

Re-Evaluating Federal Civil Rights Policy

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The first serious steps at both the federal and state level to combat employment discrimination directed against American blacks were taken in the 1940s.¹ Outside the South, a broad consensus emerged over many decades that the segregationist policies of the American South—and discrimination against blacks in general—were no longer acceptable. Certainly, much has changed over roughly forty-five years, as the common and blatant discriminatory practices of the past have largely been eliminated. This transformation leaves two major questions for policymakers and scholars: First, did federal antidiscrimination policy generate economic benefits for blacks? Second, how much if any of the remaining relative economic disadvantage of blacks is caused by continuing employment discrimination?

In another article, we have set forth the case that the federal civil rights effort has played a major role in contributing to the narrowing of economic differences between blacks and whites, although the gap remains disturbingly large.² There is very little concrete evidence, however, that indicates how much further relative black economic gains could be realized by eradicating racial discrimination in employment and wages. The severity of employment discrimination currently faced by blacks is unknown. To some it is obvious that discrimination against blacks is pervasive—this is the implicit premise of David Strauss's paper.³ To others, it is obvious that there is very little discrimination against blacks.⁴ Even if significant racial discrimination persists, there is uncertainty about the economic consequences flowing from such discrimination. It is conceivable that the bureaucratized personnel policies of the major employers have so reduced discrimination in hiring and promotion

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1. The most important federal effort of this period was President Roosevelt's executive order creating a committee on Fair Employment Practice, which monitored the federal prohibition of discrimination by defense contractors. Exec. Order No. 8802, 3 C.F.R. § 234 (1941). By 1949, eight states had enacted fair employment laws. 1947 Conn. Pub. Acts 171; 1946 Mass. Acts 368; 1945 N.J. Laws 169, 1949 N.M. Laws 169; 1945 N.Y. Laws 292; 1949 Or. Laws 221; 1949 R.I. Pub. Laws 2181; 1949 Wash. Laws 183.

2. Donohue & Heckman, *Continuous versus Episodic Change: The Effect of Federal Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE (forthcoming Dec. 1991).

3. Strauss, *The Law and Economics of Employment Discrimination*, 79 GEO. L.J. 1619 (1991).

4. See R. EPSTEIN, *THE ANTI-DISCRIMINATION LAWS IN EMPLOYMENT MARKETS: A LEGAL AND ECONOMIC ANALYSIS* (forthcoming 1991).

that even large amounts of continuing discrimination by the nation's small employers would not have major economic consequences for blacks. Conversely, it may be the case that racial discrimination continues to depress black wages by significant amounts. These issues cannot be resolved by theoretical speculation; rather, they require empirical exploration.

It is clear that our society today shows much less toleration of overt discrimination against blacks than was true even twenty-five years ago. It is also true that the number of complaints to the Equal Employment Opportunity Commission (EEOC) and the number of employment discrimination lawsuits has grown dramatically over time.⁵ Given the current tension between the apparent desire of the Supreme Court to restrict the scope of federal antidiscrimination law⁶ and the equally strong Congressional preference for either preserving or strengthening this law,⁷ it is a particularly auspicious time to re-examine all aspects of federal civil rights policy.

Part I will begin this process of re-evaluation by summarizing the empirical evidence on the effect of the federal antidiscrimination effort. This summary will provide a foundation for our subsequent analysis and policy recommendations. Part II will discuss the existing economic theories of employment discrimination that are based purely on models of individual preferences or decisionmaking, and argues that they do not explain the historical facts of black economic progress. Part III discusses an alternative conception of discrimination that better explains the historical evidence; and Part IV offers some concluding remarks on the current policy debate over the

5. Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

6. See e.g. *Patterson v. McLean Credit Union*, 491 U.S. 164, 178-80 (1989) (42 U.S.C. § 1981 restricted to racial discrimination in the making and enforcement of contracts; claim of racial harassment in employment not actionable under § 1981); *Lorance v. AT&T Technologies*, 490 U.S. 900, 911 (1989) (when seniority system is nondiscriminatory in form and application, claim of discrimination in adopting the system must be filed within the limitation period of 42 U.S.C. § 2000e-5(e), based upon date of initial adoption of the system; no continuing violation found from allegedly discriminatory adoption of seniority system); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (employment decisions made pursuant to consent decree, which include goals for hiring and promotion of blacks, may be challenged by nonparties on grounds of racial discrimination against whites); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651, 657, 659 (1989) (To establish prima facie case of disparate impact, plaintiff cannot rely solely upon statistics of work force racial composition; rather, plaintiff must demonstrate specific employment practices which cause statistical disparity. If prima facie case is established, burden of producing evidence of legitimate business justification shifts to employer, but burden of persuasion remains with plaintiff.).

7. Congress responded to the Supreme Court decisions cited *supra* note 6, with the Civil Rights Act of 1990. S. 2104, 101st Cong., 1st Sess. (1989). The Act was primarily designed to restore antidiscrimination jurisprudence to its pre-1989 status. *Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Committee on Labor and Human Resources*, 101st Con., 1st Sess. 1-3 (1989) (statement of Senator Edward Kennedy). Although both houses of Congress passed the bill, President Bush vetoed it on October 22, 1990, and Congress failed to override the veto. *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, Col. 3.

proposed Civil Rights Act of 1991 and the Strauss proposal for a shift in federal civil rights policy toward employment quotas for blacks.

I. DID FEDERAL CIVIL RIGHTS POLICY HELP BLACKS?

This discussion focuses on whether Title VII has improved black employment levels and wages relative to white employment levels and wages. The law clearly has aided thousands of individual blacks (and other employment discrimination plaintiffs) who have received monetary judgments, but the most important objective of the law is to generate employment benefits for black workers through the elimination of discrimination, rather than monetary benefits through the pursuit of litigation.

Between 1920 and 1990 there were only two periods in which black incomes rose relative to white incomes: during the economic rebound from the Great Depression induced by World War II,⁸ and in the decade following the launching of an intensive federal effort to guarantee the civil rights of blacks.⁹ But having identified progress leaves us with little information about its cause. Indeed, some analysts have argued that the progress reflected in aggregate economic statistics is only part of a long-term historical trend:

[T]he racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized . . . — education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains around this long-term trend.¹⁰

But this picture of uniform black progress in the post-World War II era is somewhat misleading. Consider first the issue of migration: enormous numbers of blacks fled the South.¹¹ In the decade of the 1940s, and again for the following decade of the 1950s, roughly a quarter of young black men living in

8. James Smith and Finis Welch report that relative black wages rose by 24% in the 1940s. Smith & Welch, *Black Economic Progress After Myrdal*, 27 J. ECON. LITERATURE 519, 522 (1989). The reasons for the narrowing of the black/white wage differential during the 1940s have not been fully determined. There is some evidence suggesting that the apparent wage gains of blacks are exaggerated because blacks migrated from low-wage, low-cost, rural areas to higher wage, but commensurately higher cost, urban areas. *Id.* at 541, 545-46. In other words, correcting for cost of living changes, black relative wage gains would be smaller than the uncorrected data suggests—perhaps even nonexistent. *Id.* at 541, 543 n.29.

