

**RACIAL DISCRIMINATION, THE POLICE POWER AND THE 1964 CIVIL RIGHTS
ACT IN RICHARD EPSTEIN'S FORBIDDEN GROUNDS: AN EVALUATION
OF THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS**

EDD S., NOELL

DEPARTMENT OF ECONOMICS

WESTMONT COLLEGE

Richard Epstein has written a provocative challenge to prevailing wisdom of the essential correctness and efficacy of anti-discrimination laws. He argues for their abolishment. My task is largely to consider the role that Epstein's treatment of and 20th-century Supreme Court rulings plays in the development of his thesis. The interaction between the doctrine of police powers and substantive due process in the Jim Crow constitutional decisions of this period is a key -issue. I will also consider Epstein's discussion of the efficacy of the Title VII provision of the 1964 Civil Rights Act. On this issue there has been some important interaction among Epstein and economists who challenge his conclusions.

In the opening pages of his book, Epstein refers to "autonomy principle" in the common law. In economic terms this refers to the unbridled freedom of contract, the principle that "allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all" (p. 3). The antidiscrimination principle stands in sharp contrast to freedom of contract, resting "on the collective social judgment (often born out of wrenching historical experience) that some grounds private decision are so improper that is both immoral and illegal for the government to allow employers to -use them in deciding whether to hire, retain, or promote workers" (p. 4). The list of forbidden grounds includes race as well as gender and religious and ethnic background. This use of forbidden grounds operates as a powerful brake against the libertarian principle of freedom of contract.

Much of Epstein's theoretical analysis concerns application of freedom of contract to employment markets. He highlights several salutary features associated with voluntary and free exchange in labor markets.

Epstein's analysis raises several issues which must be considered. There are some central questions to be concerned with: First, what is the economic basis for the libertarian account of the proper scope of government's police power? What role does it play in Epstein's evaluation of the high Court cases?

Secondly, to what extent was discrimination practiced in the South a product of state policy or state-backed private prejudice; and to what extent was it a product of culture and social pressure which required a federally-imposed remedy?

Thirdly, in what sense does Epstein's analysis depend on competitiveness of labor markets? Are there relevant instances of failure in labor markets which Epstein overlooks or downplays? And even if employment markets are reasonably competitive, can they be relied -upon without exception to eliminate unnecessary private discrimination?

I begin with a brief discussion of these questions in the context of the arguments of Section I of the book.

I. COMPETITION AND LABOR MARKET FAILURE

In the analytical foundations of Section I, Epstein argues labor markets are "generally competitive." As a result "the preferences of individual firms do little to alter the overall shape of the market or the prospects of workers within it" (p.266). Competitive markets ensure a minimization of unnecessary discrimination, for "There are good reasons to believe that some firms may be better able to operate if they select their workers by race rather than by some race-neutral criterion" (p. 266). It should be noted that for Epstein, discrimination is largely treated as either simply just another preference (a matter of taste), or as a criterion by which firms select their labor inputs.

The key issue is segregation by choice versus segregation by command. Segregation based on freedom of contract is consistent with maximization of social welfare. Segregation grounded in public mandate is not. Thus Epstein argues that

in the former case we should expect the choices to be driven by efforts to improve output, whereas in the latter we should expect the impulse for redistribution to drive the effort, with the usual consequences; the diminution of long-term freedom, wealth, and utility, and an increase in government power, planning, and control (p. 266).

This becomes important in regards to the Southern Jim Crow laws, which mandated segregation and 'separate but equal' treatment in the period after the Civil War until 1964. In Epstein's view, the heinous practices of the period were not largely generated from the private sector:

The dominant evil in the pre-1964 period was not self-interest or markets, inflexible human nature, or even bigotry. It was excessive state power and the pattern of private violence, intimidation, and lynching, of which there is a painful record but against which there was no effective federal remedy (p. 93).

The Jim Crow laws supported and preserved private discrimination; coercive activities by private individuals or groups (such as the Klu Klux Klan) were "left unchecked by state agents" (p. 94). Epstein relies upon a form of public choice analysis to analyze the genesis of much of the Jim Crow legislation. The lack of black political power to oppose state-mandated discrimination its consequences:

the systematic exclusion of blacks from the electorate shifted the voting population in favor of whites . . . In the legislative arena racists and bigots could, and did, outvote more moderate whites [and passed] laws that required segregation, discrimination, unequal taxes, and biased enforcement of the law (p. 96).

