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Richard A. Epstein
Erwin Chemerinsky

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FORUM

SHOULD TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BE REPEALED?

RICHARD A. EPSTEIN*
ERWIN CHEMERINSKY**

Professor Richard Epstein’s 1992 book, Forbidden Grounds: The Case Against Employment Discrimination Laws, boldly challenges the existing social consensus in favor of laws against employment discrimination. On November 19, 1992, the University of Southern California chapter of the Federalist Society sponsored a debate on Professor Epstein’s proposal to repeal all employment discrimination laws. Approximately 300 students attended the debate, which was made possible by the generous support of the John M. Olin Foundation.

Editors’ Note: Professors Epstein and Chemerinsky have agreed to publish further rebuttals in the Fall 1993 issue of the Southern California Interdisciplinary Law Journal.

PROFESSOR EPSTEIN: EMPLOYMENT DISCRIMINATION LAWS SHOULD BE REPEALED

In this brief talk, I want to outline some of the reasons why I think that the present body of antidiscrimination laws should be repealed insofar as it applies to private employers who operate in competitive markets. The simplest way to justify that position is to give a comparison between the operation of the antidiscrimination laws and the usual tort prohibitions against the use of force. In my view the differences in the operation of these two types of laws largely explain why the antidiscrimination laws should be repealed. The fact that there is a strong social consensus in

* James Parker Hall Distinguished Professor of Law, University of Chicago Law School.
** Legion Lex Professor of Law, USC Law Center.
favor of the civil rights acts, and the antidiscrimination principle they are said to embody, offers, if anything, an additional reason for their repeal, and none for their continued enforcement.

In making this general claim I want to stress again that the focus here is on private employment. I am not concerned with voting rights or with any other subject, such as aid to educational institutions that are covered by the Civil Rights Acts themselves. In many cases the analysis that I have given will carry over, but in other cases it may not. It is best therefore to focus on one area, and leave all else aside.

Returning then to our basic inquiry, I should state at the outset that my basic political orientation is libertarian, but that as a limited-state libertarian, I do not believe that there should be no government at all. I do not believe that we could endure a state of affairs in which all individuals have no legal rights and no legal duties. I do not believe in a legal regime of anarchy, without any regime of government. But I do think that the central legal prohibition on certain individual conduct does derive directly from the Hobbesian concern with the use of force and, I will add, fraud, in a state of nature.

Given this orientation, the central question is a comparison in the positions of two kinds of victims, those of force and those of discrimination in employment markets. The dissimilarities will dominate. In order to see why, ask first why it is that we all fear the use of force. I think that the explanation is not difficult or complicated: some people could kill us. So now the question is, what steps do we have to take in order to control these people. One approach is to adopt a market orientation and to say that we should all enter private contracts to secure our self-protection. But immediately the question is, with whom should the contract be made? In a world in which you are looking at force as the major source of horror, the people you are concerned with are not your friends, but generally speaking, your enemies. So the first person with whom you must contract has to be the person who is most intent on doing you harm. You would have to find some mix of bribes and threats that would lead him to renounce the use of force against you, and to keep his promise. Only then could you start to breathe easily.

But not for long, for there are lots of people out there who could do you ill, so that even if you enter into a contract with one or another of them, there will remain others who are every bit as hostile to you, and with the same designs on your person and property. So what now? It turns out that you need a second arrangement, and then a third, and then a fourth. In a world in which, I am sorry to say, there is a great deal of
bigotry and a great deal of intolerance, and impatience and stupidity, you will not be able to make, let alone enforce, enough contracts with enough persons to keep all these potential enemies at bay. There is in effect a huge set of transactional barriers that block the voluntary creation of a complicated network of contracts whereby everyone agrees to a mutual renunciation of force. So owing to these barriers, we have come to recognize the need for the state, and the coercive transactions it uses to insure peace. The state imposes taxes (hence the reason for calling me a limited-government libertarian) on us all for the benefit of the common good, which in this particular case is to create a monopoly of force that prohibits the private aggression by one individual against another. It is perhaps somewhat paradoxical that a strong libertarian like myself who generally thinks that state intervention is a “bad” must nonetheless concede that it is possible to identify some circumstances in which the collective use of force is a manifest good. The failure of coordination by private agreement is what drives us to a social contract.

