



THE VIRTUE OF TOLERANCE IN HIRING AND PROMOTION BY PRIVATE INSTITUTIONS

*Peter de Marneffe**

The political cultures of some private universities and corporations are criticized as intolerant.¹ There is a dominant political ideology, the thought goes, and those who hold it are intolerant of others who hold different views. One form of alleged intolerance is political discrimination in hiring and promotion: Those known to hold contrary views are not hired or promoted for this reason. But what is the virtue of tolerance and what attitude toward those who disagree with us does it require? Here I appeal to Scanlon's account of tolerance in order to identify a relatively clear sense in which political discrimination in hiring and promotion is intolerant, and to identify some bad things about it.² It does not follow, however, that this kind of intolerance violates anyone's rights or that it should be illegal.³ So although this essay identifies a sense in which political discrimination in hiring and promotion is intolerant, it leaves questions of permissibility unanswered.

* Professor of Philosophy, Arizona State University. Thanks to Sally Ball, Jon Quong, Leif Wenar, and Paul Weithman for comments on earlier drafts.

¹ See, for example, David French, *James Damore's Lawsuit Exposes Google's Culture of Ignorant Intolerance*, NAT'L REV. (Jan. 9, 2018); Gideon Scopes, *Lawsuit Exposes Internet Giant's Internal Culture of Intolerance*, QUILLETTE (Feb. 1, 2018), <https://perma.cc/SXG4-Y38F>; Eric Kaufmann, *Academic Freedom Is Withering*, WALL ST. J. (Feb. 28, 2021); Letter from Michael B. Poliakoff, President, Am. Council of Trs. and Alumni, to the Princeton Univ. Bd. of Trs. (Mar. 4, 2022), <https://perma.cc/87GG-UMBY>; Ilya Shapiro, *Princeton's Shame—and Ours*, NAT'L REV. (May 27, 2022); Jason Riley, *The Chautauqua Institution Isn't What It Used to Be*, WALL ST. J. (Aug. 23, 2022).

² T.M. SCANLON, *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* (2002).

³ As suggested, for example, by Vivek Ramaswamy & Jed Rubenfeld, *The New Woke Discrimination Demands a New Law*, WALL ST. J. (Nov. 15, 2022).

Central to the question of political intolerance on campus and in the workplace is disagreement about racial and gender proportionality as a social goal. This goal is that the proportion of faculty and students at private universities who are nonwhite or female and the proportion of corporate officers and managers at private companies who are nonwhite or female roughly matches the proportion of nonwhites and females in the general population. Is it a serious institutional failing if, compared to the general population, university faculty and corporate officers and managers are disproportionately white or male? Those committed to diversity, equity and inclusion—as the slogan goes—believe this is a serious failing urgently in need of being addressed. Others disagree. For convenience I refer to the first group as “DEI advocates” and to the second group as “DEI nonadvocates.” A charge of intolerance might be directed at DEI advocates on the grounds that they discriminate in hiring and promotion against nonadvocates. Imagine, then, that you are a DEI advocate. What attitude toward nonadvocates in hiring and promotion does the virtue of tolerance require of you?

Scanlon writes:

Tolerance requires that people who fall on the “wrong” side . . . should not, for that reason, be denied legal and political rights: the right to vote, to hold office, to benefit from the central public goods that are otherwise open to all, such as education, public safety, the protections of the legal system, healthcare, and access to “public accommodations.” In addition, it requires that the state not give preference to one group over another in the distribution of privileges and benefits.⁴

This seems easy enough to accept and, as far as I know, DEI advocates do not generally hold that nonadvocates should be deprived of basic political rights or that the state should give preference to DEI advocates in the distribution of benefits such as public education and health care. But the question here is: What does tolerance require of private institutions?