An effective federal remedy for state-mandated discrimination finally came in the form of the 1964 Civil Rights Act. Epstein states that

There is a vast difference in motivation between the passage of Jim Crow legislation and the 1964 statute. The latter can claim an appeal to high principle that the former cannot. But the political pressures and the partisan politics of race legislation were in a sense released anew after 1964, as within a short time the question of color-blind treatment was displaced by an explicit demand for equality of results and, if necessary, for race-conscious affirmative action programs (p. 266).

The story Epstein tells then is that freedom of contract and freedom of association are the foundations for market activity. Market processes often (but not always) check and limit private discrimination.

Epstein acknowledges the common law provisions for state interference with market activity. He recognizes that necessity and/or mistake are principles that challenge the principle of freedom of contract. Economists will roughly translate these notions as respectively, the possibility of monopsonistic power and imperfect information. To what extent do they provide the basis for regulation of employment relations? Epstein finds little justification for labor market regulation from invoking them:

Employment markets are largely competitive and hence regulation is not justified as a means to control monopoly or to protect workers against unwise choices made under conditions of necessity. Workers and employers generally have good information about the terms of their relationships, so that regulation is not necessary to combat mistake, especially where the issues are unrelated to health or safety. The civil rights laws cannot be justified as full disclosure laws (p. xii).

He adds that labor markets

raise neither of the two problems on which a principled case for legal intervention may properly rest. There are neither the holdout, coordination, or public good problems that justify government coercion and control so long as compensation is paid to the regulated parties; nor are there the problems with externalities in the use of force or fraud against strangers that justify the use of state force without compensation (p. 12).

Beyond having little theoretical justification, antidiscrimination laws also have harmful consequences for some black and white workers. Competitive labor markets provide benefits to all workers, regardless of race, that would not be available when those markets are constrained by antidiscrimination laws. As a consequence Epstein calls for the repeal of the "entire apparatus of the antidiscrimination laws in Title VII" of the 1964 Civil Rights Act as applied to private employers, that is, for those who "operate in ordinary competitive markets without legal protection against the entry of new rivals" (p. 9). Epstein likewise denounces Court decisions upholding mandatory collective bargaining. He finds that market failure cannot be relied on as a rationale for these types of laws, contending that "competitive markets work neither a nuisance nor a deception on the public at large, which benefits from goods produced under competitive labor market conditions" (p. 119).

It should be noted that Epstein does not consider other market failure arguments which provide the basis for mandatory collective bargaining. Freeman and Medoff (1984) contend that employer-employee relations are subject to market failure. Labor unions act as a voice for workers through collective bargaining. These workers would otherwise be unwilling to express their grievances individually for fear of employer reprisal.

What if the provision of competitive markets does not hold? The antidiscrimination principle may then be valid. This was recognized in the British and American common law. The principle applied to "to conditions of natural monopoly ... as with common carriers and innkeepers. [Only then] did it follow that the state should impose an obligation not to discriminate among the persons who received service" (p. 91). Under the common law, two main considerations were pertinent; uniform requirements for service, and checking the market power of the natural monopoly.

However, the application of the antidiscrimination principle to employment markets on either basis is quite problematic. Employees are not fungible, as are hotel guests or passengers; employers have differing requirements due to quantitative and qualitative considerations. Thus Epstein suggests "there is no reason to expect a close fit between the voluntary norms that emerge through market behavior and the formal requirements of the antidiscrimination norms" (pp. 86-87). In addition, most empirical studies find limited monopsonistic power (if any) in the hands of employers.

Given these considerations, Epstein concludes that the application of the antidiscrimination principle by the state does not have a theoretical basis in the labor market. Turning to the history of race relations, he argues that in practice government intervention has made labor markets less competitive and in fact promoted discriminatory activities. Epstein examines the actions of state governments in the South to find prime examples to support this assertion.

II. POLICE POWERS AND THE SUPREME COURT ON THE JIM CROW LAWS

Epstein focuses on the period of Jim Crow laws in the early twentieth century, a time which overlaps what is often described as the substantive due process era of the Supreme Court. In this period the Court struck down certain state regulations based on the Fourteenth Amendment, which prohibited states from depriving any person of life, liberty, or property without due process of law, or equal protection of the law. The Court applied the due process provisions to support key forms of occupational freedom. Some have gone so far as to characterize the rulings of this era as those of a 'laissez-faire Supreme Court.' Historians have spoken of the Court being dominated by large business interests, whose power was manifested in rulings that gave free reign to corporate hegemony.

