Advocacy Versus Analysis in Assessing Employment Discrimination Law

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Prior to the passage of Title VII of the 1964 Civil Rights Act, individuals of substance argued with great force that an essential element of freedom included the right of private employers to discriminate against blacks. Over the succeeding quarter century, these voices have lapsed into silence as the principle of equal opportunity in employment has been widely and enthusiastically endorsed, even by its former enemies. To be sure, controversy continues to rage over questions of implementation of the antidiscrimination principle, and serious legal, political, and academic objections are commonly marshalled against any form of preferential treatment or quota hiring. But just as history seemed poised to render its verdict on the moral
illegitimacy of private employment discrimination, Professor Richard Epstein has issued a cry in *Forbidden Grounds* against the near uniform consensus favoring antidiscrimination laws.

Professor Epstein takes up the libertarian banner once again to argue that, whatever their noble aspirations, antidiscrimination laws are "a major social and intellectual mistake" and "a new form of imperialism that threatens the political liberty and intellectual freedom of us all." As the subtitle "The Case Against..." suggests, Professor Epstein has written a brief for the position that the social costs of prohibiting private discrimination in labor markets far outweigh the benefits. Professor Epstein effortlessly roams across the entire realm of theoretical issues raised by antidiscrimination legislation, demonstrating an impressive command of economics, political philosophy, constitutional theory, tort law, and employment discrimination doctrine. But while Epstein's elegant prose and forceful argumentation serve a vital role in identifying the costs of Title VII, the book leaves to the reader the task of constructing a larger vision of its benefits.

Professor Epstein does not even pause to consider whether the strong—and to him, disturbing—consensus in favor of the antidiscrimination principle in itself constitutes evidence that antidiscrimination laws are still generating wide-ranging social benefits. Ironically, the law and economics community has criticized judicial and scholarly writing in the antitrust field for failing to recognize the welfare-enhancing aspects of certain enduring business practices, yet in failing to consider the similar implications of the enduring popular support of antidiscrimination laws, Epstein may be committing the fallacy of equating the inability to understand the value of a social practice with the absence of social benefits. An evaluation of antidiscrimination laws that falls victim to this fallacy will necessarily be incomplete.

The broad themes of the book may be sympathetically encapsulated in the following three points:

1. In the first decade of its existence, Title VII served a valid and useful role in advancing black economic welfare. Over this period, the legislation enhanced economic efficiency and greatly accelerated the country's movement to an approximate laissez-faire equilibrium.

2. Title VII accomplished its purpose by breaking down severe exclu-
sionary practices. However, the gradual expansion of the law’s reach and the doctrinal extensions permitting broad interference in labor market decisions, even in the absence of any discriminatory intent, have so elevated the relevant costs that the burdens inflicted by the regulatory apparatus far exceed its benefits.

(3) Since the market checks nonprofit-maximizing discrimination, we should repeal Title VII where competitive pressures are likely to discipline firms that discriminate. Firms in the “competitive” sector would be free to discriminate without restraint. These firms would have the right not only to exclude minorities and women, but also to resort to affirmative action, without justifying their behavior to government officials. Conversely, Title VII would be retained for government employers and in unionized and regulated industries, where market pressures inhibiting inefficient discrimination would be weak or nonexistent.

Professor Epstein is most persuasive when he focuses on specific elements of antidiscrimination law to demonstrate that seemingly reasonable legal prohibitions can at times cause much mischief. For example, he convincingly demonstrates that many aspects of employment discrimination law disrupt useful business practices, generating transfers of wealth of uncertain magnitude. These conflicting transfers make it difficult to assess the net benefits of particular legal interventions. Epstein also makes a strong case that elements of the prohibition against discrimination, including the Age Discrimination in Employment Act, are not premised on sound, clearly articulated policy objectives. He argues that the federal government should not mandate the consumption of considerable resources for the purpose of

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10. The market tends to penalize discrimination against minorities or women that is motivated by employer animus, since this form of discriminatory behavior is designed to maximize the utility of employers rather than to maximize profits. Conversely, discrimination that is motivated by the preferences of customers or by the employer’s interest in using information about race or sex as a proxy for productivity can be profit-maximizing and is therefore encouraged by competitive markets.

11. Epstein argues that the justification process is a costly and inaccurate enterprise aimed at the difficult task of assessing the motivations behind employment decisions. Pp. 165-75.

12. Epstein’s point is illustrated by the prohibition of sex differentiation in certain insurance markets. See pp. 313-28. The longer lifespan of women makes it more expensive for employers to supply female employees with pensions but cheaper for employers to insure female lives (relative to male employees). By preventing sex differentiation in pricing insurance benefits, women gain from mandated unisex pensions but lose from mandated unisex life insurance schemes. The net effect of the transfers generated by unisex pricing of insurance benefits is therefore far more complicated than the effects of striking down a single insurance scheme. See, e.g., City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (prohibiting an employer from charging female employees more than male employees for a fixed monthly pension benefit).

While Epstein’s general case against interfering with insurance pricing schemes is quite persuasive, I do have one quibble with his analysis of Manhart. Professor Epstein appears unduly optimistic in assuming that the City of Los Angeles correctly calculated the relative costs of providing pension benefits for its male and female workers. Pp. 322-23, 326. The City paid benefits to employees and their surviving spouses. While male employees died earlier than female employees (thereby reducing pension costs to the City), the pension burden for male workers was elevated by continued payments to their wives who generally outlived them. Professor Epstein’s faith in a governmental agency’s ability to calibrate this benefit finely enough so that “everyone gained” reveals an uncharacteristic confidence in the wisdom of public servants. P. 320.

defining and complying with antidiscrimination laws that lack a compelling theoretical justification. Furthermore, *Forbidden Grounds* serves the useful function of reminding readers that the discrimination of the past, which flourished with strong governmental endorsement, may differ greatly from the private discrimination of today. It is not unreasonable, then, to ask whether the federal civil rights policy that is most desirable in 1992 is different from that required thirty years ago.

While Epstein presents a helpful critique of employment discrimination statutes, he frequently relies upon controversial assumptions and questionable factual conjectures to justify dismantling much of federal antidiscrimination law. His unswerving belief in libertarianism virtually mandates the conclusion that Title VII is harmful, since any intervention in free markets necessarily reduces social welfare according to Epstein's calculus. Because Epstein argues from libertarian first principles, rather than from comprehensive empirical assessments of the costs and benefits of Title VII, he could have written the same book, *mutatis mutandis*, advocating the repeal of the laws prohibiting drug use, sodomy, pornography, prostitution, gambling, or dueling. But an argument that proceeds theoretically from libertarian premises is equally compelling—or unconvincing—whether the claim involves creating free markets for sex, drugs, and consensual killings or unshackling the discriminatory preferences or practices of private employers. Consequently, I doubt that this work will persuade serious nonlibertarian scholars that we should repeal the laws against employment discrimination, although it could conceivably spawn a body of empirical research that would confirm, or refute, Epstein's beliefs concerning the high costs and meager benefits of these laws.

I do not deny that an argument could be mustered against Title VII

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14. On the other hand, Epstein does not directly confront one of the major theoretical arguments favoring age discrimination statutes, namely that such laws protect against the violation of implicit contracts between workers and firms. Conceivably, in order to increase productivity and reduce monitoring costs, firms may promise workers the carrot of considerable deferred compensation in return for many years of work at wages that are low in relation to the workers' marginal product. Once the workers have performed their part of the deal, management—or corporate raiders—have an incentive to fire all the older workers, depriving them of their anticipated compensation. See Andrei Schleifer & Lawrence Summers, *Breach of Trust in Hostile Takeovers, in Corporate Takeovers: Causes and Consequences* 33, 56-57 (Alan Auerbach ed., 1988) for empirical support for this expropriation hypothesis as well as for the skeptical comments of Bengt Holmstrom and Oliver Williamson. Although the dangers of rent expropriation through breach of implicit contracts could provide a justification for some protections for older workers, the *ADEA* does not limit its protection to long-tenured workers, as this theory might suggest it should.

While Epstein is no doubt correct in arguing that contractual arrangements, such as the vesting of pension benefits and reputational effects, can inhibit employer opportunism to some degree, he seems to exaggerate the economic power that older workers have over their employers. Epstein argues that “[l]egal rules . . . should not be designed to curb employer opportunism when employee opportunism is a problem as well,” in that “the older worker may well demand a sharp increase in wages because his or her particular skills are not replaceable.” P. 449. As Richard Posner has noted, the power of a specialized worker “is apt to decline with age.” RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 329 (4th ed. 1992); see also Stewart J. Schwab, Shirking, Opportunistic Firings, and Implied Contract Limitations on At-Will Employment (1992) (unpublished manuscript, on file with the *Stanford Law Review*) (arguing that older workers are more vulnerable to employer exploitation).
without committing the country to unrestricted laissez-faire; indeed, the outlines of such an argument can be gleaned from Epstein's book. But given the painful legacy of racism and bigotry that has dominated the domestic problems of this country since its inception, it is unlikely that a pure theoretical approach based on the benefits of freedom of contract will resolve the public policy debate on employment discrimination. I will, therefore, attempt to examine the past and present value of federal antidiscrimination law from an empirical perspective, outlining what we know, what we have good reason to believe, and what awaits illumination from future research.

Part I of this review begins by contrasting Epstein's conception of social welfare, from which his opposition to antidiscrimination laws directly follows, to a utilitarian approach that evaluates all costs and benefits associated with the law in order to develop the appropriate employment discrimination policy. In brief, libertarians such as Epstein support the right to discriminate on the basis of race and sex, while moralists oppose this right. In a world with zero transaction costs, the entitlement would be held by whichever group valued it more highly. The public good nature of this entitlement, however, implies that transaction costs will be prohibitive. Consequently, social welfare can only be maximized if the legislature assigns the entitlement correctly, which necessarily requires a comprehensive cost-benefit analysis. In furtherance of this assessment, I summarize Epstein's views and outline his points of contention and agreement with the Chicago School concerning the desirability of Title VII at its inception and today.

