Implementing Quotas

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David Strauss has provided an elegant analysis of the law and economics of racial discrimination in employment.1 If his argument is correct, our current approach to racial discrimination in employment is, at the very least, suboptimal. Whatever the niceties of our increasingly sophisticated arguments concerning “disparate treatment” versus “disparate impact” analyses, we are unlikely to make much progress toward the ultimate goal of ending employment discrimination unless we turn our attention to prescribing quotas, rather than denying any intention to do so. Strauss’s suggestions thus have a decidedly radical flavor. Had he been given only the task of demonstrating that law and economics analysis does not lead inexorably to conservative political positions, he would have succeeded admirably. As it is, Strauss’s law and economics radicalism is merely a by-product of his successfully accomplishing his role for this conference, providing a strikingly new agenda for the discussion of racial discrimination in employment.

In this comment I do not want to argue with Strauss’s economic analysis. I agree with virtually all of it, and there are those better equipped than I am for that task. Instead, I want to discuss two different issues. The first, to put the matter starkly, concerns Strauss’s attempt to make beliefs about the existence, prevalence, or causes of discrimination virtually irrelevant to public policies attempting to remedy racial disparities in employment. The second concerns the institutional structure that might be implied by Strauss’s prescriptions. Although both topics could be thought of as questions of “implementation” or “implementability,” the first focuses on issues of political morality, and the second on questions of bureaucratic feasibility.

I. TAKING DISCRIMINATION OUT OF ANTI-DISCRIMINATION POLICY

As I understand his basic argument, Strauss assumes that virtually everyone opposes discrimination in employment based on the racial animus of employers, customers, or employees.2 It is probably also true that most Americans oppose the use of racial classifications as a substitute for otherwise unavailable information when such stereotyping penalizes groups that historically have been oppressed.3 Presumably one or the other type of dis-

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2. Id. at 1624.
3. Id.
Discrimination describes the subject matter (or the alleged subject matter) of the tens of thousands of employment discrimination suits and complaints that arise each year in the United States. Strauss's point is not that these attempts at individualized remedies are misguided, only that they are likely to be ineffective at remedying racial discrimination in employment. The litigation touches only a part of the potential problem, that part most likely to be solved by market forces even in the absence of antidiscrimination laws. He urges us to abandon this morality play of "good" plaintiffs versus "evil" defendants and get on with the business of eliminating both the vestiges of past discrimination and the present reality of racial stratification in employment markets.

I think there is much that is persuasive in Strauss's indictment of the efficacy of our current policies. Nevertheless, I think he passes too quickly over the crucial question of the role of morality in politics. Strauss recognizes that the simple quota solution he advocates is very similar to a tax and transfer scheme that provides compensatory payments to all minorities currently disadvantaged in labor markets. Indeed, Strauss recognizes that a simple transfer policy might have certain efficiency advantages over his proposal, but he does not think it is politically realistic to attempt compensatory justice using this institutional mechanism. Invoking a "political counterpart of the theory of the second best," Strauss wants to employ the current consensus against discrimination in employment to create a quota system that will achieve the same compensatory objectives by awarding jobs rather than cash. This system promises to ameliorate class stratification problems by giving a job rather than a stipend, thus raising the status of minorities as well as their incomes.

Strauss has difficulty, however, elaborating the moral sentiments that would support such a radical redirection of antidiscrimination energies. As a vast affirmative action scheme employing explicit quotas, his proposal confronts the apparent distaste of broad segments of the population for affirmative action, and the recent refusal by even the most fervent legislative advocates of antidiscrimination laws to admit that they are arguing for quotas. This raises an obviously troublesome issue: Why do public officials

4. Id. at 1644.
5. Id. at Part IV.A.2.
6. Id. at Part IV.c.
7. Id. at 1630.
8. Id.
9. Id. at 1631.
10. Id. at 1630.
11. Id. at 1631.
12. E.g., Holmes, On Job Rights Bill, a Vow to Try Again in January, N.Y. Times, Oct. 26, 1990, § A, at 25, col. 1 ("The bill's proponents argued at first that their bill did not go beyond Griggs, and that because there had not been a pervasive use of quotas since Griggs, the measure would not foster
flee from the position that Strauss hopes to implement by relying on a broad political consensus opposing employment discrimination?

The answer, I take it, is quite straightforward: While Strauss tells us that the facts about the persistence of employment discrimination are unavailable and that one must remain agnostic over the question of whether current disadvantage is the effect of past discrimination, embracing his remedy on moral grounds commits us to a view on both issues. Unless the existence of current discrimination or the lingering effects of past discrimination are pervasive, racial stratification in employment has no moral significance. And, while one might be concerned that existing remedies for disparate treatment are underinclusive, it is hard to imagine that we must resort to Strauss’s solution merely to deal with that problem.

