process. Their members are easily identified. Ethnic groups are often already organized for religious or cultural purposes. These organizational structures that are already in place can be utilized for political purposes, often at a lower cost than would be required to organize a political coalition from scratch.

Thus, once government begins transferring wealth based on race or ethnicity, it becomes advantageous for people to define themselves more sharply as ethnic groups. From an economic standpoint, the very existence of ethnic transfer programs alters the costs and benefits of defining oneself ethnically. As people define themselves as members of an ethnic group, they correspondingly define others as outsiders. In this way, the government can create incentives for race consciousness, even among people who initially felt no antagonisms toward each other. In fact, the late Professor W.H. Hutt argued that this was the central feature of South African apartheid:

We do not, however, find in colour prejudice as such the main origin—nor, perhaps, even the most important cause of economic colour bars. The chief source of colour discrimination is, I suggest, to be found in the natural determination to defend economic privilege, . . . non-whites simply happening to be the essentially underprivileged groups in

2. The classic articles on rent seeking are Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); and Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). For a survey of the enormous theoretical and empirical literature, see Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575 (1982).

3. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

South Africa.⁴

The presence of ethnic-based rents also creates a necessity for legally defining who is or is not eligible for obtaining the rents. So, not only do the ethnic groups themselves have an incentive to define their boundaries more sharply, but the government itself must develop standards of group membership that can be impartially applied. The matter of categorization became important during the Jim Crow era,⁵ as shown by the high volume of litigation to determine whether certain persons met the legal definition of "black."⁶ Each state developed its own rules to determine what mixture of black ancestry constituted being black, for example, for the purpose of deciding which students were entitled to attend schools set aside for whites only.⁷ Parents pursued litigation if they thought that their children might be "white enough" to clear the hurdles to obtain the privileged position of attending the superior schools for whites only.⁸

Problems of categorization arose in other contexts, as well. In *Plessy v. Ferguson*,⁹ for example, Homer Plessy was chosen as the litigant because he appeared to be white.¹⁰ Plessy's counsel argued that Louisiana's separate coach law deprived him of the

4. W.H. HUTT, *THE ECONOMICS OF THE COLOUR BAR: A STUDY OF THE ECONOMIC ORIGINS AND CONSEQUENCES OF RACIAL SEGREGATION IN SOUTH AFRICA* 27 (1964).

5. The Jim Crow era refers to the period of legalized separation of the races, which corresponds roughly to the period between the Supreme Court's decisions in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

6. See, e.g., *Mullins v. Belcher*, 142 Ky. 673, 134 S.W. 1151 (1911) (holding that, under Section 187 of the Kentucky Constitution, which provided for separate schools for white and "colored" children, that the latter were those children whose "proportion of negro blood is one-sixteenth").

7. See P. MURRAY, *STATES' LAWS ON RACE AND COLOR* (1950). The 12 southern states had definitions of "black," "negro," or "colored" in their constitutions or statutes, or developed such definitions through case law. For example, the Mississippi Constitution defined negro or mulatto as "a person having one-eighth or more blood." Miss. CONST. art. XIV, § 263 (1890). Although Louisiana had no statutes providing a definition of "negro," the Louisiana courts developed case-law definitions. See, e.g., *State v. Treadway*, 126 La. 300, 52 So. 500 (1910). See also C. MAGNUM, *THE LEGAL STATUS OF THE NEGRO* (1940). The first chapter of this work is entitled "What Is a Negro?", and gives a state-by-state listing of the relevant statutes and case law.

8. For evidence of the quality difference between schools for whites and schools for blacks, see Margo, *Race, Educational Attainment, and the 1940 Census*, 46 J. ECON. HIST. 189 (1986); R. MARGO, *DISENFRANCHISEMENT, SCHOOL FINANCE, AND THE ECONOMICS OF SEGREGATED SCHOOLS IN THE UNITED STATES SOUTH, 1890-1910* (1985); and Smith, *Race and Human Capital*, 74 AM. ECON. REV. 685 (1984).

9. 163 U.S. 537 (1896).

10. See *Plessy*, 163 U.S. at 541 ("The petition for the writ of prohibition averred that Petitioner was seven eighths caucasian and one eighth African blood; that the mixture of colored blood was not discernable in him. . .").

valuable property right of being known as a white person.¹¹

It is easy to see that a government structure that allows transfers among ethnic groups alters the incentives to define oneself ethnically. If the net transfers go from blacks to whites, people will have an incentive to be defined as white, at least officially, and probably for more informal purposes as well. If the net transfers go from whites to blacks, this fact increases the incentives for black nationalism and separatism.

One conclusion that might be drawn from this discussion is that governmental income transfers among ethnic groups should be prohibited. And this is a conclusion that I certainly support, believing as I do that government should not be in the business of encouraging ethnic divisiveness and separatism.¹² The problem is deeper and more general, however, than a simple prohibition on quotas or on ethnic set-aside programs, because the modern American state creates rents in a wide variety of areas, and provides transfers to numerous groups within society. I contend that these rents and transfers, too, need to be examined for their impact on the socio-economic gap between the races, and for their impact on the political relations among the races.

Why do I say this? First of all, many of the numerous forms of regulations, licensing requirements, quotas, and the like, provide rents to someone in the economy. The existence of these rents induces rent-seeking activity, as described above; that is, the existence of returns in excess of opportunity costs creates a queue of people trying to obtain those returns. The very existence of the queue often allows those with responsibility for allocating the rents the opportunity to indulge their private preferences.¹³ That is, regulators who allocate scarce

11. See *id.* (petition stated that Plessy "was entitled to every right, privilege and immunity secured to citizens of the United States of the white race").

