UIC Law Review

Volume 29 | Issue 3 Article 1

Spring 1996

The Subtle Vices of the Employment Discrimination Laws, 29 J. Marshall L. Rev. 575 (1996)

Richard A. Epstein

POINT

THE SUBTLE VICES OF THE EMPLOYMENT DISCRIMINATION LAWS

RICHARD A. EPSTEIN*

Quite unexpectedly, I shall begin this speech in a manner that I did not anticipate when I signed on for this program. In examining the materials that the Conference examiners reproduced from my book, *Forbidden Grounds*,[1] I discovered they gave it an instructive new title. The heading renames the book *Forbidden Grounds: The Case in Favor of Abolishing All Civil Rights Laws*.[2] The original title was *Forbidden Grounds: The Case Against Employment Discrimination Laws*.[3] The difference is important. In modern usage, the language "all civil rights laws" covers a far broader terrain than "employment discrimination laws." The term "civil rights laws" includes, for example, laws devoted to voting rights,[4] public accommodations[5] and housing.[6] The principles applicable in private employment markets may not carry over to these other areas, so we should not understand the call for the repeal of Title VII[7] as an effort to return to the inexcusable rules that barred individuals from voting because of their race or sex.[8] Indeed, quite the opposite relationship seems proper. So long as political and constitutional safeguards are in place, the repeal of employment discrimination laws will not lead to a return to the intolerable political position under Jim Crow that the modern civil rights laws did so much to discredit. Therefore, I will direct my remarks to private conduct and not government power.

---

* James Parker Hall Distinguished Professor of Law, The University of Chicago. This Article is an adaptation of a speech given by Professor Epstein at the conference entitled *Handling the Difficult Civil Rights Case in the '90s* held at The John Marshall Law School on October 10, 1995.

1. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) [hereinafter FORBIDDEN GROUNDS].

2. *Id.*

3. *Id.*

4. *See* 42 U.S.C. § 1973(a) (1988).

5. *See* 42 U.S.C. § 2000a (1988).

6. *See* 42 U.S.C. § 1982 (1988).

7. This passage refers to Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), *amended by*, 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. 1994).

8. Richard A. Epstein & Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 Be Repealed?* 2 S. CAL. INTERDISCIPLINARY L.J. 349, 349-50 (1993) [hereinafter *Title VII Repeal*].

The organizers' misstatement of the book title should remind us, moreover, of the modern transformation in our thinking about the term "civil rights laws." The term's modern usage is somewhat corrupted relative to its nineteenth century meaning. The debates over the Civil Rights Act of 1866[9] took place hard on the heels of the emancipation of the slaves and the end of the Civil War. Thus, people used the phrase in opposition to political rights, of which voting is perhaps the most important. This indicates that the domain of civil rights was somewhat smaller than it is today. In addition, the concept of civil rights within that more limited domain was closely linked to the question of civil capacity. The Civil Rights Act of 1866 provides that all persons shall have the same rights to buy, sell and lease property as white persons.[10] Congress designed this statute to extend the standard of civil capacity of the most preferred class before its passage to all individuals regardless of race.[11] The statute's clear implication was that since any white person could decide with whom to contract or who not as he or she saw fit, every other person would have exactly the same right once the statute took effect. As originally understood, the civil rights laws sought to insure that every individual had the advantages of freedom of association and could hire and sell his labor or sell or exchange his goods to whomever he so pleased.[12]

Since the 1940s or 1950s, the definition of civil rights in private sector disputes has veered sharply away from the original definition to take, in fact, exactly the opposite position. Modern civil rights laws circumscribe the grounds on which all employers may refuse to do business with current or potential employees.[13] Modern civil rights laws no longer have the universal coverage of the earlier civil rights acts directed toward civil capacity. Instead, they focused originally on race, sex, religion and, later, on age and disability.[14] The question now is whether the shift in focus from the older definition of civil rights to the newer one makes sense.

In dealing with the matter of "sense," the problem is not one of cognition or definition. Instead the inquiry assumes that these problems are resolved. It then asks which of the systems is most efficient over the long haul; it asks which system will lead to a greater level of productivity inside labor markets relative to its competitors. The position that I took in *Forbidden Grounds* was,

---

9. Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1988)).