Epstein provides some important illustrations which counter this laissez-faire depiction of the Court. Indeed, one of the interesting questions raised by Epstein's historical analysis is following: in an era in which freedom of contract supposedly dominated as a legal principle, why did the Court in fact in key decisions uphold the Jim Crow laws? The justification was rooted in the state's police power, its "ability to regulate to achieve safety, health, morals and general welfare of the public" (p. 99). Upon this basis were rationalized the "explicit racial restrictions governing voting, marriage, economic arrangements and schooling that permeated every important aspect of southern life under segregation" (pp. 91-92). Epstein does not hesitate to critique the rulings which upheld the Jim Crow laws. He explicitly condemns them:

The evil of Jim Crow and segregation in the South was a national disgrace. The critical decisions of the Supreme Court, which allowed the southern states (and to a lesser extent the northern ones) to impose this regime, were equally disgraceful (p. 92).

One of the most significant examples is the infamous case of Plessy v. Ferguson (1896). This case represents the most well-known example of the separate but equal doctrine. An 1890 Louisiana statute was challenged. It required that railroad cars provide separate and equal accommodations for whites and blacks on passenger trains.

This case provides a tangible example of Epstein's claim that private discrimination is likely to be diminished, if not eliminated, by market processes. Mandated segregation was costly to the railroads. This provided an incentive to integrate all compartments. Only by a statute requiring separate cars could a political majority force segregation on firms that had strong private incentives to integrate. This was true notwithstanding the admitted prejudice of some of the railroads' passengers (p. 102).

Epstein highlights the importance of the distinction between discrimination mandated by the state as upheld in Plessy and private discriminatory decisions. He observes that "... the case itself does not deal with the private, voluntary discrimination that railways might practice in their own self-interest. Government coercion required the separation of the races" (p. 100). This was exactly what the Jim Crow laws accomplished. That is, the significance of Plessy was that it insulated "the basic structure of Jim Crow from constitutional attack by allowing segregated facilities on common carriers [and] school segregation" (p. 92). In doing so, it provided a "blanket authorization of wide-scale state regulation under the police power [that] dictated the agenda that governed civil rights at both the state and national level for the next seventy years" (p. 92).

The statute in question was challenged on the basis of the equal protection clause of the Fourteenth Amendment. This amendment was a part of significant Constitutional change in the postbellum period:

The Civil war amendments -- on slavery, citizenship, voting, equal protection, due process, and privileges and immunities -- were designed to decrease the scope of state power to confer ordinary common law liberties selectively on some while denying them to others (p. 98).

How could the Louisiana statute be consistent with the Fourteenth Amendment? The regulation was understood to fall within the police power of the state.

As recognized by Epstein, two broad dimensions have characterized the police power in the common law. One is the phenomenon of nuisance, such as air or water pollution, which damages another's person or property. The other dimension involves the act of fraud. Neither seems to apply in the case of mandated segregation found in Plessy. In fact, as Epstein notes "if the railroad had any monopoly position that justified regulation . . . consistent with the common law position, [the railway] would be under an obligation not to discriminate among its passengers unless it could show a viable cost justification" (p. 105).

However, during the latter part of the nineteenth century, Epstein observes that the Supreme Court had already begun to move towards extending the police power "far beyond the contours of common law nuisance and fraud" (p. 106). The Court upheld state laws stipulating health and safety regulations: "These were broadly construed where there was the tiniest risk to health and safety." Thus the police power "was used to sustain anti-competitive measures." In Plessy, the Court went further by including "racial segregation among the proper ends of the police power" (p. 106). In doing so, it went against the principle of freedom of contract. Epstein observes that

Plessy did not fall along the health-labor continuum used to organize police power cases. Rather, it assumed that race relations were, like health, proper subjects of government regulation, notwithstanding the legislation's manifest limitation on both common law rights of contract and property (p. 108).

Thus Plessy set a precedent by which the judiciary left "the whole area of race relations" to "unfettered political control" (p. 108).