Part II discusses the important factors to consider in any comprehensive cost-benefit analysis of federal antidiscrimination laws, and underscores the need for further empirical work in light of the uncertainties about the magnitude of critical factors. Part III reviews some evidence on the current prevalence of racial discrimination and speculates about the likely consequences if Epstein's call for repeal of Title VII were heeded. It also discusses the prospects for the law of sexual harassment, which has recently been invigorated by the enormously enhanced remedies authorized by the Civil Rights Act of 1991. The review concludes with an overall assessment of the strengths and limitations of Epstein's provocative work.

I. Evaluating the Social Desirability of Title VII

A. Libertarian First Principles Versus Utilitarian Empiricism

To support his contention that governmental efforts to inhibit discrimi-
nation in labor markets are misguided, Epstein enlists the standard microeconomic argument that wealth will be maximized if competitive markets can operate without restraint. This conclusion only follows, however, if either all costs are internalized or the transaction costs of the affected parties are low. For example, free markets do not maximize wealth in settings where pollution costs and bargaining costs are high. Because of free rider problems and other transaction costs, the victims of widespread pollution will generally be unable to induce the polluters to stop polluting, even when the social benefits from such a contract would exceed the social costs.  

Once it is recognized that discrimination in labor markets imposes external costs that are quite analogous to the costs of pollution, the case for laissez-faire evaporates at a theoretical level and can only be sustained through a proper assessment of the costs and benefits of an antidiscrimination regime. Private discrimination is a form of psychological pollution that corrodes the well-being of both victims and moralists, and excluding these costs from the social calculus—as Epstein does—would be as illogical as excluding the costs of chemical pollution in assessing environmental programs.

Assume that the existence of discrimination against a certain racial group—say blacks—lowers the group’s economic welfare by reducing the level of employment and the wages of its members. In other words, if discrimination could be eliminated, a new equilibrium would be attained in which black employment and wages would rise. One plausible objective of an antidiscrimination law is to generate this hypothetical nondiscriminatory equilibrium by commanding employers to ignore any discriminatory preferences, whether their own or those of customers or other employees. In my view, the two possible equilibriums both have attractive and unattractive features; in Epstein’s view, only the discriminatory equilibrium is normatively appealing.

The first advantage of the discriminatory equilibrium is that, as the product of free competitive markets, it avoids governmental coercion and thereby fosters contractual freedom. The second advantage is that the free market solution promotes “narrow” wealth maximization by maximizing the wealth of the market actors directly involved in the individual employment relationships, as measured by the ability and willingness to pay. In other words, if we were to coerce the attainment of the nondiscriminatory equilibrium, we would reduce the total wealth of the market participants because the gains to blacks from moving to the new nondiscriminatory equilibrium would presumably be outweighed by the losses to the discriminators.

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18. R. Posner, supra note 14, at 61-64.

19. Somewhat arbitrarily, I refer to those who have been discriminated against as “victims” and to those who have not personally suffered from the discrimination but are offended by it as “moralists.”

20. A different, although not necessarily conflicting, objective might be to attempt to alter the discriminatory preferences themselves, so that ultimately the nondiscriminatory equilibrium could be maintained without further coercion.

21. The discriminatory market equilibrium presumptively generates more wealth for the market participants than the nondiscriminatory equilibrium because, if it did not and the gains to blacks
On the other hand, free markets may not promote "broad" wealth maximization, let alone the more normatively appealing goal of utility maximization. The existence of racial discrimination in labor markets imposes external costs on those, both black and white, who are offended by such invidious discrimination. If there is a widely shared belief that such discriminatory conduct is wrong, then these external costs may be quite high. From the utilitarian perspective that I endorse, total social welfare in this scenario might be higher if the nondiscriminatory equilibrium were secured. In order to resolve this issue, one would have to assess (1) the wealth reduction to the market participants that would be imposed by trying to bring about the nondiscriminatory equilibrium, (2) the magnitude of the external harm caused by discrimination and the extent to which this harm is diminished by antidiscrimination legislation, (3) the social harm of government coercion and the costs of operating a regulatory regime, and (4) the degree to which the governmental program would actually achieve the nondiscriminatory equilibrium.

In Part II, I will grapple with the difficult task of quantifying some of these magnitudes empirically, but at this point it is useful to underscore the very different approach that Professor Epstein adopts in denouncing "the entire complex of modern civil rights laws and their administration." In his view, "the only hard questions about the employment discrimination laws concern the types and magnitudes of the social dislocations that result from their vigorous enforcement." He asserts that "as a matter of first principle" discrimination by private parties is not a wrong requiring state intervention or correction. Moreover, society should "exclude all instances of mere offense born of moral outrage or bruised sensibilities from the class of actionable harms, however deeply felt the hurt." To my mind, a libertarian solution to a particular public policy issue is desirable when an appropriate and comprehensive cost/benefit assessment argues against governmental interference. Epstein offers no justification—other than his liber-

from eliminating discrimination exceeded the losses to discriminators, then blacks could conceivably use the surplus wealth to bribe the discriminators to move to the nondiscriminatory equilibrium. I have speculated elsewhere, however, that the usual role of the market in maximizing the wealth of market participants may not apply in the case of discrimination. The problem in this context is that any effort by blacks to bribe whites to stop discriminating may generate psychological losses that exceed the gains from eliminating discrimination. In other words, the very act of trying to bribe someone to treat you equally underscores your own subordinate role. See John J. Donohue III, Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. CHI. L. REV. 1337 (1989). Some things of value may simply not be achievable through purchase.

22. P. xii.
23. P. xii.
24. P. 351.
25. P. 415. While Epstein believes that, in enacting legislation, the state should ignore moral outrage against private employment discrimination, others argue that the government should ignore the psychological costs borne by discriminators who are forced not to discriminate because the costs are wholly illegitimate. A traditional law and economics, or utilitarian, approach would consider both types of costs. See Donohue, supra note 21, at 1343-44. Epstein endorses the utilitarian perspective in evaluating the preferences of the discriminators but abandons it when considering the external costs of discrimination. P. 43.
tarian first principles—for skewing the analysis by ignoring the external costs of discrimination. In other words, while under my utilitarian approach the nondiscriminatory equilibrium could conceivably be preferable to the discriminatory equilibrium, Epstein's libertarian perspective necessarily precludes this possibility. By excluding the harms caused to the victims of discrimination and to those who sympathize with them, Epstein is left with a cost-benefit calculus that includes only costs. No wonder that the only hard question is how much harm is caused by the law.

Epstein buttresses his conclusions about antidiscrimination laws by arguing that:

The problem of social governance . . . requires that we make peace not with our friends but with our enemies, and that can be done only if we show some respect for their preferences even when we detest them. Using the principle of exclusion allows both groups to go their separate ways side by side. The antidiscrimination laws force them into constant undesired interaction. The totalitarian implications become clear only when one realizes the excessive steps that must be taken to enforce the antidiscrimination principle in favor of some groups while it is overtly ignored relative to other groups. It is not the least of the ironies of the study of Title VII that it has brought in its wake more discrimination (and for less good purpose) than would exist in any unregulated system.26

Epstein asserts that the existence of de jure segregation in the American South led to a misunderstanding of the proper role of government, stating that "[t]he great tragedy of the American experience with segregation was that our nation lost sight of [the principle that civil rights refers to the civil capacity to contract], and substituted an expansive regime of government activity . . . which injected government influence and government favoritism into every transaction."27

These provocative remarks will surely infuriate many readers. The suggestion that different racial groups should go their separate ways side by side evokes unpleasant memories of lunch counter owners at Southern department stores informing blacks that they were not welcome to dine with whites.28 The equation of federal civil rights laws with totalitarianism and the thought that the "great tragedy" of the American version of apartheid involved a misconception of a legal definition appear insensitive in light of the enormous human suffering that white oppression inflicted on Southern blacks. Furthermore, those who believe that discrimination is widespread will be critical of Epstein's belief that because there "are many areas in which the employer has no rational reason to discriminate on the basis of race or sex; such discrimination will not be found to any systematic or large degree, even if some discrimination will (and should) survive . . . ."29

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27. P. 499.
28. No law—other than the unwritten Southern code of racial segregation—prevented the private store owners from serving blacks.
29. P. 447.
While Epstein will be widely criticized for his rhetorical excesses, his book can serve a valuable function to the extent that it forces supporters of antidiscrimination laws to re-examine critically their own beliefs. For example, while I object to the admonition that, to further social harmony, individuals should show respect for preferences that they detest, I profited from grappling with Epstein's assertion. Individuals are certainly entitled to respect, I reasoned, but preferences that we detest are not entitled to respect. In the process, I remembered a story that illustrates the complexity of this issue. I once told a student of mine at Yale University that I thought Title VII and the federal civil rights effort had contributed to a reduction in the virulence of discriminatory tastes. The student, who was from North Florida, replied: "I guess that's right. My father doesn't get sick anymore when he sees a black drink from a water fountain." The father had once detested the preference of blacks to drink from public water fountains that were used by whites. I detested the father's preference that blacks be prevented from using "white" water fountains. The white segregationists were as confident in their position that social welfare would be advanced by honoring racist preferences, as I am in thinking today that their preferences should be thwarted. This fact serves as a reminder that governmental power should be exercised with humility and caution, and if this were the message of Epstein's book, it would be a prudent one.

But the anecdote also suggests that when government acts wisely, preferences may soften over time, thereby reducing and possibly eliminating the sting of the initial coercion, as well as the psychological costs of discrimination, to everyone's benefit. On the other hand, when government acts un-wisely—for example, in passing Jim Crow legislation—the pain inflicted by law, and the need for coercion, only grows over time. Therefore, while I agree with Epstein that the country suffered when racists used governmental power to thwart the preferences of blacks, I question his contention that a problem of similar magnitude inevitably arises if the government thwarts the preferences of racists.