10. 42 U.S.C. § 1981(a) (1988).

11. *Id.*

12. *Id.*

13. 42 U.S.C. § 2000e-2(a)(1) (1988).

14. *Id.*

and is, distinctly unfashionable. My view is that the entire apparatus of the Civil Rights Act of 1964[15] should be scrapped insofar as it applies to private employers in competitive markets. To this general proposition, I shall state two important qualifications in the hope of persuading you that the position I advocate is not as implausible as some of you might think.

The first qualification is that my position is confined to private employers. In speaking about private behavior, the negative pregnant in the proposition is that some non-discrimination obligations should be imposed on government, both when it acts as an enforcer of various individual rights and also when it hires people to fill its various offices. Governments depend on tax monies raised from all individuals. Governments require all individuals to surrender their rights of self-defense in order to obtain the benefit of greater public protection. Governments must work for the benefit of all individuals, which means that they cannot be secular or partisan in their operation. To allow governments to discriminate in any direction without justification or cause indicates, to me, a very serious violation of individual rights that should prompt vigorous political and judicial responses. This norm of public non-discrimination is of course what distinguishes my position from the perpetuation or revival of Jim Crow.[16] Jim Crow laws relied on extensive government regulations of social and economic arrangements which were based on explicit racial classifications.[17] This abhorrent system was the antithesis of laissez-faire, which placed emphasis of strong property rights, freedom of contract and limited government.[18] By advocating the repeal of Title VII, I do not urge a return to an age in which it is quite proper to heap scorn and derision. Rather, my position is an effort to separate private and public domains in order to protect the former from the corrosive powers of the latter.

The need to limit government discretion should incline society toward the traditional color-blind rule that the first Justice Harlan championed in his impassioned *Plessy v. Ferguson*[19] dis-

---

15. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1994).

16. FORBIDDEN GROUNDS, *supra* note 1, at 91-115.

17. *See* Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws are Still a Mistake*, 108 HARV. L. REV. 1085, 1104 (1995) (recognizing that Jim Crow laws were pervasive programs that maintained African-Americans as a "subordinate racial caste"). *See also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320-21 (1986) (noting that Jim Crow laws were designed to keep blacks in a lower social position).

18. *See Title VII Repeal*, *supra* note 8, at 354 (discussing how taking direct regulation of racial policies out of private industry would lead to a more free and open economy).

19. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting),

sent. Ironically, my allegiance to the antidiscrimination principle, while not absolute in the public sphere, is much more firm than modern civil rights advocates' views. For these advocates, the public/private distinction matters relatively little and they favor the two tier approach of a stringent antidiscrimination norm for some forms of decisions and unimpeded voluntary affirmative action programs for others. This role reversal is only one of many that takes place in the general civil rights arena.

This qualification has to do with competition and market structure. The basic argument I have made in favor of discrimination in employment markets is: when large numbers of employers who are in competition with one another, society does not have to worry about the irrationality or stupidity of any individual employee or employer.[20] Instead, society must ask itself how the *least* irrational employer would respond to the requests of workers in disfavored groups. The reason is clear enough. A majority vote is not required to get a job in an open market. People normally do not expect to find employment with employers who are hostile to their aims and ambitions. Yet, as long as there is any variation in taste, the inclinations of the hostile group do not matter because these groups can pair themselves up with employers who have favorable sentiments. Thus, if ninety percent of the market is absolutely irrational and crazy, people who have the qualities of mind, the temperament and the work ability which allows them to succeed in the workplace can seek employment with the remaining ten percent. The long term consequences are even more favorable. If the ten percent of the employers willing to put prejudice aside get better workers for a lower price than the rival irrational firms, they will be able to expand their market share and, thus, create more opportunities for the disadvantaged workers who are left behind. The process of equilibration in markets strongly favors disadvantaged workers.

