

Michigan Law Review

Volume 92 | Issue 8

1994

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Recommended Citation

John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583 (1994).

Available at: <https://repository.law.umich.edu/mlr/vol92/iss8/8>

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EMPLOYMENT DISCRIMINATION LAW IN PERSPECTIVE: THREE CONCEPTS OF EQUALITY

*John J. Donohue III**

Over the past fifty years, the body of law prohibiting discrimination in employment has grown enormously in terms of the extent of geographic coverage, the range of covered employers, the array of protected workers, and the spectrum of prohibited practices. Beginning in the mid-1940s, states began passing Fair Employment Practices laws that generally prohibited discrimination on the basis of race, color, religion, or national origin. Over the next two decades, the geographic reach of these laws spread as most states outside the South enacted some form of this legislation. With the passage of Title VII of the Civil Rights Act of 1964,¹ the legal prohibition became national in scope and the categories of protected workers were extended to include women. In successive years, more employers came within the regulatory domain of Title VII as the required number of workers in a covered firm dropped from one hundred to fifteen,² and in 1972 Congress extended the reach of the law to state and local government and educational institutions.³ Then, in the mid-1970s, the prohibition against racial discrimination was extended to all employers through the Supreme Court's decision in *Runyon v. McCrary*,⁴ which interpreted the century-old 42 U.S.C. § 1981 as providing a remedy for racial discrimination that was independent of Title VII and therefore not bound by the latter's exemption of small employers.

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (establishing incremental implementation of the Act with 100 employees as the statutory minimum the first year, 75 the second, 50 the third, and 25 thereafter); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(2), 3, 86 Stat. 103, 103-04 (lowering the statutory minimum from 25 to 15 to be effective one year after enactment).

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(2) 3, 86 Stat. 103, 103-04 (amending 42 U.S.C. §§ 2000e(b), 2000e-1).

4. 427 U.S. 160 (1976).

Prior to 1971, employment discrimination laws had banned only intentional discrimination. But in the first Supreme Court case interpreting Title VII, *Griggs v. Duke Power Co.*,⁵ Chief Justice Burger, writing for a unanimous Court, extended the reach of the law through the novel formulation of the disparate impact doctrine — which prohibited the application of neutral employment practices that generated adverse effects upon the protected classes specified in Title VII, absent a showing that the practices were justified by business necessity. Since then, subsequent decisions and legislative enactments have banned an array of diverse practices — ranging from actuarially based pension plans⁶ and exclusions of childbirth expenses from employer health insurance plans⁷ to sexual harassment⁸ — that were not at first seen as discriminatory. In addition, the passage of the Age Discrimination in Employment Act,⁹ the Americans with Disabilities Act,¹⁰ and a large array of state and local employment discrimination laws that are more expansive than Title VII¹¹ has greatly broadened the number of workers falling into some protected category.

One might suppose that the burgeoning corpus of employment discrimination law reflects a consensus that this form of regulation has been working well and should be expanded. But the contentious and protracted struggle among the Supreme Court, Congress, and the Bush administration that culminated in the passage of the Civil Rights Act of 1991,¹² as well as the growing academic debate over the appropriate scope of employment discrimination law, belie this view. There are deep disagreements about whether the country would be best served by a reduction or an intensification of the legal attack on employment discrimination. This essay attempts to provide a conceptual framework with which one can assess both the

5. 401 U.S. 424 (1971).

6. See *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

7. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1988)), overturned the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), which had permitted discrimination on the basis of pregnancy.

8. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

9. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 633a (1988)).

10. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12,101 (Supp. III 1991)).

11. Although federal law does not prohibit discrimination on the basis of sexual orientation or against cigarette smokers, many state and local governments do. See *infra* notes 14, 16.

12. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (Supp. III 1991)).

enormous transformations of employment discrimination law and the continuing disagreements over its proper scope. The thrust of the argument is that the initial creation and subsequent growth of employment discrimination law has been generated by the development over time of a richer conception of the demands of equality, while the antagonism between the contending parties is at least in part explained by differences concerning which version of equality best describes the modern labor market.

The essay begins with a discussion of which groups deserve the protection of employment discrimination law. With the protected categories of Title VII of the 1964 Civil Rights Act etched into the American consciousness, many might consider the appropriate categories to be fully self-evident. But of course, they are not, and many jurisdictions continue to struggle over whether certain dis-preferred groups merit the law's solicitude.

Over time, three different conceptions of equality have influenced the development of employment discrimination law. Before World War II, the nation's willingness to accept the outcomes generated by competitive labor markets was premised on an implicit conception of equality — namely, that a worker's wage should equal the market-determined value of the individual's labor. I refer to this concept of equality as “contingent equality” because a worker's value often depended on the degree of discrimination against a particular group of workers — and therefore was contingent on attitudes about the worker and not just on his work. As Part II discusses, there is a distinction between the equality one can expect from a competitive labor market and the greater degree of equality that is generated by a more perfectly competitive market such as an efficient capital market. Capital markets ensure that the price of assets will equal their value even in the presence of severe bias or discriminatory attitudes on the part of investors. The capital market equates price not with mere contingent value but with intrinsic value and in this sense guarantees “intrinsic equality.” The initial goal of employment discrimination law was to provide intrinsic equality, which the free labor market could not deliver, to the enumerated protected classes. But while a consensus has emerged that intrinsic equality is a desirable goal for protected workers, there is significant disagreement regarding both the extent to which intrinsic equality has already been achieved and the degree to which the goal itself is adequate. A richer notion of equality, which I refer to as “constructed equality,” has motivated much of the growth of employment discrimination law in an effort to go beyond

the protections that even a perfectly competitive market would afford.

Part III illustrates that the early civil rights movement sought to achieve the equivalent of intrinsic equality for black workers; the goal was to have black workers receive what would be the true value of their labor in a nondiscriminatory environment. Some of the principled opponents of antidiscrimination law in the early 1960s based their opposition on the view that intrinsic equality already existed. Many of the principled opponents of today believe that intrinsic equality has now been achieved and thereby deny the continued need for legal intervention in labor markets to protect female and minority workers. Yet, while the labor market has tendencies pushing in the direction of intrinsic equality, there is likely to be a significant difference between contingent equality — which is all that workers can hope for without government intervention — and intrinsic equality.

Part IV shows that although women, the elderly, and the disabled at first embraced the quest for intrinsic equality, the closer they have come to achieving it the more they have sought to reject it as the goal of employment discrimination law. Law increasingly seeks and requires a higher degree of equality — “constructed equality.” Rather than compelling employers to pay protected workers the true value of their productivity by equating wages and intrinsic value, the demand is to have employers make workers equal. Although the market was often an ally — albeit at times an inconsistent one — of the quest for intrinsic equality for protected workers, the market cannot achieve constructed equality. In fact, the market relentlessly opposes it.