9. The aggregate black/white earnings ratio rose from .62 in 1964 to .72 by 1975, before falling to .69 in 1987. Absolute black progress was enormous over this time period, since the real wages of all workers were climbing significantly. Donohue & Heckman, *supra* note 2.

10. *Id.* at 555.

11. *Id.* at 539.

the South migrated North.¹² This amazing black exodus grew at an even faster pace in the first half of the 1960s, but then suddenly the outflow slowed to a trickle. Indeed, over the decade of the 1970s the flow was reversed, as the South experienced a net influx of black migration.¹³ For two reasons, one would expect this massive exodus of young blacks to have a powerful effect in narrowing the racial wage gap. First, blacks were largely leaving low-paying agricultural jobs in the South and securing higher-paying industrial jobs in the North.¹⁴ Second, the departure of so many black workers from the South diminished the supply of Southern black labor, which contributed to upward wage pressure for the blacks who remained in that region. After 1950, the productivity of migrating blacks was lower than average.¹⁵ This selective migration contributed to the appearance of black gains in the South.

Although black migration is an important factor in the explanation of black progress in the period prior to the passage of the 1964 Civil Rights Act,¹⁶ it cannot serve as an explanation for the substantial black gains in the aftermath of the civil rights legislation. Indeed, rather than undermining the case that federal civil rights policy aided blacks—as the above quote from James Smith and Finis Welch would suggest—the story of black migration powerfully buttresses it. Something very dramatic happened in the mid-1960s to make Southern blacks decide to remain in the South. We submit that the cause of this sudden shift was the perception that the comprehensive federal effort, directed primarily at the South to eliminate barriers to blacks in housing, voting, schooling, and employment, would improve the quality of life for blacks in the South.

In addition to migration, improvement in the education of blacks relative to whites has been offered as an explanation of black progress in the decade following passage of the 1964 Act. Smith and Welch state that the cause of the rapid movement toward the national norm in the Southern racial wage gap during the 1970s may have been that:

black-white skill differences . . . converged in the South as the post-World War II cohorts entered the labor market. To illustrate this point, assume that Southern schools were effectively desegregated in 1960, six years after

12. U.S. COMMISSION ON CIVIL RIGHTS, *THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA* 79 table 5.2 (1986).

13. R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 117-19 (1987).

14. Smith & Welch, *supra* note 8, at 546 (“migration increased black-white wage ratios by 11% to 19% between 1940 and 1980”).

15. See Hamilton, *Educational Selectivity of Migration from the South*, 38 *SOC. FORCES* 33, 40 (1959) (prior to 1949, it was primarily higher-skilled blacks that migrated from the South).

16. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447 and 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988)).

the Brown [sic] decision. The first class of Southern black children who had attended entirely desegregated schools would have first entered the labor market in the early to mid-1970s. Some of the improvement in black incomes during the 1970s may have been due to the skills acquired through this improved schooling. However, that is unlikely to be the whole story because there was a substantial erosion in racial wage disparities even among older workers in the 1970s *A more plausible explanation may well be that racial discrimination is waning in the South.*¹⁷

But while improved schooling does explain a portion of black post-1964 progress, desegregation was not the vehicle for these black schooling gains. By 1964, there was virtually no desegregation of Southern schools.¹⁸ It was not until a very firm, activist Supreme Court called for immediate action in 1968 and 1969¹⁹ that Southern school desegregation became a reality.²⁰ Moreover, as even Smith and Welch concede, there were substantial increases in the returns to black education during the period in question for blacks of all ages. In other words, black progress after 1965 was not simply the product of better educated blacks entering the labor force; the poorly educated blacks of previous cohorts suddenly started earning more in the post-1965 era as well. This phenomenon of increased returns to higher education may have resulted from declining prejudice, as Smith and Welch suggest, but a far more likely explanation is that federal law opened up opportunities for blacks that discriminatory attitudes had previously kept closed. The law, at first, may not have changed the attitudes, but it appears to have altered the behavior, of discriminatory employers.

Moreover, recent work by David Card and Alan Krueger reveals that relative improvements in the quality of black schooling contributed only fifteen to twenty percent of the post-1960 gains in black relative earnings.²¹ Another ten to twenty percent of these gains are the product of the differential departure (relative to whites) of low-income blacks from the labor force, which leads to a spurious improvement in measured black relative earn-

17. Smith & Welch, *supra* note 8, at 543 (emphasis added).

18. See Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 44 n.9 (1967) (in 1964, only 2.25% of southern black children attended desegregated schools).

19. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (per curiam) (one paragraph opinion chastising Fifth Circuit for delay in desegregation case); *Green v. County School Bd.*, 391 U.S. 430 (1968) (invalidating "freedom of choice" plan).

20. Even so, some scholars conclude that desegregation failed to generate educational gains for black children. N. ST. JOHN, *OUTCOMES FOR CHILDREN: SCHOOL DESEGREGATION* 119 (1976).

21. It is important to distinguish relative black gains that flow from relative gains in the quantity versus the quality of black education. Card and Krueger assert that the narrowing differential between blacks and whites in their years of education generated no improvement in the relative earnings of blacks. Donohue & Heckman, *supra* note 2. Smith and Welch, on the other hand, contend that relative black gains in the years of education did play some role in reducing the wage gap. Smith & Welch, *supra* note 8, at 531-39.

ings.²² It would thus appear that these long-run supply side factors do not explain roughly sixty to seventy-five percent of the measured black relative advance. Even if the diminishing gap in years of education between blacks and whites contributed as much as twenty-five percent to the black relative advance, the remaining unexplained residual would still be from thirty-five to fifty percent. While additional research is needed to sharpen the estimates of the contribution of various supply factors in elevating black economic welfare, it appears likely that federal pressure has increased the demand for black labor and played a considerable role in generating relative black gains.

The finding that so much of the black economic gains came in the South is significant for two reasons. First, it shows that there is significant alignment between federal pressure, which was largely directed toward the South, and black economic gains. Second, it buttresses the position that the economic benefits were generated by federal pressure. In general, it is difficult to assess the effect of a law when the social changes that led to the passage of the law may be the true cause of any ensuing developments. While this would indeed be a problem in assessing the impact of the law in the North where support for the law was high, this is a less serious concern when examining the economic progress of blacks in the South.²³ The South fought the law, and the law won.

The example of the textile industry in South Carolina provides a useful illustration of how black employment levels rose dramatically at about the time that Title VII went into effect and the federal government contract compliance program was initiated in 1965. Figure 1 presents the share of black employment by sex in the textile industry of the state over the period from 1910 to 1974 taken from a study by James Heckman and Brook Payner.²⁴ Through two World Wars, the Great Depression and the Korean War, the share of blacks remained low and stable, despite the fact that the industry was expanding in employment throughout this period. Regardless of the degree of labor market tightness or slackness, one fact emerges with remarkable clarity: virtually no black women, and only a small portion of black men, were permitted to work in the textile industry in the fifty-five years before 1965.²⁵ After that date, black male and female wages (relative to those of

22. Donohue & Heckman, *supra* note 2.

23. The South's opposition to the 1964 Civil Rights Act is seen in the roll call votes on the bill. Of the 27 Senators opposing the bill, 21 were from states that had belonged to the Confederacy. 110 CONG. REC. 14,511 (1964). Similarly, in the House, 96 of the 130 members opposing the bill were from former Confederate states. *Id.* at 2,804.