12. I argue elsewhere, however, that a more fundamental problem is to recognize that both separateness and integration are of value to people in different contexts. The more difficult question is how to determine the relative amounts of separation and integration that would be desirable, from the point of view of the participants themselves. For a preliminary attempt to address some of these issues, see Roback, *Plural but Equal: Group Identity and Voluntary Integration*, 8 Soc. PHIL. & POL'Y — (forthcoming 1991).

13. This argument has long been made with respect to the allocative effects of the minimum wage. For a survey of the literature regarding this issue, see Brown, Gilroy & Kohen, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487 (1982). For an earlier, more focused treatment, see Welch, *Minimum Wage Legislation in the United States*, 12 ECON. INQUIRY 285 (1974).

political resources are probably more likely to allocate them to their friends, relatives, or neighbors—or, more generally, simply to people with whom they are familiar and comfortable. It would not be surprising if many of these people proved to be of the same ethnic background as the regulator. This type of bias could exist quite independently of anyone's conscious intention.

Similarly, regulations that are neutral on their face may prove to have a disparate impact on different groups. Something of this kind seems to have resulted from the maximum-hours restrictions for woman workers: These restrictions had a disproportionate impact upon immigrant women.¹⁴

Many conservatives disdain affirmative action and minority set-asides as nothing but income transfers to African-Americans. And indeed, these programs certainly can be viewed in that light. Blacks are not the only Americans to whom transfers flow, however. Blacks did not invent the rent-seeking process; in fact, it is not even clear that they are net beneficiaries, all rent transfers considered. So long as the timber companies are unwilling to give up the subsidized Forest Service, so long as the teachers' unions are unwilling to give up the taxpayer-supported Department of Education, why should African-Americans give up the Equal Employment Opportunity Commission? I can think of no particular reason why ethnic minorities should be the first groups in the economy to give up their rents.

The general problem is that the creation and seeking of transfers is deeply imbedded in modern American political life. In my view, this process has particularly devastating consequences when ethnic groups are among the rent seekers. But it is quite unrealistic, not to mention unfair, to expect ethnic groups to demure voluntarily from the process of seeking government transfers when so many other groups are engaged in the same process.

In this sense, the transfer society has the characteristics of a Prisoners' Dilemma problem.¹⁵ If a system of transfer creation is in place, it is in each group's interest to try to obtain its

14. See Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980).

15. The literature on the Prisoners' Dilemma problem is vast. For a textbook treatment of the problem, see D. KREPS, *A COURSE IN MICROECONOMIC THEORY* 503-50 (1990).

share. Groups that do not participate in the scramble for rents are left behind with what has been colorfully called the "sucker's payoff." On the other hand, everyone would be better off if the entire transfer process could somehow be stopped. No one, however, is willing to take a unilateral step toward ending the mutual destruction.

The problem of governmental intervention into race relations extends beyond the simple transfer of wealth and income. Often, governments have intervened in areas that are not usually associated with pure income transfers. For example, many of the segregation ordinances of the Jim Crow era do not appear to have transferred wealth, as ordinarily understood.

One obvious question is why these non-wealth transfer interventions arose. Why, for instance, did municipalities in so many southern states pass streetcar segregation laws? From my reading of the records of the introduction of streetcar segregation laws, I found that, in many cities, streetcar companies resisted these laws because providing separate cars and sections was too expensive.¹⁶ The companies also feared the loss of revenue that might arise as irate black passengers boycotted the cars. In some cities, even the white passengers seemed almost indifferent to such ordinances.

Who, then, wanted these laws badly enough to work for their passage? The answer seems to be that ambitious politicians could appeal to a prejudiced white constituency that might want segregation, but not badly enough to bear its costs themselves. By passing a segregation law, the politicians could impose costs on groups that did not have much political impact: streetcar companies, which were regulated utilities that everyone loved to hate; and black passengers, who were by this time disenfranchised as voters.

Therefore, the reason that governments so often intervene in the non-economic relations among ethnic groups is very similar to the reason that they intervene in economic relations. So long as the political system is available to ethnic entrepreneurs to make their constituencies better off, the temptation to do so is almost irresistible. The streetcar segregation laws alluded to above were passed in the 1890s and early 1900s, after the Supreme Court had clearly ruled that politically created segre-

16. See Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893 (1986).

gation was permissible.¹⁷ Not coincidentally, black voters had been disenfranchised by this time, as well.¹⁸ In our own time, the government has made a commitment to ending the inequalities created in the Jim Crow period and thereafter. The difficulty with this commitment is that it makes the tools of politics available to a very broad class of ethnic entrepreneurs. Indeed, the availability of political mechanisms for realigning the relations among the races creates incentives for these entrepreneurs to broaden and expand the interpretation of the moral mandates of the civil rights movement.

The consistent politicization of race in the United States is somewhat astonishing, if one were to consider the loftiness of our founding documents, and the fact that Martin Luther King's dream of a color-blind society continues to resonate so deeply with us. But the politicization of race is not so astonishing once one considers the incentives we have unwittingly created for the process to continue. I repeat my earlier comment: African-Americans did not invent the game of American politics, with all of its transfer seeking and creation. African-Americans are simply playing by the rules that were created long before their active participation in American political life.

If we are ever to escape the cycle of one group being on top and the next group trying to catch up, we need to restrain ourselves in the ordinary course of politics. I do not believe that Congress or the Supreme Court can ever achieve this restraint independently of the people. Ultimately, all of the groups in society will have to agree that the costs of devouring one another are too high. I hope that, through forums like this, people will begin to think in these terms, and truly reach the ideal of the separation of race and state.

17. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

18. See generally J. KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).