The difficulties here are very pronounced, for even if voluntary agreements could be reached to satisfy ninety-nine percent of the population, the reluctance of the other one percent to go along could undo all or much of the gains from the agreements otherwise reached. Owing to these instabilities, a strong social consensus does not create a viable equilibrium. The misbehavior of a single individual can undo the precarious social peace which commands wide social support. It is truly a case where all must be bound in order for any to be protected.

Now when we switch to the antidiscrimination laws in employment we face a very different social phenomenon. In order to see what it is, it is important to recall what the basic structure of the Civil Rights Acts provides. It does not deal with the punishment of individuals who act out of bad motives; there are indeed many situations (especially those involving the use of force) where the presence of a bad motive can make an illegal action worse. Thus to refer for a moment to the celebrated R.A.V. case in the Supreme Court,¹ the bad motive of a deliberate trespasser can surely aggravate the nature of the offense. If you want to enter the property of someone else out of hatred or spite, the traditional tort law treated the motive as making the actions worse, even if they could not make a legal act illegal.²

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So now it is important to keep the Civil Rights Acts in perspective. They are not concerned with cases of aggravated assault for racial motives or something of that sort. Instead as the statute itself recognizes, we are dealing with cases where someone "fails to or refuses to" deal with another person because of—and you may now fill in the blanks—race, creed, religion, age, handicap, intelligence, or indeed anything that you want. The precise content of the particular prohibition has relatively little to do with the basic structure of the law.

What basic structure? The key feature concerns the kinds of searches and the kinds of conduct open to individuals to improve their positions. Recall—and it is critical to the argument—that we are in a world in which all persons have secured a liberty of the person by a prohibition against the use of force. What is the analogous danger that we face from private discrimination?

Initially, note that in this situation, you are looking at a world of hundreds, and thousands, and millions of people, some of whom hate you quite as much as they did in an unregulated state of nature. The question still remains, what can they do with their hatred? By definition they can at most refuse to do business with you. The change in the nature of the legal rules changes the nature of the contracts that you must seek in order to better yourself. In effect what you must now do is to search the other side of the market to try to find those individuals whose inclinations are most favorable to your welfare. You can spurn all of those whose inclinations are hostile to your own welfare. In this setting the relevant imagery is very different from that involved when the use of force is allowed. If you can find a tiny segment of the population which will do business with you on favorable terms, then the fact that many others refuse to deal with you will not result generally in any systematic diminution of your wealth. Now you need not enter into a mass of contracts to keep the enemy at bay, but only one, or a few contracts, to sell your labor to some willing employer.

So how should we expect the world to play out even if there is some conscious discrimination so that whites (for example) prefer to do business with whites. In order to see what is going on here, it is critical to return to a central distinction introduced by Gary Becker in his early analysis of discrimination:3 one possible outcome of discrimination is a wage differential, and the other is a separation of blacks and whites (to take a simple example) into different firms. His argument was that even

if you could show that many employers wished to discriminate against some portion of the population, so long as there is free entry into the market (that is many parties looking for contracts) the wages between the two groups will in equilibrium be the same, adjusting for productivity variables, even though you might find some level of market separation between blacks and whites. In a competitive situation, his position was that you could find market separation, but not wage differentiation.

Now, with some trepidation, I would like to suggest that what Becker said is wrong on one point. He said that in a world of pure competition, you would expect all forms of discrimination to cease, because the firms that engage in discrimination in competitive markets would find themselves at a systematic disadvantage relative to their rivals. He is clearly correct that competition will have an enormous effect on the way in which the market operates, so much so that I am in favor of some antidiscrimination or nondiscrimination provision to the extent that there is monopoly or restricted entry that allows one firm, or union, to have some control over price or contract terms. The point is that once the monopolist is a sole person with whom you can deal, various forms of discrimination do become possible, and these lead to inferior allocative outcomes to situations in which competitive forces are allowed to work.