I. WHO DESERVES SPECIAL PROTECTION?

Employment discrimination laws forbid employers from considering various attributes — such as race, sex, religion, or national origin — in making employment decisions. This formal command to disregard particular characteristics of workers is based on the premise that bearers of these characteristics should be treated equally with members of some favored comparison group who lack these traits — perhaps white males under the age of forty. But who deserves special protection? The State of Israel prohibits discrimination on the basis of sex but not on the basis of religion.¹³ Do the

13. See Employment (Equal Opportunities) Law, 5741-1981 (1981), 35 LAWS OF THE STATE OF ISRAEL 350 (authorized translation from the Hebrew prepared at the Israel Ministry of Justice).

unique religious tensions that exist in that country argue in favor of or against the exclusion of religion from the list of protected categories? Some state and local jurisdictions in the United States have prohibited discrimination against gays,¹⁴ overweight individuals,¹⁵ and cigarette smokers,¹⁶ while others have rejected these claims. Defining the appropriate characteristics of workers that merit the special solicitude of employment discrimination law is not a simple task. Yet this process of definition is an important one, because every expansion of the categories to be given special consideration carries the risk of diluting the protections afforded to the groups already defined.¹⁷

The problem is particularly difficult because numerous factors appear relevant to the determination of protected classes, and in many cases the factors offer conflicting signals. For example, at first glance, it seems relatively unobjectionable that older workers should be given special protection. We help the elderly across roads and we give them special seating on public transportation, so why not give them a little break in the work arena? Perhaps surprisingly, though, the large majority of cases brought under the Age Discrimination in Employment Act — and the cases resulting in the largest awards by far of all employment discrimination suits — are brought by white, male professionals and managers.¹⁸ This is not a

14. Eight states and over 100 municipalities prohibit discrimination in employment on the basis of sexual orientation. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POLY. REV. 47, 63 (1993).

15. California law protects from employment discrimination overweight individuals who can establish on the basis of medical evidence that their excessive weight was the result of a physiological condition affecting one or more basic bodily symptoms and limiting a major life activity. *Cassista v. Community Foods, Inc.*, 856 P.2d 1143 (Cal. 1993). Michigan is the only state that has codified a prohibition against employment discrimination on the basis of weight. MICH. COMP. LAWS § 37.2102 (1979). See generally Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951 (1990).

16. For examples, see John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1614 n.147 (1992) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION (1992)), and the sources cited therein.

17. This problem was highlighted in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), in which female job candidates were severely disadvantaged by laws providing preferences to veterans.

18. Seventy-three percent of ADEA cases in which no other claim of discrimination was raised — that is, pure ADEA cases — and in which race and gender were identifiable from case files were brought by white males, and 67% were filed by managers and professionals. The average monetary judgment per plaintiff was \$135,574 in pure ADEA cases and \$15,206 in non-ADEA cases. For a discussion of the data set from which these calculations were made, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

class of individuals that one normally would consider to be in need of special legal protections.

Even groups with seemingly unassailable claims for privileged treatment can possess characteristics that at least raise the question whether the goal of equality, when broadly considered, is furthered by such privileged treatment. The reason for this counterintuitive speculation is that it is possible for a group to be somewhat disadvantaged in the labor market — and thus, from this narrow perspective, legitimately entitled to special protections — but at the same time relatively advantaged in other measures of well-being. In such cases it is conceivable that the attainment of equality in the labor market without equality in other spheres important to human well-being might actually undermine a more broadly conceived notion of equality of human well-being. One might think of this proposition as a form of the “Theory of Second Best” applied to the concept of equality.¹⁹

This possibility may be illustrated by an examination of the United Nation’s *Human Development Report*,²⁰ which seeks to evaluate how various countries succeed in enhancing the human potential of their citizens and in creating an environment that enables the full use of human capabilities. The consultant on the United Nations project was the famed economist Amartya Sen, who developed a Human Development Index (HDI) based on longevity, educational attainment, and access to resources, designed to measure “people’s ability to live a long and healthy life, to communicate and to participate in the life of the community and to have sufficient resources to obtain a decent living.”²¹ While in many ways the rank order of various countries according to this Human Development Index accords with one’s intuitions, the most surprising finding is that on this measure of human well-being, white women in America — the primary beneficiaries of sex discrimination law — come out ahead of not only every other demographic group in the United States but also the citizens of every other country *in the world*.²²

19. The well-known Theory of Second Best teaches that when multiple market imperfections exist, the elimination of any single market imperfection may actually lower total social welfare. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 *REV. ECON. STUD.* 11 (1956-1957). More broadly, the theory can be thought of as implying that when one is dealing with a large and interdependent problem — such as the pursuit of equality in the complex modern world — optimizing the solution to only one component part of the problem may actually make the overall problem worse.

20. UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 1993* (1993).

21. *Id.* at 104.

22. *Id.* at 18.

This finding is particularly surprising because Sen in part devised the index out of his concern for the poor treatment of women throughout the world.²³ Nonetheless, white women in the United States stand at the top of the list with an HDI value of about 1.0, while white males in the United States, with an HDI value of only approximately 0.975, are surpassed by the citizens of Japan, Canada, Norway, Switzerland, and Sweden.²⁴ By comparison, black females have an HDI of only about 0.9, which puts them on a par with the citizens of Greece, and black males have an HDI just above 0.85, placing them at about the level of the citizens of Bulgaria.²⁵ Of course, simply having the longest life-span, the most education, and considerable access to resources does not establish the attractiveness of the lives of a particular group, and there are obvious shortcomings in the Human Development Index.²⁶ But it does suggest that the numerically largest protected class of workers — white women — compares quite well on a number of important dimensions of well-being, not only in relation to other protected classes of workers, but also in relation to the presumably favored comparison group of white men.

While the Human Development Index may offer a counterintuitive perspective on the relative status of white women, it strongly buttresses the conventional view that black Americans enjoy a far lower degree of well-being than white Americans, even after the substantial gains that occurred following the passage of the Civil Rights Act of 1964. Certainly, at the time of the debate over this Act in the early 1960s, black Americans had an exceptionally strong claim to the solicitude of federal employment discrimination law,

23. Sen's most arresting finding was that owing to poor treatment of women, infanticide, and selective abortion, there were perhaps 100 million women missing in the world from the numbers one would expect if women and girls were treated equally with men. *Id.* at 25.

24. *Compare id.* at 11 tbl. 1.1 with *id.* at 18 fig. 1.13.

25. *Id.* at 18 fig. 1.13.

26. For each dimension of the HDI — longevity, educational attainment, and access to resources — a value is calculated ranging from 0 to 1. The HDI is the equal-weighted average of these three numbers, which can therefore range from a low of 0 to a high of 1. American women surpass American men by 10% in terms of longevity and by 2% in terms of education but fall below them in terms of income. *Id.* at 196. The index is computed in such a way that increases in income that are substantially above the poverty threshold have a decreasingly proportional impact on the HDI. Thus, at the high levels of income of both American men and women in comparison with world income figures, the income shortfall of American women receives less weight in the HDI than the advantages that American women enjoy in life-span and education. Thus, despite the Development Report's position that "the HDI is particularly well-suited to examining gender inequalities" and that "[a] constant concern in constructing the HDI has been to preserve its universality — to retain a single index for both the rich and poor countries," there are reasons for caution in using it to examine gender disparities within the wealthiest nations. *Id.* at 111.

for not only had they experienced the egregious oppression of slavery for over two hundred years prior to 1865, but they also suffered from enormous public and private discrimination, hostility, and violence for the next one hundred years, coupled with substantial relative economic deprivation. Without question, American blacks, most conspicuously in the South, were earning less for their labor than otherwise identical white workers were earning, and this was a major source of inequality that Title VII was designed to redress.

I have alluded to the multidimensional growth in the body of employment discrimination law over the last fifty years, and this Part has examined some of the issues that arise along the single dimension of determining which groups should be protected. But in turning now to a discussion of the progressive demands of what "equality" requires, one must keep in mind that as society attempts to provide protected groups with increasingly more than a free-market allocation would render, the conflict between who deserves protection and how much protection they get can become acute. In the extreme case, affirmative action for all becomes affirmative action for no one.