In order to understand the dangers of collective action, it is very instructive to compare the operation of a market with the operation of a jury. In an earlier speech today, Mr. Galland said that jurors often exhibit irrational behavior or questionable judgment in race and sex cases.[21] Unfortunately, I think that some evidence supports this view and does not suggest that the bad motives infect only individuals of one race. The dangers come from

---

overruled by Brown v. Board of Educ., 347 U.S. 483 (1954). In his dissent in *Plessy*, Justice Harlan argued that the Constitution is "color blind" and that "[i]n respect of civil rights, all citizens are equal before the law." *Id.* at 559.

20. FORBIDDEN GROUNDS, *supra* note 1, at 29-41.

21. George F. Galland, Jr., Presentation given at The John Marshall Law School seminar on *Handling the Difficult Civil Rights Case in the '90s* (Oct. 10, 1995).

all quarters. Moreover, the dangers are far more important in a jury that holds the power of life and death over a single individual than they are in markets. Why the difference? When there are twelve jurors, society cannot say that the decision will be made by one or two jurors who can sift through the evidence and make dispassionate judgments on a defendant's guilt or innocence. Rather, all jurors must reach a *collective* verdict, making it very unlikely that the one or two most rational jurors will dictate the outcome. Given this collective dynamic, we cannot be that optimistic about the final outcome. The collective decision will very likely track the sentiments of the median voter on the jury. Unlike a market, isolated groups, such as juries, make decisions that matter by the individuals who are most supportive of them. Individuals behave one way in making collective decisions and quite another way in making decentralized decisions. The critical advantage of the competitive market is that it allows more rational players to act on their own initiative without having to persuade their more capricious peers to join forces with them. Rational jurors cannot drive out irrational ones. Rational market participants can drive out irrational ones.

The second qualification asks whether we should always regard the word "discrimination" as a term of opprobrium. The classical meaning of discrimination had the opposite connotation. People used the word to compliment individuals for their ability to distinguish between good and bad. When you said that somebody had "discriminating taste," it meant that they could tell the difference between a fine wine and its inferior impostor. Now that the civil rights movement has taken over the term, saying that somebody is a "discriminator" carries with it the implication of invidious behavior. But is that correct? In chapter three of *Forbidden Grounds*, "Rational Behavior in Competitive Markets,"[22] I argued that in certain contexts, the former meaning of discrimination, mainly that which facilitates sensible and rational judgments, provides the appropriate lens through which to view the overall social situation.[23] The book identifies a couple of these situations in order to explain why a well-functioning competitive industry will not have each firm as reduced microcosms of the larger universe. If 100 firms in the computer industry have certain distributions by race and sex, you would not expect each firm to have a distribution that matches that of the industry as a whole.

The explanation for the differences in firm composition basically comes in two parts. The first part is that firms supply their workers with more than a menu of individual benefits in the form

22. FORBIDDEN GROUNDS, *supra* note 1, at 59-61.
23. *Id.* at 59-78.

of wages, job assignments, promotion opportunities and vacations. Firms also supply these workers with a localized public good, namely a work place environment that is shared with other workers. This common environment is a public good limited to members of the firm. The greater the disparity in taste among the workers, the more difficult it will be for employers to provide a single homogenous environment equally pleasing to all. One way employers may avoid this problem is to eliminate some of the divergence by grouping workers according to common tastes, which implies some degree of discrimination among them. As long as workers' tastes are correlated by race, religion, sex and age (and one can easily add disability), some forms of discrimination routinely condemned under the Civil Rights Act actually work to the advantage of employees in both groups. It is quite likely that tastes in music, in food and in decor do correlate along these lines; that is the testimony that people hear more frequently from women, blacks and religious minorities than from white males. Society has no reason to treat these tastes as suspect or not worthy of respect. The government is not, and should not, be in the mind-bending business because it does not possess the superior wisdom to allow it to shape the preferences of its citizens.

Once again I must stress the consequences. If this argument is correct, then on some portion of the spectrum, higher levels of discrimination should be accompanied by higher wage levels given the higher productivity that the reconfigured workers can generate. In some settings, net wages for black and white, male and female workers could all rise when segregation increases. However, these are merely tendencies and not absolutes. Firms can easily reverse their field without having to go before some public board to confess error and to obtain absolution. We can also predict which firms will likely prize a strong interracial atmosphere. A real estate firm that is trying to sell to a broad clientele will want to have staff that can relate to the full range of its customer base. Therefore, these firms will prize individuals who can get along with other persons. They will also use trade to encourage the removal of prejudices not only as a moral, but also as a business matter. However, we do not have to put absolute faith in its ability to assess the dynamics of each individual firm. At some level, it is best for society to learn that it does not have to care. Let the chips fall where they may, firm by firm. Different firms have different internal dynamics and they can sort through these problems without an assist from the national government.