But does it follow that in a competitive world we would expect to see a color-blind or race-blind equilibrium, of the sort that was generally thought desirable in the social discussion around the time that Congress enacted the 1964 Civil Rights Act. It is of course difficult to predict in the abstract the precise form that the market behavior and discrimination will take. Indeed most of the standard models on the subject tried to identify various imperfections that could explain the persistence of discrimination: all employers were white males with preferences for their own kind; or that all customers had preferences for white over black, or male over female, or some other assumptions that were every bit as austere and improbable.

It turns out that these depictions of the market are, however, wholly inconsistent with any assumption of free entry into the marketplace. If anyone can become an employer, then we should expect to find lots of persons becoming employers whose preferences run very much at cross-currents with the simple, uniform descriptions of the market, and each of these employers will seek out some niche where he, or she, can enjoy some temporary advantage relative to some equally determined rivals.

Given this added measure of complexity, I would predict that there would still be some situations with good old-fashioned bigotry. But by
the same token it would be very difficult in the abstract to identify which persons would be practitioners of that not-so-subtle art, and who would turn out to be its victims. It is not correct in my judgment to assume that the historical record speaks for itself about the way in which an unregulated competitive labor market will work. Anyone who examines closely the operation of the market in the Jim Crow South, and indeed in many segments of the North, will discover that there were many very heavy-handed forms of government intervention that at every level were designed to frustrate the condition of free entry—thus creating the conditions that call for the imposition of some antidiscrimination law.

But if the world could be freed of these oppressive forms of direct regulation, then my prediction would be this: there are many people in this country who are deeply sensitive to what I regard as the manifest injustices that took place on issues of racial policy over long periods of our history. Nobody in his right mind could say, I think, that Jim Crow was the embodiment of laissez-faire politics. Nobody could say that the Davis-Bacon Act of 1931, which was passed with explicit racial animus, was the embodiment of a free and open economy. Open up the economy for real, however, and I predict that certain paradoxes that trouble a great many people will be resolved in a coherent fashion.

First, it seems that you will find some firms—typically small firms in specialized niches—may practice same-type discrimination. You would expect to find Korean firms, Jewish firms, black firms, and all women firms. But if, in the alternative, these larger organizations must engage in mass marketing in an age of diversity, then the exact opposite is likely to be the case. These firms will cater to all sorts of different people in order to allow for the largest level of outreach. Who one is becomes relevant to what one can do. The airtight division of 1964 between merit on the one hand, and all extraneous considerations on the other hand, will pass into the mists of history.

It follows therefore that firms seeking to reach out to all segments of the market will find it in their interest to take into account race. They may well choose to adopt race-conscious policies and adopt diverse hiring strategies. They may well choose to adopt some kind of affirmative action program, although one far different, I suspect, from those which

EMPLOYMENT DISCRIMINATION LAWS are routinely required by governments. It may well be that this private firm will choose to adopt some internal quota system, coupled with rules sensible to itself but mysterious to any outsider. But as someone who approaches this set of issues from a libertarian perspective, I do not have to face the problem that has consumed so much time and energy under the current antidiscrimination laws. I do not have to explain why it is that certain people are allowed to act on the strength of these race or sex preferences, while other persons, whose behavior may or may not be terrible, are denied the like privilege, the like privilege of freedom of association.

But it is said that there are preferences and preferences; that the arguments for diversity are vastly stronger than the arguments in favor of old-fashioned bigotry. One could point to the stain of history and the need for some rectification. And I must say that in general I have sympathy with this position, although I am ever more distressed by the intolerant way in which the case is often made. But by the same token even if the arguments for diversity carry some weight, it is important to recognize their intrinsic limitations: while these arguments may justify the race-conscious practices of the firms that choose to accept their moral force, they do not justify the coercion of others who do not share this view of history. One can make the argument from history on the retail basis, and respond to it at that level. There is no reason to make a strong point of view, no matter how sound, official state policy.