II. PRICE AND VALUE

Because southern blacks in the early 1960s earned dramatically less than the benchmark group of otherwise identical southern white workers,²⁷ one can conclude that southern blacks were earning less than their "true value." But because wages are simply the price paid to labor, and because one of the hallmarks — indeed the very defining characteristic — of a competitive market is that price equals value, we are confronted with something of an anomaly.²⁸ Either the southern labor market was not competitive, in which case it is not particularly surprising that the price paid to black labor did not equal its value,²⁹ or, more plausibly, it was broadly competitive but the "value" of black workers did not equal the "value" of the otherwise identical white workers.

27. See generally John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991).

28. See RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 11 (4th ed. 1991) ("[I]f there is a good market for an asset, its value is exactly the same as the market price.").

29. Richard Epstein believes that the southern labor market was not competitive because of interference by racist governmental restrictions. See EPSTEIN, *supra* note 16, at 244-54. While Epstein may be correct, the evidence in support of this claim is somewhat limited. Donohue, *supra* note 16, at 1594.

In order to address this apparent anomaly, it may be helpful to elaborate on the concept of a perfectly competitive market. As I noted above, a perfectly competitive market is one in which the value of an asset equals its price. Perhaps the best illustration of such a market is the market for financial securities. Here the hallmarks of perfect competition are most in evidence: all the shares of a given company's stock are perfectly fungible, and millions of investors and money managers spend much time and effort trying to ascertain the true value of these shares. Moreover, when investors perceive any divergence between value and price, they can buy or sell the under- or overvalued security very quickly in a trading market that has very low transaction costs.

A. *Perfectly Competitive Markets and Intrinsic Equality*

These features of modern capital markets imply that there will be a strong tendency for price and value to be equal. If the price of a capital asset, such as a financial security, is below its true value, a host of offers to purchase will tend to elevate the price to the point at which the price-value discrepancy is eliminated. Conversely, if the price of an asset lingers above the true value, the downward pressures on price operate quickly as owners of the asset try to sell it. Even nonowners can facilitate the rapid price drop toward the true value through the use of short sales. With so much at stake in discerning whether price equates with value, with only a few thousand stocks that need to be valued, with tens of thousands of analysts spending all their time trying to ascertain this value, and with the fantastic volume of stock trading that provides at very low cost virtually constant updates on the latest assessment of value by knowledgeable market participants, the stock market is unparalleled in the degree to which it approximates the perfectly competitive market.³⁰

Consider the situation in which someone tries to sell authentic \$20 bills to the highest bidders. The demand curve for such \$20 bills would be perfectly horizontal (elastic), because no one would pay more than \$20 to receive such a bill, and if buyers could purchase the bill at anything less than \$20, the quantity demanded would become infinite. Even if a large majority of buyers have some personal reason that keeps them from purchasing the \$20 bills, there will certainly be more than enough demand to bid up the

30. Stephen A. Ross, *The Interrelations of Finance and Economics: Theoretical Perspectives*, AM. ECON. REV., May 1987, at 29, 30 (“[F]inancial markets are extremely liquid and as close to our purely competitive ideal as one can find in the real world.”).

price of the bills should it slip below \$20. The intuition behind this example explains why “[t]he conventional wisdom among legal scholars and financial economists is that demand for stock (as well as other securities) is horizontal.”³¹ Although the task of valuing corporate securities is not as trivial as that of valuing paper currency, securities analysts do a good enough job in this enterprise to make the analogy a useful one.

The implication of this discussion is that there is little need to fear the problem of the undervaluing of a corporate security. The owner of a corporate security can sell the security at a price equaling its value even if a great number of individuals were for some reason “prejudiced” against the owner or the particular corporation. Investors in capital markets are interested only in the nondiversifiable risk and the expected returns for differing securities, and they tend to price securities accordingly. One confirmatory piece of evidence on this score is that there is no call for government regulation — other than a requirement that relevant information possessed by the management of firms whose securities trade in the organized securities markets be disclosed in a timely fashion — to assure that price and value are equated.

One point in particular should be underscored. The existence of irrational biases or prejudices on the part of investors does not prevent capital markets from ensuring that price equals value. One might suppose that this statement tells more about the relative lack of prejudice in investors than about the ability of capital markets to equalize price and value. Proponents of this view would argue that while there is much in the real world and the social psychological literature to suggest that some Americans harbor strong prejudices — at times, rising to the level of intense hatred — against blacks or women or other identifiable categories of workers, there is little reason to think that such emotions are aroused by sterile assets like corporate securities. But this view underestimates the passions and biases of investors and overlooks the institutional features of capital markets that tend to eradicate their influence over price. To begin with, because trading takes place through brokers on an organized exchange, most investors would never be in a position to know who the previous owner of a corporate security was, and therefore there

31. Richard Booth, *The Efficient Market, Portfolio Theory, and the Downward Sloping Demand Hypothesis*, 68 N.Y.U. L. REV. 1187, 1187 (1993).

would be no opportunity to avoid purchasing or selling a particular stock, say, because one did not like its prior or prospective owner.³²

Moreover, even if many investors find a certain company or product distasteful, the shares of that company's stock should still trade at full value. It is undoubtedly the case that significant numbers of investors have biases against holding certain actively traded securities. Some may feel that Dow Chemical should be shunned because it manufactured napalm during the Vietnam War. There are no doubt large numbers of investors who believe that gambling is wrong and therefore avoid purchasing the stock of casino enterprises, or who believe that tobacco companies are the merchants of death and therefore avoid purchasing their stocks, or who shunned the stocks of companies investing in preliberation South Africa. Others may simply shun stocks altogether because of memories or fears of the stock crash or for some other reason.

Furthermore, some investors may avoid certain stocks, not out of a sense of personal or political distaste, but rather from erroneous beliefs about the future profitability of certain companies or particular enterprises. Some may believe that video laser disks represent the technology of the future even though videotapes have almost completely displaced them. But as long as the market is perfectly competitive and a sufficiently large number of other investors are concerned only with the risk and return of financial assets, the auction quality of these markets should bid up the price of these assets to their full value. In other words, because there are enough investors who care only about maximizing profits and who can quickly and cheaply purchase any undervalued securities, prejudice against a security owner or a company simply cannot cause the price of a security to diverge from its value. These biases do not pose a concern to issuers of stock or to those who own stock because millions of investors are trying to ascertain the value of a security, and others who do not carry biases against the particular stock will be happy to step in to fill the void if the stock can be purchased at a price below its value.

32. Obviously, not all sales of assets are shielded from the effects of discrimination. Consider, for example, the studies documenting discrimination in the sales of houses and automobiles. See, e.g., Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites From Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 33 (1994); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). Moreover, for a vivid depiction of the apparent satisfaction that a biased and unoccupied shoe salesman could obtain from refusing to acknowledge the existence of a black customer, see *Primetime Live: True Colors* (ABC television broadcast, Sept. 26, 1991).

But confidence that the market will assure the equality of value and price does not extend to all markets. Indeed, the very existence of employment discrimination law would seem to reflect the enormous concern over precisely this question in labor markets. Consequently, one of the major goals of the civil rights movement and the women's movement was to achieve a federal guarantee that the wages of workers in certain protected classes equaled the value of what those workers would produce in a perfectly competitive — and nondiscriminatory — market.