The second reason why some form of discrimination might be rational in markets stems from the commonplace observation that all legal contracts are not perfectly enforceable in fact.[24] Every-

24. For a more detailed discussion of rational discrimination arising out of em-

one understands that there is a lot of slippage between cup and lip, and that sometimes people do not have a legal remedy even when there are clear violations of contractual terms.[25] The absence of a legal remedy does not necessarily mean that there is no remedy at all. Rather, people will shift the search toward substitute informal mechanisms that take the place of legal remedies in order to keep people in line. Generally speaking, the greater the level of sympathy and cooperation between individuals, the greater the number of non-job-related ties that individuals have to one another, the more likely that these people will honor their business arrangements. These informal sanctions become extremely important when trying to define how employees and partners will start to interact with one another. Close knit communities, such as the Israelis in the diamond trade and the Koreans in the grocery business, rely on these informal arrangements to facilitate complex credit arrangements that could not survive in the long run if only legal remedies stood between a creditor and default. Thus, it follows that the discrimination and specialization that occurs in markets is not a sure sign of irrationality.[26] Many forms of discrimination have no systematic harmful component. The use of discrimination is compatible with overall increases in wealth and human satisfaction.

The case against antidiscrimination laws in private competitive markets is, in fact, still stronger than this. One common feature of antidiscrimination laws that is often overlooked is how they frequently work at cross purposes to one another. Although proponents advertise these laws as a coherent whole, they often do not work in that fashion. The way I like to put this point to student groups is by asking them the following question: which would be of greater benefit to them in the work place, the repeal of age discrimination statutes[27] or the more vigorous enforcement of race and sex discrimination laws? Without hesitation, I will answer it is the former. Nothing impedes the progress of young people up an organizational ladder more than the prohibition of mandatory retirement practices and the heavy loading of damages for willful discrimination under the age statute. These statutes do not solely affect the relationships between employees and elder workers, but also have manifest, negative spillover effects on third parties.

Thus, if society looks at the overall distribution of income in

---

ployment contracts, see FORBIDDEN GROUNDS, *supra* note 1, at 59-78.

25. *Id.* at 69.

26. *Id.* at 70. Thus, it is cheaper to do business within a closely knit group than it is to do business with strangers. *Id.*

27. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. 1994).

the United States, the most striking feature about this statistic is how the major powerful and political clout of the over fifty-five set has led to a skew in wealth and opportunities in the United States. The average income and wealth of people over fifty-five relative to that of people thirty-five has increased vastly in past years.[28] Age discrimination laws contribute to this increase, along with the escalation of social security benefits relative to wages and the vast expansion of Social Security, Medicare and Medicaid.[29] No evidence exists which supports reverse flows to the twenty to thirty-five set. Clearly, the wealth transfers only to the older set. How should society respond?

One possibility is for the younger set to try to get even. Rather than commit political suicide by seeking to repeal the age discrimination statute, the younger set could try to strengthen the protections for other individuals. For example, government could increase the penalties for race and sex discrimination in order to more evenly enforce them across the board.

This is a losing strategy. The workplace already suffers from too much uncertainty, confusion and overregulation. If the government strengthens antidiscrimination laws on race and sex, it increases its administrative costs, it further hampers the degree of flexibility that employers retain and it reduces the mobility of labor by making it harder for people to get jobs and, therefore, more reluctant to quit present jobs. The search for counterstrategies leaves everyone worse off. When there is a hole in the bottom of the boat, it is best to patch it, not to cut a second one.