24. Textiles has long been the major manufacturing employer in the state, accounting for 80% of all manufacturing employment in 1940 and more than 50% in 1970. Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy On The Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 142 (1989).

25. *Id.*

EMPLOYMENT IN THE SOUTH CAROLINA TEXTILES INDUSTRY

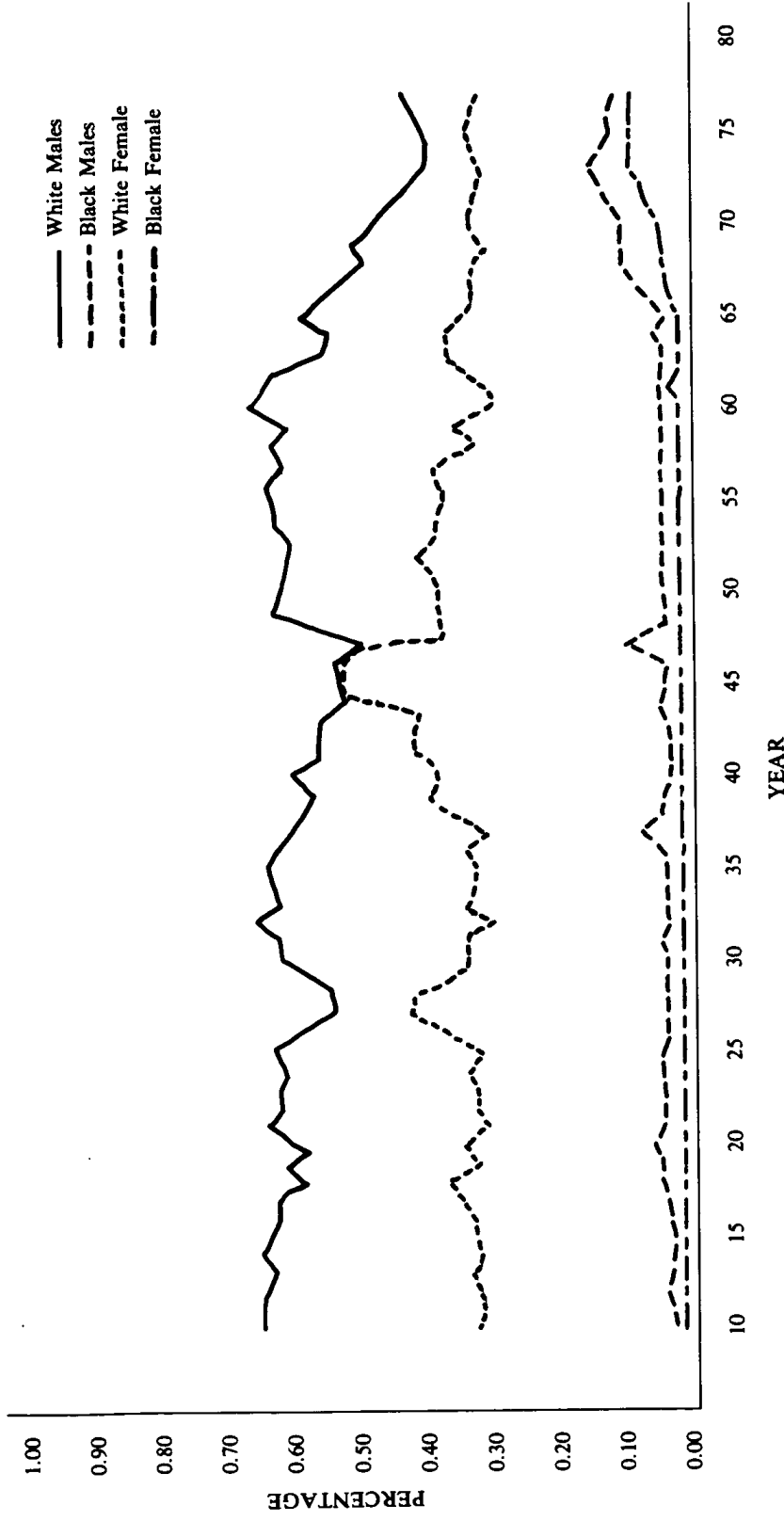


Figure 1

white males) suddenly accelerated in the industry.²⁶

Black relative progress was dramatic in the decade following 1965, particularly in the South, but was virtually nonexistent thereafter.²⁷ Figure 2 shows the relative earnings shortfall of blacks controlling for a number of human capital variables. Although in 1965 all blacks in the country earned twenty-five percent less than similarly situated whites, this earnings deficit fell below fourteen percent in 1976, and increased to roughly nineteen percent in 1988.²⁸ Economists and sociologists have argued that one reason for the stagnation in black relative economic progress after 1975 is the fall in the demand for low-skilled labor.²⁹ It will be very important to confirm the existence and strength of any such adverse demand shifts if we are to understand the effect of government antidiscrimination policy on the black-white earnings differential. For example, the evidence seems clear that the Carter Administration pursued enforcement of the civil rights laws and the affirmative action component of the federal contract compliance program far more vigorously than did the Reagan Administration.³⁰ Nonetheless, it is difficult to amass any evidence that indicates that black gains were greater during the Carter years than in the Reagan years. If one accepts the evidence that the adverse demand shifts harming blacks did not begin until at least 1979, then the equally poor record of black performance in the Carter and Reagan years might undermine the view that substantial additional economic gains by blacks can be achieved through more vigorous EEOC enforcement or substantive strengthening of the prohibition against discrimination.

Clearly, the annual costs of bringing and adjudicating eight to ten thousand employment discrimination cases are not trivial.³¹ In addition, the burdens of erroneous decisions and employer adjustments to avoid them are inevitable but of uncertain magnitude. We have argued that the federal civil

26. *Id.* at 168.