B. The Chicago School View—Conflicts and Consensus

At first glance Epstein's work seems to fit comfortably into the laissez-faire tradition of the Chicago School. Thirty years ago, powerful intellectual voices at the University of Chicago registered their strong opposition to the passage of federal civil rights legislation on theoretical grounds. For example, in 1962, Milton Friedman emphasized that fair employment practice laws were unnecessary because the existing free markets were generating great progress for blacks: "The maintenance of the general rules of private property and of capitalism have [sic] been a major source of opportunity for Negroes and have [sic] permitted them to make greater progress than they otherwise could have made."30

Friedman's view became the established orthodoxy for many within the

Chicago School tradition who believed that antidiscrimination laws were both unnecessary and unsuccessful at providing economic benefits for blacks. Five years ago, Richard Posner endorsed the widely accepted work of James Smith and Finis Welch to the effect that:

"The racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized—education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains around this long-term trend."

More recent studies, however, have provided strong evidence against this conclusion. The impressive study of James Heckman and Brook Payner demonstrates a dramatic surge in black employment in the South Carolina textile industry beginning in 1965. The study reveals that from the time of the first available employment data in 1910 until the black breakthrough in 1965, blacks were almost completely excluded from this major manufacturing employer in the state. This exclusion persisted during the tight labor markets induced by World War II as well as the depressed economy of the 1930s. Moreover, since the skill requirements for employment in this industry are modest, large numbers of blacks were qualified for this factory labor. It is significant that, after fifty-five years of exclusion, the rapid increase in black employment began in 1965, the effective date of Title VII and the date that President Johnson issued Executive Order 11,246, calling for affirmative action on behalf of blacks by federal government contractors. Since the black breakthrough was identical in timing and magnitude in virtually all counties of the state, regardless of the variation in labor market tightness, and since Heckman and Payner painstakingly eliminated a host of potential alternative explanations for the dramatic black gains, their conclusion that federal antidiscrimination laws generated dramatic employment gains for blacks seems compelling.

Moreover, Donohue and Heckman conclude that the sizable black economic gains over the decade from 1965 to 1975 cannot be fully explained by Smith and Welch's preferred explanations of migration or gains in the quantity and quality of black education. During this decade, the relative wage gains for blacks were large in the South, but virtually nonexistent elsewhere. That these wage gains occurred in the South undermines the view

36. Id. at 1610. In 1965, black men in the South earned roughly 35% less per hour than white men, holding constant age and years of education. By 1975, this disparity had been reduced to only
that migration to the higher wage North caused the increase in black earnings. Indeed, the sharp reduction in the rate at which blacks left the South following the passage of Title VII\textsuperscript{37} corroborates the view that the federal civil rights effort improved the economic status of Southern blacks. Nor can the significant black advances beginning in 1965 be fully explained by the steady, long-term progress in the quantity and quality of black education that has taken place over this entire century.\textsuperscript{38} The current state of the evidence supports the view that federal civil rights policies promoted major black economic gains in the South in the decade following the effective date of Title VII.

Interestingly, Epstein departs from the Chicago School orthodoxy by acknowledging the initial economic gains for blacks that the law generated. Indeed, the contrast between Epstein's conception of the value of Title VII at the time of its passage and the comments of Chicago School economists prior to enactment is striking. Epstein writes that in 1964 "Title VII was heaven sent," and that "the Civil Rights Act of 1964 played an enormous role in the advancement of black economic interests by knocking out Jim Crow restrictions."\textsuperscript{39}

Thus, Epstein concludes that Title VII was a libertarian dream come true, at least in the short run, in that it "countered the totalitarian influences at the state and local levels . . . . Some federal enforcement shock to the system was no doubt necessary."	extsuperscript{40} Contrast Epstein's dream in 1992 with Milton Friedman's nightmare in 1962:

>[Antidiscrimination] legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state, provided a majority can be found to vote that way, to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws in the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle to [antidiscrimination legislation].\textsuperscript{41}

This sentiment, however, is essentially Epstein's view today. While conceding that Title VII generated sizable efficiency gains in its early days, Epstein returns to the Chicago School fold by offering a controversial explanation for Title VII's favorable effects. Antidiscrimination laws were only effective because government-sponsored segregation laws inhibited the

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} P. 251.
\textsuperscript{40} P. 251.
\textsuperscript{41} M. FRIEDMAN, supra note 30, at 113. While Milton Friedman focused on the benefits that free markets had been conferring on Southern blacks, Epstein argues that "[f]or much of the period before 1965, segregation pursuant to statute, the very antithesis of a market system, was dominant in the South." P. 251.
free market with respect to labor. According to Epstein, Southern whites used the power of government, coupled with private violence, to systematically exploit disenfranchised blacks with cartel-like restrictions on their employment. These restrictions artificially reduced black wages and employment levels, while simultaneously thwarting those firms that would have been willing to hire the relatively cheap black labor in order to maximize profits. Therefore, Title VII's sole benefit was the elimination of discrimination sponsored by the state or enforced privately.

Certainly, violence was often directed against Southern whites and blacks who challenged the strict racial segregation, and the exercise of federal power to tame a lawless land was an important and undeniable social gain. But Epstein's view that racial exclusions were purely the product of private violence and Jim Crow laws is debatable. Consider again the case of the Southern textile industry. Despite Gary Becker's observation that the Southern textile industry was "extremely competitive," Epstein blames a 1915 South Carolina statute that mandated separate but equal facilities for textile workers of different races for defeating competitive employment practices in the industry. In support of his claim, Epstein notes the finding of Heckman and Payner that the textile industry was the only area in which blacks were underrepresented, correcting for level of education, as well as the one industry subject to a Jim Crow law.

If one accepts the view that segregationist legislation caused the exclusion of blacks from the Southern textile industry, three conclusions follow: (1) the exclusion would not be found prior to passage of the segregationist law or during periods when the law was not enforced; (2) the exclusion would occur only in areas subject to such legislation; and (3) competitive pressures would undermine the racial exclusion shortly after the unconstitutionality of the segregationist law was perceived. Yet, the evidence seems to contradict all three points. First, South Carolina did not adopt the law requiring separate but equal facilities in textile firms until 1915 and virtually never enforced it after the 1920s. Nonetheless, Heckman and Payner document that the exclusion of blacks in the industry was complete from 1910-1915 (prior to the passage of the law) and continued until 1965. Second, despite the fact that North Carolina lacked similar Jim Crow legislation, its textile industry experienced a pattern remarkably similar to South Carolina's: profound racial exclusion in the textile industry before 1964 followed by a pronounced black breakthrough beginning in 1965. Specifically, be-

42. Pp. 246-47.  
43. Pp. 246-47.  
44. P. 251.  
45. P. 248.  
47. P. 246. The law was formally repealed by the South Carolina legislature in 1972.  
49. The data that Heckman and Payner used in their study only went back to 1910, five years prior to the passage of the 1915 textile segregation act. Heckman & Payner, supra note 33, at 174.
between 1964 and 1965 black employment in the textile industry increased by 59 percent in South Carolina and by 73 percent in North Carolina. Third, while the unconstitutionality of the South Carolina segregation law was uniformly recognized long before the passage of the 1964 Civil Rights Act, the employment gains documented by Heckman and Payner only occurred in 1965. Where was the vaunted power of the market to break down discriminatory exclusions? Epstein’s position that the wholesale exclusion of blacks depended upon government-sponsored segregation does not conform with the evidence. Rather, the history of racial exclusion in the Southern textile industry may demonstrate that the economically and politically dominant class can maintain widespread employment discrimination in competitive markets by enforcing discriminatory norms through social shaming and shunning, buttressed by the threat of private terrorist activity.

Epstein’s attempt to blame racist Southern governments for the adverse employment conditions of blacks before 1964 appears to founder on another finding by Heckman and Payner: Correcting for levels of education, blacks were not underrepresented in either state or local government in South Carolina. Presumably, if racist government officials were the impetus behind racial discrimination against blacks, few blacks would be employed in Southern government. However, except for the textile industry, the representation of blacks prior to 1965 appears to be the same in South Carolina governmental and private employment.

Another piece of evidence concerning the centrality of government’s role in perpetuating widespread racial exclusions is Donohue and Heckman’s finding that Title VII brought large economic gains to the South but uncertain economic gains to the North. I believe that the explanation for this pattern is that Title VII successfully attacked the wholesale exclusions and egregious discrimination that existed in the South, but failed to counteract the less extreme forms of private discrimination that persisted outside the South in 1965. This finding might buttress Epstein’s position, if no gains were seen in the overall economic status of blacks outside the South because of the absence of governmental restrictions for Title VII to dismantle. Conversely, one can argue that the benefits from Title VII’s prohibition of discrimination had been secured outside the South prior to the passage of the 1964 Civil Rights Act by the widespread adoption of state antidiscrimination statutes beginning in 1945.

52. Heckman & Payner, supra note 33, at 153. These figures for state and local government employment exclude school teachers.
53. Donohue & Heckman, supra note 35, at 1610 (figure 6).
Indeed, prior to 1945, evidence from two major non-Southern manufacturing industries—automobiles and airplanes—supports the view that widespread exclusions of black workers were common outside the South, where there were no segregationist restrictions enforced by government. Warren Whatley and Gavin Wright contend that:

The experience of blacks in the auto industry has a bearing on many broad themes in African-American economic history. For one, the sharpness of the distinction between north and south may be less clear than expected. Industrial exclusion of blacks in southern textiles, for example, was rooted in generations of entrenched attitudes and community-enforced barriers. Yet most auto companies practiced an exclusion just as complete. Even where we do find a vigorous entrepreneurial response to the opportunity offered by black workers, as we do at Ford, the social implications were ambiguous. Instead of market pressures breaking down distinctions between races, the market incentives faced by Ford led that firm to treat the races differently, ultimately to institute a high degree of racial segregation.\(^5\)\(^6\)

Herbert Northrup documents a similar story of racial exclusion in airplane manufacturing both inside and outside the South, explaining that “[t]he virtual exclusion of Negroes from the aircraft industry prior to World War II was certainly consistent with conscious owner-managerial policies.”\(^5\)\(^7\)

The percentage of nonwhite workers in airplane manufacturing rose from .2% in 1940 to 1.6% in 1950 and 3.6% in 1960. In 1940, the four states employing the most airplane manufacturing workers were California, New York, Connecticut, and New Jersey. Of these four states, New York had the distinction of employing the greatest number and percentage of blacks in this industry: eighteen black workers out of 13,791 total employees, or .1%.\(^5\)\(^8\) I am not persuaded, then, that widespread racial exclusions are limited to cases in which governmentally supported segregation impairs the salutary influence of competitive labor markets.

