

Even Here, Freedom of Contract and Association

Lecture handout/slides by
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For the Markkula/CSI event at Santa Clara University
“Should Americans Be Allowed to Discriminate?”
A Debate between Klein and William Sundstrom
(Both speakers affiliation: Economics, SCU)
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“[T]he movement of the
progressive societies has hitherto been a
movement *from Status to Contract*.”¹

¹ Sir Henry Sumner Maine, *Ancient Law* (1861), p. 141; italics in original.

Spencer's Law

Herbert Spencer (1820-1903): An English political and social philosopher, a leading theoretician of liberalism in the 19th century sense, which roughly corresponds to what we now call libertarianism.

Like John Stuart Mill, he favored radical, progressive reform of the libertarian sort; he strongly advocated equality before the law for people of either gender and of any race. He sat with Mill and other radical liberals on a Committee to investigate police violence against blacks in the British colony of Jamaica – violence that left 400 Jamaicans dead. On this issue, Mill and Spencer were opposed by racists Thomas Carlyle and John Ruskin. [On this matter see <http://www.econlib.org/library/Columns/LevyPeartdismal3.html>]

Spencer's Law:

- (1) A social problem gains attention, concern, and controversy when its severity is diminishing. Social movements to remedy problems gain influence and support especially during times when their cause is progressing.
- (2) The social movement for improvement starts as voluntary, grass-roots action but often ends in governmentalization. The movement often becomes political and culminates in pulling the levers of government coercion such as taxation or restrictions on individual liberty.

Sometimes the cause is about reforming bad government law – reforms such as abolition, repealing Jim Crow laws, allowing gay adoption, and allowing gay marriages.

But often the cause is about problems that need not or should not be politicized or governmentalized.

Examples:

Educating one's children	→	Government schooling
Temperance	→	Alcohol prohibition
Concern over narcotics	→	Drug prohibition
Quitting smoking	→	Bans and sin taxes
Outcry over safety	→	the FDA
Labor movement	→	Labor market restrictions

Explanations for the second part of Spencer's Law:

A social movement generates activists who become visible and vocal interests groups. The activists often become zealots and want to carry the cause *too far*. The ultimate form of reform, the ultimate form of influence, is altering government rules for society and marshalling the police power that stands behind those rules. In other words, all ordinary citizens are subjected to government force in the name of the cause.

Activists seek the “brass ring” of governmentalization for three reasons:

- (1) It is a way of establishing the activists’ own prestige and influence. It serves their ego and their material interest.
- (2) Governmentalization might channel public resources (such as tax-dollars) into serving the cause.
- (3) Governmentalization is perceived to be an official affirmation of the cause and validation of the movement. Many regard governmentalization to be a way for “the people” to express “what we think” or “what our values are.”

Spencer’s Lament:

Spencer felt that government was not a proper or especially capable means of serving social goals. (He believed government should be limited to “nightwatchman” functions.) Spencer lamented that *many good causes culminate in legislation that increased the size and power of government and reduced citizens’ liberty.*

I view anti-discrimination law as an example of Spencer’s law.

Antidiscrimination Laws Violate Freedom

Maryland used to prohibit whites and blacks from playing tennis together. H.L. Mencken protested:

“Is such a prohibition supported by anything to be found in common sense and common decency? My answer is a loud and unequivocal No. A free citizen in a free state, it seems to me, has an inalienable right to play with whomsoever he will, so long as he does not disturb the general peace. If any other citizen, offended by the spectacle, makes a pother, then that other citizen, and not the man exercising his inalienable right, should be put down by the police.”²

But if freedom means being allowed to play tennis together, it also means being allowed *to choose not to* play tennis together.

U.S. Supreme Court (1984, 2000):

“Freedom of association plainly presupposes a freedom not to associate.”