Scanlon does not limit the virtue of tolerance to the recognition of equal political rights and the impartial distribution of privileges and benefits by the state. Tolerance requires in addition that we “accept as equals” those who disagree with us, where to accept others as equals in the relevant sense involves accepting that “all members of society are equally entitled to be taken into account in defining what our society is and equally entitled to participate in determining

⁴ SCANLON, *supra* note 2, at 189.

what it will become in the future.”⁵ This, according to Scanlon, requires more than equal rights of participation in the formal political process of voting and running for office; it requires, too, equal rights of participation in the informal political process through which our society will become what it is in the future. “A tolerant society,” Scanlon writes, “is one that is democratic in its informal politics.”⁶ The question, then, is what must informal politics be like to be democratic? What, exactly, is one committed to if one believes that everyone is equally entitled to participate in the informal politics that will determine what our society is like in the future?

Though Scanlon does not say so explicitly, I assume that the informal political process includes what takes place in private institutions. This is because political advocacy and political organization do take place at private institutions; policy decisions are made by these institutions on the basis of beliefs about what an ideal political society would be like; this kind of politics is different in structure and substance from the formal politics of voting and running for public office; and these political activities and decisions affect what our society will be like in the future. Furthermore, if informal politics did not include what happens at private institutions, then a society might be democratic in its informal politics, and thus tolerant in Scanlon’s sense, even if every private institution discriminated in hiring and promotion on the basis of religious affiliation or sexual orientation. I suspect this is not a society that Scanlon would see as tolerant. But then if a tolerant society is one that is democratic in its informal politics and if informal politics includes what happens in private institutions, then we need to know what it is for private institutions to treat fellow citizens as equals in the informal political process, in order to know what it is to live in a tolerant society.

Perhaps we should start by considering the value of formal political democracy and the kinds of tolerance it seems to require. A representative democracy, as I understand it, is a political system in which government policy is made by elected representatives; in which there is universal adult suffrage, a secret ballot, and some form of adherence to the “one person, one vote” principle; and in which adult citizens have equal rights of political participation: freedom of political expression and association, as well as the right to vote and the legal

⁵ *Id.* at 190.

⁶ *Id.*

opportunity to run for office. One reason to value this kind of political system is that equal rights of political participation endow each adult citizen with an equal political status, which has value for its own sake. Another reason to value it is that it provides a fair process for determining government policy. Some forms of intolerance seem incompatible with the value of democracy, then, because they deny citizens equal political status and because they are unfair. A historical example is the British practice of refusing to administer the oath of office to atheists, preventing them from being seated as members of Parliament. This practice denied atheists equal political status and it was unfair in being arbitrary—arbitrary because performing well the functions of member of Parliament does not require belief in God.

The virtue of tolerance, however, should not be understood solely in terms of the value of equal political status and procedural fairness. It has value, too, in making possible a valuable kind of relation between citizens—the relation of *fellow citizen*, as Scanlon puts it.⁷ This relation obtains when we accept each other as full members of the same political society and as members in good standing even when we disagree on matters of moral and political importance. This kind of mutual acceptance has value for its own sake—based on the non-instrumental value of recognizing and accepting each other as fellow humans, each of us with our own life to lead, with our own capacity to reason about what is right and good—but it also has instrumental value in promoting mutually beneficial cooperation between people who hold different religious beliefs and different political ideals. If agreement with others about religion or politics was a condition of our cooperating with them, our lives would be substantially impoverished.

One kind of intolerance, however, seems compatible with democracy: exclusion from public office of those who are committed to violating others' basic rights, including their rights of political participation. In some cases, such persons may pose too small a threat to warrant exclusion, and in these cases excluding them might do more harm than good. But if there is a significant chance that such people will come to power and that some citizens' rights will be violated as a result, then excluding them would be neither objectionably undemocratic nor objectionably intolerant, both because the value of democracy rests largely on its

⁷ *Id.* at 195.

success at protecting basic rights and because the value of tolerance rests largely on the value of living with others on terms of mutual respect.

Suppose, in contrast, that some are excluded from the political process even though they are fully committed to respecting others' basic rights, and only because those with the power to exclude them reject their political ideals. This does seem objectionably undemocratic and objectionably intolerant. We hold different views of what an ideal society is like and for this reason democracy has value in enabling people with different and opposed political ideals to select through a process that all can reasonably regard as fair the officials who will determine government policy. In a society of individuals who hold conflicting political ideals, government policy cannot reflect the political ideals of everyone. How, then, is government policy to be determined? A good answer is that it should be determined by elected representatives chosen in fair, competitive elections. This is a good answer partly because it is one that everyone can accept while regarding themselves as equally entitled to participate in the process and influence the outcome.

