BOOK REVIEW

ABOLITION IN A DIFFERENT VOICE


Reviewed by George Rutherglen*

Forbidden Grounds, by Professor Richard Epstein, is the latest and perhaps the most controversial of his many works expounding a comprehensive libertarian critique of American law. Epstein has argued tirelessly, and often brilliantly, for a libertarian approach to an ever-expanding range of legal issues, from tort law to takings to legal theory. In this book, he attacks laws against employment discrimination. In defiance of the conventional wisdom, Epstein defends private discrimination on the basis of race, sex, religion, age, and disability as, at worst, a moral evil that will be eliminated by the market, and, at best, a reflection of private preferences that should be encouraged instead of stamped out. In taking this position, he concedes (with disarming understatement) that he places himself "securely outside the mainstream."1

Epstein’s attack upon laws against employment discrimination, like Machiavelli’s upon the political morality of his contemporaries, is deeply disturbing, and for the same reason: it is simultaneously outrageous and, from a certain tough-minded perspective, completely convincing. Were it not for the force and conviction that Epstein brings to his arguments, the whole book might be regarded as an exercise in irony—a reductio ad absurdum that demonstrates, not that the laws against employment discrimination should be repealed, but that Epstein’s libertarian premises should be reexamined.

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Such an offhand dismissal would be a mistake. Although it is necessary to examine Epstein's "first principles" with care, it is also necessary to go beyond them. As he candidly recognizes, his arguments are intended less to persuade than to provoke.\(^2\) His motto might be, to paraphrase a slogan from the nineteenth century (his favorite period in legal history), "It is necessary to outrage the politically correct."\(^3\) What else can we say of a book that reserves the "very hard question of whether contracts to create slavery should be allowed,"\(^4\) that casually suggests that women should be preferred for employment as nurses or social workers because they are better at "affective personal relations,"\(^5\) that cites a Shirley Temple movie for the propensity of merchants, in this case Chinese, to cheat foreign travelers,\(^6\) or that argues that the Civil Rights Act of 1964 could be held constitutional only on the reasoning of \textit{Plessy v. Ferguson}?\(^7\)

If the reader can survive a barrage of such examples,\(^8\) this book shows that it has much to offer. It reveals, in striking and extreme form, both the strengths and the weaknesses of economic analysis of law. With his usual candor, Epstein takes the enthusiasm for the market, now current in some legal circles, to its rhetorical conclusion: a general suspicion of any form of government interference with the market. Yet his defense of the market rests on a fundamental equivocation between protecting individual freedom of contract and maximizing some measure of overall social welfare. His equivocation between these two justifications for the market leads him, I think, to emphasize legal and economic theory at the expense of the available empirical evidence. He also lapses occasionally into that favorite argument of the Legal Formalists—the parade of horribles. Although his legal analysis of cases and statutes is often insightful, it also frequently is marred by unwarranted inferences that horrendous consequences will follow from a single leading case. Any extension of government, of course, may be horrendous for a libertarian, but Epstein's argument requires more than the simple repetition of the libertarian premise that government is, in most of its mani-

\(^2\) See id. at 6.
\(^3\) "Il faut épater le bourgeois." Attributed to Théophile Gautier.
\(^4\) Epstein, supra note 1, at 20 n.6.
\(^5\) Id. at 272.
\(^6\) Id. at 70 n.10.
\(^7\) Id. at 141 (discussing \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), overruled by \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954)).
\(^8\) The strangest examples arise from Epstein's confessed propensity to believe in genetic differences between men and women. Id. at 271-72. For instance, he opines that men cannot dance on pointe in ballet, despite the contrary practice of the Ballet Trocadero de Monte Carlo. Id. at 275.
festations, a bad thing. If *Forbidden Grounds* is not to beg the question, it must show how the laws against employment discrimination have undesirable consequences even for someone who does not share its libertarian premises.

Although Epstein does not consistently take up this task, it is here, I think, that this book makes its principal contribution. Most of his arguments that laws against employment discrimination are inefficient are persuasive only as arguments that these laws do not accomplish their intended goals. Despite his disdain for questions of "how to implement some goal that all agree is just and appropriate,” he is persuasive chiefly in pointing out the limited effectiveness of laws against employment discrimination. In recent years, these laws, which were designed to open jobs to groups excluded from them, have been used most frequently to protect the rights of incumbent employees. Epstein's book provides us with a timely reminder of the ways in which laws against discrimination can defeat themselves.