The simple point of my argument is that if a large portion of the population thinks that some form of race preference is an appropriate response to past discrimination, then even if one repealed the antidiscrimination laws tomorrow, you would expect to see many more firms engage in these desired forms of discrimination than in the opposite forms. The moral case does not disappear with the statute. But since the forms of discrimination are not wholly voluntary (with no stick in the side of those who disagree with the official policy), then we are freed as a nation of the incredible government colossus that today imposes a huge tax on us all. Likewise we will be freed of the enormous political risk that the civil rights statutes that were originally defended as a “mild and moderate” intervention in the market will create massive intrusions with respect to testing, pensions, promotions, and every other aspect of the employment relationship.

These remarks are not idle comments. If you start to look at these civil rights statutes and ask yourself to consider the drain that they
clearly create, it is necessary to identify some offsetting social improvement that they can deliver. And on this critical point the evidence in favor of the statute is very, very weak. There were some gains attributable to the passage of the civil rights statutes in the years before 1975. I think that it is fair to say that virtually all of those gains had to do with the dismantling of the apparatus of segregation as it existed in the old South, and with the change in union practices throughout the country. But by the same token, if you look at the post-1975 period, there are two critical findings that are in close correlation with each other. There is both a relative stability in black/white wage differentials, and a decline in the overall level of wage growth. The reason why these two phenomena go together is that competitive markets do a far better job in sorting people by tastes, abilities and preferences than any system of heavy-handed government planning.

The bottom line should be clear. On issue after issue, it is clear that governments cannot move with assurance and wisdom in response to changes in external market and technology forces. We know from the socialist failures of Eastern Europe and the old Soviet Union that centralized planning cannot work. Those arguments carry over to a T with respect to the antidiscrimination laws as they apply to the employment relationship. For that reason—and perhaps for that reason only—I think that these statutes should be forthwith repealed. All of us, regardless of race, regardless of color, would be far better off under a color-blind state that enforces a regime that prohibits the private use of force and fraud, and gives legal protection to voluntary contractual relations in competitive markets.

PROFESSOR CHEMERINSKY: SOCIETY NEEDS EMPLOYMENT DISCRIMINATION LAWS

I thank the Federalist Society for inviting me to participate today. I thank all of you for coming. This is probably the largest gathering I’ve seen in the ten years I’ve been here. I think it’s wonderful for so many people to gather to think about and talk about ideas.

Professor Epstein is the foremost libertarian scholar among law professors today. But any idea taken to an extreme gives absurd results. What Professor Epstein is arguing for today is the repeal of all employment discrimination laws. He is arguing that employers should be free to discriminate, in any way they want, based on race, gender, religion, sexual orientation, disability, or age. He does this by focusing on abstractions—freedom of contract, the market in theory—but he ignores the
EMPLOYMENT DISCRIMINATION LAWS

social realities. I would argue that it is imperative that society have laws that prohibit employment discrimination. What I want to do is go step-by-step through the justifications for social prohibition of employment discrimination.

The first step of the analysis is that without legal regulation, significant employment discrimination would exist in the American market system. Racism, sexism, anti-Semitism and homophobia are realities in this society. They've long manifested themselves in employment discrimination. Professor Epstein argues that the market system left to its own devices will eliminate most of that employment discrimination. I think he is clearly wrong.

Let me point to five flaws in his analysis with regard to the market system. First, history proves him wrong. We long had an unregulated market system. Civil rights laws did not exist until 1964 and employment discrimination was pervasive on all of these grounds. The statistics and real world examples both confirm this. Sandra Day O'Connor graduated high in her class from the Stanford Law School in the early 1950s. No law firm would hire her except as a legal secretary. Where was the market system to provide her a job?

Or consider another example, concerning a mutual friend that Professor Epstein and I share, who is now a chaired professor at Yale Law School. He is about ten years older than I am. He said that when he graduated from Yale Law School near the top of his class virtually no law firm would offer him a job because he was Jewish. Where was the market system when he needed work? The simple reality is, as history shows us, employment discrimination is pervasive in a free market system.