Richard Epstein:

“An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all . . . By its nature the antidiscrimination principle is interventionist.”³

Along with self-ownership, the *freedom of contract* (or of association) is a cornerstone of *freedom or liberty*, as understood by the whole classical-liberal tradition, exemplified by such figures as Locke, Hume, Smith, America’s founding fathers, Mary Wollstonecraft, JB Say, Bastiat, the Abolitionists, Margaret Fuller, Mill, Spencer, Sumner, Mises, Hayek, Coase, Friedman, Buchanan and Sowell.

I believe that only libertarian-liberal notions of freedom (or liberty) are really coherent and common sensical. Real freedom entails the freedom of contract.

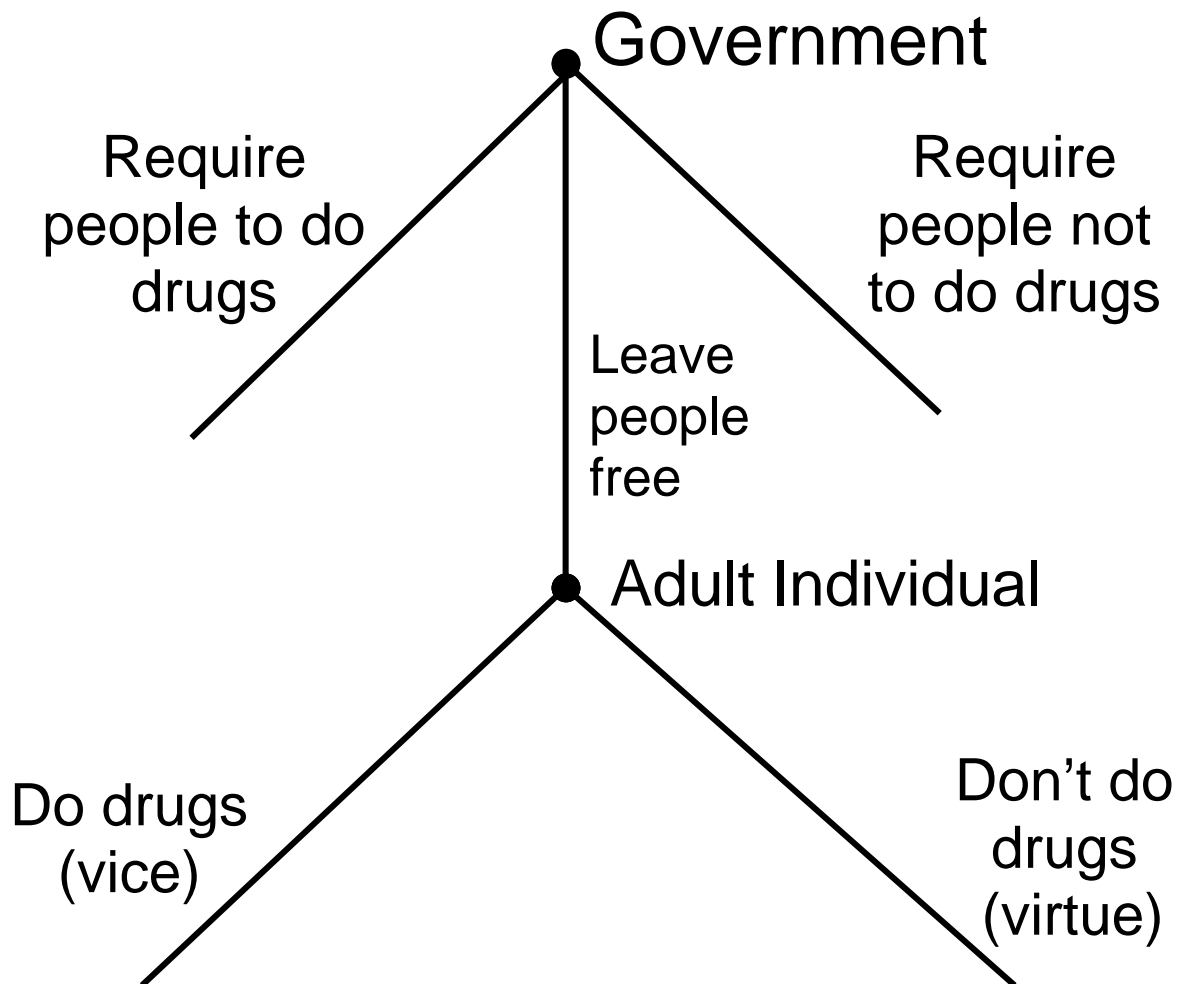
This is not to say that antidiscrimination laws are necessarily bad; sometimes freedom should be restricted.