I. UTILITARIANISM WITHOUT REGRETS, FREEDOM WITHOUT HISTORY

Epstein begins his book with two introductory sections: the first on foundational principles of political and economic theory, and the second on the legal history of racial discrimination, from slavery through Jim Crow to the modern civil rights laws. These introductory sections constitute a broad, but necessarily summary, defense of the regime of freedom of contract that Epstein has defended more fully in other works. As applied to employment discrimination, freedom of contract allows workers to avoid those who discriminate against them and to seek out those who discriminate in their favor. In Epstein's libertarian vision, the victims of discrimination need the assistance of government only in protecting their common law rights to personal safety, property, and freedom of contract. It is freedom of contract, not laws against employment discrimination, that enables the victims of discrimination to seek the best opportunities available to them, and through competition, to drive unjustified discrimination from the marketplace.

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9 Nevertheless, most chapters in the book conclude on this note. See id. at 26-27, 78, 87, 115, 143, 157-58, 181, 241, 266, 282, 312, 328, 349, 390-91, 437, 478-79, 494. The book itself ends with an overwrought denunciation of laws against employment discrimination as "a dangerous form of government coercion that in the end threatens to do more than strangle the operation of labor and employment markets. The modern civil rights laws are a new form of imperialism that threatens the political liberty and intellectual freedom of us all.” Id. at 505.

10 Id. at 6.


12 Epstein, supra note 1, at 29-31.

13 Id. at 59-72.
Epstein attributes the evils of discrimination entirely to government or government-sponsored monopolies, like unions.\textsuperscript{14} Government is a part—indeed all—of the problem, not the solution. Like other libertarians, he believes that government is more likely than private enterprise to impose losses upon society and hence that it stands in need of constitutional restrictions. Majorities and special interest groups inevitably engage in rent-seeking behavior in order to obtain subsidies at the expense of those who cannot effectively wield political power. In order to protect citizens from coerced and uncompensated takings of their property, it is necessary to impose constitutional restrictions on all forms of government regulation, except those designed to safeguard common law rights against force and fraud.\textsuperscript{15} It follows that laws against private discrimination by private actors generally are unconstitutional.\textsuperscript{16}

Discrimination by government is another matter, because, on Epstein's libertarian premises, it is just another attempt to satisfy private preferences through the government when they can be satisfied more efficiently in the market.\textsuperscript{17} As applied to government, laws against employment discrimination are constitutional yet unnecessary, because they just repeat the constitutional prohibitions against expansive government. Epstein, however, acknowledges a distinctive role for the Civil Rights Act of 1964; when enacted, it helped to break down forms of private discrimination fostered by state law.\textsuperscript{18}

Although Epstein frequently expresses his own strong disapproval of racism,\textsuperscript{19} his personal preferences hold no special place in his legal theory. His preferences must compete with the opposite and equal, or perhaps stronger, preferences of racial bigots. He bases his legal theory on a version of utilitarianism, apparently one that maximizes the satisfaction of preferences of all individuals within society.\textsuperscript{20} In this calculus, both at the abstract level of justifying the entire system of legal rules and within the system itself, preferences are not to be weighed according to whether they are good or bad, fair or unfair, selfish or unselfish. At the abstract level, only their existence matters; and at the concrete level, only their ability to be satisfied in the marketplace. Epstein derives all of his libertarian principles of individual autonomy, and all of the common law principles protecting the institution of

\textsuperscript{14} Id. at 118-25.  
\textsuperscript{15} Id. at 103-12.  
\textsuperscript{16} Id. at 141-43.  
\textsuperscript{17} See id. at 99-103.  
\textsuperscript{18} Id. at 126-29, 142-43.  
\textsuperscript{19} See id. at 92-97, 121-22, 142. Sexism is a different matter. He finds many gender roles to be justified, if not biologically determined. Id. at 269-78.  
\textsuperscript{20} Id. at 42, 65-67, 75-76, 304-06, 415-16, 427.
the market, from the utilitarian principle of maximizing the satisfaction of preferences.\textsuperscript{21}

If Epstein's libertarian principles are not simply to become an exercise in begging the question, he must show how they are justified by his utilitarian moral theory. He has set himself a difficult task.\textsuperscript{22} Utilitarians and libertarians take starkly opposed positions on the central question of political theory: how to reconcile the demands of the community with the rights of individuals. This contrast is often overlooked because adherents of both views often defend the market as the dominant institution of modern society. They do so, however, for diametrically opposed reasons. Utilitarians seek to maximize collective social welfare; libertarians seek to protect individual rights from the state. The contrast between these starting points could not be greater. Epstein, in particular, wants to do more than protect some individual rights. He wants to protect all individual rights, except the right to engage in force and fraud in a Hobbesian state of nature. He wants to deny government the power to attempt to maximize overall social welfare directly, except by full compensation of those subject to regulation.\textsuperscript{23}