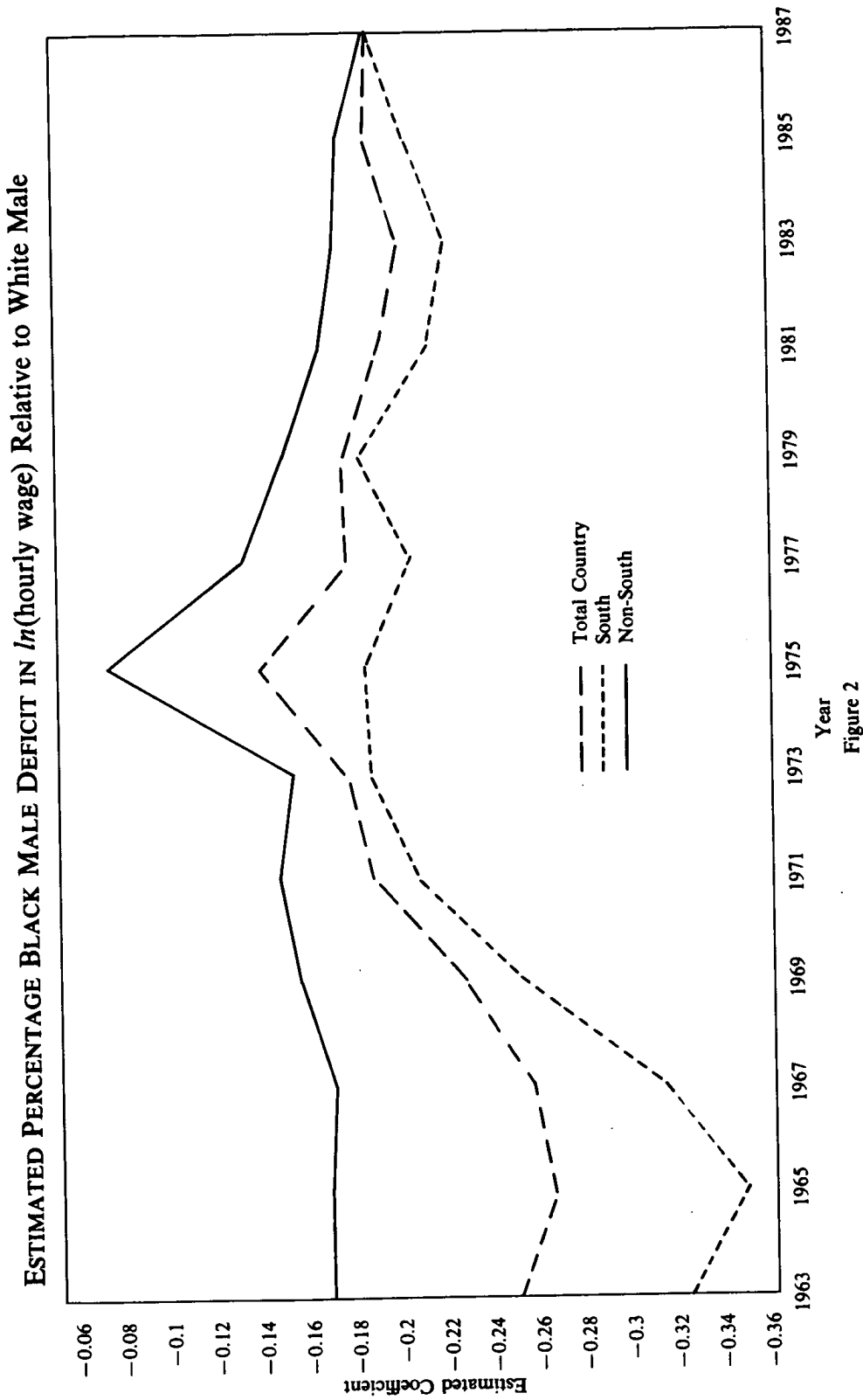
27. The evidence of black economic gains induced by favorable demand-side factors—such as the reduction in discriminatory behavior of employers—is quite strong beginning in the mid-1960s, when Title VII became effective and the strengthened federal contract compliance program was initiated. Donohue & Heckman, *supra* note 2. It is an open question whether earlier governmental actions—such as the decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), state antidiscrimination laws, the contract compliance program of the Kennedy Administration, or private efforts to achieve racial justice had any significant economic impact prior to 1965.

28. The data are derived from the Bureau of Labor Statistics, Current Population Surveys (1964-1989), with the plotted figures representing the estimated coefficient on the BLACK dummy variable. Explanatory variables included race, region, SMSA, age, years of education, and dummy variables showing high school and college graduation. The dependent variable is the natural log of the hourly wage.

29. W. WILSON, *THE TRULY DISADVANTAGED* 39-42, 100-02, 135, 180-81 (1987).

30. Leonard, *Affirmative Action in the 1980's: With a Whimper Not a Bang*, J. HUM. RESOURCES (forthcoming).

31. In 1989, plaintiffs brought nearly 10,000 employment discrimination suits. 1989 ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. app.1, table c2.



rights apparatus yielded large gains in the post-1964 decade, although this view is not uniformly accepted. Some of the critics of Title VII, such as Judge Richard Posner, argue Title VII has not served to enhance the economic well-being of blacks, and, therefore, they are dubious about the wisdom of retaining federal laws forbidding employment discrimination.³² If they are correct that the legal interventions that succeeded in dismantling the Southern segregationist system did not generate significant economic benefits for blacks, it is unlikely that further efforts to eradicate any remaining, more subtle forms of employment discrimination would yield significant results. But adopting the conclusion that the law was helpful to blacks does not constrain one to favor the preservation or strengthening of the law. Richard Epstein still argues for repeal of Title VII even though he concedes that it did confer valuable benefits on blacks in the decade following the law's enactment.³³ Conceivably, the changes that have taken place since 1964 are so entrenched that even if the antidiscrimination laws were suddenly repealed there would be no erosion of the considerable black gains. On the other hand, it is still possible that repeal could induce further slippage of black progress. Strengthening the law is only advisable if significant gains can be achieved through further efforts to sanction discrimination—in other words, only if there is a significant amount of continuing subtle discrimination and the law can succeed, at reasonable expense, in eliminating it.

II. INDIVIDUALIST ECONOMIC THEORIES OF DISCRIMINATION

Strauss asks the basic philosophical question of why discriminatory practices by employers are bad and, therefore, appropriate for government prohibition. No society of which we are aware has codified the view that “no one should be made worse off simply to satisfy someone else's taste for discrimination.”³⁴ Individuals are constantly discriminated against because they are ugly or fat, and unless this behavior can be categorized as discrimination against one of the classes protected by Title VII, it is entirely permissible. We adopt the narrower premise that in the employment context, discriminatory acts directed at members of a racial group are wrong if they (1) deprive individuals of employment opportunities for which they are qualified, (2) serve to brand their race as inferior, and (3) injure their economic well-being.³⁵ This conclusion reflects a value judgment of individual worth that now

32. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517 (1987) (Title VII may give employers incentives to hire fewer blacks since employers are not allowed to use race as a ground for pay differentials).

33. R. EPSTEIN, *supra* note 4.

34. Strauss, *supra* note 3, at 1625.

35. Note that the second element is absent in the typical case where affirmative action leads to discrimination against whites, who may be better qualified but are denied certain employment op-

has wide acceptance in the United States, although we hasten to note that such judgments are outside the scope of economics. This broad consensus that such conduct is wrongful establishes the desirability of a governmental prohibition of discrimination, if the normal prudential considerations of enforceability and effectiveness are satisfied. Of course, the costs of detection and proof, and the risks of erroneous judgments are real. The relative magnitude of these costs in comparison to the harm resulting from discriminatory acts can explain when society will accept the wrong because efforts at eradication are too costly.

All three elements of what we view as potentially prohibitible discrimination would be met if the basis for the discriminatory acts is racial animus regardless of whether the animus comes from employers, fellow employees, or customers. Such animus will tend to cause the wages and employment levels of the nonpreferred group to fall under circumstances that can only reflect the stigmatization of the racial group as inferior. Moreover, when the discriminatory preferences emanate from fellow employees and customers, the market will not tend to eradicate the discriminatory behavior.

The definition of wrongful employment discrimination presented above may also extend to the case where the employer gets positive utility from hiring workers of a given racial group, if this conduct serves to brand the nonpreferred races as inferior. Unlike Gary Becker's model of animus-based discrimination by the employer,³⁶ the model of nepotistic discrimination does not imply that the discriminating employer will be driven from the market.³⁷ The reason is the positive utility that comes with this form of employer discrimination is sufficient to compensate for the lower earnings that result from the failure to look only to productivity narrowly defined. Nepotism is just another form of consumption.