² *Balt. Eve. Sun* 1948, reprinted in *The Impossible H.L. Mencken* (1991), p. 205; in quoting I’ve taken minor liberties.

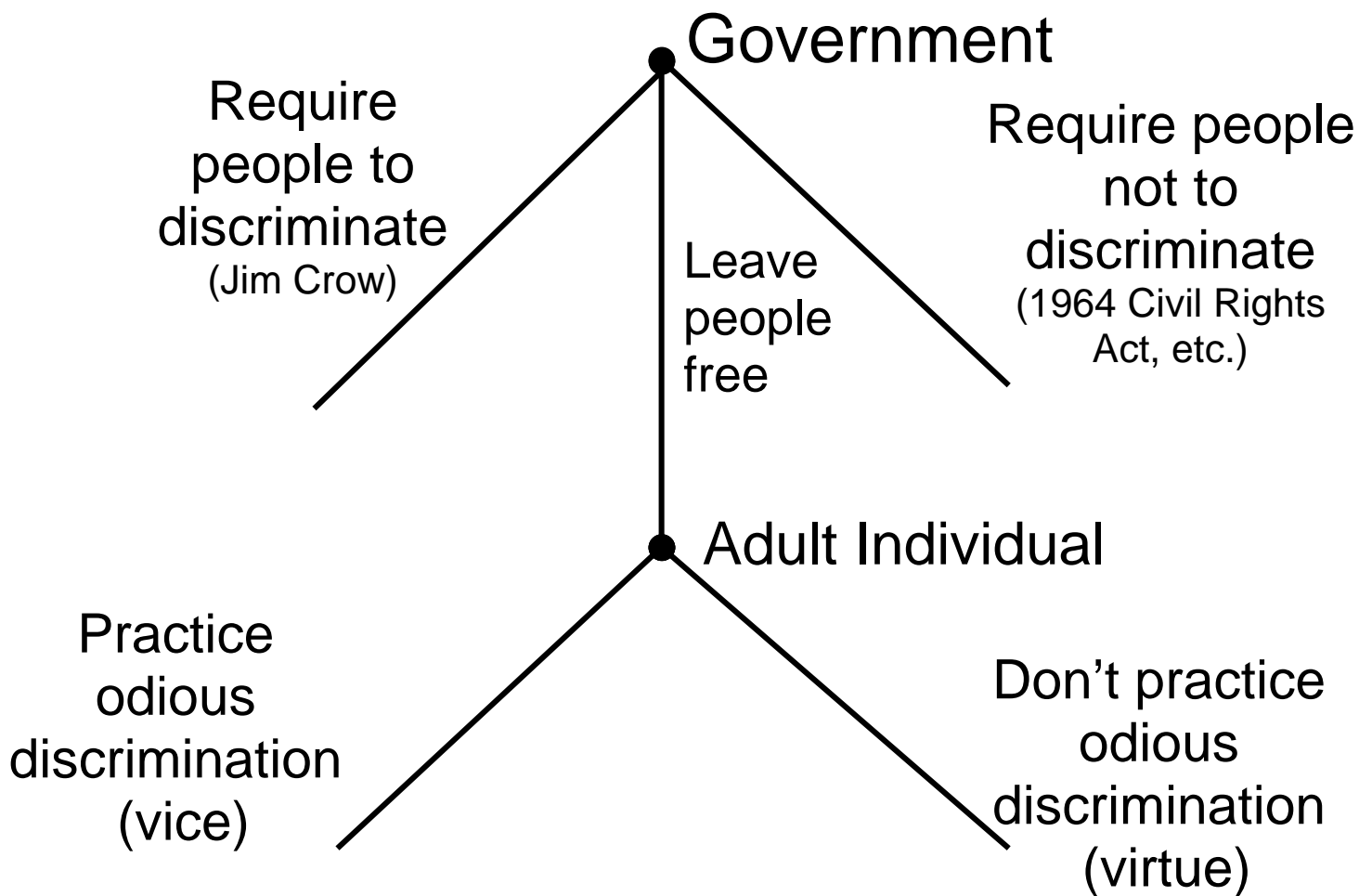
³ Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (University of Chicago Press, 1992), p. 3-4.