The opposed principles of collective social welfare and individual rights can be reconciled only through very strong empirical claims about the effectiveness of the market, and the ineffectiveness of government, in satisfying individual preferences. Although there is much rhetoric in Epstein's book to this effect,\textsuperscript{24} he provides little evidence to back it up. His discussion of empirical evidence is confined mainly to criticizing studies that find evidence of persistent racial discrimination in competitive markets.\textsuperscript{25} Instead of offering empirical evidence, he turns repeatedly to microeconomic theory to support his strong claims about the limited role of government in promoting overall social welfare. Only a libertarian who gave overriding and fundamental importance to freedom of contract—not a utilitarian who needed evidence about the actual operation of social institutions—could object to government intervention in such absolute terms. And indeed, by the end of the book, we find Epstein emphasizing, not the fundamental importance of satisfying the most preferences of the largest number, but "the bedrock

\textsuperscript{21} Id. at 15-24, 75.

\textsuperscript{22} In an earlier article, he tried to show how the two positions are consistent, but his analysis was based on the assumption that strict libertarians can offer only their intuitions to justify their position. Epstein, Foundations, supra note 11, at 715, 718.

\textsuperscript{23} Epstein, Takings, supra note 11, at 337-38.

\textsuperscript{24} For instance, in defending the doctrine of employment-at-will, he argues: "No system of judicial supervision is likely to work a tenth as well as IBM's internal procedures." Epstein, supra note 1, at 156.

\textsuperscript{25} Id. at 38-39, 47-58, 96-97, 242-66.
These libertarian principles make an implicit, but powerful, appeal to distributional assumptions, which Epstein never acknowledges. The principle of freedom of contract, as he uses it, has some plausibility because it makes an appeal to equality. It is a principle of equal freedom of contract for all. On this interpretation, selling oneself into slavery poses problems for a libertarian, not because of externalities or duress, but because it results in unequal freedom of contract for the person who has enslaved himself. Epstein trades on this implicit appeal to equality when he argues that a common law regime of freedom of contract, unhindered by laws against employment discrimination, leaves each worker with an equal right to avoid employers who would discriminate against him and to seek employers who would discriminate in his favor. This argument has some force just because it makes an appeal to the equal right of all workers, regardless of race, sex, age, or disability, to enter into contracts with employers of their choice.

Once Epstein has opened the door to such distributional issues, it is difficult for him to insist that it really was closed all along. After he has implicitly appealed to a principle of equality of opportunity through freedom of contract, he must consider other appeals to this principle. The most obvious alternative to formal equality of opportunity—the right to enter into contracts only with parties of one's own choosing—is what John Rawls calls "liberal equality of opportunity"—the right of those who are equally talented and equally willing to work to enter into contracts of their own choice. Liberal equality of opportunity requires more than careers open to talents—it also requires that those who are equally talented and equally willing to work have an equal opportunity to succeed, regardless of how they started off in life.

The only consideration that Epstein gives this competing principle is a brief discussion of the costs of achieving equal opportunity, including the costs of frustrating the preferences of those who would otherwise engage in

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26 Id. at 505.
27 Like many economists, he postpones consideration of these issues, seemingly indefinitely. See id. at 343-44, 435-36.
28 Id. at 20 n.6. Epstein argues that contractual slavery would impose costs on the children of slaves because they, too, would be enslaved. The slavery of children, however, simply does not follow from the slavery of their parents. Probably for this reason, Epstein also argues that most, but not all, contracts of enslavement would be made under duress.
29 Id. at 29-31.
discrimination. Epstein criticizes the advocates of liberal equality of opportunity for beginning "with an untested moral assumption that simply calls some preferences out of bounds before the discussion begins." Instead, he would invoke his own untested assumption that all preferences must be taken into account. Yet here again, Epstein begs the question by appealing to the utilitarian principle that all preferences should be considered equally.

Far more alarming than Epstein's failure to consider general issues of distribution is his failure to consider issues of rectification. He is adamant in defending the Lockean principle that each individual owns his or her own labor, at least at the beginning of life. Slavery, of course, was a notorious violation of this principle and would therefore require some form of rectification, such as payment of reparations to the descendants of the slaves or various forms of affirmative action. This is a claim—indeed, the best possible claim—of a taking without just compensation to which libertarians like Epstein should be especially sympathetic. Yet in this book he dismisses all questions of rectification at the outset with the assertion that "there is no adequate remedy" for such historical injustices. Other libertarians, notably Robert Nozick, have recognized the dimensions of this issue. It is not one that can be resolved simply by trusting the future operation of the market, or even general prohibitions against discrimination.