A second flaw in Professor Epstein's market analysis is that prejudice distorts employers' evaluation of employees. The reality is that because of prejudice, employers discount the skills and talents of minorities. Because of prejudice, employers discount the skills and talents of women, or Jews, or gays and lesbians. And as a result, when prejudice is pervasive throughout society the market system repeatedly undervalues contributions of these individuals and as a result these people never get hired as they should.

Third, Professor Epstein fails to account for customer preferences, and more importantly, perceived customer preferences. A law firm believes that its clients don't want to deal with Jewish lawyers. An employer believes that its customers don't want to deal with those with
disabilities. And as a result, throughout the market you see individuals who are minorities or disabled or Jewish simply not getting hired.

Fourth, Professor Epstein assumes that the market system through competition will create enough slots for these individuals. Professor Epstein says the Korean community will create jobs for Koreans; the black community will create jobs for blacks. But why believe that enough jobs will be created within these communities, especially given pervasive discrimination by the white community against these groups.

For all of these reasons I would say Professor Epstein's market theory is wrong. But I add a fifth reason. Professor Epstein fails to account for the fact that at times employers would rather discriminate even if it's costly. Think of a simple example: sexual harassment. Some studies show that over half of all women in the workplace have been harassed. Why do employers do this knowing that they might lose valuable female employees who might quit as a result? The reason is that their short-term perceived benefits are greater than their long-term costs. Perhaps they believe that the workers in the market are sufficiently fungible. Regardless, they believe that the short term gains are worth the cost to them, and, thus, they go ahead and discriminate. The market system produces discrimination.

As I read Professor Epstein's long book I was convinced that a key thing he fails to take into account is the pervasiveness of discrimination in the market economy. Then I got to his conclusion and it became clear to me. On page 503 he writes: "Anyone who works in academic circles, or I dare say elsewhere, knows full well that all the overt and institutional discrimination comes from those who claim to be the victims of discrimination imposed by others." Professor Epstein says there is no discrimination against blacks, women or Jews in this society. That's obviously not true.

My second step in the analysis is that laws should prohibit employment discrimination. I reason in two substeps here: Substep A is that employment discrimination is terribly harmful. I believe the single most outrageous part of this book is that it does not take into account the terrible social harms of employment discrimination.

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Professor Epstein refers to employment discrimination as a "preference" or in his words, "a taste of employers." For him, there's no difference between a company choosing white wallpaper as opposed to black wallpaper, and their choosing white employees over black ones. For him there's no difference between picking furniture as opposed to picking employees. And that's wrong. Employment discrimination imposes enormous costs on society. I think of three.

First, think of the cost to workers who are treated unfairly by being discriminated against on account of their race, or their gender, or their religion. Fairness should be one of our concerns in society. An individual who loses income on account of discrimination is being treated unfairly. Think of the loss of human potential in that person. A person is not able to pursue his or her calling and find fulfillment because of discrimination. Think of the enormous dignity harm to that person who can't get a job or can't get a promotion because of discrimination. Nowhere does Professor Epstein speak of that.

Think of a second harm, the harm to society's value of equality. We as a society should be deeply committed to equality. We should adhere to the principle that likes should be treated alike. Any compromise of that is unacceptable. This is something that has acceptance from all parts of the political spectrum. George Bush, certainly no friend of the laws that prohibit employment discrimination, wrote, "[d]iscrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose." 8

And third, there's enormous economic cost to society from discrimination. When we think of the cost in terms of the potential unfulfilled, we will never be able to measure what people could have contributed but didn't. We will never be able to measure the people who didn't look for a job because they know of discrimination. But we know that it is enormous. Society loses terribly when there's discrimination. For all of these reasons, discrimination must be regarded as an unacceptable evil.

Substep B of this argument is that freedom of contract should be interfered with to eliminate employment discrimination. Professor Epstein begins by saying that the main normative premise for society should be freedom of contract. But I believe where he goes wrong is that

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he tremendously overweighs the importance of freedom of contract and he underweighs the harms of discrimination.