Note that the appended qualification that the market be nondiscriminatory was deemed superfluous in the case of capital markets. Price equaled value in that context even if many investors were highly prejudiced. But this statement cannot always be made in less efficient markets. For example, the typical southern black in 1955 had no expectation of being able to sell his labor at a price equaling its value in a nondiscriminatory environment. Indeed, the widespread exclusion of blacks from certain enterprises and occupations implicitly offered a price of zero for the labor of black workers when there is little doubt that the value of black labor far exceeded this amount.³³ In other words, for a very extended period of time, blacks and women felt that they could not rely on the protections of the market to ensure that they would be hired and paid their true value. This fundamental fact explains much of the focus of the civil rights movement on securing the passage of legislation prohibiting discrimination in employment: the goal was to assure that the price that protected workers received for their labor was equal to the value of their labor in the American economy, so long as value was determined only with respect to intrinsic productivity and was not distorted by discriminatory preferences of employers, fellow workers, or customers.

When employers, fellow workers, or customers shun certain protected workers for certain jobs, they impose social costs even apart from the depressing of wages of the dispreferred group. Such slights can in themselves cause psychological pain; indeed, the very reason members of one group might discriminate is to secure some gain in self-esteem at the expense of the other group.³⁴ But for now, I want to leave this issue aside and focus only on the question

33. For example, blacks were widely excluded from the southern textiles industry for 50 years prior to the passage of the 1964 Civil Rights Act. See James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989).

34. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. (forthcoming Mar. 1995).

of the equality of price and value, or the lack thereof. Why do labor markets fall so short of what capital markets seem to deliver?

There are two reasons. First, labor markets are far less efficient markets than capital markets, and as one departs from the features of a perfectly competitive market, the forces that equate price and value weaken. Persistent and substantial divergences between price and value can exist in imperfect markets. Second, at best labor markets can only be expected to equate price with the value of labor as determined not simply by the intrinsic value of the assets as in capital markets but by the contingent assessment that will be influenced by an array of discriminatory participants. Put differently, labor markets can only hope to achieve contingent equality, while capital markets can deliver the higher ideal of intrinsic equality. I will discuss each of these points in turn.

B. Labor Markets Are Not as Efficient as Capital Markets

Capital markets possess a number of attributes that make them unusually efficient. There are a relatively small number of traded equity securities in the United States, and for any given company, all the shares of that company's stock are identical. Moreover, at any particular point in time, everyone knows or at very small cost can learn the price of a stock, as this information is generated through the public stock exchanges. At the same time, because substantial profits can be made from identifying mispriced stocks, a large number of financial analysts and investors are continually trying to ascertain the true value of these stocks. Moreover, once an investor has identified an undervalued stock, he can possess that stock in a matter of minutes by incurring a relatively low transaction cost. In other words, in capital markets, there are only a relatively small number of prices to get right, and there are huge rewards from doing just that. Consequently, analysts and investors spend a great deal of time and effort trying to ascertain the correct prices of securities, and for little more than the price of a phone call and a small commission, they can almost immediately purchase any undervalued security they identify.

None of these attributes are characteristic of labor markets. There are over 130 million workers in the U.S. labor force,³⁵ and each one is different. For the vast majority of jobs, there is relatively little at stake in accurately assessing the true value of any single worker, and there is little or no publicly available informa-

35. 1994 ECONOMIC REPORT OF THE PRESIDENT 307.

tion about the current salaries or productive abilities of workers. This means that relatively few individuals are in a position to ascertain whether a worker is receiving a wage that is less than his value, and thus few will be interested in doing so. Moreover, even among those who are interested, such as prospective employers, there are limits on how much they will be willing to spend to determine the true productivity of workers because the gains from acquiring such information on any single worker are apt to be relatively modest.

One might think that labor markets have one benefit over capital markets in that workers themselves advertise their availability for work and therefore give employers the ability to learn at low cost of the existence of valuable and underpaid workers. But there are two reasons why the behavior of workers and applicants does not improve the performance of labor markets vis-à-vis capital markets. First, while workers do not need to wait to be found but can take the initiative in contacting prospective employers, this conduct adds a new dimension of noise to the search process. All workers are trying to signal their availability and talents; this raises the transaction costs of those who must sift through the information and obscures the signal emerging from the desirable workers. Second, while an important difference between capital and labor markets is that laborers, unlike stock certificates, are alive and able to communicate, this difference does not provide an informational advantage to labor markets because the owner of stock has the same incentives to trumpet its value as does the owner of labor.

Even if undervalued workers can be identified, it is not always a simple matter to hire them. The worker may be living on the other side of the country, and family connections may impede the easy ability of the worker to move to the highest bidder. Even if a worker is willing to move to a higher-paying job, transaction costs may still be high. For example, assume that because of widespread discrimination, firms in the South in 1960 were unwilling to hire black workers at a wage equal to their productive value, but that firms outside the South, in states where employment discrimination laws were then widely in place, were less discriminatory. This assumption would be consistent with the data showing that the wage penalty for blacks outside the South was far smaller than it was in the South.³⁶ These data suggest that black workers might have been able to receive a wage more closely approximating the value of their work by simply leaving the South. Of course, such a move

36. See Donohue & Heckman, *supra* note 27, at 1610.

would have entailed both the monetary costs of relocating and the nonmonetary costs of uprooting one's life and leaving family and friends behind. For many individuals, these costs were not insurmountable, and in fact large numbers of young black men fled the South during the twenty-five-year period before the passage of the 1964 Civil Rights Act.³⁷ But these costs were quite burdensome for others, which may explain why the large wage penalties for blacks living in the South persisted for such a long duration when moving to jobs outside the South would have elevated black wages considerably.³⁸ The fact that it was primarily young black men who left the South suggests that the option to circumvent discrimination by moving may be more costly for married workers whose spouses might then have to change jobs as well.

These factors highlight the differences between the capital and labor markets. There are lots of investors who are eagerly looking for underpriced securities, and those securities are quickly snatched up if they are found. There are no unemployed stock certificates. In capital markets, any investor can profit from recognizing overvalued stocks through the device of short selling, but in labor markets only a current employer can benefit from recognizing an overvalued worker — by firing the worker or by reducing her compensation, both of which may be costly. Labor markets are much less supple and equilibrate more slowly, leaving workers who have limited geographic or occupational mobility with little recourse from the market for avoiding local discrepancies between the value and the price of their labor. While there is only one market for corporate securities in this country, there are thousands of labor markets. Thus, discrepancies between price and value in the labor market, which can be eliminated through the costly migration of labor, cannot be eradicated as quickly or as cheaply as similar discrepancies in capital markets.

Richard Epstein has argued that the cause of the divergence between black wages and black productivity that existed in the South was that the market was plagued by racist governmental restrictions and the fear of private violence and thus was not truly competitive.³⁹ But even if Epstein's argument is correct, which is by no

37. *Id.*

38. An alternative explanation might be that black wages as measured in the South were understated because a significant portion of black income came from in-kind benefits to agricultural laborers. Under this view, the increase in measured wealth that could have been achieved if blacks had moved out of the South would overstate the gain in real income.

39. See EPSTEIN, *supra* note 16, at 246-54.

means certain, it still underscores the difference between labor markets and capital markets. Even if no one in the South would buy the stock of say, Ford Motor Company, it would still not dampen the price of Ford stock. Northerners would simply buy more and bid up the price to the true value. The same phenomenon would not be true if all southerners refused to hire black workers. Absent massive black out-migration or massive in-migration of unbiased entrepreneurs that Epstein claims was blocked by government restrictions and violence, black wages would fall below the marginal product of black labor.