Epstein's failure to offer any argument at all on this issue is perhaps the strongest evidence of his utilitarianism, for a utilitarian would also ignore past wrongs, so long as doing so had no harmful consequences for the future. If leaving the victims of past wrongs uncompensated satisfies more preferences than providing a remedy, all things considered, then the remedy may not—and probably must not—be granted. On the other hand, here again, a true utilitarian would insist upon evidence of the feasibility and effects of

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31 Epstein, supra note 1, at 72-76. Epstein also criticizes Rawls later in the book, id. at 343-44, and in an earlier book. Epstein, Takings, supra note 11, at 338-44. In these passages, Epstein takes issue with Rawls' "difference principle": his requirement that any increase in resources for those better off in society should also be to the advantage of those who are worst off. Rawls, supra note 30, at 75-78. This principle, however, is distinct from the principle of liberal equality of opportunity. Id. at 73-74.

32 Epstein, supra note 1, at 75-76.

33 Id. at 76.

34 Id. at 21-24.

35 Id. at 2. This passage is followed a few pages later by a citation to Aristotle's discussion of corrective justice. Id. at 20 n.5.


37 In an earlier book, Epstein rejected any claim for reparations based on common law principles of adverse possession and utilitarian arguments about future gains from trade. Epstein, Takings, supra note 11, at 346-49.
different remedies. Although Epstein would allow all forms of private affirmative action, just as he would allow all forms of private discrimination,\textsuperscript{38} he would not require any remedy for historical discrimination. He gives no weight to the historical injustices of American society and therefore assumes away the principal historical reasons for enacting laws against racial discrimination.

Epstein's neglect of historical injustices demonstrates just how profoundly ahistorical his theory is. In the historical section of his book, he simply reinterprets the historical record to support his faith in the market. Epstein argues that all unjustified forms of racial discrimination after the Civil War were entirely attributable to the Jim Crow laws in the South.\textsuperscript{39} This argument rests either on his narrow definition of unjustified discrimination or on his attempt to minimize the extent of widespread private discrimination. Epstein's narrow definition results from his pervasive assumption that almost anything done by government is unjustified, but anything allowed by competitive markets is the expression of private preferences, or as he calls it, "rational discrimination."\textsuperscript{40} As he says, "[u]nder 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."\textsuperscript{41} Passing the question of how Epstein can identify "the wrong people" in a manner consistent with his libertarian premises, he believes that "the wrong people" acting in competitive markets would not engage in such pervasive forms of discrimination. The best historical evidence that he could have for this assumption would be evidence of the absence of private discrimination outside the South and beyond the reach of Jim Crow—evidence which he does not marshal. Additionally, his argument neglects well-documented instances of private discrimination in the North, particularly as black migration from the South increased.\textsuperscript{42}

Just as Epstein's social history is ahistorical, so also is his legal theory. He accurately recounts some of the major constitutional decisions since \textit{Lochner v. New York},\textsuperscript{43} but as he frankly admits, he thinks that most of them have

\textsuperscript{38} Epstein, supra note 1, at 413-21.
\textsuperscript{39} Id. at 93-112.
\textsuperscript{40} Id. at 60-72.
\textsuperscript{41} Id. at 94.
\textsuperscript{42} See Gilbert Osofsky, Harlem: The Making of a Ghetto 35-52 (1966); Howard N. Rabinowitz, A Comparative Perspective on Race Relations in Southern and Northern Cities, 1860-1900, with Special Emphasis on Raleigh, in Black Americans in North Carolina and the South 137, 149, 151, 156-57 (Jeffrey J. Crow & Flora J. Hatley eds., 1984). I am indebted to Mike Klarman for these references.
\textsuperscript{43} 198 U.S. 45 (1905), overruled by Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).
been wrong. In his view, the only problem with *Lochner* is that it did not go far enough in limiting government regulation of the economy.\(^4^4\) Epstein believes that government can regulate the economy only within the limits of selected principles of the common law of property, contracts, and torts, as it existed at some time in the nineteenth century. It comes as no surprise that this legal theory fails to supply a justification for laws against employment discrimination. The whole exercise is somewhat quixotic. Laws against employment discrimination are not designed to maximize the satisfaction of preferences or to protect freedom of contract. On the contrary, they are directed against preferences for discrimination and against contracts that reflect those preferences. The principle of liberal equality of opportunity, which Epstein summarily rejects, fits the purpose of these laws much better than his libertarian principles do.