Overcoming Governmentalized Moral Reasoning

Government Policy on Drug Freedom



Government Policy on Discrimination Freedom



Historical Sketch of Racial Discrimination Policy

1865: Emancipation

1868: Fourteenth Amendment: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

1870-96: Race relations in the South were in flux. Though blacks remained much poorer than whites, blacks advanced economically more rapidly than whites.⁴ White racism and economic interest used the levers of government power to create laws that, explicitly or implicitly, kept blacks down.

1896: *Plessy v. Ferguson*.

A Louisiana statute required the separation of races on railcars. The US Supreme Court upheld the statute. Thus, the Federal government said it's okay for state and local governments to forcibly prevent people from mixing and integrating, as long as the services provided to blacks and whites were of equal quality.

Robert Higgs: “[*Plessy v. Ferguson* opened] the doors for a sweeping, legally sanctioned separation of the races . . . As everyone knows, the ‘separate-but-equal’ facilities provided for blacks were in fact almost invariably inferior, usually grossly inferior.”⁵

Often the “separate” services were simply *nonexistent*. Hence, forced separation often was, *de facto*, *forced discrimination against blacks*.

Moreover, the Supreme Court laid down the odious doctrine that integration may be regarded as a public danger! The Court wrote: “Laws permitting, *and even requiring*, [the two races’] separation . . . have been generally, if not universally, recognized as within the competency of the state legislatures, in the exercise of their *police power*.” [The “police power” is a way of saying government may force people to do things that supposedly preserve public safety.]

In a lone dissent, Justice John Marshall Harlan wrote: “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.”

Jim Crow [1880-1964]: The Extensive System of State and Local Law to Implement Racism, to Keep Blacks Down. [The Term “Jim Crow” comes from a black character in minstrel shows.]

⁴ Robert Higgs, *Competition and Coercion: Blacks in the American Economy, 1865-1914* (Cambridge University Press, 1977), p. 117. Not all scholars are convinced about Higgs's claim of relative advance.

⁵ Higgs, *Competition and Coercion*, p. 90.

To racists and cheats influencing state and local government, Plessy was like a green light from the Feds *to require discrimination against blacks*.

There was an explosion of laws requiring separation and discrimination, by restricting the freedom of contract and the freedom of association. Jim Crow is a negation of the free market.

[See examples from the MLK National Historic Site accompanying this handout. Available at http://www.nps.gov/malu/documents/jim_crow_laws.htm]

A common misconception: That the Jim Crow laws simply codified racist social norms that people would have practiced anyway.

The case of streetcars was studied by Jennifer Roback Morse:
“[S]egregation ordinances were not initially successful in many cities. Streetcar companies either ignored the law or blatantly refused to enforce it . . . Many streetcar companies refused to enforce the law because they believed it would be too expensive. There is little indication that streetcar companies initiated legislation or that they would have segregated in the absence of legislation.”⁶

Another Evil Deed of Governments: Allowing Private Coercion

Higgs: “Especially in the rural South the sheriff, his deputies, and the local judge normally awaited the behest of influential whites . . . One black aptly described the trial justices as men ‘whose judgment and decisions the “Boss” influences as I would the movements of a devoted dog. Under these circumstances the administration of the law was casual and arbitrary . . . [T]he black could expect no legal protection whatever against intimidation or violent abuse by the whites, as literally thousands of unpunished lynchings attest. [D]uring the years 1882-1915 about 3,000 blacks died at the hands of mobs.”⁷

Incidentally, one of the ways government manipulated the balance of power was laws that stripped blacks of the freedom to own and carry guns.