The second major type of discrimination that Strauss considers is statistical discrimination.³⁸ The concept of statistical discrimination is rarely defined with specificity. For example, if one assumes that blacks on average are equally as talented as whites, it may still be the case that measures of productivity—such as years of education—would be more precise predictors for

portunities. While the economic pain may still be great, the psychological burden of being deemed inferior is simply not present in an honest affirmative action program.

36. See G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 21-22 (2d ed. 1971) (arguing discrimination harms discriminating employers).

37. See Arrow, *Models of Job Discrimination*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 90 (A. Pascal ed. 1972) (discriminating employers may continue to operate by hiring only white employees as long as wages for whites and blacks are equal). Even the Becker model of animus-based discrimination by employers does not imply that the discriminators will be driven from the market if the supply of entrepreneurs is limited—as Becker believes it to be. G. BECKER, *supra* note 36, at 47-50.

38. Strauss, *supra* note 3, at 1622.

whites than for blacks.³⁹ In this event, an employer has confidence that a highly educated white individual is highly productive, but she may have less confidence that a highly educated black is highly productive. As a result, the white college graduate may earn more than an equally productive black college graduate, because *ex ante* the employer has less confidence in the black's educational credential. But what of the high school dropout? Here the lack of precision of the educational credential may work to the advantage of the black applicant. The employer will have a high degree of confidence that a white high school dropout is a low productivity worker, but will have less confidence about judging the black dropout negatively. Therefore, low education blacks may actually do better than low education whites. In other words, if employers believe that the two groups are equally productive on average, but simply have better measures of productivity for whites, then high credentialed blacks will be hurt but low credentialed blacks will benefit. The result is that blacks as a group do not earn less than whites as a group.

What if blacks and whites are not equally productive? For example, assume that blacks tend to be, say, ten percent less productive than whites because white parents have a larger stock of educational and social capital to convey to their children and because white children attend better public and private schools.⁴⁰ In this case, a well-functioning labor market would lead to blacks earning ten percent less than whites. This is not *employment discrimination*, although it may be the result of prior discrimination against blacks.

What if, however, in making individual employment decisions, an employer attempted to make use of the fact that *on average* blacks were ten percent less productive than whites? Imagine that three blacks are hired—all to be paid at ten percent below the white wage—and one black is really twenty percent less productive than the average white, one black is ten percent less productive than the average white, and the third black is equally productive as the average white. In this case, the low-productivity black is receiving more than his marginal product, the average black is being paid exactly his marginal product, and the high-productivity black is receiving less than his marginal product. On average, though, the black workers are not being economically harmed. True, the high-productivity black is suffering, but the low-productivity black is profiting from the employer's use of

39. Note that there are two types of potential employer ignorance: ignorance about the average productivities of the two groups and ignorance about the relative position of any individual within the group's distribution of productivity. The instant example assumes that employers know the average productivities of the two groups.

40. See Loury, *A Dynamic Theory of Racial Income Differences*, in *WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION* 155-56 (1977) (access to education and career information varies with socioeconomic status).

race as a proxy for productivity.⁴¹ Nonetheless, while blacks as a group are not disadvantaged by the employer's behavior, current law would clearly prohibit this practice.

Shelly Lundberg and Richard Startz have noted that the black workers will have a tendency to reduce their human capital investments because they will all be treated as the average black.⁴² Indeed, if employers did treat all blacks as identical, the Lundberg and Startz effect could be significant. But there are many sources of information for employers that would enable employers to identify degrees of ability within racial groups, and it is well established, for example, that each additional year of education is rewarded in the marketplace by higher earnings for both white and black workers.⁴³ Therefore, it is not the case that employers treat all blacks the same, regardless of their level of schooling. Indeed, one implication of the Lundberg and Startz hypothesis is that blacks would earn a lower return from additional years of education than whites, which was historically the case.⁴⁴ Since 1980, however, young blacks (those with less than sixteen years of labor market experience) have actually earned somewhat greater returns than their white counterparts from each additional year of schooling.⁴⁵

Thus, the scope of the Lundberg and Startz effect is narrower than might at first appear—probably because employers can easily differentiate between workers with different amounts of schooling. At most, then, the effect would merely operate if employers treated, say, all black high school graduates as equal. Such behavior might dampen work effort within each grade level because, if one would only be treated as the average black high school graduate, why work hard in one's senior year of high school? But again, this effect would only operate if employers could not readily find out who did well in high school. The Lundberg and Startz effect should be minimal unless the informational processing abilities of employers are quite crude.⁴⁶

41. Cain, *The Economic Analysis of Labor Market Discrimination: A Survey*, in 1 HANDBOOK OF LABOR ECONOMICS 724 (1986).

42. Lundberg & Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340, 344 (1983) (whites acquire more training because their return is greater than that of blacks).

43. See J. SMITH & F. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS xxix (1986) ("Today, there is little racial difference in the economic benefits of schooling for young workers.").

44. *Id.* at 114-16 (older blacks in 1980 and all blacks before 1980 earned lower returns on additional years of education than did whites).

45. *Id.* For example, black males with one to five years of experience earned 9.6% higher wages for each additional year of education, while comparable white males only earned 8.5% more for each additional year of education. For male workers with six to ten years of labor market experience, blacks received a return of 7.3% and whites received 6.1%. *Id.* At least for young blacks, the incentives to pursue additional years of education seem at least as attractive as those confronting whites.

46. It is possible that the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424

Two additional comments on the Lundberg and Startz effect should be noted. First, the potency of the Lundberg and Startz effect may be undermined by an additional countervailing consideration. Even if blacks were dissuaded from extra study because they earned a lower return on their additional investment in schooling, they would also suffer a smaller opportunity cost since the greatest monetary loss associated with pursuing more education is foregone earnings. Thus, while the returns from more school would be lower for blacks, thereby impairing their incentive for more study, their foregone earnings would also be lower, thereby contributing to their incentive to undertake more education. If the returns to and costs of achieving education are diminished in the same proportion, statistical discrimination might not have any negative effect on the human capital investment decisions of blacks. Second, even if the Lundberg and Startz effect were significant, a better remedy than the Strauss quota proposal might be simply to subsidize black education. This would more closely tailor the remedy to the problem to be addressed without causing the inevitable labor market distortions that would attend the implementation of any quota program.

The advantage of formulating precise economic models of discrimination is that they can be tested empirically. Unfortunately, when one tries to apply either the Beckerian version of the animus-based discrimination model or the statistical discrimination model to the facts of a specific case such as the Southern textile industry, neither model is entirely satisfactory. It is hard to imagine that blacks were largely excluded from this low-skilled industry over the fifty-five year period preceding passage of Title VII because employers were trying to use the information contained in valid stereotypes to select a work force at lowest cost. When blacks were finally introduced into the textile mills in the mid-1960s, their presence stabilized previously rising labor costs.⁴⁷ The model of statistical discrimination does not seem to capture an important part of the story. Indeed, if the opportunity costs of, and returns to, black education are equally affected, statistical discrimination should have no effect on the degree of investment in schooling.