Epstein, of course, does not contend otherwise (although he does question the effectiveness of these laws). He comes not to praise the laws against employment discrimination, but to bury them. He uses his libertarian principles, much as Bentham used utilitarianism, as an external vantage point from which to criticize existing law.\(^4^5\) This is a worthy task, but one poorly suited to the sympathetic interpretation of legal doctrine. Quite the opposite—as the example of Bentham illustrates, it is suited to a hostile (which is not to say unedifying) polemic against the status quo. In Epstein's case, however, the emphasis on formal principles of freedom of contract in his libertarian principles leads him to a similar formalism in his interpretation of concrete cases and statutes.

### II. LEGAL FORMALISM REVISITED

When he turns to criticism of existing law, Epstein presents an account that is at once dubious and alarmist about the effects of laws against employment discrimination. His account is dubious insofar as it disputes the empirical evidence of the success of Title VII and similar laws. Because the authors of these studies have responded to Epstein\(^4^6\) there is no need to come to their defense. They do note, however, Epstein's failure to cite virtually any studies that support his position; his empirical evidence comes almost entirely from his criticism and reinterpretation of studies that

\(^{4^4}\) See Epstein, supra note 1, at 108.


oppose him. If he is going to endorse the sentiment that "it takes a theory to beat a theory," perhaps he should also consider the corollary that "it takes an empirical study to beat an empirical study."

Epstein's discussion of cases is concentrated almost entirely on decisions of the Supreme Court, but he includes some that now have lost whatever significance they had and omits others that are of continuing importance. His omission of any systematic discussion of the Civil Rights Act of 1991 is particularly unfortunate. Although he does note similar provisions in the proposed Civil Rights Act of 1990, which was vetoed by President Bush, he never develops the fundamental changes proposed in this legislation and eventually enacted in the Civil Rights Act of 1991. That act overruled six decisions of the Supreme Court and greatly changed both the way individual cases are litigated under Title VII and the statutory basis for the theory of disparate impact. Epstein discusses both of these issues at some length, but, because of the change in the law, what he says bears only marginally on the questions that are most likely to be of significance. Nevertheless, the reader must sympathize with an author who completes a book of this scope and ambition just as Congress changes the law on which he writes. And,

47 Epstein cites only two studies in support of his general claim for the effectiveness of the market in eliminating patterns of discrimination: one a study of litigation of traffic claims in Japan and another of the efforts of coal companies in West Virginia to improve the quality of local black schools. Epstein, supra note 1, at 96-97. He also cites an historical study that concludes that streetcar companies were opposed to racial segregation because of its costs. Id. at 102 & n.32. This unrelated and limited evidence contrasts dramatically with several studies that document the effect of Title VII in eliminating discrimination, especially in the South. See id. at 242-66.

48 See id. at 15.

49 For instance, he spends several pages on Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), a decision on the effect of pregnancy leave on the accrual of seniority. Epstein, supra note 1, at 344-46. Although the decision had some significance at the time it was handed down (I confess to writing about it myself), it has been completely superseded by the Pregnancy Discrimination Act of 1978. See id. at 15.

50 See infra notes 60, 62, 71, 75.


too, the Civil Rights Act of 1991 hardly raises fundamental questions for an author who would like to see the whole array of employment discrimination laws repealed.\(^5^4\)

Epstein's discussion of doctrinal issues, if only it were accurate, would gladden the hearts of civil rights lawyers. What he views with some alarm as the dire consequences of government interference with private contracts, they would see as the vigorous enforcement of the nation's commitment to equal opportunity. Unfortunately for both, inferring actual consequences from the bare statement of legal doctrine in a leading case is often misleading. In fact, legal doctrine has worked much smaller changes than Epstein fears, at least in recent years. In other areas, perhaps the laws will have truly dismaying consequences, as he argues in an extended discussion of the elimination of mandatory retirement for university professors.\(^5^5\) Such issues, however, are of immediate concern only to narrow segments of society.\(^5^6\) A less alarmist, but, at the same time, less original emphasis on the effectiveness of laws against employment discrimination in general would have greatly enhanced the contributions of this book.