The Failure of Race Relations to Progress Was Rooted in the Two Forms of Coercion:

Epstein: “The explicit discrimination in the South and elsewhere was preserved by the use of coercion, both by state law [Jim Crow] and by private individuals (such as the Ku Klux Klan) whose activities were left unchecked by state agents.”⁸

Higgs: “The fountainhead of effective discrimination, then, whether public or private, lay in the governments of the Southern states, counties, and

⁶ Jennifer Roback [Morse], “The Political Economy of Segregation: The Case of Segregated Streetcars,” *Journal of Economic History*, Dec. 1986, p. 916.

⁷ Higgs, p. 124, 90.

⁸ Epstein, *Forbidden Grounds*, p. 93-94.

cities, where the racial monopoly of politics allowed the hostile whites to treat the blacks as they pleased.”⁹

Caveat. This is not to say that racism existed only because governments perpetrated or tolerated coercion. But the progressive forces of free competition were severely suppressed, resulting in a *lack of progress* toward a more liberal, cosmopolitan society in which people accord each other equal dignity.

Other Coercive Blows by Governments

Many labor restrictions – emigrant-agent laws, occupational licensing laws, minimum wage laws, union privileges -- stripped blacks of the freedom to compete with privileged white labor. Unions were notoriously racist.

From 1900 to 1945 these harms against blacks came increasingly from *the federal government*.¹⁰

Rosa Parks and the Montgomery Bus Boycott

1955, Rosa Parks, a black seamstress, was arrested for refusing to obey a Montgomery bus driver's order to give her seat up for a boarding white passenger. *Montgomery City Law required bus companies to discriminate.* Outrage over the arrest sparked a boycott. MLK emerged as the president of the Montgomery Improvement Association which organized the boycott. Racial tensions increased during the standoff. Preaching a course of non-violence, King was convinced that the cause could be won through a combination of dignified behavior and economic pressure. The Boycott ended in 1956 when the U.S. Supreme Court ordered the desegregation of buses in Montgomery.

1964 Civil Rights Act.

As pertains to the issue at hand, it did two things:

- (1) Ended Jim Crow.
- (2) Established the antidiscrimination principle as law.

The pendulum swung from forcing people to discriminate to forcing people not to discriminate. -- “That which is not required is forbidden!”

Freedom would say: “Discrimination is neither required nor forbidden.”

Semantic Issue. “Civil Rights” had always been a hallowed term associated with individual liberty. But parts of the Act are anti-liberty. A better name for the 1964 Act would be “The Antidiscrimination Act.”

⁹ Higgs, p. 134.

¹⁰ See David E. Bernstein, *Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Duke University Press, 2001).

Other Antidiscrimination Legislation:

- Equal Pay Act (1963) [Prohibition of Sex Discrimination]
- Age Discrimination in Employment Act (1967)
- Americans with Disabilities Act (1990)
- Civil Rights Act of 1991

Reasons to favor Freedom, Rather than Antidiscrimination Laws

- (1) The rules of freedom (property, consent, and contract) are simple. They are largely self-enforcing by esteem and reputation. A sense of fair-play emerges and adapts from bottom-up social processes. Local knowledge.
- (2) Government Isn't God.
 - A. Vague, complicated govt rules are imposed from the top-down. They lead to uncertainty; people don't know what's unlawful. People are confused about appropriate behavior; social norms of esteem and reputation don't work well when people don't know what kind of behavior is "bad."
 - B. The enforcement of interventionist rules falls on government.
 - C. Specifying an Anti-Discrimination Law
In formulating an anti-discrimination law, a philosopher-statesperson must specify:
 - What categories are protected
 - What constitutes belonging to the protected category
 - In what activities such discrimination will be unlawful
 - How the law will be administered and enforced
 - What kinds of behavior constitute unlawful discrimination

--- Kinds of Discrimination --- see next page

Kinds of Discrimination

Associated-Characteristics Discrimination.