But the Becker model does not explain these facts well either. Certainly, customers had no concern—or knowledge—about whether their clothes or linens were made by black or white workers, so customer discrimination cannot be a factor. If fellow-employee discrimination were the problem, one would imagine that enough blacks could be assembled to staff an entire tex-

(1971), has served to impair the ability of employers to use nonrace proxies such as years of education or the possession of a high school diploma to measure productivity. In *Griggs*, the Court held that, despite the employer's lack of discriminatory intent, an employment practice (such as requiring a high school diploma or intelligence tests as a condition of employment) which operates to exclude blacks is prohibited unless the practice is demonstrably related to successful job performance. *Id.* at 432.

47. Heckman & Payner, *supra* note 24, at 168.

tile mill. This type of discrimination can be circumvented by segregating facilities. Yet we see no evidence of successful all-black textile firms. Finally, if employer animus were motivating the exclusion of blacks, why did the market fail to drive out the discriminators? Becker's answer is that entrepreneurial skill is a factor of production that is inelastically supplied so that "discrimination exists, and at times even flourishes, in competitive economies, the position of Negroes in the United States being a clear example."⁴⁸ But the ahistorical model of discrimination that Becker proposes cannot explain why Northern entrepreneurs would not jump at the chance to earn supercompetitive profits by migrating South to hire cheap black labor to work in textile mills, or why black migration from the South would not equalize the earnings of blacks in different regions of the country. The Becker model of animus-based employer discrimination has been tested by William Landes⁴⁹ and Heckman⁵⁰ and the model failed both tests. The Becker model predicts that, as the percentage of blacks in a state increases, the black/white wage gap should grow because more and more blacks will be forced to sell their labor to discriminatory white employers.⁵¹ Although this might at first seem to explain why black wage deficits are much greater in the South (where the percentage of the population that is black is high), the Becker model fails because there is no evidence that within regions a high proportion of black residents correlates with a larger black/white wage gap.

Epstein disagrees with Becker's characterization of the Southern labor market as competitive.⁵² Epstein has argued that Jim Crow legislation, requiring firms to have segregated entrances and bathroom facilities for black and white workers, interfered with the ability of the market to purge the discriminatory employers. Two points should be noted in response. First, although South Carolina was the only Southern state with the segregationist law applying to the textile industry, the segregationist practice was pervasive throughout the textile industry in the South.⁵³ Thus, government action was not necessary in that industry to achieve the exclusion of blacks. Second, the validity of the South Carolina statute was dubious for some time before blacks started entering the textile industry. One legal scholar writing in 1948 referred specifically to the segregationist laws pertaining to textiles employment adopted by South Carolina as "probably unconstitutional."⁵⁴ This

48. Becker, *Discrimination, Economic*, in 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 210 (D. Sills ed. 1968).

49. Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507 (1968).

50. Heckman, *Simultaneous Equations Models with Continuous and Discrete Endogenous Variables and Structural Shifts*, in STUDIES IN NONLINEAR ESTIMATION 235 (1976).

51. G. BECKER, *supra* note 36, at 123.

52. R. EPSTEIN, *supra* note 4.

53. G. WRIGHT, OLD SOUTH, NEW SOUTH 187-95 (1989).

54. M. ROSS, ALL MANNER OF MEN 307 (1948).

legal conclusion certainly had to be buttressed by *Brown v. Board of Education*.⁵⁵ Although *Brown* explicitly addressed only the issue of segregated schools, its logic was soon extended to the entire realm of state-assisted segregation in a series of one sentence per curiam orders issued in 1955, 1956, and 1958.⁵⁶ Yet it was not until 1965 that blacks started to flow into the textile industry. Does Professor Epstein really believe that the market is too weak to knock down a clearly unconstitutional law?

III. THE ROLE OF SYSTEMATIC SOCIAL BELIEFS AND COERCIVE SOCIAL NORMS

A full understanding of the patterns of social conduct in the segregated South suggests that the models of discrimination based purely on individualistic preferences may not capture an important dimension of the historical reality. George Akerlof and others have noted that, regardless of any individual entrepreneur's attitudes concerning the desirability of hiring blacks in certain positions, the social penalty that could be visited on those who broke the code of Southern segregation could be quite high.⁵⁷ Everything from social snubs at the local church and economic sanctions from fellow businessmen to violence could be and often were mustered to insure compliance with the social norms that kept blacks out of certain industries and occupations.

Epstein has noted that at times discriminatory state laws buttressed these segregationist conventions, and therefore, the primary effect of Title VII, at least initially, was to restrain the discriminatory tendencies of government.⁵⁸ But this explanation is incomplete because the social code of segregation was frequently maintained without resort to legislative action, and existing segregationist laws in the wake of *Brown* were either clearly or probably unconstitutional.

This raises a troubling question: why, in the absence of legal impediments, did the market's ruthless search for profits fail to undermine this racist norm? Two answers are possible. First, it is conceivable that the informal methods of enforcement were sufficient to overwhelm the ability of the profit motive to undermine the racist cartel. Just as a man with a single bullet can often succeed in holding a large crowd at bay, the penalty for being the first

55. 347 U.S. 483 (1954).

56. *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf course); and *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

57. See Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 Q.J. ECON. 749, 751 (1980) (a custom will persist if disobedience results in sufficient costs, including loss of reputation).

58. R. EPSTEIN, *supra* note 4.

to break the color line was likely to be high enough to dull the enthusiasm of all but the most determined iconoclasts. Second, the mechanisms of enforcement did not have to be so great because for some time the segregationist code was supported by a virtually universally shared belief in the inferiority of blacks. If the entire society—including both blacks and whites—endorsed this systematic social belief, then there would have been little reason to challenge the system.

How this systematic social belief developed in the first place, and what factors led to its rejection are profound and difficult questions. But if one believes that this view of discrimination explains the historical pattern of discrimination more effectively than the individualistic models of Beckerian animus and statistical discrimination, then one is led to very different policy prescriptions. Epstein, in embracing the individualistic models, sees the role for public policy simply as the elimination of the segregationist legislation of the Southern states: eradicate the anticompetitive dimension of government power and all will be fine.⁵⁹ The experience of the post-*Brown* era raises doubts about this view. Given the picture of segregationist norms and social beliefs as the driving force in maintaining desegregation, the law must either overcome the informal enforcement mechanisms of the norm or force people who do not share the law's premise of equality to confront that view. Our position is that much of the value of Title VII came through its success in serving both these functions. Of course, this also suggests that as we seek to reexamine current antidiscrimination policy we remain sensitive to the danger of employing methods of redress that, however inadvertently, may perpetuate or rekindle the claim of inferiority.