At the very least with regard to freedom of contract, I disagree with his premise that it can only be interfered with to stop force or coercion. I certainly agree law is necessary and government is necessary to stop force and coercion. That's not the only time we need laws. The law should prohibit contracts for slavery even if slavery doesn't involve force or coercion. We should and do interfere with freedom of contract to protect the public safety and health. For example, you can't go to the gas station across the street to buy gasoline that has lead any longer. That interferes with freedom of contract, but the public health and the environment demand it. There are numerous instances where we interfere with freedom of contract for the public good. And one of these instances must be prohibiting employment discrimination.

Furthermore, Professor Epstein's argument with regard to freedom of contract only focuses on freedom of contract of employers. He ignores the freedom of contract of employees who are discriminated against. Imagine Sandra Day O'Connor graduating from law school in the early 1950s. What freedom of contract did she have in the market to get hired?

Professor Epstein assumes that the only thing that can interfere with freedom of contract is government laws. Discrimination, even the market system itself, can interfere with freedom of contract. We would expand the protection of freedom of contract for businesses at the expense of decreasing freedom of contract for individuals. But even if that were not true, I believe the evils of employment discrimination justify limiting freedom of contract. The principle of equality is simply more important in this society than the principle of freedom of contract.

The third step in my argument is that employment discrimination laws are successful in outlawing employment discrimination. At the beginning of Professor Epstein's book, he presents the argument that he advanced today: there's no evidence that employment discrimination laws succeed. And then later in his book he proves that employment discrimination laws succeed and he argues they work too well.

He says, for example, that employers are often forced to stop discriminating even when there's no proof of discrimination. He says, for example, with regard to age discrimination, that over twenty percent of
the university budgets might have to go to pay the costs of the Age Discrimination in Employment Act. In other words, statistically, employment discrimination laws work. Moreover, he ignores an enormous body of evidence that shows that employment discrimination laws have been successful.

Professor Blumrosen, for example, looks at the success of employment discrimination laws in advancing minorities within professions. He says that within the minority community, millions of dollars of income have been transferred because of employment discrimination laws. He shows, with regard to almost every professional category, the number of minority employees went up as a result of employment discrimination laws. It is always hard to deal with this statistically because it is always very difficult to measure what doesn’t exist, or what the world would be like without those laws. So think of examples.

Look at the airline industry. As a result of the laws prohibiting employment discrimination, airlines are now required to hire male flight attendants. If you fly in airplanes you’ll see the employment discrimination laws work there. It used to be that the airlines said that flight attendants had to retire and leave the service when they got married. No longer can airlines discriminate in this way. It used to be that airlines had sex-based weight requirements imposed only on women flight attendants. That requirement no longer exists. It used to be that a flight attendant had to leave as soon as she knew she was pregnant. That requirement no longer exists. I could generalize from this industry to almost any industry at which the bottom line point is: employment discrimination laws are successful regarding hiring blacks, women, Jews and those who have been traditionally discriminated against.

My fourth and final major point is that even if employment discrimination laws are unsuccessful, their repeal would be a social disaster. Think of the message that would be conveyed if we repealed all employment discrimination laws. It would be the government implicitly saying racism, sexism, and homophobia are acceptable in this society. It would be giving license to the expression of that. We live in a society already terribly divided over basic characteristics like race and religion. I can’t imagine any government action that would more tear at the social fabric.

and divide a society than repealing them. Even if the employment discrimination laws are nothing but a symbol, their symbol is one society must continue to have.

History shows that the vilest of ideas can be justified with the noblest of rhetoric. Today Professor Epstein comes before you with abstractions. He wants to talk about the market as an abstraction. He wants to talk about freedom of contract as an abstraction. I think you have to look at the reality of American society and what the legacy of discrimination is. We have to say loudly and always that employment discrimination is unacceptable and the laws must prohibit it.