In the end, Epstein finds himself in the uncomfortable position of endorsing a view that directly contradicts the position of his Chicago School predecessors. Friedman and Becker argued that the Southern labor markets were protecting black economic interests, and that no antidiscrimination laws were needed.\(^5\)\(^9\) Since this view conflicts with the finding of rapid black progress in the wake of Title VII, Epstein endorses the Heckman and Payner finding of black breakthrough but attributes the need for the law to the lack of free labor markets caused by Southern segregationist legislation. Epstein does not advertise that, if his view is correct, it stands as a major indict-

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\(^5\) Warren Whatley & Gavin Wright, Getting Started in the Auto Industry: Black Workers at the Ford Motor Company, 1918-1947, at 22 (1991) (unpublished manuscript, on file with the Stanford Law Review). In 1940, the percentage of auto workers who were black varied widely among the big three: Ford, 12.22%; General Motors, 2.5%; and Chrysler, 4.0%. The vast majority of black auto workers at Ford worked in the foundry at their River Rouge, Michigan plant.

\(^6\) HERBERT NORTHRUP, THE NEGRO IN THE AEROSPACE INDUSTRY 17 (1968).

\(^7\) Id. at 26.

\(^8\) See text accompanying notes 30, 41 & 46 supra.
ment of the Chicago School's initial opposition to the law and of its refusal to recognize the positive consequences of federal antidiscrimination policy.

Even now, when it might appear as through Epstein and the pantheon of Chicago School economists could all align behind their heated opposition to antidiscrimination law, Gary Becker has disrupted the consensus. He implicitly questions whether Epstein has correctly arrayed his priorities in launching an all-out attack on this federal intervention, stating:

I don't like group quotas and other aspects of affirmative-action programs, but I am puzzled by the handwringing and anger of those who are opposed, especially some intellectuals. Although no one has even rough estimates of the social costs and benefits of these programs, I strongly suspect that certain other subsidies and regulations do more damage. Examples include tax and other breaks to the housing industry, the declines in labor-force participation of elderly persons induced by the tax on Social Security benefits, and higher consumer prices due to quotas on imported cars, textiles, computer chips, and until recently, steel.

Recognizing that affirmative-action programs are government regulations with a complicated incidence of costs and benefits does not resolve the dispute over whether or not they are desirable. But it may help us focus the debate on the real question: Do they cause as much harm or do as much good as other government programs that generate very little debate?60

II. THE SOCIAL COSTS AND BENEFITS OF TITLE VII

In a debate with Richard Posner over the efficiency of Title VII, I previously argued that the law generated social gains by shifting the labor market closer to a nondiscriminatory equilibrium at a time when the market had failed to make reasonable progress toward achieving that goal.61 Posner concluded that the law was costly, ineffective, and unnecessary.62 In a sense, Epstein's position is a hybrid of both views. In 1964, Title VII was needed to dismantle the socially wasteful, government-sponsored cartel that disadvantaged Southern blacks; with this mission accomplished, Title VII has now outlived its usefulness. Accordingly, since the law imposes costs on society while no longer serving any socially useful function, Epstein contends that Title VII should be repealed.63

The first stumbling block that Epstein must confront in building his case for eliminating antidiscrimination laws is the enormous popularity of Title


63. P. 252.
The transformation of President George Bush on this point is informative: Despite the liberal, pro-civil rights tendencies of his father, Senator Prescott Bush of Connecticut, George Bush was vehemently opposed to the 1964 Civil Rights Act when he sought a Congressional seat from a conservative district in Houston, Texas. While the President is not above playing racial politics, as demonstrated by the Willie Horton incident, his signing of the Civil Rights Act of 1991 signified his support for the notion that antidiscrimination in employment is an essential component of the modern conception of freedom. Presumably, Bush's support for the civil rights bill reflects his view that the vast bulk of the American people embrace the core concept of Title VII.

If, as Epstein argues, virtually everyone would be better off if the laws were eliminated, why isn't there a big push by informed citizens to repeal them? Two possible answers come to mind. First, the public might be opposed to retaining the laws, but unwilling to invest resources to try to topple them out of a fear that their efforts would be thwarted by strong interest groups supporting Title VII. This view is untenable. Dim prospects for legislative success have not inhibited organized efforts to secure everything from the legalization of marijuana to the prohibition of handguns, yet no similar effort has occurred to challenge the basic prohibition of discrimination in employment. Second, citizens may be misinformed about the consequences of Title VII. If these citizens were fully informed, the argument holds, then they would oppose the law. This explanation, however, poses problems for Epstein. A bedrock assumption of Forbidden Grounds is that individuals know quite well what is in their interest and should be trusted to advance those interests. This assumption seems to compel the conclusion that, given the overwhelming public support for federal antidiscrimination law.

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64. By 1968, 83% of whites favored “laws that make white people hire qualified Negroes.” Paul Burstein, Discrimination, Jobs, and Politics 57 (1985); see also Prejudice, Discrimination, and Racism 3-5 (John Dovidio & Samuel Gaertner eds., 1986) (documenting that whites are becoming more liberal and egalitarian in their attitudes toward blacks). An index constructed to reflect the public's liberalism on racial equality issues and the need for an active federal role in promoting this outcome suggests that the public was consistently more liberal on this issue after 1983 than it was in 1968. James A. Stimson, Public Opinion in America: Moods, Cycles, and Swings, 70-73, 134 (1991).


66. Id.


68. See note 2 supra. Thus, there is a sharp contrast between Epstein's conception of freedom, which includes the freedom to discriminate in one's contractual arrangements, and the conception of freedom that underlies Title VII. As President Lyndon Johnson stated in signing the Civil Rights Act of 1964: “Our Constitution, the foundation of our republic, forbids [racial discrimination]. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.” Edward Carmines & James Stimson, Issue Evolution: Race and the Transformation of American Politics 43 (1989).

69. As always, it is important to distinguish between the overwhelmingly popular concept of equal opportunity and the more controversial and conceptually distinct issue of quotas and affirmative action. While Epstein would shackle federal civil rights policy on both issues, I am aware of no organized opposition to the equal opportunity dimension of federal law.
laws, Title VII is welfare-enhancing and should be preserved. But since the bedrock assumption is questionable in this context, this section of the review will proceed to examine the relevant costs and benefits associated with Title VII.

A. Some Speculative Thoughts on Costs

In order to estimate the costs of antidiscrimination law, one should consider four factors: the frequency with which firms are sued and the costs of such litigation, the administrative costs of enforcing antidiscrimination laws, the higher costs of selecting a workforce prescribed by Title VII, and the productivity losses that might follow from misallocations of labor.

1. Litigation costs and administrative budgets.

Let us begin with the assumption that roughly 1.5 million firms averaging perhaps fifty employees per firm are covered by Title VII. Over the twenty year period beginning in 1969, approximately 80,000 lawsuits were filed in the federal courts against private employers. This implies that at least 95% of employers have never been sued in federal court. Moreover, in any one year less than one-half of one percent of firms covered by Title VII would expect to be sued. Accordingly, given the small proportion of firms sued under antidiscrimination laws, the litigation costs could be quite high for those firms that are sued without causing the average cost for the full population of 1.5 million firms to be very large. These litigation costs

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70. See note 64 supra.

71. I do not argue that mere passage of a law creates a presumption of social desirability. Legislative failures are common; special interests frequently secure privately beneficial laws that are socially harmful and lack public support. These laws (e.g. agricultural price supports) remain on the books because of the power of special interests and the difficulty of repeal. The antidiscrimination principle of Title VII, in contrast, commands broad-based public support. Epstein might respond that in the public forum (unlike the private domain) individuals rationally remain ignorant or apathetic because they have little chance of influencing policy. But having no opinion about a policy question because it is too costly to become informed is different from having a strong positive opinion. Moreover, if Epstein is correct about the law’s severe social harms, political entrepreneurs should have adequate incentive to make the case for repeal.

72. Under this assumption roughly 75 million private workers are covered by the law. I excluded from the analysis firms with fewer than 15 employees (as such employers are not covered by Title VII) and governmental employees (since Epstein would retain the antidiscrimination law for public employers). P. 396.

73. This very rough estimate is obtained as follows. From 1969-1989, 93,844 employment discrimination cases were filed against employers other than the federal government. This calculation is based on data described in John Donohue & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983 (1991). I then reduced this figure to 80,000 to eliminate cases filed against state and local employers.

74. Given an assumption that 80,000 cases have been filed against 1.5 million firms, at most only 5.3% of the firms could have been sued. Since it is obvious that many firms have been sued repeatedly, and that many firms that were sued are no longer in business, the percentage of firms yet to be sued must be greater than 95%.

75. The total number of employment discrimination cases filed in the federal court is now around 8000 per year. Donohue & Siegelman, supra note 73, at 989. If we assume that 20% of these cases are against government employers, then 6400 are filed yearly against private employers. (6400/1.5 million = .0043).
combined with the administrative budgets of the Equal Employment Opportunity Commission (EEOC) and the Office of Contract Compliance Programs (OFCCP)\textsuperscript{76} aggregate to perhaps $1 billion\textsuperscript{77}—an amount that in the grand scale of a $5.5 trillion economy\textsuperscript{78} is relatively small.\textsuperscript{79}

2. Compliance costs.

The complex of EEO laws and regulations certainly increases the costs of paperwork, programs, and procedures while potentially lowering productivity.\textsuperscript{80} Given the paucity of existing evidence, the compliance costs for the average firm under Title VII can only be roughly estimated in orders of magnitude. If compliance costs equaled $1000 per year per firm, or $20 per employee, yearly costs would total roughly $1.5 billion.\textsuperscript{81} Increasing costs to $10,000 per firm, or $200 per employee, would raise annual costs to $15 billion. At $100,000 per year, or $2000 per employee, the annual cost would be $150 billion per year. One careful study of the cost of EEO regulations by Arthur Andersen and Company provides suggestive evidence that compliance costs are in the neighborhood of $6.5 billion (exclusive of any net productivity losses that might result from having a lower quality labor force).\textsuperscript{82}

\textsuperscript{76} Both of these agencies enforce federal antidiscrimination laws. The 1991 budget outlays were $192 million for the EEOC and $52.5 million for the OFCCP, for a total of $244.5 million.