The many differences between the two markets reveal that the success of capital markets in equating price and value is an ideal that labor markets might approach but never reach. In capital markets the high profits that are attainable through identifying divergences between price and value ensure that correct pricing of individual securities will be the norm. In labor markets, by contrast, the relatively small value and high cost of determining worker productivity ensures that employers will frequently find it profitable *not* to determine the correct prices for individual workers. Instead, employers often use cheap proxies such as race and sex to approximate true worker value. In other words, statistical discrimination cannot exist in capital markets but can thrive in labor markets.

Unlike capital assets, labor assets — that is, workers — are not mere passive investments; therefore, statistical discrimination will likely distort workers' decisions with regard to investment in human capital. If a member of a group knows that he will be treated as though he possesses the average traits of all group members, he will have no incentive to make investments that would increase his productivity. Thus, there may be an efficiency rationale for prohibiting statistical discrimination against protected workers in labor markets,⁴⁰ which Title VII clearly does.

Moreover, even though one would always expect capital markets to outperform labor markets in equating price and value, capital markets themselves have at times experienced substantial long-term deviations between price and value. As Peter Bernstein notes, "An efficient market is not necessarily a rational market, nor is the information it reflects always accurate. Investors in their enthusiasm, or in their collective gloom, sometimes agree among themselves that certain stocks are somehow worth more or less than

40. See Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340 (1983) (rebutting the common presumption that equality-enhancing measures generally cause efficiency losses).

their intrinsic values."⁴¹ These deviations between price and value, even in the relatively efficient capital market, can be remarkably persistent. For example, over the past sixty-three years the returns on small-company stocks have exceeded the returns on large-company stocks to a degree that is far greater than their higher risk can explain.⁴² If substantial discrepancies between the price and value of corporate securities, however unusual, can persist for long durations, it should hardly be surprising that extended deviations between the price and value of groups of workers can persist over long periods of time.

C. Contingent Value Versus Intrinsic Value

The value of a stock is determined by the discounted stream of future earnings that will be conveyed to its owner. Thus, if one knows the stream of expected earnings, one can determine the stock's value by simply discounting with the appropriate discount rate. The discount rate is ascertained through the application of the Capital Asset Pricing Model, which relies upon a proper estimation of the firm's systematic risk, or "beta."⁴³ Any two securities with similar beta and expected return will trade at the same price. In other words, one need look only at the intrinsic aspects of the security — its systematic risk and its expected return — to determine its price. Contingent factors — the preferences of other parties — operate only on the demand for the company's product and thus on the stock's expected return, not on the price of the security once that return has been established. Thus, if the demand for cigarettes plummets because fewer individuals wish to smoke, the expected returns to the owners of tobacco company stocks will fall. As those expected returns fall, so will the price of the stock. But the price of the stock will still exactly equal the value of any other asset that

41. PETER BERNSTEIN, *CAPITAL IDEAS: THE IMPROBABLE ORIGINS OF MODERN WALL STREET* 137 (1992).

42. BREALEY & MYERS, *supra* note 28, at 296-97. This may not be a sign of a long-term deviation between price and value if small stocks suffer some other defect, such as lack of ready marketability, but the fact that much of the superior performance is concentrated during the first week of January would seem to undermine that speculation. As the authors of a prominent textbook conclude: "It is difficult to imagine any reasonable model of equilibrium consistent with the efficient-market hypothesis that could also be consistent with [these] results." STEPHEN A. ROSS ET AL., *CORPORATE FINANCE* 353 (2d ed. 1990).

43. Beta indicates how volatile a particular asset is compared with the overall market. A stock with a beta of 1 would have the same nondiversifiable risk as the market as a whole and would therefore have a discount rate equal to the expected return on the market. A stock with a beta in excess of 1 would have greater nondiversifiable risk than the market portfolio and would therefore have a higher discount rate. BREALEY & MYERS, *supra* note 28, at 161-69.

generates a similar expected return with the same degree of systematic risk. Thus, the capital market overcomes the biases, prejudices, and tastes of those who trade in capital markets; it does not overcome the biases, prejudices, and tastes of those who purchase the products of a particular company.

In contrast, the price of labor is not determined entirely by the intrinsic productivity of the worker. Rather, it will be determined by a host of extrinsic factors, including the various preferences of employers, fellow workers, and customers. In other words, one cannot look only to a laborer's physical product to determine his value; one must also look to the preferences of others with regard to associating with that worker. If many fellow workers or customers are particularly drawn to a worker, his wage will be higher for any given level of actual production. For example, if Mickey Mantle and Willie Mays are baseball players of equal talent but fans prefer to watch Mantle because he is white, Mantle may be expected to earn more in a competitive market. In other words, his "value" is not simply determined by his baseball ability but also by the effect he has on the audience. Put differently, his value is contingent upon the preferences of others and not on his intrinsic skills as a batter and fielder.⁴⁴

The major economic burden imposed by employment discrimination is the divergence between the price paid to certain classes of labor and the true value of this labor. In other words, in a perfectly competitive market with zero or low transaction costs, one would not expect a divergence between, say, the wages of blacks and the true productivity of blacks.⁴⁵ A worker whose productivity substantially exceeds her wage will be in great demand. If the labor market worked like the stock market, we would expect the price — wage — of this worker to be bid up rather quickly until the divergence between price and value was eliminated. Thus, if the labor market were as perfectly competitive as the stock market, there

44. Some evidence of such customer discrimination in baseball has been offered from an analysis of the trading price of baseball cards. See Clark Nardonelli & Curtis Simon, *Customer Racial Discrimination in the Market for Memorabilia: The Case of Baseball*, 105 Q.J. ECON. 575 (1990). After controlling for measurable performance traits, the authors of the study found that the cards of white baseball players traded at between 10% and 13% more than baseball cards of nonwhite players. *Id.* at 594. What is true for baseball cards also seems to be true in many professional sports: black athletes often seem to earn less than their productivity would warrant. For references to studies demonstrating this phenomenon, see Donohue, *supra* note 16, at 1608 n.122.

45. The qualification about transaction costs being close to zero is necessary to foreclose the possibility of a situation — such as the one that existed in the pre-Title VII southern labor market for blacks — in which those who hire black workers are quickly identified and punished via some regime of informal, private sanctions.

would be little to fear from discrimination and little need for the law to try to add to the protection already provided by the market — at least if society is content with providing intrinsic equality to its workers.⁴⁶

In summary, modern capital markets ensure that the price of an actively traded security will equal its value. Most importantly, this statement is true regardless of whether or not many investors are biased against holding the particular security. The security will trade at the same price as if no investors were biased against it. Although there are tendencies, perhaps even strong ones, pushing the price of labor toward the value of labor, in every dimension capital markets will necessarily do a better job of equating price and value than labor markets will.

III. THE GULF BETWEEN CONTINGENT EQUALITY AND INTRINSIC EQUALITY

A. *An Idealized Vision of Labor Markets*

Thus far, we have focused on the equality between price and value that one can hope to achieve in the capital market and suggested that this is at best an unattainable ideal to which the labor market can only aspire. But if one considers the criticisms of employment discrimination laws by their primary principled opponents, it becomes clear that those opponents think of the labor market as being as perfectly competitive as modern capital markets.