With this sketch of the value of formal political democracy in mind, we can now consider what kinds of tolerance might be required of private institutions in order for the informal political process to be democratic. According to Scanlon, tolerance requires that we regard each other as equally entitled to participate in determining what our society will become in the future,⁸ and one thing this arguably requires of private institutions is nondiscrimination in hiring and promotion on the basis of future social ideals. By "future social ideals," I mean views about what the ideal future society is like. For DEI advocates, an ideal society is one in which racial and gender identity makes no significant statistical difference in socio-economic status or in the distribution of influential, status-conferring social positions. Furthermore, DEI advocates commonly hold that, in order to reach this goal, public and private institutions should do as much as they can to reduce these statistical differences, for example, by counting the fact that someone is a member of an underrepresented group as a reason to admit them, hire them, or promote them over someone who is not a member of an underrepresented group. For DEI nonadvocates, in contrast, an ideal society is one in which decisions about admissions, hiring, and promotion are made

⁸ *Id.* at 190.

without regard to racial or gender proportionality, by taking into account only those qualifications that are predictive of success at the relevant institutional tasks (other than achieving racial and gender proportionality). According to the proposal under consideration, then, private institutions treat their members as equals in the informal political process only if they do not discriminate in hiring and promotion against DEI advocates or nonadvocates on the basis of their future social ideals.

This proposal must be modified in at least two ways. Just as it is not objectionably undemocratic to exclude persons from the political process who advocate for the violation of others' basic rights, it is not objectionably undemocratic for private institutions to discriminate in hiring and promotion on the basis of future social ideals if these ideals include the violation of others' basic rights. So I now assume for the purpose of this discussion that neither the future social ideals of DEI advocates nor those of nonadvocates include the violation of basic rights. That is, I assume that racial and gender preferences in hiring do not in themselves violate anyone's basic rights, and I assume that the absence of racial or gender proportionality in the workplace (as well as of measures, such as racial and gender preferences in hiring and promotion, that would be necessary to achieve this proportionality) is not in itself a violation of basic rights. So although DEI advocates and nonadvocates disagree about what the ideal society is like, this is not, I will assume, a disagreement about whether anyone's basic rights should be violated.

Another way in which this proposal should be modified is to allow discrimination on the basis of future social ideals if this kind of discrimination is necessary for a private institution to achieve its primary purpose. Because discrimination on the basis of religious affiliation is not necessary for the government to perform its primary purpose, this kind of discrimination by the government is arbitrary and unfair, and for this reason it is objectionably intolerant. But private institutions have different functions from the government and certain forms of discrimination by the government that would be arbitrary are not arbitrary when engaged in by private institutions. As Scanlon writes, "religious groups and political movements would lose their point if they had to include just anyone. . . . It would be absurd for Presbyterians to consider everyone born within the fifty United States a member of their church, and it would therefore not be intolerant to deny some of them the right to participate in the

evolution of this institution.”⁹ Private organizations come into existence to achieve certain goals and if an organization exists to achieve a certain goal, it is not objectionably intolerant for that organization to discriminate in hiring and promotion against those who do not share this goal. So if a private political organization exists to promote DEI goals, it is not objectionably intolerant for it to discriminate in hiring and promotion against those who do not endorse these goals.

For this reason, I now limit the discussion that follows to private institutions of which the following is true: There are good reasons to create and maintain institutions of this kind that are independent of the goals of racial and gender proportionality and these reasons provide sufficient reason for creating and maintaining institutions of this kind independently of whether they do or do not advance the goal of proportionality in the workplace. I assume that there are such private institutions and that the modern private research university is one of them. Scholarly and scientific research that improves our understanding of the world has instrumental and noninstrumental value, as does sharing this understanding with interested young people. These are good reasons to create and maintain private research universities, and these goals provide sufficient reason for creating and maintaining these institutions independently of the goal of workplace proportionality. Or so I assume for the purpose of this discussion, and assume, too, that something similar is true of other private institutions, such as private tech companies.