\textsuperscript{77} An estimate of the total litigation cost for each of the 6400 cases filed per year might be $30,000 per case. See James Dertouzas & Lynn Karoly, Labor-Market Response to Employer Liability 36 (1992) (estimating that legal fees for defendants in state wrongful termination cases average $15,000 per case). The litigation costs would therefore equal $192 million which when added to the federal budgetary outlays of $244.5 million comes to $436.5 million. If one adds an additional expense of perhaps $7000 per case to process 80,000 cases in the EEOC, the total of all these budgetary and litigation expenses is roughly $1 billion.


\textsuperscript{80} Arthur Andersen & Co., Cost of Government Regulation Study for the Business Roundtable 5-29 (1979).

\textsuperscript{81} One arrives at this figure by simply multiplying the per firm expense of $1000 by 1.5 million firms, which totals $1.5 billion.

\textsuperscript{82} Arthur Andersen & Co., supra note 80, at 28-29. The study examined 48 firms in 1977 who comprised 5% of the private labor force (excluding agricultural laborers). Id. at 7. It individually assessed compliance costs under the following categories: 1) affirmative action programs—minorities and women, 2) general administration of EEO regulations, 3) procedural regulations of the EEOC, 4) sex discrimination guidelines, 5) employee selection guidelines, 6) affirmative action guidelines—handicapped workers, and 7) all other EEO regulations and requirements. The report found EEO compliance costs of $217 million for the participating companies. Id. at 28.

We need to expand this number to the entire private labor force covered by Title VII—that is, firms with at least fifteen workers—and to express it in current dollars, since prices today are now three times as high as they were in 1977. Making both these adjustments yields an annual figure of roughly $10.4 billion ($216.6 \times 16 \times 3). Interestingly, affirmative action programs (category one) generated 76% of the total estimated costs. Id. at 29. These programs require compliance with the basic commands of the federal government contract compliance program. Since the vast majority of the 1.5 million firms covered by Title VII are not monitored by the OFCC (which only regulates government contractors), I adjusted the $10.4 billion cost estimate downward to reflect the lower costs incurred by most firms. I used the following equation: $(216.576 \text{ million} \times 8 \times 3) + ((1-.76) \times$
Adding this $6.5 billion estimate of annual compliance costs to the estimated $1 billion in administrative and litigation costs leads to a combined cost estimate of antidiscrimination law in the neighborhood of $7.5 billion, without considering any productivity losses.  

3. Productivity costs.

It is normally safe to assume that free labor markets will generate a more productive workforce than regulated labor markets. But in trying to assess the extent to which the workforce selected in compliance with Title VII and the contract compliance program is less productive than the workforce that would emerge without regulation, it is also important to consider three countervailing factors that are easily overlooked.

First, any discrimination based on the animus of the employer could impair productivity (even though it may maximize the total monetary and psychological wealth of the discriminator). If the law succeeds in reducing such discrimination, productivity gains will be registered. Second, I have noted elsewhere that the freedom from discrimination combined with an official proclamation of equality might improve the attractiveness of the working environment, thereby generating offsetting productivity gains that might not be achievable through Coasean bargaining. Even small gains in worker productivity or decreases in the onerousness of work would yield billions of dollars of gains from the law. Third, a portion of equal opportunity law has been directed at preventing employers from relying on race or sex as proxies for productivity in making hiring decisions. Employers wish to use these proxies because they provide cheap, albeit imperfect, information about the quality of workers. Spending more money to select the workforce would presumably yield a more productive set of employees, but employers would forsake these gains in a non-Title VII world because they are outweighed by the added costs. But since these higher search costs have already been included in our estimates of antidiscrimination costs, any resulting productivity gains from these higher search costs must be considered as well.

The productivity costs resulting from less homogeneous workforces, or

216.576 million * 8 * 3) = $6.4 billion. This adjustment reflects the fact that only government contractors are saddled with the high affirmative action costs. To be conservative, I assumed that half of the private workforce was employed by government contractors, which is clearly an upper-bound estimate.

While Arthur Andersen estimated that EEO regulation costs for the 48 companies studied in 1977 totalled $217 million, the study also discovered that these participants had EPA regulation costs of $2.02 billion—an amount nearly ten times as large. ARTHUR ANDERSEN & CO., supra note 80, at 19.

The evidence from Eastern Europe strongly corroborates the general prediction.

The reason is straightforward. Animus-based discrimination implies that a less qualified applicant is hired instead of a more qualified applicant. Ordinarily, hiring the more qualified worker will raise productivity. Productivity may not rise, however, if the presence of the more qualified worker creates tensions due to his fellow workers’ prejudices.

See Donohue, supra note 21.

Id. at 1355.
from hiring, promoting, or not terminating less qualified workers (to avoid litigation costs or to comply with affirmative action requirements), must be weighed against these potential productivity gains. While I wish to endorse Gary Becker's view about the enormous uncertainty in these estimates, my admittedly speculative guess at the net effect of these conflicting factors is to assume annual productivity losses of $7.5 billion, producing a total cost estimate for Title VII in the neighborhood of $15 billion per year. This corresponds to the estimate of $10,000 per firm or $200 per worker. On the other hand, Epstein would assess the productivity losses at a much higher figure—perhaps in the neighborhood of $80 billion or higher. Indeed, a very recent study that merits further investigation suggests that state law departures from the general rule of at-will employment elevates labor costs by ten percent because of the difficulty of discharging unfit workers. This percentage seems so large that it draws into question the accuracy of this finding. If the results of this study prove to be reliable, however, they may suggest that Title VII generates considerable productivity losses to the extent that it serves as an unjust-dismissal statute. Regardless, this discussion reveals that the costs of enforcing and complying with the law are not trivial, nor are they measured very precisely.

One additional point concerning the costs of Title VII is worth mentioning. Epstein notes that to the extent antidiscrimination regulation imposes

88. See text accompanying note 60 supra.
89. If the annual costs of litigation and government expenditures are $1 billion, the compliance costs are $6.5 billion, and the productivity losses are $7.5 billion, the total cost of EEO law and regulation would be $15 billion.
90. See text accompanying note 81 supra.
91. Epstein alludes to, but expressly declines to vouch for, John Hunter's estimate that expanded use of evaluative employment testing could increase productivity by $80 billion per year. P. 237 (citing John E. Hunter's work discussed in NATIONAL RESEARCH COUNCIL, FAIRNESS IN EMPLOYMENT TESTING: VALIDITY, GENERALIZATION, MINORITY ISSUES, AND THE GENERAL APTITUDE TEST BATTERY 19 (John A. Hartigan & Alexandra K. Wigdor eds., 1989)). If this figure were accurate, antidiscrimination laws (which currently restrict such testing to ensure no disparate impact against minorities and women) could have a greater impact on productivity than noted above. However, Hunter's estimate is highly dubious, as the National Research Council has stressed:

[Hunter's $80 billion] theoretical gains to be reaped from testing come from allocating the top X percent of test scorers to jobs and the bottom 100-X percent to no jobs. Hunter's numbers would mean that 10 percent would be selected and 90 percent would not. For an individual employer who can afford to be highly selective, [Hunter's methodology] may well be applicable. But it cannot apply to the whole economy, for which the prospect of the top-scoring 10 percent working and the bottom 90 percent not working is absurd. . . .

. . . [Expanded use of testing] will not improve the quality of the labor force as a whole. If employers using the [tests] get better workers, employers not using the [tests] will necessarily have a less competent labor force. One firm's gain is another firm's loss. Id. at 239-41. In short, the $80 billion estimate of lost productivity is not only enormously exaggerated but both theoretically and empirically unjustified. For additional telling criticisms of this figure, see Mark Kelman, Concepts of Discrimination in "General Ability" Job Testing, 104 HARV. L. REV. 1157, 1221 (1991).
92. J. DERTOUZOS & L. KAROLY, supra note 77, at 63.
93. If one takes 80% as labor's share of the current GNP of $5.6 trillion, then total labor costs come to roughly $4.5 trillion. Ten percent of this figure would equal $450 billion.
94. See Donohue & Siegelman, supra note 73.
higher costs on business, it serves as a tax on employment and provides an incentive to reduce the workforce. But if the annual costs per worker are estimated at $200, then, given standard estimates of the elasticity of demand for labor, one might expect to see a reduction in employment of about one-fourth of one percent—around 188,000 jobs.

In any event, not all of the above specified costs will fall as a tax on labor. Indeed, compliance with the regulations will actually cause an increased demand for some types of work—primarily clerical and legal. The Arthur Andersen study found that seventy-six percent of EEO incremental costs were for labor, which suggests the need for 96,000 full-time workers to deal with compliance. The net loss of perhaps 90,000 jobs to the antidiscrimination tax on employment is relatively modest in an economy that has increased employment by over 46 million since the passage of Title VII. Consequently, the major problem associated with Title VII is not likely to be that it reduces employment. Rather, Title VII is problematic only if the benefits the Act generates are not sufficiently valued by the population, in which case our resources are being devoted to producing outcomes that are less desirable than the alternative use of these resources. Consequently, what is most important to ascertain is not the absolute magnitude of the costs of Title VII but the relative magnitude vis-à-vis the benefits of the law.

B. A Thought Experiment Concerning the Benefits of Title VII

While considerable uncertainty exists about the magnitude of the costs of Title VII, primarily because of the difficulty in evaluating the productivity consequences of the legal regime, the effort to evaluate the benefits of the law is far more difficult and speculative. Ideally, a benefit analysis would aggregate the utility gains from Title VII and subtract the utility losses to discriminators (and those who dislike governmental interference in labor markets). Given the practical and theoretical difficulties in evaluating utility, economists frequently measure consumers' willingness to pay for a good in order to discern how a governmental initiative influences social welfare.
correspondingly, to assess the benefits of the law, I offer the following thought experiment: What is the average monetary amount that a fully informed American would require before he or she would accept the repeal of Title VII?\textsuperscript{103} This question is not equivalent to the query: "What amount would induce an individual to leave a state of Nirvana to return to the vicious American version of apartheid that ruled the South for much of this century?" Under this formulation of the question, the value approaches infinity, and the costs would be paltry in comparison. Of course, the problem with this assessment is that the United States is not in a state of Nirvana today, nor would the repeal of Title VII necessarily take the country back to the horrible and unjust conditions that prevailed only twenty-five years ago. My guess, however, is that some of Professor Epstein's most severe critics implicitly think in these terms when contemplating the value of Title VII.