IV. SOME THOUGHTS ON THE PROPOSED CIVIL RIGHTS ACT OF 1991 AND THE STRAUSS PROGRAM

An examination of black economic progress over the last seventy years leads to the following broad conclusions. First, federal antidiscrimination law is a powerful tool in attacking egregious forms of discrimination, such as that existing most conspicuously in the pre-1965 South. The process of breaking down these blatant barriers to black advancement in employment, schooling, voting, and housing was complete by roughly 1975.⁶⁰ Second, once the egregious forms of exclusion have been eliminated, a law enforced by the complaints of alleged victims of discrimination is not likely to produce further significant black improvement.⁶¹ Accordingly, there has been little improvement in the relative earnings of non-Southern blacks since the pas-

59. R. EPSTEIN, *supra* note 4.

60. Donohue & Heckman, *supra* note 2.

61. Donohue & Siegelman, *supra* note 5, at 1027.

sage of Title VII and for Southern blacks after the egregious segregation was dismantled. Third, given the dramatic shift in the nature of Title VII cases, which now overwhelmingly complain of discriminatory discharge, Title VII may actually provide a disincentive to hiring additional blacks, since the failure to hire will not likely bring a lawsuit, but the hiring may expose the employer to litigation should a subsequent discharge occur.⁶² Fourth, administrative enforcement of hiring goals, such as those required of government contractors under the contract compliance program, appears to have increased demand for black labor in the covered sector during the period since 1975,⁶³ but this benefit has not translated into aggregate black economic gains because (1) black workers tend to leave the noncovered sector thereby reducing or eliminating the overall increase in black employment,⁶⁴ and (2) adverse economic conditions for low-wage labor have offset any aggregate gains.⁶⁵

The question then becomes whether the strengthening of federal antidiscrimination law contemplated in the currently debated Civil Rights Act of 1991 will lead to any narrowing of the economic gap between blacks and whites.⁶⁶ A number of points must be made. First, some have argued that the major purpose of the law is simply to reverse the five recent Supreme Court decisions that cut back on the prior federal law of employment discrimination.⁶⁷ To the extent that this is true, there would be no reason to hope for black improvement—the only possible goal would be to forestall black relative declines. The relevant 1989 Supreme Court decisions weakened or reversed law that had been in effect for the previous fifteen years, during which time there was little or no relative black economic advance. Simply restoring the status quo ante is not likely to generate any relative black gains. Second, it is clear, however, that in a number of respects the proposed legislation would strengthen Title VII beyond its previous level. Should the Civil Rights Act become law, its most potent weapons will likely be the widening of monetary remedies for victims of discrimination beyond the award of mere backpay to permit punitive and compensatory damages in certain instances; the raising of the threshold for justifying a practice that has a disparate impact on minorities; and, possibly, the provision of the right to a

62. See *id.* at 1015, 1027 (providing a very rough estimate that a minority worker who is discharged is 30 times more likely to bring an employment discrimination action than one who is merely rejected at the hiring stage).

63. See Leonard, *Employment and Occupational Advance Under Affirmative Action*, 66 REV. ECON. & STATISTICS 377, 379 (1984) (black male employment grew more at establishments which were contractors than at noncontractors); Leonard, *The Impact of Affirmative Action on Employment*, 2 J. OF LAB. ECON. 439, 446 (1984) (same).

64. Donohue & Heckman, *supra* note 2.

65. *Id.*

66. It is likely that some version of the proposed Civil Rights Act of 1991 will be enacted.

67. See *supra* note 6.

jury trial.⁶⁸

The conventional view is that this proposed legislation will induce greater hiring of blacks because the remedies from discrimination will be even greater. The left is heartened by this prospect, seeing the perceived barriers to black progress further dismantled; the right is dismayed, seeing the nonmeritocratic elevation of workers further damaging American productivity. Clearly, a more powerful disparate impact standard will provide an added stimulus for hiring minorities, but the added penalties for disparate treatment violations may have an unwelcome effect on the hiring of blacks. We have, however, already explained that under current law the predominance of discharge rather than hiring cases may provide a disincentive to hire blacks.⁶⁹

Conceivably, the enlargement of the possible sanctions under Title VII will only serve to exacerbate this effect, particularly if punitive or compensatory damages prove to be higher for discriminatorily discharged workers than for those who are simply not hired. Therefore, expanding the remedies under both the disparate impact and disparate treatment standards may generate conflicting effects, and which will predominate depends upon how these factors influence the propensity of litigants to sue for alleged hiring violations as opposed to discharge violations of the statute.

While a strengthened disparate impact standard might tend to induce significantly expanded quota hiring of blacks, this productivity may not be realized if the higher remedies induce more reverse discrimination suits by whites. The reason is that white workers will have an incentive not to stand by if blacks perceived to be less qualified are hired or promoted above them. If employers deviate from the straight and narrow path of pure productivity-based hiring, they face discrimination suits by blacks on the one hand and whites on the other. With perfect decisionmaking by triers of fact, the higher penalties would likely lead to more individualized, meritocratic employment decisions generated at greater expense to employers.⁷⁰ Would the hopes of

68. The qualification is necessary because in some areas juries will tend to favor whites and defendants, as opposed to blacks and plaintiffs. A good example of how jury decisionmaking can operate in favor of whites may well be the § 1981 action brought by a white plaintiff in *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989), where a white high school football coach in Dallas received an exorbitant award from a jury after being fired by a black principal of a predominantly black school.

69. See *supra* note 62 and accompanying text. Indeed, there is speculation that the general phenomenon of imposing constraints on firing may explain the rising levels of unemployment in many European nations that provide high degrees of job security for workers. Bertola, *Job Security, Employment, and Wages*, 34 EUR. ECON. REV. 851, 852, 868, 877-78 (1990). If employers fear that they will not be able to discharge workers, they will be more reluctant to hire them in the first place.

70. While individualized meritocratic employment decisions are beneficial, they are costly to obtain. For example, a test may be a useful way of selecting workers, but it is obviously not perfect. If we force employers to abandon the test, and require them to more precisely measure individual

the left of deserved black gains be achieved? The answer is that, to the extent blacks are still victims of discrimination, more meritocratic decisionmaking will aid them. On the other hand, if affirmative action has already pushed blacks beyond their productivity-based deserts—as some conservatives fear—then the Act will actually impair black economic opportunities.⁷¹

We know, however, that decision-making at trial will not be perfect. Indeed, there is even reason to think that, in addition to the inevitable random blunders, some systematic errors will be present. Biased—or, more neutrally, culturally influenced—juries will push employers to favor one group or another over their pure meritocratic position.⁷² For example, employer behavior in Newark or Harlem may well generate punitive damage awards for black plaintiffs that would yield no relief in Dallas or Cincinnati. This could lead to increased hiring of blacks in areas that favor blacks, and increased hiring of whites in areas that favor whites. In the long run, however, capital will flow in response to these short-run changes. Specifically, if employers find that in certain areas they will be forced to hire some unproductive blacks, they will tend to shun these areas, impairing black progress to some degree. The effect on the “pro-white” areas is more complicated. Once again, capitalists will tend to shun areas where they must hire labor inefficiently—whether it is black or white labor that must be favored. On the other hand, if white labor is preferred because of the discriminatory tastes of white employers or fellow workers, then capital may flow into “pro-white” areas. Therefore, it is possible that both the short-run and long-run effects of

productivity—for example, through increased reliance on probationary hiring—we may increase individual fairness and make better meritocratic decisions, while incurring the burden of expending more resources in selecting the work force. The issues involved in a full cost-benefit analysis are complicated because this type of statistical discrimination can be privately profitable but socially inefficient. Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 532-33 (1987).