PROFESSOR EPSTEIN'S REBUTTAL

I have only five minutes to answer, and will start by going back to the beginning. It is not as though the positions I defend have widespread support in either the Republican or Democratic party. What I find so enormously ironic is the effort to place the failures of modern race relations at my doorstep when nothing I believe represents current policy and Professor Chemerinsky's beliefs are dominant on all key issues. There may be explanations for the current racial tensions, but to attribute them to the market is odd when there is no market operating here at all—which might explain why the situation has become so bad.

Professor Chemerinsky also misstated my position as to the current state of affairs. The sentence he quoted referred to overt and institutional discrimination, and noted that it all was in favor of members of protected classes, such as women and minorities. I did not say that there was no individual discrimination, which is how Professor Chemerinsky interpreted my remarks. I think that my original statement is true. I have not been in any firm or institution that has any formal white male preference. I do not know of any such business; neither does anyone else.

Next Professor Chemerinsky chides me for my devotion to moral abstractions, and offers his own, namely, that discrimination on the basis of irrelevant characteristics is impermissible and unacceptable. But he is strangely silent on whether he favors affirmative action programs. And we don't know whether he thinks that diversity is a justification for race- and sex-conscious decisions. I suspect that he supports affirmative action and diversity. I do not know how he squares these beliefs with a thoroughgoing defense of the antidiscrimination principle. Yet somehow in his denunciation of my position, these issues all fade to the background, and we once again see the 1964 vision of a color-blind society emerge. I
thought that I had made it clear that one of the advantages of getting rid of the antidiscrimination laws in private competitive markets was that it allowed well-intentioned people who favored these programs to adopt them if they so chose.

Now we still must ask what would happen if these statutes were repealed. We are told that there will be a great symbolic failure. I think that the exact opposite is more likely to occur. If we could explain why we want to repeal the statutes, we might enjoy a symbolic success. George Bush may endorse the statutes, but the thought that he is the moral beacon of our time is an idea that is out of touch with reality. If I were facing someone as hostile as Professor Chemerinsky or Ted Koppel, I would stress that these are not color-blind or sex-blind laws. These are laws that say essentially that we do not believe that blacks and women can make it on their own. These are laws that say that explicit legal protection is necessary for their economic success, when in fact it is a barrier to them. These are laws that say that no employer can do a decent thing unless hit over the head by the threat of legal suit. I think that these laws are an insult, or at least an injustice, to every woman, every black, every Hispanic, who has been able to advance by hard work and honest effort.

Professor Chemerinsky stresses that in the past there were all sorts of barriers, many of them informal, to blacks and women who wanted to advance. But before one endorses the political remedy, it must be recognized that in 1951 no one could have passed any antidiscrimination statute: the votes were not there. But today there is a political majority in favor of the statutes, so why think that they are needed when there are huge numbers of employers who actively recruit on a race- and sex-conscious basis?

Professor Chemerinsky also insists that there have been great successes under the civil rights laws. But he does not know the difference between a change and a success. It may well be that we have turned the hiring practices of the airline industry inside and out. But when reliable polling data suggested that ninety-seven percent of your customers—men, women, and children—in 1968 prefer female stewardesses, then why condemn the firms for responding to these preferences? What else are they supposed to respond to? Are we supposed to tell people when they are anxious or under stress that we are less concerned with their emotions and feelings and more concerned about our abstract ideals? Or should we try to help them? And if it turns out that these preferences do change—and I suspect that they would have changed—there is nothing
that forces the airlines to keep their former policies, and many of them will change voluntarily.

Professor Chemerinsky also refers to the age discrimination laws. I can assure each student here that he or she will face enormous barriers to entry into labor markets because of these statutes. I and others have worked for hours at the University of Chicago to formulate plans that will limit their harmful effects so that we can find ways to hire young people without having to pay senior faculty full salaries, full pensions and social security long after they have passed their most productive periods. Why their wages should shoot up while everyone else suffers a decline is simply beyond me. The age discrimination statutes are bad for you and bad for society at large. They will create major dislocations in future years, and you will bear the brunt of it.