Reasons to do it:

1. Differences in distributions of the characteristics + uncertainty of the individual's characteristics.

Statistical Discrimination.

Pregnant women,
old people.

2. Likeness among members might enhance group experience + performance.

Shared
Preferences
over amenities
+ conditions.

Music, food,
environment,
schedule,
management styles,
activities.

Facilitating
interaction.
Common language,
social network,
esteem, comraderie.

Discriminating upon race or gender *per se.*

Discrimination to
select for members of a
distinctive group:

"You have to be xxx to
participate."

Associations that express a
group's identity, shared
values + interests.

The Italian-American club,
an all-male gay nightclub,
Boyscouts of America,
Jesuits.

Discrimination to
select out members
of a distinctive group.

"You have to not be xxx to
participate."

Invidious or odious
discrimination:

Bigotry.
Racism.
Sexism.

Civil Rights Act of 1964 reads:

Section 703. (a) “It shall be an unlawful employment practice for any employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual’s race, color, religion, sex or national origin.” [bold italics added]

D. Intervention presumes *knowability* (Hayek). But the relevant social facts are usually not knowable.

- Who knows what lurks in the hearts of men?
Only the Shadow knows!
- From “disparate treatment” to “disparate impact”
- Central expressions in the law:
 - “business necessity”
 - “job-related”
 - “equally qualified”
 - “reasonable accommodation”

E. People become pitted against each other, suspicious.

F. Our broken tort system makes matters pretty awful¹¹

G. In practice, “antidiscrimination” often becomes a lot like “quotas” (or required discrimination in favor of protected categories).

H. Forsaking the focal points of freedom (the Rule of Law), we are left on a slippery slope: Government encroachment expands and expands:

- More groups claim protected status
- More practices become illegal
- More of daily life becomes politicized

¹¹ For a lengthy discussion with gruesome detail see Walter K. Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (The Free Press, 1997).

- (3) Antidiscrimination laws often undo opportunities that would have been morally unobjectionable.
- (4) Freedom Breaks down Bigotry

A. Free Markets Make Bigotry Expensive:

David Henderson: “Any employer who discriminates on grounds that have nothing to do with productivity will pay a cost for doing so.”

A bigoted landlord might not like blacks or Jews, but free competition among landlords is likely to induce the attitude: “Well, their money doesn’t stink.”

Voltaire observed the London Stock Exchange:

“You will see representatives of all nations gathered there for the service of mankind. There the Jew, the Mohammedan, and the Christian deal with each other as if they were of the same religion, and give the name of infidel only to those who go bankrupt.”

Many economic studies show that free competition break down discrimination, while government restrictions, such as minimum wage and rent control, prop up discrimination.

When *employees or customers* are bigots, they bear an extra cost.

Freedom affords individuals creative means of proving their worthiness.

Market society clearly brings a pluralistic, open, cosmopolitan society. Market society is the arch enemy of communities with narrow, closed, rigid cultures.

Henderson: “The economic system that removes the props from racism is free markets.”¹²

¹² Both Henderson quotes and the Voltaire quote are at: David R. Henderson, *The Joy of Freedom: An Economist's Odyssey* (Prentice Hall, 2002), p. 123.

Sir Henry Sumner Maine (1861): “[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”¹³

B. Esteem Mechanisms: Victims of Insult Strike Back and Virtuous Individuals Combat Bigotry

- The Boycott
- The Demonstration
- Voicing Objections and Disapprobation
- Creating Awareness: bumper stickers, buttons, etc.
- Creating a Social Movement

Esteem mechanisms and market mechanisms work together!