Yet, as Strauss well knows, when we enter the murky area of the morality of quotas, people’s intuitions vary significantly. To think that covert or unconscious racial discrimination in employment is widespread is to think that many, if not most, of us are racists, and a significant proportion of the population is likely to reject that view of their existing conduct or social consciousness. The notion that employment disadvantage is the result of prior discrimination and, therefore, demands current compensatory action confronts other beliefs that blame current economic inequality on the attitudes and behaviors of minority employees and job applicants. Finally, even if current racial minorities are the appropriate recipients of compensatory social action, is it clear that nonminority employees and job applicants should be the “donors” of the social surplus—jobs and income—needed to effectuate compensation?

I confess that my own moral intuitions are much the same as Strauss’s (or, should I say, those that I am reading into his text). I believe covert or unconscious racism is not just widespread, but ubiquitous. I suspect that it infects a huge proportion of marginal hiring decisions and is the most significant single cause of racial stratification in employment and under-investment of human capital by minorities—both all-too-familiar aspects of the contemporary scene. Nevertheless, these assumptions are debatable by reasonable people, and I suspect that those of contrary persuasions significantly outnumber Strauss and me. Therefore, if Strauss’s program is to be the program

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13. Strauss, supra note 1, at 1648.
14. Id. at 1620.
15. Id. at 1625-26.
for eliminating racial discrimination in employment in this decade, we need both better facts about racism's effect on current levels of employment stratification and a better articulated moral vision, one that will capture the moral sense of those whose consensus on the desirability of quotas is critical to success.

Strauss's proposal is vaguely reminiscent of arguments that social security pensions that are "wasted" on the nonpoor aged population should be shifted to children and young people who lack the level of public support necessary for their development.\textsuperscript{16} The problem with that argument, like Strauss's, is that it imagines that the ethical and political underpinnings of social security pension insurance can be retained while the money is transferred to a different clientele. That people have been proposing this solution for decades with little effect suggests that there is something wrong with the argument. The problem is that the self-help underpinnings of social security entitlements simply cannot be transferred to need-based benefit programs for noncontributors. Judging by our behavior, we give more money to social security pensioners because we believe they deserve it. We give less to poor children and their families because we worry about corrupting them. Our public morality may be confused, but it is there, at the level of moral argument, that the issue must be confronted.\textsuperscript{17}

I doubt that Strauss's strategies for avoiding this moral question can be successful. His proposal alters the idea of discrimination in ways that are morally relevant to developing the political consensus necessary for the adoption of a broad system of employment quotas, but I fear he lacks an effective strategy for achieving that consensus. Nationwide employment quotas cannot be achieved by stealth, and a politician willing and able to promote such a program effectively is nowhere in sight.

\section*{II. Bureaucratic Implementation}

While Strauss is surely not to be faulted for speaking so little about the institutional structures necessary to give reality to his proposals, I often find that I can see clearly what a proposal means only by thinking more concretely about its bureaucratic details. Because policy analysis is always a matter of comparative incompetence, contrasting the messy current state of affairs with an abstract, and apparently ideal, solution is a temptation that we should seek to avoid.

\begin{footnotesize}
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\item See generally T. Marmor, J. Mashaw & P. Harvey, America's Misunderstood Welfare State: Persistent Myths, Enduring Realities 22-52 (1990) (discussing the multiple and conflicting bases for social welfare programs).
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Strauss's sketch of his institutional proposal has four elements: (1) a quota system based on the percentage of minorities in the national population; (2) fines for failure to meet the quotas; (3) a cost-justification defense; and (4) an enforcement bureau modeled on the National Labor Relations Board.\textsuperscript{18}

The details of this scheme could be developed in any number of ways and I will not attempt that task here. I merely want to raise a few questions about implementation in order to suggest the level of detail that any viable proposal would have to attain, and some of the disputes that will arise around those details. I do not raise these questions to suggest that Strauss's proposal is necessarily infeasible, but instead as proposals for discussion about the implementation of any large-scale quota system.