PROFESSOR CHEMERINSKY’S REBUTTAL

Professor Epstein just shifted positions enormously. He began by telling you that all employment discrimination laws should be repealed. In his rebuttal he shifts away from that and instead wants to argue that particular aspects of the law are undesirable because affirmative action programs have a great cost. We are not arguing about whether particular provisions are good or bad. They can be changed. But what we are arguing about today is whether all employment discrimination laws be repealed and on this he clearly loses the debate.

I advance these four points. First, that without legal regulation substantial discrimination would exist in the American market system. I pointed to five flaws in Professor Epstein’s reasoning; he responded to none of them. Instead he says two things: first, he says we have had racial tensions since 1964 even though we’ve got the laws, so obviously the laws have failed.

We have racism in this society, we have sexism in this society, and as a result we do have racial and sexual tensions in this society. That doesn’t prove that the employment discrimination laws fail. In fact, it’s the very existence of racism and sexism that necessitates the laws prohibiting discrimination. And I believe the tensions would be far greater if we didn’t have the laws, and infinitely greater if the laws are repealed.

Second, he talks about affirmative action and diversity. That’s just not what this debate is about. I’d be glad to invite Professor Epstein back to debate affirmative action with him. But that’s not what we are talking about here. We are not saying whether or not there should be
preferences given to minorities or women in hiring. We are talking about whether or not employers should be prohibited from discriminating on the basis of race, gender, and religion. And on that ground Professor Epstein does not deny that the market will inevitably leave discrimination.

With regard to the last quote from his book that I read, where he said there is no institutional discrimination except against white males, he said that he was speaking of institutional discrimination. And that’s my point: that he fails to recognize that institutions—employers—will discriminate and do discriminate. The discrimination will increase tremendously if there aren’t laws prohibiting employment discrimination. Even if no business has an announced “white-male preference,” countless businesses do discriminate against women and racial minorities.

My second major point was that laws should prohibit employment discrimination. I tell you in subpoint A that employment discrimination is a terrible harm. It’s harmful to the individual who is discriminated against, it offends society’s notion of equality and is enormously costly to society.

I tell you in subpoint B that we should interfere with freedom of contract so as to stop employment discrimination. As I point out, he only wants to protect employers’ freedom of contract. He ignores the rights of employees to have freedom of contract. And every time an employer discriminates, the freedom of the employee is compromised. Moreover, even if it means we are interfering with freedom of contract, it’s worth doing that in order to stop discrimination in this society.

In my third major point I tell you that the laws that prohibit employment discrimination are successful. There are studies, there are statistics that prove this. In fact, I suggest that Professor Epstein’s own book proves this. I say for example that the age discrimination act must be successful if there is an imposed twenty percent cost on the university budgets.

His response is to tell you that that is a terribly burdensome cost that will hurt all of you. Well notice there are two points here: First, he proves therefore that the law is working in eliminating discrimination. It has to have worked to impose harms on others in order to impose a cost. The second question: Is it desirable to have that? And that really goes to whether or not the law is too strict. Maybe we should relax the terms of the law. Maybe we should have other ways of dealing with that. But the
fact that age discrimination laws impose those costs refutes his claim that there is no effect.

I give you the example of the airlines. I said look at all of the ways with regard to the airlines that the airlines have obviously changed. He says, well, that assumes it’s good. And this is my view: I use the airlines as an example to show that the laws prohibiting discrimination work. Once we see that they work we now can talk normatively about whether that’s desirable.

He says, “What about customers? What if ninety-eight percent of customers only want female flight attendants.” I do not believe we should give in to preferences that are discriminatory. I believe that those preferences deserve much less weight in our society than we should give to the right of people to not be discriminated against. I believe that customer preferences should not be a justification for employment discrimination, but our commitment to equality deserves far more weight.

Fourth and finally, I tell you that even if everything else is wrong, the repeal of employment discrimination laws would be a social disaster. That would transmit a symbolic message that racism, sexism and anti-Semitism are acceptable. Frankly, I found Professor Epstein’s book outrageous because I think it fails to account for how evil racism, sexism and anti-Semitism are in this society, and how essential it is that the government now and always be against them. Employment discrimination laws must remain on the books. I think Professor Epstein is simply wrong in urging their repeal.