Professor Epstein's own formulation of the question might be: "What would the average American be willing to accept to relinquish the set of benefits that are actually afforded by Title VII?" Such a question would focus on the mere economic benefits of Title VII. From this perspective, someone like me, a white male under the age of 40, would presumably derive no economic advantage from the statute and therefore would not value the utility gains associated with elevating the wealth of relatively poor minorities would further strengthen the case for antidiscrimination law. See John J. Donohue III & Ian Ayres, Posner's Symphony No. 3: Thinking About the Unthinkable, 39 Stan. L. Rev. 791, 797 (1987).

\textsuperscript{103} Some individuals might be willing to pay for the repeal of the law even if it does not impose any economic burden on them. For racists, the repeal would eliminate the psychological losses resulting from the inability to discriminate; while for libertarians, the repeal would eradicate pernicious governmental power over nonfraudulent and noncoercive conduct. In the thought experiment, these individuals would be willing to accept a negative sum to eliminate Title VII. But losses caused by administrative burdens and diminished productivity should not be counted in this equation since they have been included in the estimated "costs" of Title VII. Furthermore, sums awarded through litigation or gained via settlement can be ignored because, as pure transfers, they appear on both sides of the ledger and therefore do not affect the cost/benefit calculus.

I purposely formulated the conceptual question of defining social welfare in terms of the amount that one would need to be paid to accept the removal of Title VII (a reimbursement measure), rather than the amount that one would be willing to pay to secure or retain Title VII (a payment measure). While these two amounts are obviously related, they are not identical. For example, an indigent individual who could pay very little to preserve his or her bodily integrity might well demand a high price to sacrifice it. Because of wealth and endowment effects, the amount that one would demand before relinquishing a benefit is necessarily greater than the amount that would be paid to secure the benefit for two reasons. See Herbert Hovenkamp, Legal Policy and the Endowment Effect, 20 J. Legal Stud. 225 (1991). First, if you have the good you tend to be wealthier than if you do not, which implies that your ability to pay is greater (the wealth effect). Second, people may become more attached to things they already have, so that the possession of a good strengthens one's preference for it (the endowment effect). See Daniel Kahneman, Jack L. Knetisch & Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Pol. Econ. 1325 (1990).

This reimbursement measure, instead of the willingness to pay measure, is certainly preferable where the benefit under consideration—the elimination of discrimination—may systematically affect the wealth of target beneficiaries. The reimbursement measure has the advantage of partially correcting for the fact that the depression of income caused by past discrimination will alter what individuals can afford to pay. Also, since laws seem to alter preferences, the fact that we now have Title VII makes the reimbursement measure more accurate than a payment measure because the former incorporates the law's impact on individual preferences. See Cass R. Sunstein, Preferences and Politics, 20 Phil. & Pub. Aff. 3 (1991).
statute at all. Although minorities and women would presumably benefit, the economic losses to white men would be offset against these gains to minorities and women, and the net result might well be negative. But just as the untutored assessment that Title VII generates Nirvana yields a highly exaggerated estimate of the benefits of the law, Epstein's approach produces a considerable error in the opposite direction.

Title VII confers more than economic advantage on individuals. Many Americans receive intangible benefits from a federal law that announces a principle of equality of treatment in employment, backed up by legal sanctions. Moreover, Title VII expresses society's moral outrage at those who would depart from a minimum standard of decency in treating fellow human beings. Given the enormous popularity of the law, Title VII's symbolic value is clearly positive and may well transcend the law's monetary significance. Thus, in assessing the benefits of the statute, one should consider four factors: (1) the symbolic gains (or positive externalities, to use the economic jargon) enjoyed by Title VII proponents; (2) the symbolic losses incurred by the relatively small group of opponents to the legislation; (3) the actual gains to the beneficiaries of the statute; and (4) the psychological losses of those who resist enforced interaction among different races and sexes.

It is impossible to assess these gains and losses with any precision; an entire literature in economics demonstrates the difficulty in persuading individuals to accurately reveal their true valuation of a public good.\textsuperscript{104} Nonetheless, it may be useful to consider different scenarios in order to obtain a sense of the potential magnitude of the statute's benefits. If the average adult American would forego $100 per year to maintain the basic Title VII regime, then the benefit of the statute would be $17.5 billion\textsuperscript{105}. Similarly, if the average annual value of the law to adult Americans were $500 per year, then the benefits would rise to $87.5 billion. On the other hand, if the average American values the law at closer to $10, the monetized benefits would be roughly $1.75 billion, considerably less than the costs estimated above.\textsuperscript{106}

The following table summarizes the conclusions of the preceding, speculative cost-benefit analysis.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Scenario} & \textbf{Benefit} & \textbf{Assumption} \\
\hline
Average $100 & $17.5 billion & Average adult American would forego $100 per year to maintain the statute \\
\hline
Average $500 & $87.5 billion & Average adult American would forego $500 per year to maintain the statute \\
\hline
Average $10 & $1.75 billion & Average adult American would forego $10 per year to maintain the statute \\
\hline
\end{tabular}
\caption{Summary of Cost-Benefit Analysis}
\end{table}

\textsuperscript{104} See, e.g., note 101 supra.

\textsuperscript{105} The number of Americans over 21 years of age in 1989 was 173.2 million. U.S. BUREAU OF CENSUS, supra note 100, at 12 (table 12). I am using 175 million as a rough estimate of the current number of adult Americans.

\textsuperscript{106} See notes 72-100 supra and accompanying text. Of course, I have no more expertise in assessing these very speculative figures than anyone else, and I invite readers to substitute their own estimates. With that caveat, my best estimate of the gross average value of the statute is $50 to $200 per adult American—or roughly $8.75 to $35 billion—with a point estimate of $100 per adult. As a point of reference, I note that individual charitable contributions in 1989 equaled $102 billion, or roughly $582 per adult. Richard B. McKenzie, \textit{Was it a Decade of Greed?}, PUB. INTEREST, Winter 1992, at 91, 93.
TABLE 1

Range of Estimated Costs and Benefits of Title VII
($ Billions)

<table>
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<tr>
<th></th>
<th>Costs</th>
<th>Benefits</th>
<th>Net Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worst Case</td>
<td>$87.5</td>
<td>-0-</td>
<td>-$87.5</td>
</tr>
<tr>
<td>Middle Case</td>
<td>$15</td>
<td>$17.5</td>
<td>$2.5</td>
</tr>
<tr>
<td>Best Case</td>
<td>$7.5</td>
<td>$87.5</td>
<td>$80</td>
</tr>
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Given the absence of empirical data and the difficulty of assessing Title VII's utility, widely varying estimates of the costs and benefits may be pronounced. The law may be quite costly as Professor Epstein argues, have monetized net benefits and costs that are roughly offsetting as I surmise, or have large benefits as many of the law's strongest advocates contend. These three possible cases are summarized in Table 1. However, because Title VII generates significant externalities and the legacy of discrimination alters the ability to pay, Professor Epstein's theoretical arguments relying on the market to achieve optimal social welfare are unavailing. Since the public good dimension of Title VII is a significant component of its value, one would not expect this benefit to be provided at the optimal level in a free market. The relative costs and benefits of antidiscrimination law simply cannot be derived mechanistically from libertarian first principles.

In considering the value of antidiscrimination law, one should at least consider that the repeal of Title VII holds the remote possibility of cataclysmic racial conflict. The lessons of slavery, Jim Crow, and Nazi Germany all serve to remind us that racial prejudice can be a dangerous force. Just as efforts to push affirmative action too forcefully may ignite dangerous passions, the injustices of private sector employment discrimination, at a time when black incomes and wealth are far below those of whites, also has a potential for explosive consequences. While I certainly do not purport to speak with authority on the mechanism through which prejudice reverberates throughout a community, it is plausible that a certain amount of bigotry can exist in a society without catastrophic result, but that beyond some

107. In Epstein's view, there are large productivity losses associated with antidiscrimination law and no offsetting benefits—this is Table 1's "worst case."

108. See note 106 supra. This middle case assumes that the costs of federal antidiscrimination laws are roughly $15 billion, including $7.5 billion in productivity losses; the benefits are taken to be $17.5 billion, representing an average annual value of $100 per adult.

109. This best case assumes that productivity losses are zero, and that the benefits of the antidiscrimination regime equal $500 per adult American, or $87.5 billion.

110. In a free market, goods are only supplied to the extent that someone steps forward to pay for them. With a public good, such as Title VII, the benefit is shared widely, so individuals will have an incentive not to contribute but simply to free ride on the expenditures of others. The result is that the public benefit may not be achieved.

111. This discussion was written prior to the recent rioting in Los Angeles that followed the acquittal of four police officers charged with the videotaped beating of Rodney King.

112. Donohue & Heckman, supra note 35, at 1610, show that, correcting for observable human capital attributes such as age and education, black men still earn almost 20% less than white men. Injustice coupled with wide racial income disparities, even in the absence of any causal relationship, is likely to be a socially corrosive combination.
threshold, the prejudice could spiral out of control. Epstein may be correct that if we stop the discriminatory conduct of governments, we will have little to fear from the discrimination of private employers. An alternative view, however, is that through conscientious efforts to eradicate private discrimination, we limit the likelihood of racial antagonism growing to the point where the demand for malicious or mean-spirited governmental action is difficult to check. Therefore, society may tolerate a law that seems socially costly, based on a purely contemporary assessment of costs and benefits, in order to diminish the (albeit small) likelihood that the repeal of Title VII would breach the bigotry threshold and lead to catastrophic social costs. Like Pascal, society may not be willing to gamble with the risk of suffering a near infinite burden—such as the holocaust in Nazi Germany—even if the chance of such a burden is minuscule.  