The Court did affirm substantive due process in other cases during this period. In Lochner (1905), the Court overturned a New York state law which set a maximum ten hour limit on work days for certain classes of bakers. The purported end was protecting the workers' health. In fact, by limiting their potential work hours, the law "left immigrant German workers to the mercy of their more established union rivals" (p. 118). Epstein notes that the "ten-hour limitation on employment was held to be a 'labor statute' that fell outside the permissible ends of government" (P. 108).¹

Epstein addresses several other cases of this period. These decisions also relied on police powers to validate state legislation which segregated private educational facilities or allowed zoning ordinances which could be utilized "to exclude vulnerable or unwelcome political groups" (p. 115). The rationale was to "prevent racial conflicts, to maintain racial purity, and to prevent the deterioration of property values in mixed neighborhoods" (p. 113). Epstein contends that "The police power exception to a wide range of constitutional protections was vehicle that allowed local government to trample the ordinary rights of property and contract,

¹ Likewise the Adair and Coppage decisions overturned state and federal legislation which required railroads to bargain in good faith with majority unions and outlawed yellow-dog contracts. Epstein rightly points out that the Court held that these laws lay outside the police power (p. 108). On the principle of substantive due process, mandatory collective bargaining was held to be unconstitutional. This was due to "its interference with the employer's (and employees') freedom of contract in ways not justified under the police power" (p. 119).

which were as valuable to blacks as they were to whites" (p. 115). However, if the Court had ruled consistently with the substantive due process principle, as in Lochner, these statutes, as well as the Louisiana statute upheld in Plessy, would not have been sustained.

Epstein does note a couple of examples where the Court follow Lochner and ruled in favor of economic liberty, and by extension, protected blacks and other minorities. He comments on the push and pull of tolerance of discriminatory actions: "Where deference to political authority was exercised under police power, state-sponsored discrimination against blacks flourished. Where individual property rights were protected to a modest extent, discrimination was limited" (p. 116).

Clearly Epstein's account of this period wrestles with the tensions between substantive due process and the state's police powers. Epstein enunciates the position that the exercise of the police power of the state, if limited to dealing with fraud and negligence, is consistent with a libertarian approach. He argues that the police powers rationale was abused in the Plessy case. Epstein is correct on this point; the police powers basis for 'separate but equal' laws was unfounded. Moreover, Epstein is right in his assertion that if the Court had consistently followed the principles of economic liberty, as in the Lochner decision, the Court would not have validated mandatory segregation as an abuse of the police power.

That is not to say that the police power should be limited to operating within libertarian constraints. Epstein must take a strictly Lockean interpretation of the Constitution and its Amendments. A stronger interpretation, recognizing the powerful influence of Sir William Blackstone and the tradition of the British common law on the American Constitutional Convention and Constitutional developments (McDonald 1985), would find some police power regulation legitimate beyond matters of nuisance and fraud. The 'racial segregation' abuse does not mean police powers have no place in dealing with morals and the general welfare of the public.

III. THE NEW DEAL COURT ON UNION POWER AND RACE RELATIONS

As we turn to the end of the substantive due process era in 1930's, we find the New Deal Court removing remaining restrictions on the scope of state and federal governmental power to intervene in economic matters. Epstein rightly points out that Court eradicated "the once critical line between health and safety on the one hand and labor statutes on the other" and sustained minimum wage and maximum hour laws (pp. 116-117). Even more significantly, the Court sustained collective bargaining legislation.

The Railway Labor Act of 1926 mandated collective bargaining in the railroad and transportation industry. In the J.I. Case Co. ruling (1944), the Court upheld this provision of the Act. The ruling made "the union the sole and final arbiter of conflicts of interest among the members of the bargaining unit" (p. 120). Epstein observes that the Court was ratifying a change in the bargaining position of individual workers brought about by the Railway Labor Act. It gave

the white majority total control over the choices of both black workers and the railroads. The white majority had less leverage under the system of multiple unions which was in place prior to the passage of the RLA. Before the statute . . . each worker, black or white, had the right to negotiate individual contracts on his own behalf, or to bargain through a voluntary union of his own choosing -- even one whose members were of a single race. Monopoly power breathed new life into old racial prejudices . . .(p. 122) .

The significance of this is elaborated as we consider that many unions would contain workers drawn from different races. A union was now given the power as a monopoly organization to "discriminate in the wages it [paid] its members" (p. 121).

A clear example of the exercise of this power was found in the actions of the Brotherhood of Locomotive Firemen and Enginemen, "an all-white organization which had power to bargain on behalf of the black firemen who worked for the railroad." This union issued several demands:

it wished to renegotiate the master employment agreement with a view toward eliminating all blacks from preferred positions on the line; preventing blacks from taking firemen positions, from which they could be promoted to engineers; and finally stripping black firemen who had done their work well of their desirable positions in the so-called passenger pool and replacing them with white firemen junior in terms of service and no more competent than the black firemen they would replace. The goal was to squeeze black workers by relegating them to the most marginal jobs (p. 121).