Let me try to make the point in a more forceful fashion. Can society best evaluate the effectiveness of the civil rights laws by analyzing whether their use advances or retards the welfare of various individuals or groups? Litigators have a strong time preference in how they ask that question. They typically begin the analysis the moment when a potential client has been laid off by a

---

28. *See generally* Thomas Sowell, *The Social Security Scam: The Poor Pay the Wealthy*, SEATTLE TIMES, Jan. 25, 1995, at B5. This article noted that individuals 55 to 64 years old average more than four times the net wealth as those individuals under the age of 35. *Id.*

29. For a discussion of Social Security, see Michael Miller, *Uh-Oh*, THE NEW REPUBLIC, Apr. 15, 1996, at 20. The author notes, for example, that "in the 1970s, [social security] benefits grew *'ten times faster in real terms than did the number of Americans aged 65 and older.'*" *Id.* (emphasis in original). For a more technical presentation on the same issue, see Martin Feldstein, *The Missing Piece in Policy Analysis: Social Security Reform* (The Richard T. Ely Lecture to the American Economic Association (1995)). Mr. Feldstein observed that "[t]he resulting deadweight loss is approximately one percent of each year's GDP [Gross Domestic Product] in perpetuity, an amount equal to 20 percent of payroll tax revenue and a 50 percent increase in deadweight loss of the personal income tax." *Id.*

harsh, indifferent employer. The only question is whether you, as a lawyer, can get the client compensation for the harm that he or she has suffered. At this juncture, you are not interested in the creation of opportunities for other individuals. You are interested in exacting a pound of flesh for your client. The way you can achieve this result is to pursue the other fellow to make sure that transfer payment in damages takes place.

However, that legal daring is shortsighted from a social point of view. Complainants must always remember that the moment they bring suit in one case, it is going to influence behavior of potential employers in other settings long before any suit is or can be filed in those other settings. Any sound overall assessment cannot ignore the material effects that such litigation has on the creation of new jobs for other workers. Tracing down these consequences will be hard. Firms are not likely to announce that their decisions are made to minimize the adverse effects of the civil rights laws. They are not likely to broadcast their strategy. The effects are likely to be large and significant, but they also will be hidden from view. They may involve decisions on where to build the next new plant; or to decide which of two plants the firm will expand and by how much; or to decide which plant the firm will shut down. Civil rights laws also might influence the types of capital equipment that companies purchase, or the kinds of new jobs they create. They surely influence the percentage of individuals who companies will hire as employees covered under the Civil Rights Act, compared to the percentage of work that will be set out on a piecework basis to independent contractors to whom the Civil Rights Act[30] does not apply. It is no accident that the rate of independent contracting, *e.g.*, the number of temporary workers in the United States, is increasing rapidly.[31] A key motivation for this trend is to enable employers to escape the burdens associated with civil rights laws and other so-called protective employment laws.

The moral is clear. Government must never ask whether a civil rights law is a good thing after a violation has occurred, but must ask people to decide whether they desire the law before they know whether they will lose or gain a job because of its operation. Here, the default position of no civil rights law leads to a more open and competitive economy, which increases people's chances

30. Pub. L. No. 88-352, 78 Stat. 241.

31. *See* James Risen, *Temporary Employment Industry Working Overtime Jobs: Rapid Growth Attributed to Corporate Cost-Cutting*, L.A. TIMES, July 5, 1994, at A1. This article noted that 15% of all jobs created during the recent economic recovery are temporary. *Id.* The reason for this increase is "directly attributable" to the fact that American corporations are cutting the costs associated with permanent workers. *Id.*

of being hired for a job with good raises. People will gain more from the high side of markets than they will lose from their low side precisely because, as mentioned earlier, they can migrate to the employers who favor them the most. We must beware of judging a system only by its failures and then judging the system's rivals only by the successful suits it fosters. The simple and ultimate point is that no system of government regulations can outperform a competitive economy. No rigged economic scheme with government at its center will do better. Yet when all the shouting dies down, the chief achievement of the civil rights laws is just that; they create a government monopoly that subsidizes, in disguise, some employees at the expense of employees, employers and customers. It is nice to assume that you can somehow create a better society even when you have less wealth to go around on the happy illusion that you can surgically distribute it to the right people. The reality is, however, that the wealth will rarely end up in the hands of its intended recipients. Too many people, from lawyers to bureaucrats to politicians, will take their cut of the action first.