I qualify this argument in two ways. First, I have criticized Professor Epstein for stressing the costs imposed by certain elements of antidiscrimination law without offering some indication of the relative magnitude of these costs. Yet, my argument that Title VII may provide important insurance benefits to a risk-averse population by reducing the remote chance of a discrimination-induced conflagration, is equally speculative. Second, Professor Epstein might respond that federal antidiscrimination law's expanded reach and elevated penalties pose a greater threat of racial cataclysm than the repeal of Title VII. This point undoubtedly merits considerable further exploration. However, with dangers on both sides, the path of wisdom is not likely to pass too closely to either extreme position—repeal of Title VII or greatly invigorated preferential hiring to equalize black and white incomes. Choosing the best policy for promoting racial tolerance is a tremendously difficult but vital issue. The costs and benefits of Title VII are difficult to specify, but in light of evidence demonstrating the dramatic early success of Title VII, I am not prepared to accept the view that the government cannot play any positive role in this area.

III. DISCRIMINATION IN THE NINETIES

At times there is a strange air of unreality surrounding some of Professor Epstein's discussion of the modern workforce. I will try to illustrate some difficulties I have with his approach by focusing on some of his views concerning the prevalence of racial discrimination and the problem of sexual harassment.

113. This argument is quite similar to those frequently offered by economists in support of the need to restrain inflation. Even if the social costs of restraining inflation at any point in time outweigh the social benefits, the small risk of hyperinflation, with its potential for causing an economic collapse that could ultimately threaten our democracy, justifies the costly vigilance.

114. "Pascal's Wager" refers to the following argument for believing in God: Even though the likelihood of God's existence might seem small, the burden of suffering eternal damnation is so large relative to the gain of enjoying eternal heavenly bliss that no rational individual would be willing to take the risk.

115. See text accompanying note 103 supra.

116. See text accompanying notes 33-38 supra.
A. **The Prevalence of Racial Discrimination**

Professor Epstein’s proposal to eliminate antidiscrimination laws for the private sector is explicitly premised on the view that there is more discrimination today (presumably against white males) than there would be if Title VII were repealed.\(^{117}\) Apparently this view stems from Epstein’s belief that government exerts enormous pressure on private firms to hire blacks.\(^{118}\) If he were correct, one would expect that an attractive black candidate would be quickly swept up by employers—indeed, would be favored over a similarly qualified white applicant. But study after study in which paired black and white testers apply for employment contradicts this view. A recent Urban Institute study of employment discrimination in Chicago and Washington revealed no evidence that blacks ever received preferential treatment over ostensibly equally qualified white applicants.\(^{119}\) To the contrary, particularly in Washington, the study provided considerable evidence of adverse treatment of black applicants.\(^{120}\) While I agree with Epstein that the authors of the Urban Institute study tended to exaggerate the magnitude of the discrimination,\(^{121}\) at least their study is part of a body of evidence that documents the presence of racial discrimination in employment.\(^{122}\) Conversely, Epstein offers nothing but words in support of his view that reverse discrimination is a significant problem.

One of the most dramatic tests of discrimination was presented by ABC’s PrimeTime Live. Hidden cameras captured repeated examples of marketplace discrimination against an articulate, intelligent, and well-dressed black

\(^{117}\) See text accompanying note 26 supra.
\(^{118}\) Pp. 395-96.
\(^{120}\) M. Turner et al., supra note 119, at 40-41. In response, Epstein suggests that the Urban Institute’s decision to limit its study to jobs advertised in the paper tended to weed out firms with affirmative action plans. Pp. 56-57. This point is probably correct, but it certainly does not prove that had the Urban Institute looked at a different category of firms, it would have found evidence of reverse discrimination. The study provides evidence of discrimination against blacks, even though such disparate treatment is unlawful. The greater the number of firms that discriminate against blacks in hiring, the more likely it is that black incomes will suffer.
\(^{121}\) The problem is that the Urban Institute interpreted a finding that white testers fared better 23% of the time, while black testers fared better 7% of the time, to indicate that discrimination occurred in 30% of the tests. The inevitable randomness in the hiring process, however, might suggest that, in the absence of discrimination, the white testers should be favored as often as the black testers. Consequently, discrimination would only be deemed to have occurred in 23% - 7% or 16% of the tests. See James Heckman & Peter Sigelman, The Urban Institute Audit Studies: Their Methods and Findings, in CLEAR AND CONVINCING EVIDENCE (Michael Fix & Raymond Struyk eds., forthcoming 1992).
\(^{122}\) Moreover, a number of studies from the world of sports, in which productivity can often be measured with some accuracy, reveal that blacks are paid less than whites when productivity is held constant. Lawrence M. Kahn, The Effects of Race on Professional Football Players’ Compensation, 45 INDUS. & LAB. REL. REV. 295 (1992); Lawrence M. Kahn, Discrimination in Professional Sports: A Survey of the Literature, 44 INDUS. & LAB. REL. REV. 395 (1991); Lawrence M. Kahn & Peter D. Sherer, Racial Differences in Professional Basketball Players’ Compensation, 6 J. LAB. ECON. 40 (1988).
man, in comparison with a white counterpart tester. Although at times rational reasons can explain racially discriminatory treatment, the Prime-Time Live episode shows a shoe salesman snubbing a black patron and foregoing personal profit in an apparent effort to gain utility. While a white customer is served immediately, the salesman refuses even to acknowledge the presence of the black customer and stands idly by throughout the lengthy sequence. Although one must be cautious about generalizing from such anecdotal evidence, it seems fair to conclude that at least some individuals will forgo economic gain to indulge their bias against blacks. Presumably, even more would do so, if there were no price to be paid. Yet the presence of agency costs, which separate the interests of managers and owners of firms, implies that managers will likely have some freedom to discriminate on nonproductivity related grounds without suffering any personal penalty. Given the previously mentioned externalities associated with such discrimination, governmental opposition to discrimination rests on a strong theoretical foundation.

Epstein urges minorities to respond to such slights by taking what the market offers: the ability to patronize and work for nondiscriminatory establishments. But at the very least, even if equally satisfactory merchandise and jobs are available elsewhere, the discriminatory firm imposes dignitary harms and search costs on minority citizens. Of course, search costs could be eliminated by repealing Title VII and allowing firms to advertise “Minorities need not apply” or “Minorities welcome.” But any effort to reduce the search costs by promoting “freedom of contract” necessarily elevates the dignitary harm imposed on minority citizens. Title VII remains the only possible mechanism for reducing both the prevalence of dignitary harm and the imposition of higher search costs.

In fact, Title VII’s repeal would most likely increase the dignitary harm without reducing the search costs. Although private firms would be free to discriminate, any firm that openly announced such a policy would become the target of immediate protest, driving away customers or harassing managers. Thus, even without Title VII, discrimination would continue to be concealed, forcing minorities to search for non-discriminators. In other words, Professor Epstein’s solution would probably impose on minorities both higher search costs and more discriminatory rejections, with their attendant injury to dignity—the worst of all worlds. Moreover, the repeal of Title VII would increase racial confrontation and drain the energies of some of the most talented members of the black community who would almost certainly


124. In one episode, a record store clerk clearly was concerned that the black tester might attempt to shoplift. Id. This type of discrimination could derive from the higher rates of crimes committed by blacks than by whites. But field experiments have found that white shoppers spontaneously report and confirm instances of shoplifting at a higher rate when the shoplifter is black than when he is white. Faye Crosby, Stephanie Bromley & Leonard Saxe, Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review, 87 PSYCHOL. BULL. 546, 555 (1980).

125. PrimeTime Live: True Colors, supra note 123.
be pulled into the struggle against open private employment discrimination. Clearly, the legal prohibition against discrimination and the existence of affirmative action create tensions in our society, but these tensions might be dwarfed by the racial confrontation instigated by the repeal of Title VII.  

B. Confronting Sexual Harassment

Six years ago, the Supreme Court held in *Meritor Savings Bank v. Vinson* that Title VII prohibits sexual harassment in employment. But not until last November, with the passage of the Civil Rights Act of 1991, had there been an effective federal remedy for such misconduct. For the first time, women will be able to sue for compensatory and punitive damages arising from sexual harassment. Thus, while a smattering of cases have been filtering through the system over the years, sexual harassment cases are likely to be the new growth area in Title VII litigation in the 1990s. Given the fact that Congress has just boldly advanced the law of sexual harassment, it may be instructive to examine Professor Epstein's case for total retreat in this area.

Pointing out that at the heart of sexual harassment is the violation of personal autonomy, Epstein first asserts that potent common law remedies exist for such violations and that federal antidiscrimination law duplicates and complicates the common law. In support of this view, Epstein notes that intentional offensive contact could provide a basis for a battery suit, threatened physical harm could support a claim for assault or intentional infliction of emotional distress, and shadowing a person could constitute the tort of invasion of privacy. But, once again, the air of unreality and the flight from evidence mar the analysis. Perhaps these tort doctrines could have supplied the basis for a legal action for a woman who was confronted by what we now call hostile environment and quid pro quo sexual harassment, but there seems to be no evidence of any such cases being successfully prosecuted, and Epstein does not cite a single one in his book. In the face of the "inexorable zero," it seems that Catherine MacKinnon's claim

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126. The situation of conspicuous discrimination might be comparable to that confronting Buck Williams, the only doctor in South Dakota who performs abortions today. Due to the threat posed by anti-abortion protesters, Dr. Williams works in a cinderblock office with bullet-proof windows and burglar alarms. For eleven years he has walked through pickets to enter his office. As Dr. Williams describes the situation, "There are ugly phone calls and death threats, and one of the reasons I can keep doing this is that my kids have grown up. It's a lot harder for someone with small children who knows how his family is going to be affected." Tamar Lewin, *Hurdles Increase for Many Women Seeking Abortions*, N.Y. Times, Mar. 15, 1992, at 1, 11.

While I am not aware of any such protests against Title VII, my guess is that its repeal might unleash similar hostility against brazen discriminators. On the other hand, if Epstein is correct that the level of wealth will rise sharply from repeal of Title VII, minorities might be content to focus on the abundant good opportunities that are available to them.