This action was upheld by the Alabama Supreme Court.

Epstein notes that in the 1943 Steele decision, the U.S. Supreme Court overturned this decision, but not on the grounds that substantive due process was being denied black workers. Rather it imported into the text of the Railway Labor Act "a duty of 'fair representation' which prohibited discrimination between workers on the grounds of race" (p. 123). As Epstein observes, this is a second-best solution. It corrected some of the excesses of union power, but it still left

black workers far more exposed to the wishes of a hostile white majority than they would be if they could bargain free from the constraints of any collective bargaining system at all. Nothing in Steele required the white craft unions to open their membership to blacks, so white workers hostile to black interests could still choose the fiduciaries responsible for protecting black interests without violating their statutory duties (p. 124).

Unions with white racist leadership could still negotiate job, seniority, and salary classifications which imposed "disproportionate losses on black members, given the costs of fashioning an effective legal remedy" (p. 124).

In the 1937 Jones & Laughlin Steel Corp. case, the Supreme Court upheld the 1935 National Labor Relations Act. It required management to bargain in good faith with majority-elected union representatives. This law "applied to all types of businesses, wholly without regard to any special showing of their connection with interstate commerce" (p. 138). It set an important precedent for the 1964 Civil Rights Act. As Epstein observes, "once Congress can have a collective bargaining statute that covers all forms of employment, there can be no objection to an employment discrimination statute, such as Title VII, which covers the same types of transactions" (pp. 138-139).

IV. THE CONSTITUTIONAL AND MORAL LEGITIMACY OF THE 1964 CIVIL RIGHTS ACT

In Chapter 7, Epstein turns to the legal background of the 1964 Civil Rights Act. Did the Congress in 1964 have "the power to legislate over public accommodations and employment discrimination"? (p. 130). Epstein considers several different arguments supporting this proposition. He concludes that the New Deal Court decisions provided a legal legitimacy for the 1964 Act, even though they were analytically flawed. In spite of this, Epstein supports the civil Rights Act as a second-best solution.

Epstein observes that the Thirteenth and Fourteenth Amendments were directed toward state actions which deprived individuals of due process and other economic liberties. He concludes that the 1964 Civil Rights Act is not sustainable under these Amendments, "save where the actions of private parties can be brought under some rule in which state action 'sanctions and supports' private discrimination..." (p. 135). There is a credible argument to then overturn "the restrictions on entry imposed by a wide network of Jim Crow statutes, especially in the Old South." The problem is that the 1964 law is "overbroad, especially in terms of employment relations...." Epstein contends that its scope is too wide because "it applies with full force to those private firms that have made independent and autonomous decisions to exclude persons on statutorily prohibited grounds." Epstein concludes that

The Fourteenth Amendment . . . is the wrong weapon for the federal government to use to direct its power against private discrimination in both public accommodations and employment . . . [for the] Fourteenth Amendment relies on the sharp distinction between private and public action that the 1964 Civil Rights Act repudiates (p. 135).

As a consequence of the decisions of the New Deal Court, there was no further basis upon which to utilize substantive due process as a principle against legislative action in regards to the employment market. Thus "the level of protection that private property and private contract received from the government against general forms of economic regulation" disappeared. The Supreme Court upheld the Civil Rights Act against constitutional challenges based on substantive due process, for "By 1965 virtually all types of federal regulation were permissible under police power as it had come to be construed." Thus Epstein suggests that the end of "eliminating racial discrimination was beyond question within the power of Congress" (p. 141). In Epstein's view, the antidiscrimination statute necessarily infringed the rights of individuals in labor markets requiring the employer to hire a given worker against his will" (p. 141). Such a statute could only be held constitutional if properly grounded in the state's police powers. Herein lies the difficulty for Epstein, for he believes that the proper ends of the police power are "confined to the prevention or control of physical harms -- trespass and nuisance -- and of private deception." He contrasts these ends with "the prime illustration of an illegitimate use of the police power [which would be stifling] the ordinary business activities of a competitor" (p. 142). On this basis, Epstein believes it is consistent for libertarians to oppose antidiscrimination laws, since

freedom of contract and private property [would be protected] as much against an antidiscrimination law as [they would be protected] against a law that mandates segregation. Forced associations are in principle no better than legal prohibitions against voluntary associations (p. 142).