Epstein's discussion of individual claims of intentional discrimination, or disparate treatment, is a case in point. He emphasizes the disruptive consequences of *McDonnell Douglas Corp. v. Green*,\(^5^7\) which established a three-part structure of shifting burdens of production that is invariably applied to almost all individual claims of disparate treatment.\(^5^8\) Although *McDonnell Douglas* is the leading decision on proof of disparate treatment, it is hard to imagine a leading decision of less significance. Epstein argues that the case made a truly momentous change in the law by abandoning the color-blind perspective expressed in the language and legislative history of Title VII.\(^5^9\) Yet the phrase from the opinion in question—the requirement that the plaintiff prove "that he belongs to a racial minority"—was promptly disowned by

\(^{54}\) As Epstein himself, of course, does not hesitate to say. Epstein, supra note 1, at xiv-xv.

\(^{55}\) Id. at 459-73.

\(^{56}\) On the other hand, Epstein may have gauged his readership correctly.

\(^{57}\) 411 U.S. 792 (1973).

\(^{58}\) Under *McDonnell Douglas*, the plaintiff must first produce evidence

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. If the plaintiff carries this burden, the burden of production shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. If the defendant carries this burden, the plaintiff must show that the stated reason for her rejection was a pretext for discrimination. Id. at 804.

\(^{59}\) Epstein, supra note 1, at 177.
the Supreme Court when it held that white employees, as well as black, could bring claims under Title VII.60

Epstein also exaggerates the effect of McDonnell Douglas on employment practices that do not reach litigation. He argues that the decision leads employers to cut short their efforts to hire new employees after a single black individual with minimal qualifications has applied for an open position. Yet he cites no case in which an employer has been held liable for continuing a search in these circumstances. To his credit, he does cite the principal case that denies recovery for such claims, Furnco Construction Corp. v. Waters.61 Nevertheless, his attempt to distinguish Furnco from his hypothetical case, based on the need for the employer to advance a continuing search as a "legitimate, nondiscriminatory reason" in rebuttal of the plaintiff's prima facie case, reveals a surprising ignorance of the cases after McDonnell Douglas. The fact that the plaintiff has made out a prima facie case in McDonnell Douglas usually is of no consequence because the plaintiff's burden of making out that case, and the defendant's rebuttal burden of showing a "legitimate nondiscriminatory" reason, are so easily satisfied. Almost all individual cases under McDonnell Douglas come down to a determination whether the plaintiff has proved that the "legitimate, nondiscriminatory reason" offered by the defendant is really a pretext for discrimination. As a good common law lawyer, Epstein might be forgiven for reading more into the shifting burdens of proof in McDonnell Douglas than is in fact there, but the Supreme Court has warned repeatedly against precisely this mistake.62

If Epstein had looked a little further into the lower court cases he would have found that his hypothetical, based on discrimination against an applicant, is defective in yet another respect. Very few such claims are brought. In recent years, over eighty percent of employment discrimination cases concern claims by incumbent employees who have been denied a promotion or discharged.63 His dire forecast that efficient search strategies will expose employers to unjustified liability is simply a creature of his own abstract economic analysis. Epstein, already the leading defender of the doctrine of employment-at-will, would have done well to expand his discussion of this issue. Instead of using employment-at-will as an abstract base line for evaluating laws against employment discrimination, he could have used claims for

wrongful discharge as a concrete example of what will happen to future litigation under Title VII. 64

Having devoted himself to an alarmist interpretation of McDonald Douglas, 65 Epstein inexplicably neglects the fundamental change in individual claims made by the Civil Rights Act of 1991 (and anticipated by the vetoed Civil Rights Act of 1990): the creation of the right to jury trial and the right to recover damages on all claims of intentional discrimination under Title VII. 66 This change in procedure and remedy has transformed the nature of individual claims of employment discrimination, so that they now resemble tort claims for personal injuries much more closely than they did before. Employers faced with liability and damages to be determined by a jury, which is less likely to be sympathetic to them than might be a judge, are likely to change their employment practices even more than Epstein imagines.