- (5) Sometimes antidiscrimination laws harm their purported beneficiaries.
- (6) Degradation of esteem mechanisms, including self-esteem. One never knows whether someone attained a position because he was a member of a protected category. The only way you can know that you can ride without training wheels is to ride without training wheels.
- (7) Antidiscrimination laws demean members of the protected categories. The ADA (1990) says: “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.”
By coercing ordinary citizens, antidiscrimination laws might make the disabled swell with a sense of power, but the law also sends the message that without government privileges they cannot assert their own worth and dignity.
- (8) Antidiscrimination laws create backlash. People resent being forced, they develop hatreds. One reason racial and gender issues are so bitter and acrimonious is because force is involved.

¹³ *Ancient Law*, p. 141.

(9) Antidiscrimination laws have led groups to band together to seek special recognition and privileges from the government – to become an official “minority.” The political leaders of all the protected categories – blacks, Hispanics, women, gays, the disabled, the fat, the elderly, etc. – promulgate a culture of protection by big government and validation by politics, rather than a culture of self-help and validation by voluntary associations. Antidiscrimination laws belong to an unhealthy culture of personal validation by politics. This whole culture has come to be called ***identity politics***.

(10) What if the government sets faulty criteria for bad discrimination? Or for enforcing against bad discrimination? Is government good at correcting its mistakes? NO! In a free society, moral sensibilities evolve to suit the particulars of time and circumstances. In a free society, moral criteria are more open to correction, adaptation, and diversity.

(11) Activists seek governmentalization as an official affirmation and validation of their cause. They seek governmentalization as a symbol. But when the levers of government power are up for grabs for symbolic aims, things become extremely dangerous. “It is dangerous to assume that whatever conduct is thought to be wise or enlightened can and should be forced on society by the public speaking with a single voice.”¹⁴ We have ugly battles for using government policy to create a symbol, and victory is decided by the collective foolishness of the democratic politics (remember, Hitler was elected). We end up with policy catastrophes such as drug prohibition, for which millions of innocent Americans have been caged like animals, for offending the symbol of “A Drug-free America.” Political prisoners of “The War on Drugs.”

The best antidote to such abuses is for all of us to accept the strong presumption in favor of individual liberty.

In a free society, many channels remain open for us to persuade others of the worthiness of our cause and to win their support, not through government force, but by the power of moral and intellectual suasion. In the effort to

¹⁴ Epstein, *Forbidden Grounds*, p. 505.

diminish bigotry, we would do best to leave government and politics out.

John Stuart Mill

The Subjection of Women (1869)

- The most influential work in the cause of women's liberation
- Mill's most adamantly libertarian work

Mill's argument in a nutshell:

We habitually say that man's liberty is both beneficial and just. Well, what is beneficial and just for man should also be beneficial and just for woman!

In Mill's words:

"[F]reedom of individual choice is now known to be the only thing which procures the adoption of the best processes, and throws each operation into the hands of those who are best qualified for it. Nobody thinks it necessary to make a law that only a strong-armed man shall be a blacksmith. Freedom and competition suffice to make blacksmiths strong-armed men, because the weak-armed can earn more by engaging in occupations for which they are more fit."

"But if the principle is true, we ought to act as if we believed it, and not to ordain that to be born a girl instead of a boy, any more than to be born black instead of white . . . shall interdict people from all the more elevated social positions [and] respectable occupations."

"[I]t is only asked that the present bounties and protective duties in favour of men should be recalled. [N]obody asks for protective duties and bounties in favour of women . . ." ¹⁵

¹⁵ *Sub. of Women*, pp. 144-45, 154. For an excellent presentation of the libertarian perspective on women's issue, see Joan Kennedy Taylor, *Reclaiming the Mainstream: Individualist Feminism Reconsidered* (Prometheus, 1992); also highly recommended are the books authored and edited by the libertarian writer Wendy McElroy.