To restate the proposal with these two modifications, then, discrimination in hiring and promotion by private institutions on the basis of future social ideals is inconsistent with informal political equality unless (a) these ideals include the violation of basic rights or (b) this kind of discrimination is necessary for the institution to achieve its primary purpose. If a private institution discriminates in hiring and promotion on the basis of future social ideals when neither condition (a) nor (b) is met, then it fails to treat fellow citizens as equally entitled to participate in the informal political process through which our future society will in part be determined.

This kind of discrimination by private institutions seems undemocratic because it is analogous to the kind of government discrimination involved in not

⁹ *Id.* at 194–95.

permitting atheists to hold elective office. This analogy depends, however, on the assumption that just as it is not necessary to believe in God in order to perform the functions of elective office well, it is not necessary to endorse any particular (rights-respecting) future social ideal in order to perform one's job at a private institution well. And whether this is true depends on how the job is understood. Tolerance does not require nondiscrimination by a private institution if achieving the primary purpose of this institution requires this kind of discrimination. So more must now be said about what the "primary purpose" of a private institution is. Does it consist of the primary goals that its founders had in founding it? Or does it consist instead of the primary goals that its current leadership has in leading it? Or does it consist of something else?

The first option—that the primary purpose of an institution is determined by the goals of its founders—seems incorrect because an institution might have been founded many years ago and its primary purpose might have changed over time in response to changing social conditions, changing values, and changing leadership. For example, it seems that the primary purpose of a private college now might be to impart a scientific and scholarly understanding of the world to interested young people even if its founders aimed only to provide religious education to future clergy members. On the other hand, the second option—that the primary purpose of an institution is determined by the goals of the current leadership—also seems incorrect. If a cadre of militant atheists were to take over the leadership of a private research university and hold that the primary purpose of that institution was henceforth to extinguish belief in God, it would not, I think, establish that this was the primary purpose of this research institution.

To avoid these implications, I suggest that the *primary purpose* of a private institution should be understood as the one that provides the strongest reasons for establishing and maintaining an institution of this kind. Suppose, for example, that the purpose that provides the strongest reasons for establishing and maintaining a private research university is to increase our understanding of the world through scientific research and rigorous scholarship, and to share this understanding with interested young people. Because it is not necessary to discriminate in hiring and promotion on the basis of race, ethnicity, religion, sex, sexual orientation, or gender identity in order to achieve this purpose, this kind of discrimination is not necessary to achieve the primary purpose of the institution, regardless of the goals of the founders or the goals of current leadership.

But when is it “necessary” to discriminate in some way for an institution to achieve its primary purpose? Suppose a private tech company publicly endorses DEI goals in order to recruit and retain the most talented software engineers and suppose that the employment of those who are known to reject these goals will interfere with achieving these recruitment and retention goals. In these circumstances, nondiscrimination against DEI nonadvocates in hiring and promotion might interfere with the company achieving its primary purpose, and from this we might conclude that this kind of discrimination is not objectionably intolerant.

Here we must be careful, though. To see why, consider racial discrimination in places of public accommodation. Imagine a restaurant owner who personally feels no animus towards Black people but who posts a “whites only” sign in the window of his restaurant because he knows that some of his customers feel this animus, and that his restaurant will therefore be more profitable if he posts this sign and refuses to serve Blacks. This seems to be an objectionable form of racial intolerance, even though the restaurant owner himself feels no racial animus and even though this policy advances the primary purpose of his restaurant—to make money by serving food. It seems to be an objectionable form of racial intolerance because the policy is adopted in response to the racial intolerance of his white customers. So although a hiring officer might personally feel no animus toward DEI nonadvocates, a policy of refusing to hire or promote nonadvocates might still be objectionably intolerant if it is adopted in response to the intolerance of DEI-advocate employees.