More serious difficulties arise from his neglect of the other major change made by the Civil Rights Act of 1991. The act took the theory of disparate impact under Title VII, which has always had an uncertain basis in the statutory language, and codified it in a form that resists narrow interpretations by the Supreme Court. 67 Epstein first considers the statutory basis for the theory as it was originally put forward in Griggs v. Duke Power Co. 68 and then turns to how it has been applied by the courts. 69 The first half of his discussion, and much of the second, is now mainly of historical interest. The source and development of the theory of disparate impact bears upon only one question of contemporary significance, but it is a question that Epstein

64 See Epstein, supra note 1, at 147-58.
65 He also offers an alarmist interpretation of the burden of proof in “mixed motive” cases, those in which the plaintiff has been rejected by the defendant both for legitimate and for discriminatory reasons. Id. at 174-75. The target of his criticism is a provision, eventually enacted in the Civil Rights Act of 1991, that allows a plaintiff to recover attorney’s fees upon proof that a discriminatory reason was “a motivating factor” in the employer’s decision. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (to be codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). Epstein contrasts this language with the requirement under preexisting law of proof that a discriminatory reason was “a ‘substantial’ motivating factor.” Epstein, supra note 1, at 175. Yet it is difficult to discern much, if any, difference between these formulations of the plaintiff’s burden of proof. Price Waterhouse v. Hopkins, 490 U.S. 424 (1971) (plurality opinion of Brennan, J.).
69 Epstein, supra note 1, at 205-41.
fails to address at all: How is the theory to be interpreted after the Civil Rights Act of 1991?

A reader of his chapter on the development of the theory of disparate impact after *Griggs* would conclude that it was an engine of massive changes in the workplace until it was substantially limited by the recent decision in *Wards Cove Packing Co. v. Atonio*. This conclusion is only half right. The theory of disparate impact did work great changes, but only until 1977, when it was limited by decisions that imposed procedural barriers in the way of class actions, eliminated seniority systems from the scope of the theory, and made the plaintiff's initial showing of adverse impact much more complicated.

On this last point, remarkably, Epstein fails to cite, let alone discuss, the leading decision on statistical evidence of discrimination, *Hazelwood School District v. United States*. Although that case concerned a claim of class-wide disparate treatment, its analysis of statistical evidence has been applied generally to claims of disparate impact. The importance of the decision lies in the complex inquiry it requires into the proper definition of the labor market and the proper methods of showing underrepresentation of particular groups in the employer's work force. The decision transformed proof of disparate impact from the simple matter that Epstein envisages to a highly technical issue on which expert testimony usually must be taken. Only if a plaintiff surmounts this initial hurdle under the theory of disparate impact is any burden of proof placed upon the defendant.

Continuing in an alarmist vein, however, Epstein suggests that while the plaintiff's burden of proving disparate impact is light, the defendant's burden of proving "business necessity" is invariably heavy. Again, his discussion is only half right. Disparate impact is easy to prove for tests, for it is only necessary to compare the pass rates of different groups of applicants. Proof of "business necessity," on the other hand, has never been uniformly required to justify a test with adverse impact. The landmark decision in *Washington v. Davis* established a very lenient standard for validating tests with adverse impact, at least in circumstances in which the test was not likely to be used as a pretext for discrimination. Again, Epstein fails to cite this decision at all. He relies instead upon the Uniform Guidelines on

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74 Epstein, supra note 1, at 212-13.
75 426 U.S. 229 (1976).
76 Id. at 246-48.
Employee Selection Procedures, which were adopted by the Equal Employment Opportunity Commission and other federal agencies as non-binding interpretations of Title VII. These guidelines do impose very strict standards of validation, but they rarely have been strictly applied by the courts. At best, only some of the cases have applied strict standards of business necessity, most often when there was some evidence, as in Griggs itself, that the employer had actually engaged in intentional discrimination. Many of the cases, especially those after Washington v. Davis, have applied more lenient standards of justification.

The latter trend culminated in Wards Cove Packing Co. v. Atonio, which reduced the defendant's burden still further, to a burden of production, instead of a burden of persuasion, and only to show that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." The decision eliminated any need for the employer to show business necessity. As Epstein notes, the vetoed Civil Rights Act of 1990 put the burden of persuasion back on the employer and reinstated the requirement of business necessity. What he fails to note, however, is that the definition of "business necessity," in both the proposed statute, which he analyzes, and the statute as enacted, reinstates the ambiguity in the case law. First, these provisions were narrowly addressed to overturning the decision in Wards Cove. Just turning the clock back to before that decision would leave all of the older cases, such as Washington v. Davis, in place. Second, the provisions themselves require proof only that the disputed employment practice "is job related for the position in question and consistent with business necessity." The equivocation between proof that a test is "job related" or that it is required by "business necessity" is precisely what characterized the law before Wards Cove. It is now embedded in the statutory language.