This type of proposal will likely not go down well to the civil rights bar, either plaintiffs or defendants. The proposal to repeal the statute as it applies to private competitive firms puts a big crimp in the cases that plaintiffs bring and, by necessity, in those that defendants can defend.[32] So, the system has the intellectual virtue and political defect of hurting all segments of the bar in equal measure. Yet in making this proposal, should I be regarded as some form of reactionary? Well, I think most of you will join the chorus of yeses. Perhaps I can redeem myself a small bit to portray myself as someone who has advanced at least to the Dark Ages from prehistoric times by commenting briefly on the question: what does my position entail about affirmative action?

The usual suspicions are clear. Many people take the view that anyone who is against the Civil Rights Act of 1964 simply has to be a die-hard opponent of affirmative action — political affirmative action is more venturesome than the color-blind standard of the 1964 Act, so anyone who dislikes the Act cannot support or tolerate affirmative action. This is wrong, at least in part. A word of explanation is given because the defense of affirmative

---

32. In 1994, complainants filed 95,447 employment discrimination claims with the Equal Employment Opportunity Commission (EEOC). David C. Bert, Note, *Election of Remedies in Employment Discrimination Law: Doorway into the Legal Hall of Mirrors*, 46 CASE W. RES. L. REV. 145, 153 n.37 (1995) (citing Janet Novak, *Silver Lining*, FORBES, Nov. 21, 1994, at 124). Furthermore, the number of employment discrimination cases filed in federal court increased 109% from 1990 to 1994. *Id.* at 146 n.5 (citing Peter Eisler, *Overloaded System Tests New Strategies*, USA TODAY, Aug. 15, 1995, at 10A).

action that I want to give does not, to say the least, follow the conventional lines. Instead, my point follows not from my view of racial politics, but from my view of the proper set of legal rights in employment markets. My root position is that employers may hire or not hire employees on any ground they see fit.[33] Based on that view, none needs state approval, and none should face state resistance, if they decide *on their own* to start affirmative action programs. To use a quaint phrase, it is an employer's own business whether it starts a program of that sort. Most certainly, employers do not have to come to me in order to explain their affirmative action programs or receive my blessing. If employers want to institute such programs, the only people they have to satisfy are their shareholders and their employees. If they want to go along with the proposal, then society does not have to worry about the federal government; does not have to worry about the state government; does not have to worry about anybody.

Will any affirmative action programs survive if the government repeals the Civil Rights Act tomorrow? My guess is yes. The explanation is prosaic. For many reasons some firms will think that it is a good marketing strategy. Others will think that a program of this sort responds to their intrinsic sense of fairness. Others will think that it is the least they can do to rectify past harms, including those for which they believe they bear no personal responsibility. My only take on the question is that we do not need to agree among ourselves on whether it should be done, how it should be done, when it should be done or who should benefit from it, whether by race, ethnicity, sex or age. This vexing issue would sort itself out much easier in a decentralized fashion. We do not need one monopoly like government decision on which affirmative action either stands or falls.

The overall situation should now be clear. Most people think of civil rights litigation in terms of the glorious results it can achieve in individual cases. I tend to think about it, quite differently, as a system with two dominant characteristics. One, it imposes a single term on all firms so that a competitive market is a government monopoly in any or all firms with fifteen or more workers. Two, this government monopolist never goes about the business of maximizing output. Rather, it constantly finds ways to create cross-subsidies between various groups which share one common characteristic. The winners get less than the losers pay. This is not good business. Society wants to foster win-win relationships. That is what employment contracts did before Congress enacted the civil rights acts. However, now the civil rights act makes a fraction of those contracts win-lose, where the losers lose

33. FORBIDDEN GROUNDS, *supra* note 1, at 413-19.

more than the winners win. Such a system is unstable. To avoid this problem, society should return to the basic ideals of the Civil Rights Act of 1866,[34] to which the Civil Rights Act of 1964[35] is antithetical.[36]

34. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6.

35. Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982).

36. *See Title VII Repeal*, *supra* note 8, at 349-50 (focusing on a similar debate where Professor Epstein called for the repeal of Title VII of the Civil Rights Act of 1964).