More to the point, even if there are good reasons for a private institution to discriminate in hiring and promotion on the basis of future social ideals, it does not follow that this kind of discrimination is consistent with treating fellow citizens as equals in the informal political process. There is a limit to what tolerance can require of a private institution. It cannot require nondiscrimination that is incompatible with the institution achieving its primary purpose. But it can require nondiscrimination that is compatible with the institution achieving its primary purpose, as is the case of government offices and places of public accommodation. So, provided that a private tech company can succeed in achieving its primary purpose without political discrimination in hiring and promotion, it makes sense to hold that this kind of discrimination is intolerant in Scanlon’s sense.

There is an obvious difference between discriminating on the basis of race and discriminating on the basis of future social ideals: A person's race is determined by heredity and is not within a person's control, whereas a person's future social ideals are determined by deliberation. But it does not follow that discrimination on the basis of future social ideals is compatible with the virtue of tolerance. For one thing, the central historical example of tolerance is religious toleration, and religious beliefs are also determined by deliberation, not by heredity. For another, the fact that a belief is arrived at via deliberation does not entail that it is arrived at by *choice* or that we hold this belief because we have *chosen* to. Our future social ideals are based on what seems to us to be true or justified, and what seems to us to be true or justified is not determined by will, intention, or choice. So, although our future social ideals are determined by deliberation, it does not follow that they are in our control in the same way that our actions are.

To return now to the main point, a tolerant society, according to Scanlon, is one that is democratic in its informal politics. According to the proposal under consideration, a society is democratic in its informal politics only if private institutions in this society do not discriminate in hiring and promotion on the basis of future social ideals unless (a) these future social ideals include the violation of basic rights or (b) this kind of discrimination is necessary for a private institution to achieve its primary purpose.

As the title of Scanlon's essay indicates, tolerance is a demanding virtue, and the principle of nondiscrimination just stated is likewise demanding. Suppose you are a DEI advocate committed to racial and gender proportionality, believing they are urgent social goals. You believe that nonadvocates are misguided or worse, and you believe that their presence in your organization, particularly in leadership positions, will make achievement of proportionality less likely. Furthermore, you yourself want to be part of an organization that is fully committed to DEI future ideals, publicly affirming them and taking clear steps to achieve them, and you believe that having DEI nonadvocates in leadership positions conflicts with the kind of full commitment you seek. If your organization does not discriminate in hiring and promotion against nonadvocates, it will not be all that you want it to be, and this will be a loss for you. What reason, then, do you have to endorse this principle of nondiscrimination as a constraint on hiring and promotion?

Tolerance has value, Scanlon suggests, in sustaining a valuable kind of relationship that we can have with one another, the relation of fellow citizen. A

tolerant society is one in which individuals who disagree on important political and moral questions can nonetheless view each other as members in good standing of the same political society, respecting each others' rights, and so respecting each other as moral equals. But one might think that the relation of *fellow citizen* can be fully maintained even in a society that is not democratic in its informal politics. If so, what reason is there to endorse the virtue of tolerance?

Scanlon suggests that, to appreciate its value, we consider "the difference that tolerance makes in one's relation to those to whom one is closest," adding, "one's children provide the clearest case."¹⁰ Imagine, then, that you are a DEI advocate with a nonadvocate child. They have heard your arguments and are not convinced. Although you sincerely believe that, given our country's history of racial oppression, our society should now work hard to eliminate statistical disparities in outcomes between different racial groups, your child sincerely believes that racial preferences in admissions, hiring, and promotion are counterproductive and are not warranted by the arguments commonly given for them. What should your attitude be to your own child qua participant in the informal political process through which our future society will be created?

Scanlon suggests that disagreement with our children about important matters does not lead us to want them to be excluded from the formal and informal political processes that will determine what our future society is like, and he is surely right that most of us would not want our children to be excluded from the *formal* political process unless we believed that they are in favor of violating others' basic rights. But this does not mean that we would want them to be treated as equals in the *informal* political process. Suppose my child and I teach at the same research university. I am in the Justice Studies Department and my child is in the Economics Department. If I am a DEI advocate, shouldn't I prefer that my child, qua nonadvocate, *not* have a position of authority and influence at our university, even if this means failing to treat nonadvocates as equal participants in the informal political process? Isn't having this preference part of what it is to be a sincere DEI advocate? And how much do I really lose by having this preference? After all, I can still love my child; I can still support him in his scholarly career; I can still view him as an equal citizen.