78 Rutherglen, supra note 73, at 1312-29.
No doubt Epstein is unhappy with such equivocation. It is a far cry from the wholesale use of employment tests that he endorses. But when he returns to his fundamental argument for allowing tests on grounds of efficiency, we are entitled to be skeptical of his evidence, for he cites none that supports his strong claims for the validity of employment tests. In his words:

Professionally developed tests have worked well because they were used so widely that it was possible to devise very strong statistical checks across firms and over time to make sure that they were internally consistent and reliably applied. They tested (the past tense is all too appropriate) skills that are doubtless related in some positive way to success on the job.\(^3\)

Most professionals in the field of ability testing would find this passage surprising, especially the reference to “very strong statistical checks.” Perhaps “it was possible” to devise such checks, but if so, Epstein is left without any explanation why employers found it so difficult to justify tests with disparate impact. The use of tests to select employees seems to be justified, for Epstein, just because employers once widely used such tests. Instead of empirical evidence for the validity of tests, we are left where we began, with an expression of Panglossian optimism: whatever occurs in a competitive market is right. In light of the conflicting and uncertain evidence of the general validity of employment tests, particularly as they are actually used by employers, the equivocation reflected in existing law makes more sense than the false certainties upon which Epstein rests his analysis.

\(^3\) Epstein, supra note 1, at 214 (footnote omitted). The footnote at the end of the first of these sentences cites two books and several articles, which do support his claim that it was “possible” to devise such checks, but not that the checks revealed the strong forms of validation that he attributes to them. John E. Hunter, Frank L. Schmidt & Gregg B. Jackson, Meta-Analysis: Cumulating Research Findings Across Studies (1982) discusses the technique of cumulating the results of different empirical studies without cumulating the studies for any particular test. Fairness in Employment Testing: Validity Generalization, Minority Issues, and the General Aptitude Test Battery ch. 6 (John A. Hartigan & Alexandra K. Wigdor eds., 1989) applies this method to studies of the General Aptitude Test Battery. It finds only a modest level of validity, greater than .15, for the General Aptitude Test Battery. Id. at 133. The book as a whole finds a higher level of validity—an average of .30—but hardly what Epstein has in mind. Id. at 169-71. Ignoring the many qualifications to this finding of general validity, these numbers report only coefficients of correlation, which must be squared to reveal the proportion of performance on the job that is explained by performance on the test. This calculation yields a level greater than two and one-quarter percent, or an average of nine percent, of performance on the job explained by performance on the test. Epstein’s final source, Barbara Lerner, Washington v. Davis: Quantity, Quality and Equality in Employment Testing, 1976 Sup. Ct. Rev. 263, also emphasizes the limitations upon validity studies. Id. at 300-04.
III. Conclusion

Epstein's book, even if it deserves criticism in detail, also deserves praise for its remarkable breadth and ambition. In this Review I have concentrated only on the two major theories of liability under Title VII: individual claims of intentional discrimination and class-wide claims of disparate impact. Epstein's reach is far wider, covering many separate issues concerned with discrimination on the basis of sex, age, and disability. He makes a strong case that these forms of discrimination pose different problems from discrimination on the basis of race, which has formed the model for all the laws against employment discrimination. Although Epstein invariably provokes disagreement (at least from this reviewer), he invariably raises issues that are worth disagreeing over. Just as it is possible to put too much faith in the market, as I believe Epstein does, it is also possible to put too much faith in the general prohibitions that now constitute the laws against employment discrimination. Epstein's sweeping attack on all such laws should lead us to reconsider how effective these sweeping laws are.

As he points out, the prohibition against racial discrimination changed the status of black workers most dramatically only in the years immediately after it was enacted. Transplanting a general prohibition against racial discrimination to discrimination on other grounds, but otherwise in nearly the same terms, might then be seen as mainly a measure to protect the individual rights of incumbent employees. As the prohibitions against discrimination expand to new grounds, they come more and more to resemble a general prohibition against discharges without good cause. Only incumbent employees, who already have a job, and especially a higher-level job, gain from such a prohibition. They also have the largest and most promising claims for damages under the new civil rights act, and they stand the greatest chance of engaging the sympathies of a jury. Protecting their rights is important, but it stops well short of providing equal opportunities for everyone willing and able to work.

The real question, raised but not answered by Epstein's book, is whether we must be content with laws against employment discrimination that do little more than protect the rights of employees who have already found a measure of success in the workplace. Epstein fails to address this question systematically because he refuses to consider any principle of equal opportunity other than the libertarian principle of formal freedom of contract, and because he refuses to condemn any form of discrimination other than government interference with freedom of contract. With less controversial

84 Epstein, supra note 1, at 252.
premises he might have reached less sensational conclusions, but he would have contributed much more to the continuing debate over the laws against employment discrimination.