For example, in 1980 Senator Orrin Hatch wrote:

The EEOC has sometimes been credited with opening up new pools of labor that corporations somehow contrived to ignore, and occasionally with hastening the breakdown of traditional barriers to labor mobility. But in the context of the market's endless search for efficiency, these anomalies would have been eliminated anyway, leaving only the question of whether they were worth the expenditures compelled by law. Affirmative action is a net cost to the economy. . . .

46. One might point out that customer discrimination can lead to the undervaluing of black workers, and the market will not root out such discrimination but rather will cater to it. This is true because the labor market is not as perfectly competitive as the capital market and therefore cannot guarantee intrinsic equality. If the labor market were as perfectly competitive as capital markets, black wages would not be depressed by customer discrimination because black workers would simply flow to jobs that did not involve customer contact. In such a market, blacks would not suffer wage discrimination, although their freedom to pursue customer-contact jobs would be impaired. In the actual labor-market world of contingent equality, a worker bears the economic burden of trying to achieve intrinsic equality — perhaps by migrating to another area where nondiscriminatory employers are more abundant; in the Title VII-induced effort to achieve intrinsic equality, the economic burden is shifted to the employer. The employee can stay where she is, and the employer must pay her full intrinsic value.

And the true dynamic effects — the opportunity cost of all this expense and effort, the diminution of competition, inefficiencies due to the employment and promotion of marginal labor and the consequent demoralization of good workers — can only be a matter of conjecture, although they are clearly the most important of all.⁴⁷

A similar theme is echoed by one of the primary scholarly antagonists of employment discrimination law, Richard Epstein:

[Consider the example of two pools of labor] with substantial variations in each group, but where the quality of the worker drawn at random in one group is known to be higher than in the other. . . . When the quality of the workers in the less desired pool exceeds the average quality of the remaining workers in the more desirable pool, then hiring will migrate toward the second pool, notwithstanding the original desire to remain with the preferred talent pool only. . . . Viewing it as a continuous process, one should see steady hiring from both pools as firms seek the best available worker from any source.⁴⁸

But these descriptions of how employers will quickly take advantage of discrepancies between the value of workers and their price focus only on the intrinsic productivity of the workers and ignore the contingent value. In other words, this analysis much more aptly describes how an investor would quickly buy up any undervalued stock than how an employer would contemplate hiring when productivity is not clearly known and certain workers are dispreferred. In Hatch's terms, the market might contrive to ignore certain categories of labor, not because of the intrinsic productivity of this group of workers, but because of the preferences of relevant actors to avoid this group. Moreover, Epstein's analysis of the choice between hiring a preferred and dispreferred worker presupposes that employers would act on their preference in making their employment decision only if the productivities of the dispreferred and preferred workers were equal; otherwise, the most intrinsically productive worker would be chosen. But intense discrimination may prevent the employment of any worker from the less desirable pool, regardless of intrinsic productivity. For example, it was not that long ago that only whites could play major league baseball. Certainly, there was a highly talented pool of labor that the market had contrived to ignore, and no governmental restriction prevented black players from being hired. Moreover, this problem is exacerbated when productivity is not easily measured and the dispreferred group has some apparent shortcomings, such as lower-quality education.

47. Orrin Hatch, *Loading the Economy*, 12 POLY. REV., Spring 1980, at 23, 31-32.

48. EPSTEIN, *supra* note 16, at 34-35.

B. *Discrimination in the Nonidealized Labor Market*

The recent story of discrimination at the Shoney's restaurant chain is instructive. The cofounder and longtime chief executive officer of Shoney's, Ray Danner, was clearly a highly prejudiced individual.⁴⁹ Several high-ranking Shoney's executives testified to the effect that "Danner would say that no one would want to eat at a restaurant where 'a bunch of niggers' were working."⁵⁰ At one point, Danner wrote a letter complaining about the performance of one restaurant in Jacksonville, Florida, and noting that it had more blacks — some of whom were subsequently fired — than other fast-food restaurants that Danner had visited in the area.⁵¹ Indeed, judging from Shoney's success with 1800 stores in thirty-six states,⁵² Danner's business instincts about what southern white customers would want from a low-budget restaurant may, regrettably, not have been without substance. In this instance the analysis would be different from what Hatch and Epstein suggest: unrestrained profit-maximizing firms would in fact avoid hiring blacks in positions where they could be seen by diners if that were the preference of their customers. Indeed, the fact that Denny's and Wendy's restaurants have been charged with similar discriminatory conduct may reveal that the tendencies toward efficiency in the labor market are not always the ally of black workers.

Moreover, Danner in all likelihood did not apply racist business theories with the laserlike precision of a profit-maximizer — that is, he did not shun blacks for visible positions to please the customers but at the same time welcome them in jobs where the customers would not see them. Only one out of sixty-eight division directors and none of the higher-level corporate managers at Shoney's were black.⁵³ It would seem that the hiring policies at Shoney's reflected deference not only to the discriminatory attitudes of its customers but also to those of its CEO and largest stockholder. But the market penalties for this behavior did not seem to be strong, and it was only a huge settlement in excess of \$100 million in damages coupled with a substantial stock-price drop when Danner showed signs of resisting the remedial measures designed to increase the number of

49. See Steve Watkins, *Racism Du Jour at Shoney's*, NATION, Oct. 18, 1993, at 424.

50. *Id.* at 427 (quoting Thomas Buckner, a former Shoney's division personnel director).

51. *Id.*

52. *Id.* at 424.

53. *Id.* at 427.

black managerial employees that led to Danner's departure from Shoney's.⁵⁴

A number of lessons emerge from the Shoney's case. No one contended that the black workers that Danner did not want customers to see were less able. They were considered to be less valuable because certain customers appeared to dislike seeing them. Thus, the value that was being equated to price was not the intrinsic value of these workers but their contingent value in light of racist customer preferences. It would not be surprising to learn that this apparently widespread racist attitude would depress the demand for black labor. As a result, black wages would be lower than the wages of otherwise identical white workers. This underscores the difference between labor markets — in which prices are determined by supply and demand, with discriminatory attitudes of employers, fellow employees, and customers influencing the demand — and capital markets — in which an arbitrage model of pricing is appropriate and price will be determined only by the intrinsic value of the asset.⁵⁵ While the demand for stocks is perfectly elastic, no study of labor demand has ever found it to be highly elastic, let alone horizontal.⁵⁶

Moreover, the market penalty for the full array of Shoney's discriminatory practices, some of which enhanced and some of which diminished profits, was not particularly powerful. Indeed, only the intervention of antidiscrimination law established the costliness of the racist policy, at which point the market did encourage the departure of a severely discriminatory owner. Although Danner's racist policy of not hiring visible black employees might have been profit-maximizing to the extent it accorded with customer preference, his general antipathy to hiring any black supervisory workers even in nonvisible positions would not be consistent with profit

54. *Id.*

55. As Stephen Ross has written,

If labor markets behaved like financial markets, the theories of finance would be used to study them. . . .

. . . .

Paul Samuelson's textbook on economics has the following anonymous quote, "You can make even a parrot into a learned political economist — all [it] must learn are the two words 'supply' and 'demand'."

By contrast, the intuition of neoclassical finance is quite different. . . . To make the parrot into a learned financial economist, he only needs to learn the single word "arbitrage."

Ross, *supra* note 30, at 29-30 (quoting PAUL A. SAMUELSON, *ECONOMICS* 52 (11th ed. 1980)).