¹⁰ *Id.* at 193.

To think of tolerance as a virtue is to think that the tolerant person and those he interacts with are better off in some way as a result of his tolerant attitude. One benefit is that a tolerant attitude can increase the pool of persons with whom one willingly interacts in mutually beneficial ways. If I am tolerant of political views that I reject, then the pool of people I am willing to play golf with is larger and might include better players. Likewise, if a private institution discriminates in hiring and promotion on the basis of future social ideals, it will lose the contributions of those who hold disfavored ideals. Another benefit of tolerance is the part it can play in a good defensive strategy. If there is an established institutional norm against political discrimination in hiring and promotion, then everyone will be protected from this kind of discrimination, even as the dominant view changes. If, however, there is no established norm—and nondiscrimination is not an independently valid moral requirement—then those whose views are shared by institutional leadership today will have no valid complaint against being discriminated against in the future if, as might well happen, future leadership endorses different views.

To identify benefits of tolerance, however, is not to establish that intolerant actions or policies violate anyone's rights or that they are morally impermissible on other grounds. Although it is intolerant to refuse to socialize with anyone outside one's ethnic group, it is not morally impermissible because we have a right to decide whom to socialize with. It is one thing, then, to explain what tolerance is and why it is good, and another to establish that intolerant acts are morally impermissible. If discrimination in hiring and promotion on the basis of future social ideals resulted in some people having inadequate job opportunities, then it might be morally impermissible on this basis, but it might not have this effect. Perhaps there are so many job opportunities that the intolerance of some private institutions makes little difference to anyone's lifetime prospects. (Something similar might be said about racial preferences in university admissions.)

To identify a disposition as a virtue, then, is different from holding that every action that results from this disposition is morally required. To be a charitable person is to be disposed to help people in need, but not every charitable action is required. We have a strict duty of rescue to save others from death or loss of limb when we can do so at little risk to ourselves, but a charitable person is disposed, too, to help those in need who are not in such dire circumstances. Likewise, a

tolerant person will be disposed to include those he disagrees with in the informal political process through which our future society is determined, even in ways that are not strictly required by respect for others' moral and legal rights. But what the virtue of tolerance "requires," like what the virtue of charity "requires," includes much more than what is *morally required*—much more, that is, than not doing what is morally impermissible.

Here I have considered what tolerance might require of private institutions in hiring and promotion. Public institutions raise different questions. Hiring and promotion at public universities is not part of the formal politics of voting and running for office, but public universities are part of the state, broadly construed. So if public universities hire and promote faculty and staff on the basis of DEI ideals, there is a sense in which "the state . . . [would] give preference to one group over another in the distribution of privileges and benefits."¹¹ Furthermore, hiring and promotion is part of the informal politics through which we seek to advance our future social ideals. So if, on the basis of political ideology, public universities favor some citizens over others in hiring and promotion, it is arguable that the state does not treat its citizens as equal participants in the informal political process through which together we will create the future. On the other hand, the fact that public universities are funded partly by tax revenues does not entail that the requirements of tolerance, as applied to hiring and promotion, are different at public universities than at private ones or that there are valid moral restrictions on hiring and promotion by public universities that are not also valid for private ones. So although public universities raise different questions, it is not obvious that the virtue of tolerance requires more of them. Whether it does is a topic for a separate discussion.

The limited purpose of this discussion here has been to consider one thing it might mean to criticize a private institution as intolerant by virtue of its hiring and promotion practices: It might mean that, as a result of its hiring and promotion practices, the informal politics of our society is less than fully democratic. This makes sense as a criticism because something is lost as a result of this kind of discrimination: opportunities for mutually beneficial cooperation with those who hold disfavored future social ideals, and protection from future discrimination as the dominant view changes. But even if this criticism is valid,

¹¹ *Id.* at 189.

more must be said to establish that this kind of discrimination is morally impermissible, and so morally objectionable in the strongest sense.