Two elements of the scheme are intricately related—the cost justification defense and the level of the fine. In Strauss's view the fine should be set to reflect "the gains to society, net of costs, that result from racially proportionate hiring and compensation practices."\textsuperscript{19} He recognizes that solving this social welfare puzzle is a tall order, but then states that using fines makes an elaborate cost justification defense unnecessary; employers can simply pay the fine if it is too costly to comply.\textsuperscript{20} This suggestion seems to assume that the fine will be set at a level that will allow employers to remain in business. But why the fine level should allow any noncomplying employer to remain in business is nowhere explained. Indeed, my own untutored intuition is that fines should be spectacularly high so that the national priority of eliminating the corrosive effects of continued racial stratification in the United States can be met. Therefore, I would expect many high cost employers to be driven out of business by this scheme unless some cost justification defense is available or, the equivalent, such a defense smuggled into the scheme by the level of the fine imposed.

A different remedial structure might avoid the problem of setting the appropriate fine. Because Strauss's scheme uses a national, numerical target, it is similar to the objective, quantitative standards in certain health and safety regulatory schemes, particularly air and water pollution. It might be sensible, therefore, to think about a system of trading "surplus minority hires," much in the same way that excess pollution control can be traded by low-cost to high-cost compliers.\textsuperscript{21} Indeed, if we use a national population standard in setting the percentage quotas, we must either allow trading or resign our-

\textsuperscript{18} Strauss, \textit{supra} note 1, at Part IV.D.
\textsuperscript{19} \textit{Id.} at 1656.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{See generally} Dudek & Palmisano, \textit{Emissions Trading: Why Is This Thoroughbred Hobbled?}, 13 \textit{COLUM. J. ENVTL. L.} 217 (1988). There may be some technical differences between the "excess hires" and "excess emission reduction" markets, but none that would make trading infeasible in the minority quota context.
selves to the fact that there will be widespread noncompliance until large numbers of minority persons or firms relocate themselves.

Of course, mentioning the possibility of trading excess quota compliance reveals a host of subsidiary issues. For one, it reraises the question of political morality. Even in emission trading systems there are complaints about selling "rights to pollute." Selling "rights to discriminate" looks even worse. Indeed, it is in an attempt to avoid this dilemma that Strauss suggests a system of fines rather than a system of redistribution for eliminating employment barriers. Yet, if the fines cannot be set precisely, failure to allow trading may result in massive undercompliance (fine too low) or massively costly compliance (high fines with substantial differentials in employer capacities to comply).

Using fines has other disadvantages. A nationally based quota system will give very substantial advantages to employers located in regions with excess minority population. Firms in other regions will have to shift locations or import minority employees to comply. Ironically, the proposed scheme would give many of the former slave states a strong economic incentive to fight for an affirmative action plan implemented by a nationwide quota. The analytic point, however, is simply that Strauss's scheme necessarily entails regional redistributions of the sort that has plagued air quality politics.

The difficulty of setting an appropriate fine level and the possibility of regional dislocations argue strongly for the use of injunctive remedies with tradeable quota rights rather than fines. But, whatever the remedy, I am not attracted to enforcement solely by a bureaucracy. As in similar situations, this device is a way of sweeping the question of the appropriate level of both penalties and compliance under an opaque and unreviewable bureaucratic rug. If we want Strauss's plan, or its equivalent, to be enforced, then employers should face the threat of private lawsuits in addition to bureaucratic enforcement. Not only does bureaucratic enforcement elsewhere in American government have a strong bias toward underenforcement, the only quota systems in employment of which I am aware—employment of the handicapped in a number of western European countries—are widely ignored in the absence of private rights of action.

This is not to suggest that one should energize private litigants by the pros-

22. Strauss, supra note 1, at 1655.
26. See Chernick, Organizing to Promote the Employment of Persons with Disabilities—The Expe-
pects of pots of gold at the end of litigation rainbows or reintroduce the litigation uncertainties that plague current antidiscrimination efforts. An injunctive remedy and attorney's fees could energize private enforcement under a scheme in which the facts of compliance or noncompliance would be extraordinarily simple. Either the employer has the proper proportion of minority employees (or minority employees plus purchased "discrimination rights") or it does not. There is no need, in the absence of some exquisite cost justification defense, to commit prosecution to bureaucratic discretion. This type of enforcement system would be a clear signal that, as a society, we want Strauss's program to be fully implemented. Thinking about the implementation of quotas from this perspective poses the right question concerning their desirability.

27. This approach is now widespread in environmental legislation. Suits are nonetheless rather sparse because of hidden and non-obvious violations, complex environmental economic disincentives, and regulatory preemption of obvious and potential claims. Feller, Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model, 60 DEN. L.J. 553, 564-65 (1983). These same factors may not be present in the area of employment discrimination, especially given the direct economic impact on a potential plaintiff.