56. See, e.g., Kim B. Clark & Richard B. Freeman, *How Elastic Is the Demand for Labor?*, 62 *REV. ECON. & STAT.* 509, 518 (1980) (estimating the elasticity of demand for labor at .4 or .5).

maximization. Thus, although the market penalty for such non-profit-maximizing discrimination did not seem to be capable of driving Danner from the market, the introduction of a sizable legal penalty enabled the market to achieve the desired social outcome. It is precisely this mechanism that might render Title VII efficient, as I have suggested elsewhere.⁵⁷ But the important point here is that the value of black workers to Shoney's was not simply based on their intrinsic productivity but rather depended on the discriminatory tastes of customers and the employer. This is the distinction between what the labor market achieves in terms of equating price and contingent value and what would be achieved if the labor market functioned in the same fashion as the capital market.

IV. THE GULF BETWEEN INTRINSIC EQUALITY AND CONSTRUCTED EQUALITY

The preceding discussion has shown that equating price and value means different things in the labor market and the capital market and that the initial goal of employment discrimination law was to give black and other protected workers the same intrinsic equality that would be guaranteed if the labor market operated like a capital market. This of course explains why some of the opponents of the statute do not feel it is needed. Because they believe that the labor market operates identically to the capital market, they see no need to have the costly and cumbersome law step in to provide what the market already offers.

But, at least thus far, the antagonists have not made much headway on this battle. The law is solidly entrenched, and the public at large seems to believe that protected workers are entitled to a legal guarantee that their labor will be compensated in the same fashion that it would be in a perfectly competitive and nondiscriminatory market. But the battles over the proper scope of employment discrimination law are not limited to debates over whether the appropriate compensation for blacks is determined by the contingent equality between price and value guaranteed in a labor market or by the intrinsic equality that the capital market can provide. A second front has opened between those who are satisfied with the goal of attaining intrinsic equality and those who feel that the law should go further than an idealized, perfectly competitive market might conceivably go. Those who find intrinsic equality to be insufficient

57. See John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987).

believe that a higher level of what I call "constructed equality" should be the aim of the law. Interestingly, while the first success in the law of employment discrimination was the acknowledgement, if not the attainment, of the right to intrinsic equality, over time this demand for equality has come to be overshadowed in much the same way that the early demands of blacks for the equal protection of the laws subsequently came to be seen as wholly inadequate.

A. *The Evolving Conception of Equality*

In this regard, consider the NAACP's thirty-year battle designed to achieve racial equality through law⁵⁸ — probably the most famous sustained litigative effort to achieve equality in our nation's history. The NAACP consciously adopted a two-step strategy in an effort to achieve the equal protection of law for black Americans. First, the NAACP relied on the equality component of the "separate but equal" doctrine of *Plessy v. Ferguson*⁵⁹ in its pursuit of improvements in the treatment of blacks. Given the severity and pernicious character of racial injustice in America over the period from the early 1920s through the early 1950s, this protracted phase of the NAACP's legal attack might seem to have been completely ineffective. In fact, this period was one of substantial progress in black southern education as measured by the convergence toward equality in "measured schooling inputs," such as the wages paid to black teachers, the length of the school year for black pupils, and the pupil-teacher ratios for black students.⁶⁰ Despite the fact that southern blacks were without significant electoral power over this period, the NAACP's struggle to achieve equal, albeit separate, schooling for blacks seems to have generated considerable improvements in virtually all categories of educational quality inputs. By the early 1950s, when this first phase of the litigation strategy was ending, most southern states had nearly equalized these inputs for black and white students.⁶¹

Having achieved this degree of racial equality, the NAACP then switched to its second phase of the legal strategy by attacking the

58. See MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950* (1987); see also Cass R. Sunstein, *How Independent is the Court?*, N.Y. REV. BOOKS, Oct. 22, 1992, at 47 (reviewing WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992), and GERALD ROSENBERG, *THE HOLLOW HOPE* (1991)).

59. 163 U.S. 537, 551-52 (1896).

60. See David Card & Alan B. Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 Q.J. ECON. 151, 167 (1992).

61. *Id.* at 168.

constitutionality of the doctrine of “separate but equal” itself. Interestingly, the NAACP sought to achieve equality, first by using the existing legal framework to push for what the law had grudgingly allowed at the level of constitutional doctrine but not in practice, and then by forcing the law to grant much more. Certainly, the relative gains in black education in the segregated South prior to the decision in *Brown v. Board of Education*⁶² were dramatic and represented significant movements in the direction of equality. Yet only by thinking of equality as something more than the formalistic achievement of equal measured educational inputs was the Supreme Court able to advance racial equality in a much more profound way than would have been possible under the doctrine of legal segregation.

The quest for equality in labor markets has undergone a similar metamorphosis. First, the civil rights movement sought to achieve what the market had yet to offer to black Americans — wages equal to the true value of their labor in a nondiscriminatory environment. This aspect of the civil rights movement was virtually a complete success, at least at the doctrinal and aspirational levels. At one point the idea that the government could coerce private employers to hire individuals that they did not wish to have as employees had little widespread support; today there is a staunch consensus that such coercion is appropriate to guarantee to protected workers what they would secure in a nondiscriminatory free market. Indeed, this consensus has become so dominant that one scholar has opined that it is virtually “forbidden” to question it.⁶³ As the goal of eradicating the appalling mistreatment of black Americans provided the battering ram against the doctrine of freedom of contract in employment, other disadvantaged groups — initially women and then the elderly and the disabled — attached themselves to this quest for legal equality in the workplace. Once this initial version of equality became widely accepted, the demands for a more aggressive employment discrimination policy began to grow.

In the same way that the doctrine of “separate but equal” came to be seen as the embodiment of *inequality* — even though for decades it was the basis of a legal strategy to advance the status of blacks — the initial phase of employment discrimination law that tried to confer what a perfectly competitive market would provide

62. 347 U.S. 483 (1954).

63. See EPSTEIN, *supra* note 16, at xii-xiii.

has come to be seen by many as a stunted form of equality that represents an impediment to needed change. These claims to go beyond the protections of an idealized market are seen in the argument that the special burdens of childbirth and childrearing require preferential treatment of female employees.⁶⁴ Women are not to be given only what a pure profit-maximizing, nonmisogynistic employer would offer them; instead they should receive what the modern conception of gender equality demands.

The Age Discrimination in Employment Act⁶⁵ emerged in 1967 from the combined support of those who sought to guarantee the intrinsic notion of equality — that is, what a non-ageist, idealized free market would yield to workers who were over the age of forty — and those who thought older workers needed to be protected from the market.⁶⁶ The latter group was uncomfortable with the relentless logic of disregarding the surface attributes of race, color, religion, sex, or age and focusing exclusively on those traits purely related to productivity. In their opinion, the single-minded focus on worker productivity, which is the very essence of the intrinsic notion of equality, could itself be the enemy of female and older workers.

The requirement that employers shift their focus away from what an idealized market would offer to what fairness requires was taken a step further with the passage of the Americans with Disabilities Act (ADA).⁶⁷ Like the Age Discrimination in Employment Act before it, the ADA incorporates a component of the market protection conception of antidiscrimination in that it prohibits em-

64. See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 244 (arguing for statutes guaranteeing pregnant workers their jobs during pregnancy-related disability as a solution to existing workplace practices "structured with the expectation that workers would not be new mothers"); see also Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 804, 833-34 (1990).