71. Note we have previously alluded to the fact that under a regime in which the vast majority of employment discrimination cases challenge discharges, the law may serve as somewhat of a drag on black employment gains. See *supra* notes 62 and 69 and accompanying text. To the extent that this effect is significant, it should undermine conservative fears that blacks have advanced beyond their meritocratic just deserts. Similarly, it would seem inconsistent to argue both that the law has advanced blacks beyond their talents and that there is no evidence that the law has aided blacks.

72. There are two possible effects in operation here. First is the decisionmaker effect—juries may differ from judges in their degree of bias. Since the new law will increase the use of juries—which at present are barred in Title VII cases although permitted in § 1981 (and age discrimination) cases—it will potentially influence the level of bias in decisionmaking. Second is the effect of higher damages; even if the level of bias were unchanged, the higher damages afforded by the new law will exaggerate the effects of the existing level of bias. For example, assume that pure merit-based decisionmaking would lead to the hiring of X blacks out of a total T workers. If decisionmakers favor blacks, then presumably more than X blacks would be hired by the firm since the X + 1st black applicant would be able to prevail in an employment discrimination case. Moreover, if Y (which is greater than X) blacks would be hired owing to the existence of biased decisionmakers under one level of damages, then presumably more than Y blacks will be hired when the level of damages rises.

decisionmaker bias might aid white advance in certain areas, while in “pro-black” regions, the short-run and long-run effects will likely conflict.

In general, then, there may be some changes in the relative economic condition of blacks from the passage of a strengthened federal employment discrimination act, although much depends on factors about which there is considerable uncertainty—for example, the degree to which discrimination is currently a labor market barrier to black advance, the likelihood that juries will be more or less biased than judges in making decisions in employment discrimination cases, and the sensitivity of employer capital location decisions to the higher risk of incurring employment discrimination lawsuits that comes with operating in high minority labor pools. Certainly, the law will generate more suits, since the deterrent effect of the enhanced penalties will almost certainly be outweighed by the direct stimulus to the propensity to sue.⁷³ The average cost to employers of settling these cases will rise, the resources used in choosing workers will certainly rise, but it is unlikely that government interference in labor markets *via antidiscrimination legislation* will be able to induce gains the size of those seen in the decade following the passage of the 1964 Civil Rights Act.

Of course, Strauss realizes this fact, which prompts him to look for alternative mechanisms of generating significant relative economic gains for blacks. His proposed solution would require employers throughout the nation to hire blacks at a fixed quota based on the percentage of blacks in the *national* population.⁷⁴ The effort to emphasize the disparate impact aspect of federal antidiscrimination law at the expense of the disparate treatment component does address the concern raised above that, as disparate treatment firing cases have become predominant, the incentives to hire minorities have been impaired.⁷⁵ Strauss’s proposal raises the important question of whether we can better detect and remedy discrimination by looking at employment outcomes rather than via the more traditional approach that focuses on employer behavior. In certain instances, it is clear that the focus on a departure from a national quota does not indicate discrimination—for example, evidence that a firm in Wyoming currently employs no blacks is not particularly strong evidence of discrimination given the small number of blacks that reside in that state. Conversely, a showing that a firm operating in a forty percent black labor market exceeds a twelve percent hiring quota of blacks is unpersuasive evidence that the firm does not discriminate. However, Strauss’s proposal would presumably immunize the second firm from an employment discrimination charge, and subject the Wyoming firm to financial penalties. Strauss does indicate that under his proposal a cost justification

73. See Donohue and Siegelman, *supra* note 5, at 1023.

74. Strauss, *supra* note 3, at 1655.

75. See *supra* notes 62 and 69 and accompanying text.

can be offered by an employer to justify the firm's lack of compliance with the national quota.⁷⁶ But, to be accurate, the cost justification defense would require the same case-by-case assessment of the possibly discriminatory conduct of firms sought to be avoided by the Strauss proposal.

In general, one assumes that Strauss's recommendation follows from a belief that a vast amount of discrimination against blacks persists, but is not susceptible to elimination through the normal process of individually initiated lawsuits because employers have learned to cover their tracks.⁷⁷ But this is an empirical issue that should be explored rather than a matter that can be resolved through theoretical musings. Certainly, nothing in any of the models of discrimination that Strauss discusses affords any insight into the question of the degree of racial discrimination that currently exists in American labor markets. Even significant amounts of discrimination against blacks by selected employers might not translate into significant labor market disadvantage for blacks if enough nondiscriminatory employers exist. For example, there is undoubtedly a degree of anti-Semitism among certain American employers, but owing to the large degree of employment opportunities that Jews do have, they are probably little influenced economically by the discrimination. In rethinking antidiscrimination law and policy, we should determine whether the evil to be addressed is economic disadvantage or simply the existence of discriminatory attitudes or behavior. The appropriate policy will depend upon which evil is our primary concern.

We also have a few specific concerns with the Strauss quota proposal. First, while Strauss has lamented the inefficiency caused by the use of statistical discrimination, the plan that he endorses would undermine the incentives for many blacks to engage in human capital acquisition. For example, in order to avoid Strauss's penalties, the demand to hire the relatively few blacks in the state of Wyoming—remember *every* firm has to hire enough blacks to meet the national quota—would be intense. But it is possible that this pressure to hire blacks will weaken black incentives to invest in their human capital: why work hard when firms will be compelled to hire you regardless of your achievements?⁷⁸

Second, although the notion that use of a national quota, rather than a quota based on the relevant labor market population, will keep firms from shifting to areas of low concentration of blacks may have a surface appeal, the scheme would impose costs on many businesses without any possible ben-

76. Strauss, *supra* note 3, at 1650.

77. Conceivably, Strauss may feel that discrimination has been largely eradicated, but that the best way to achieve future racial equality as well as to provide compensatory justice for hundreds of years of suffering is to advance blacks nonmeritocratically to create a stable and prosperous black middle class.

78. On the other hand, pressure to be the best black candidate will still be present.

efit. For example, movie theaters in Wichita would have to hire the same percentage of blacks as assembly plants in Detroit. Is it likely that movie theaters will settle in primarily white areas to avoid equal opportunity laws?⁷⁹ While manufacturing plants can be located in many different areas, services are generally concentrated where the people live. Imposing a tax on those theaters in Wichita is not only politically impossible, but inflicts a burden with no compensating benefit.

Finally, an important part of the case for any quota scheme would require some assessment of likely temporal duration. Strauss's proposal remains seriously incomplete until it specifies under what set of circumstances the quota scheme would be eliminated. The effort to address this issue might well sharpen the debate about what quotas would be designed to accomplish and whether they are the best mechanism for eliminating racial discrimination or elevating black wages.

79. The literature exploring plant location decisions has found only weak effects of explicit tax benefit schemes designed to attract new employers to particular decisions. Carlton, *The Location and Employment Choices of New Firms: An Econometric Model With Discrete and Continuous Endogenous Variables*, 65 REV. ECON. & STAT. 440, 448-49 (1983). This suggests either that we have little understanding of the factors influencing plant location or that the impact of antidiscrimination law on such decisions is likely to be a second order effect. But assume that Strauss's fear is correct and that firms might move to areas of low concentrations of blacks to avoid a quota regime based on the percentage of blacks in the relevant labor market. Use of the national quota system would prevent manufacturing flight from areas of high black population to areas of low black population, but it might induce such flight from areas of low black population to Mexico or Canada.