Why then does Epstein support the 1964 Act as a second-best solution? Only on the basis that "legislative intervention is necessary to protect businesses that want to integrate despite threats from both local governments and private parties who would shut them down" (p. 142). That is,

some federal presence is necessary to neutralize a consistent pattern of abuse by state and local governments and private individuals. The only way to protect any firms that wish to serve on a nondiscriminatory basis . . . is to require all firms to behave in that fashion, for it is just too costly to operate a system of freedom of choice, given the subtle but pervasive patterns of coercion, official and unofficial, that have dominated the local scene, especially in the South (p. 142).

Epstein considers this argument to be "both contingent and partial. It does not justify the statute as a matter of first principle, that is, good as a fundamental moral norm for all times and all places." However, when there has been "a legacy of racial injustice that [has] worked itself into the fabric of law, [and] distorted basic social

institutions" a statute such as the 1964 Act is "justified only as a `jolt' to the system." Once the barriers to entry by discrimination are broken down, the police power justification for the Act becomes impotent (p. 142).

In sum, Epstein contends that "The only justification for the antidiscrimination laws is to offset the barriers to entry created by legal rule or by the private use of force" (p. 143).

V. THE ECONOMIC SIGNIFICANCE OF THE 1964 CIVIL RIGHTS ACT

In Chapter 12, Epstein turns to the issue of the economic effects of Title VII of the 1964 Act. Did the passage of the Act in fact improve the economic conditions of blacks after 1964? His earlier theoretical analysis affirmed that "pure competitive markets function better with an antidiscrimination law than they do without it, given the costs of enforcement" (p. 242). Yet labor markets of the South of the period before 1965 were purely competitive; indeed, by mandating segregation, blacks were put at an extreme competitive disadvantage. And the mandatory requirement of collective bargaining arrangements put black workers at risk of being "relegated to minority status" (p. 243). This creates problems for comparisons of the periods before and after 1965, for they are "comparisons between mixed systems, both of which include substantial, and different, components of government regulation." Thus

Any evidence that supports a conclusion of some improvement in the income and employment prospects of black workers relative to those of whites since 1965 need not support the more universal proposition that the antidiscrimination laws correct some market failure. It may only be evidence of a more modest variety, heavily bound by time, place, and circumstance, showing simply that the distortions in labor markets prior to the passage of the Civil Rights Act of 1964 exceeded the distortions that the act created (p. 243).

Epstein's discussion of the efficaciousness of the 1964 Civil Rights Act raises some questions about the proper interpretation of race relations and black economic progress or regress under Jim Crow laws in the South. He attempts to interact with recent economic studies of the effectiveness of Federal civil rights policy.

In their 1991 JEL article, James Heckman and John Donohue examine the impact of civil rights policy on the economic status of blacks. They argue that the "story of black economic progress is not one of uniform secular advance, but rather of episodic change" (p. 1604). Donohue and Heckman distinguish between three periods, one which preceded the Civil Rights Act, and two which followed. In regards to these three periods, they make the following assertions:

1. Going back to 1940, there has been significant economic progress for blacks.
2. This progress has not been uniform across time. Two periods of growth for black incomes were 1940-1950 and 1965-1975. Since 1975, the relative status of blacks has been flat.
3. The period of 1965-1975 demonstrated the greatest black wage and employment gains. Its benefits were particularly strong for blacks in the South in terms of occupational progress.

In this regard, Donohue and Heckman highlight an enigma. The period of 1965-1975 was characterized by a limited enforcement of the civil rights laws. Agencies had small budgets, enforcement powers were weak, and the number of private antidiscrimination cases were modest. How could the federal civil rights policy be judged successful? Donohue and Heckman argue that the reasons for improved black status nationally in the 1965-1975 period are tied to the breadth of the civil rights policy which served to reinforce changing employer attitudes.

For many years the South was dominated by pervasive discriminatory attitudes and an extensive network of racist social practices. Heckman and Verkerke (1990a) contend that "informal codes effectively regulated individual conduct and severely constrained employers' conduct" (p. 278). They downplay the role of government in enforcing these behavioral codes. This is in contrast with Epstein, who emphasizes the state's role in enforcing discrimination through various types of regulations, through willful ignorance or tolerance of private violence.²

The story is not quite the same towards the end of the Jim Crow era. By the 1950s and early 1960s, many employers appeared to be willing to abandon discriminatory practices. Donohue and Heckman argue that the federal law merely ratified a social consensus (of many businessmen and other Southerners): "Substantial numbers of Southern employers appear to have been willing to gain access to the supply of cheap black labor, but required the excuse of the Federal pressure to defy long-standing community norms regarding employment of blacks." By breaking down the wholesale exclusion or segregation of blacks in employment, public accommodations, schooling, and voting, the new civil rights policy opened the door for rapid black economic progress. Thus Donohue and Heckman make a case for the efficacy of the 1964 statute, stating that "when all aspects of the Federal attack on Southern discrimination are considered, there is significant alignment between the strength of the Federal pressure in the South and the accompanying rise in black economic status there" (p. 1605).