129. P. 353.


that "sexual harassment has been not only legally allowed; it has been legally unthinkable," is a more accurate description of the reality faced by women prior to the emerging federal law of sexual harassment than that afforded by Epstein's dry recitation of the Restatement of Torts.

Epstein also argues that Title VII's extension to the sexual harassment arena is doctrinally bankrupt, because it could not be used to convict a bisexual harasser (as bisexuals do not harass on the basis of sexual preference). Even though Epstein correctly identifies the doctrinal tension in the case of the hypothetical bisexual harasser, I do not share his conclusion that he has delivered a knockout blow to Meritor Savings Bank v. Vinson. The case of the bisexual harasser is a law professor's construct, not a serious basis for making policy. Arguing that we should not have a Title VII remedy for sexual harassment because it would not prohibit the conduct of bisexual harassers is like arguing that we should not prohibit murder because a homicide committed by a person standing on the border of two states cannot be prosecuted when neither jurisdiction can establish beyond a reasonable doubt that the crime occurred on its territory. The only conceivable argument against extending Title VII's reach to include sexual harassment is that the common law remedies are adequate and the burdens of federal enforcement are unwarranted. But the absence of sexual harassment cases filed under common law tort doctrine makes the first proposition dubious, and Epstein correctly concedes that he only has a few "second-order" objections to the development of sexual harassment law under Title VII rather than under state tort law.

IV. CONCLUSION

While many readers may respond to Forbidden Grounds with either absolute horror or complete enthusiasm, my own reaction is more complicated. Without question, Professor Epstein has offered a fascinating and comprehensive assessment of the entire realm of federal antidiscrimination law. The product of a commanding intellectual presence, the book forces readers to rethink positions that might otherwise be accepted unquestioningly. For example, Epstein convincingly argues that the Supreme Court repeatedly expanded the scope of Title VII, either to areas that the 1964 Congress never

133. P. 353.
134. Pp. 357-58. A colorable argument can still be made that the bisexual harasser discriminates against his or her victims because of their sex. Sex is both a gender and a function or activity. A bisexual individual who singles out employees for bad treatment because of their sexual attributes is concerned with sex as a function or activity. Even if the bisexual harasser violates equal numbers of men and women, it is not unthinkable to argue that each individual who is harassed is being treated badly because of their sex.
136. Nothing in Title VII limits a woman's ability to seek relief from harassing conduct through state law proceedings. A plaintiff may choose to engage the Title VII grievance mechanisms if she prefers the remedies available under the federal law.
contemplated (e.g., sexual harassment\textsuperscript{137} and pregnancy leave\textsuperscript{138}) or in a manner that conflicted with explicit Congressional intent (e.g., an expansive § 1981 remedy\textsuperscript{139} and disparate impact theory\textsuperscript{140}). Yet, while Epstein's doctrinal criticisms can at times be telling, they are often beside the point. In this instance, Epstein fails to note that Congress has been quick to endorse the Supreme Court's expansive interpretations of antidiscrimination law.\textsuperscript{141} In fact, when the Court has hesitated to move forward or sought to step back, Congress has repeatedly supplied its own expansive reading of federal employment discrimination law.\textsuperscript{142}

Nonetheless, Epstein's message of the hidden and varied costs generated by the vast array of federal antidiscrimination laws is undoubtedly a useful reminder to those who overlook the costs of pursuing social justice. Indeed, it is conceivable that Epstein may even be right about one of the central conclusions of the book: that, given the costs imposed by employment discrimination laws and the ability of employers to circumvent their objectives, blacks and other minorities would actually be better off economically if the entire civil rights apparatus were abandoned. If Epstein were shown to be correct on this policy prescription, he would deserve credit for being the first to voice it.

But brilliance and even the possibility of empirical validity cannot salvage the book from its fundamental failure to offer the appropriate form of argumentation. In the world of tradeoffs that characterizes issues of race and sex discrimination, complicated public policy questions cannot be resolved with purely theoretical assertions. There is enormous uncertainty about the magnitude of the costs and benefits of antidiscrimination law, and although Professor Epstein seeks refuge from these uncertainties by clinging

\textsuperscript{138} Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (holding that policy under which employees returning from pregnancy leave lose their accumulated seniority violates Title VII).
\textsuperscript{140} Griggs v. Duke Power Co., 401 U.S. 424 (1971) (prohibiting neutral employment requirements that have a disparate impact on minorities and that are not significantly related to job performance).
\textsuperscript{142} In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Supreme Court upheld a disability insurance plan for employees that excluded pregnancy against a charge of sex discrimination. Two years later, Congress amended Title VII to overturn the decision in Gilbert by deeming discrimination on the basis of pregnancy to be unlawful discrimination. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

In 1989, the Court again tried to cut back on the scope of antidiscrimination law in a number of cases including Wards Cove Packing Co. v Atonio, 490 U.S. 642 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Congress responded by passing the Civil Rights Act of 1991, which reversed these attempts by the Supreme Court to restrict the scope of employment discrimination laws.
to his libertarian first principles, Forbidden Grounds does not answer the question that Epstein purports to resolve: Are the social benefits from the existing laws against employment discrimination greater than the social costs? While Epstein's work shows that those who uncritically call for ever-increasing regulation in the pursuit of equality in labor markets are to be faulted for ignoring the costs involved in this approach, the tragedy of his endeavor is that Epstein writes as if he has resolved a question, when at most he has served to pose one. It was a similar combination of brilliance and incomprehension that evoked philosopher John Dewey's assessment of Leon Trotsky: "He was tragic. To see such brilliant native intelligence locked into absolutes."\textsuperscript{143}

In my opinion, Professor Epstein's book would have been far more persuasive as a scholarly work had it not fallen victim to the one-sidedness that it so aptly attacks. Of course, the far Left can be insensitive to the costs of fiddling with free markets and can be remarkably obtuse when confronted with the lessons of Eastern Europe. But Epstein could have enhanced his credibility immensely by conceding that his own intellectual forebears were simply wrong when they argued against the adoption of Title VII and by acknowledging that the country would have suffered greatly if their advice had been heeded.\textsuperscript{144} Think for a moment about the position of the country in 1964 versus that in 1992. A delay of five or ten years in the passage of the Civil Rights Act would have had explosive, perhaps catastrophic, consequences.\textsuperscript{145} These costs surely dwarf the costs of a similar delay in repealing Title VII, even if Epstein's criticisms about the current operation of the law were correct. By sliding over the mistakes of his Chicago School ancestors, Epstein reveals an unbecoming intellectual timidity, and by limiting his sense of outrage to the fact that federal antidiscrimination law still exists, Epstein diminishes the effectiveness of his message.

Although I maintain my opposition to the broad repeal of antidiscrimination laws without a far more compelling empirical showing, I share many of Epstein's concerns about the burdens and ineffectiveness of specific aspects of the employment discrimination apparatus. Costly extensions have been grafted onto the basic antidiscrimination principle with little apparent benefit for anyone except EEO lawyers\textsuperscript{146}, and antidiscrimination law continues to blossom in numerous strange and arguably deleterious ways, such as the passage of state laws prohibiting employers from discriminating


\textsuperscript{144}. See text accompanying note 41 supra.

\textsuperscript{145}. Even before the decision in Brown v. Board of Education, 347 U.S. 483 (1954), Lyndon Johnson presciently observed: "We're in a race with time. If we don't act, we're gonna have blood in the streets." NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 136 (1991).

\textsuperscript{146}. Even special solicitude for white males over age 60 may be questionable given the fact that, as a whole, the elderly have a slightly lower rate of poverty than the rest of the population. U.S. BUREAU OF CENSUS, supra note 100, at 463 (table 748).
against cigarette smokers.\textsuperscript{147}

A number of searching questions must be asked by Title VII proponents. For example, given that black economic welfare continues to be tightly linked with general prosperity in the U.S., is employment discrimination law, or any of its components, sufficiently costly to impair aggregate economic health? Does the great excess in the number of discriminatory discharge cases, as compared with hiring cases, indicate that Title VII serves as a drag on the employment of blacks?\textsuperscript{148} Does the use of disparate impact theory to strike down employment qualification tests impose higher costs on business without generating measurable benefits for minorities?\textsuperscript{149} Can we avoid nightmarish applications of Title VII like the case brought by the EEOC (during the tenure of Clarence Thomas) against the Daniel Lamp Company in Chicago?\textsuperscript{150} Employment discrimination law is certainly not an area for complacency. But, unlike Epstein, I believe that one does not make out a case for chopping down a tree by demonstrating that some pruning would be desirable.

For the generation that fought and sacrificed for the passage of the Civil Rights Act of 1964, the symbolic significance of this legislation is immense. Over time that symbolic significance may wane, and one would hope that, simultaneously, the need for Title VII will diminish. While these changes might conceivably alter the relative costs and benefits of the statute in such a way that repeal may one day be possible, I have yet to be persuaded that day has arrived.

\textsuperscript{147} In response to heavy lobbying by the Tobacco Institute, 21 states have adopted laws to protect smokers from employment discrimination. Andrew M. Kramer & Laurie F. Calder, \textit{The Emergence of Employees' Privacy Rights: Smoking and the Workplace}, 8 LAB. LAW. 313, 323 (1992); Peter Karr, \textit{A Victory in Trenton for Smokers}, N.Y. TIMES, May 21, 1991, at B1. The strenuous efforts of the Tobacco Institute would seem to undercut Epstein's view that victims of discrimination can simply turn elsewhere, without substantial penalty, if one private employer refuses to employ or do business with them. If anti-smoking discrimination does not harm smokers, why would a profit-maximizing entity like the Tobacco Institute spend millions of dollars to pass antidiscrimination laws to protect them?


\textsuperscript{149} That is, if elimination of a test leads to the implementation of an alternative mechanism for selecting the firm's workforce without increasing the percentage of minority employees, costs have been imposed with no offsetting benefits.

\textsuperscript{150} The Daniel Lamp Company, a small and economically marginal manufacturer, was hounded by the EEOC for employing too many Hispanics and too few blacks. Pp. 70-72.