Donohue and Heckman are fairly convincing in arguing that the Federal civil rights policy broke through cultural impediments to societal integration of blacks. The rapid acceptance of the law did not require much federal enforcement of the law. It was easy to identify and monitor the most blatant types of discrimination. At the same time entrepreneurs complying with the law gained low wage workers and new customers.

Epstein accepts the conclusion that the 1964 Civil Rights Law helped to advance black economic status. However, he argues that previous research, such as that of Donohue and Heckman,³ ignores "the strongest explanation for the post-1965 changes in employment levels, namely the concerted action of the federal government to counter the effects of Jim Crow regulation in South" (p. 245). Thus Heckman's previous research has failed to take into account "the various legal restrictions on entry into the labor markets that were in place prior to 1965" (p. 246), particularly the formal industry-specific restraints on entry.

Thus, looking at the South Carolina laws that segregated employment in cotton textile factories, Epstein observes that it was in these industries and not in others (such as agriculture or professional services) that blacks are underrepresented in relation to their share in the labor force. At the same time there was "no comparable statutory provision regulating employment in this manner in any other line of work" (p. 247). This was the nature of the racist legislation, for "the direct Jim Crow laws applied only to the cotton textile industry, not to other industries and professions" (p. 248). For this reason Epstein rejects general cultural or social explanations of prevailing community norms which persuade employers against hiring blacks. As he puts it

² In fact one might suggest that Epstein understates the extent to which the Southern legal system limited competition in the labor market. Roback (1985) has documented the role of enticement laws, contract-enforcement laws, vagrancy laws, emigrant-agent laws, and other regulations in enforcing discrimination against blacks by state mandate. She describes their role in enforcing a labor market cartel, with the object of holding down black wages and solidifying the dominant position of whites, adding that "The laws were intended to accomplish what race prejudice could not do by itself" (p. 218).

³ Heckman and Payner (1989) make similar arguments in their study of South Carolina.

If social pressures made it impossible for any single firm to deal with black workers as long as other firms refused to do so, we should expect to see the same level of black disadvantage outside the textile industry as within it, or at least the same level of relative deprivation (p. 248).

However, Epstein does not adequately respond to the evidence offered by Heckman and Verkerke (1990b) of "patterns of racial exclusion [which] prevailed in the textile industry in Virginia, North Carolina, and Georgia. [Each of these states lacked] segregation laws." This study also notes that "the breakthrough of black employment observed in South Carolina textiles after 1965 also occurs in the textile industry in those states" (p. 328). Epstein does highlight some salutary effects of the enforcement of the Civil Rights Act. But he tends to emphasize only the "substantial increase in black participation in the labor force . . . which was attributable to the removal of formal barriers to entry, both public and private" (p. 252). He lays stress on the notion that

the major gains from the civil rights statute were its removal of the separate but equal. barriers associated with segregation in the South or . . . the elimination of the formal exclusionary practices of northern unions that were still in widespread use around the country (p. 255).

Heckman and Verkerke (1990b) contend that Epstein neglects the fact that "many Southern textile mills were geographically isolated; schools, housing, and employment in the mill towns were all segregated." Thus "a marginal firm experimenting with hiring Blacks [might] fail to become profitable unless the government [promoted] the integration of other aspects of social, political, and economic life" (p. 329). The Federal civil rights policy was a highly coordinated policy of increased black accessibility to housing and integration of schools.

Donohue and Heckman (1991) claim that Epstein underestimates the amount of private discrimination. They place more emphasis on social norms and the private coercive system which was forcibly discriminating. Donohue and Heckman in effect contend that Epstein paints a highly romanticized picture of the South. Thus they argue that industrialization in the 1920s did not bring much progress to blacks. In fact there was peer pressure not to hire blacks, in effect generated by private monopoly. Thus one might ask, where does a government racial policy of mandated segregation end and private sector pressure to discriminate against blacks begin? Epstein argues that

Under Jim Crow, big government fell into the hands of the wrong people, who were able to perpetuate their stranglehold over local communities and businesses by means of a pervasive combination of public and private force (p. 94).

One must ask, what is the source of the attitudes of those wrong people? We can not always easily distinguish between state policies and the sources of the attitudes behind those policies in the private sector.

Finally, Donahue and Heckman (1991) observe the slowdown of black economic progress between 1975 and 1990. Epstein argues that the enforcement of affirmative action laws has slowed manufacturing growth and thus hampered black progress. Donohue and Heckman believe that Epstein puts too much weight on the negative effect of these laws. Epstein wrongly downplays the role occupational safety and health laws. Donohue and Heckman contend that these latter laws have had a much more costly effect on economic growth and hence on black economic progress.

VI. CONCLUSION: EVALUATING EPSTEIN AND THE EMPLOYMENT DISCRIMINATION LAWS FROM A CHRISTIAN PERSPECTIVE

Epstein has added an important contribution to the on-going analysis of the tension between the use of the police powers of the state and substantive due process in the American common law. Epstein is largely correct in his analysis of substantive due process in the Supreme Court cases which dealt with the Jim Crow laws. Epstein rightly sees the original intent of the 1964 Civil Rights laws to be the pursuit of equal opportunity, not mandates, targets, or quotas.

Epstein is less convincing in arguing that discriminatory actions in the Jim Crow era of the South may be solely attributed to state power exercised through regulation. For similar reasons the notion that competition in labor markets will always eliminate unnecessary discrimination has not been fully established either.⁴

Donohue and Heckman contend that the blatant discrimination remedied by the 1964 Act does not exist any more. Thus intended to eliminate such discrimination are not going to be powerful today. While the evidence behind that position is strong, it is another matter to follow Epstein in claiming that the deleterious effects of antidiscrimination laws impose a very high cost that outweighs any alleged benefits. Epstein raises enough important questions that should cause economists to reexamine the "entire complex of modern civil rights laws and their administration" (p. xii), but it is not clear that it will lead them to pursue the entire abolishment of that legislation and its accompanying administrative apparatus.

Christian economists have good reason to be attuned to the problem of racial discrimination. Scripture emphasizes that God is no respecter of persons. In ancient Israel, God called His covenant people not to discriminate against immigrants or aliens, the strangers in their midst. That same principle should govern our policy today. The task remains of sorting out the most desirable private and public sector means to accomplish that end.

Epstein's study should prompt Christian economists to think more carefully about the relation between freedom and tolerance of the taste for discrimination. That is, while it is evident that state-mandated segregation and enforced discrimination would be inconsistent with Biblical values, should public policy, informed by Biblical principles, tolerate or prohibit the indulgence of a private taste for discrimination? For example, a Chinese restaurant that desires to hire only Chinese waiters is likely seeking to preserve its brand name capital as a signal to consumers. How would a Christian economist address this phenomenon in terms of public policy? Clearly there is a need for deeper reflection on this type of question, and Christian economists will find Epstein's work a provocative source in that endeavor.

⁴ Epstein also contends that unions (presumably established voluntarily and without special legal privileges) would have helped Southern blacks in the Jim Crow era. This would have likely been a difficult task because, for the most part, labor organizations historically have met resistance from workers in the South.

REFERENCES

- Donohue, John and Heckman, James. "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks." Journal of Economic Literature. 29 (1991): 1603-1643.
- Epstein, Richard. Forbidden Grounds: The Case Against Employment Discrimination Laws. Cambridge: Harvard University Press, 1992.
- Freeman, Richard B. and Medoff, James L. What Do Unions Do? New York: Basic Books, 1984.
- Heckman, James and Payner, Brook. "Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina." American Economic Review. 79 (1989): 138-177.
- _____ and Verkerke, J. Hout. "Racial Disparity and Employment Discrimination Law: An Economic Perspective." Yale Law and Policy Review. 8 (1990a): 276-298.
- _____. "Response to Epstein." Yale Law and Policy Review, 8 (1990b): 324-329.
- McDonald, Forrest. Novus Ordo Seclorum: The Intellectual Origins of the Constitution. Lawrence, Kansas: University Press of Kansas, 1985.
- Roback, Jennifer. "Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?" in Labor Law and the Employment Market: Foundations and Applications. Richard A. Epstein and Jeffrey Paul, eds. New Brunswick: Transaction Books, 1985, pp. 217-248.