65. 29 U.S.C. § 633a (1988).

66. The Report of the Secretary of Labor to Congress under Section 715 of the Civil Rights Act of 1964 — U.S. DEPT. OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* (1965) — is very explicitly concerned with statistical discrimination leading to employment bans against the hiring of older workers. It found that "[a]pproximately half of all job openings which develop in the private economy each year are closed to applicants over 55 years of age" by virtue of firms setting specific age limits beyond which they will not consider a worker for a vacant job regardless of ability. *Id.* at 6. Because the presence of statistical discrimination implies that individual workers are not being paid their true value, the concern over statistical discrimination against the elderly reflected a demand for intrinsic equality for these workers.

Conversely, while the market presumably penalizes those who are purely ageist — that is, irrationally biased against older workers — it rewards those who successfully reduce costs by not hiring older workers. This is an explicit concern discussed in the Secretary of Labor's report. See *id.* at 15-17.

67. 42 U.S.C. § 12101 (Supp. III 1991).

ployers from irrationally discriminating on the basis of a disability. A disabled worker who can perform the essential functions of a job may not be rejected because of an employer's irrational aversion to the worker's disability. This conforms precisely to the intrinsic notion of equality — workers should receive what they would get in a nondiscriminatory free market. But, at the same time, the ADA is not content with this notion of equality. The Act goes much further by requiring employers to make reasonable accommodations that would enable disabled workers to perform adequately on the job.⁶⁸ Clearly, given a choice between two equally productive workers, one requiring the expenditure of significant sums in order to accommodate him and one requiring no such expenditures, the profit-maximizing firm would prefer the worker who is less costly to hire. Thus, the transformation that has occurred in the realm of civil rights is that the ideal nondiscriminatory market solution, which previously was both the benchmark of intrinsic equality and what the law demanded, is now regarded as the obstacle to social justice.

B. *The Tripartite Equality Frameworks*

The framework of contingent, intrinsic, and constructed equality offers insights into some of the major issues of employment discrimination law. For example, some have argued that the Supreme Court's creation of the disparate impact doctrine represented a departure from the congressional intent to prohibit only intentional discrimination.⁶⁹ The claim is that the disparate impact standard represents an unwarranted shift in Title VII's purpose from guaranteeing equality of opportunity to ensuring equality of result. But the move to a disparate impact standard, which was ultimately endorsed by Congress in the Civil Rights Act of 1991, is consistent with the goal of trying to guarantee intrinsic equality. Neutral rules that adversely affect protected workers without being tightly tied to their productivity are obstacles to the attainment of intrinsic equality, because the use of such neutral rules reflects the existence of statistical discrimination. As we saw above, intrinsic equality, which is defined by what would exist in a market that was as per-

68. 42 U.S.C. §§ 12,111(9), 12,112(b)(B) (Supp. III 1991).

69. See, e.g., Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

fectly competitive as the capital market, cannot coincide with statistical discrimination.⁷⁰

In addition, the tripartite equality framework can also be used to focus discussion concerning the likely success of various legal interventions. Intrinsic equality will necessarily be easier to generate than constructed equality because the pressures of the market at least push in the direction of intrinsic equality, but they steadfastly resist the attainment of constructed equality. This is not to say that the attainment of intrinsic equality is relentlessly encouraged by the market. For example, pure market forces do not encourage the hiring of groups that are disfavored by the employer, fellow employees, or customers, nor do they dictate the disregard of low-cost statistical proxies that generate a reasonably productive work force. Still, if workers could be properly sorted throughout the economy, a market equilibrium could exist in which every worker was being paid precisely his or her intrinsic value.⁷¹ This could not happen with respect to constructed equality, because any employer who was paying a worker more than the worker's intrinsic value would find it advantageous to replace the worker.⁷² This implies that intrinsic equality is at least in theory a goal that is attainable for all workers. Conversely, ambitious efforts to extend the enlarged demands of constructed equality to a growing array of protected workers moves society away from a conceptually attainable goal to an amorphous objective, which can only be defined through wrangling among conflicting interests in the political process. This fact in no way undermines the desirability of certain objectives, but it does suggest that political power may play a greater role than principled discourse in determining the future contours of constructed equality.

70. In efficient capital markets there is no statistical discrimination because it is always profitable to spend the resources to ascertain the value of individual financial securities. In labor markets it is frequently not profitable to ascertain the true value of individual workers.

71. Another way of expressing this point is that the labor market, in equilibrium, generates contingent equality, and within the set of contingently equal outcomes are a subset of intrinsically equal outcomes that would be unlikely to be generated in a labor market but that could be maintained in equilibrium if they were somehow attained.

72. One might qualify this point by stating that if the employer expenditures that were necessary to accommodate, say, a disabled worker, have already been paid — that is, they are sunk costs — then the position of constructed equality could be a stable equilibrium, even though it would not be one that would be generated by a labor market. If the costs of accommodation are continuing, however, the pure market incentive would be to replace the disabled worker with an equally productive worker who imposed no burden of accommodation.

CONCLUSION

In the two decades following World War II, the desire to find a remedy for the egregious misconduct directed toward American blacks coalesced into a belief that because contingent equality — the best that the labor market could supply — was insufficient, the government must intervene to supply the greater intrinsic equality that would be generated by a more perfectly competitive market. The passage of Title VII would not have been possible without the conceptual and political shift that allowed a majority of the public to embrace the view that federal regulation of employment was needed to correct the injustice being visited upon black Americans. In the late days of the debate over Title VII, women succeeded in becoming one of the protected categories that benefited from this conceptual and political development.⁷³ At the same time, concerns about discrimination against the elderly emerged, leading to a provision in the Civil Rights Act of 1964 calling for the Secretary of Labor to study and report to Congress on the problem of age discrimination.⁷⁴ The elderly followed in this quest for intrinsic equality with the passage of the Age Discrimination in Employment Act, designed to achieve what the imperfections of the labor market rendered unattainable without intervention. Even the early stages of affirmative action represented an attempt to move the employment of blacks to the level that would exist in a perfectly competitive market. But whereas employment discrimination law first used the notion of the market to advance the status of protected workers, it then rejected it, in much the same way that the NAACP litigative strategy at first relied upon the doctrine of separate but equal to advance black welfare but ultimately rejected that same doctrine.

Primarily through litigative efforts on behalf of female and elderly employees, the courts began to broaden the notion of equality beyond what a perfect market could give to what a perfect market would negate. Advocates of affirmative action began not only to seek the idealized market solution but to push for broader social justice. In this vision of constructed equality, the dictates of law are defined no longer through some abstract market paradigm but rather through considering what steps would be necessary to define a fair society. Releasing the law and its goals from the theoretical confines of a market paradigm has the advantage of freeing it to

73. See John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1337-38 (1989).

74. See 42 U.S.C. § 2000e-14 (1988).

promote a more refined notion of justice, especially in light of the nonmarket roles of women as childbearers and caretakers, than would otherwise have been possible. On the other hand, freed from the theoretical mooring that the market paradigm provided, the malleable claims for constructed equality began to proliferate in ways that have weakened the moral force of antidiscrimination law. Employment discrimination law began to provide avenues for wind-fall gains rather than opportunities for promoting corrective justice, and the moral imperative that impelled the civil rights movement has been blunted to the extent that employment discrimination protections have been extended by special interest legislation to groups, such as smokers, with little to commend their legislative demands other than the political power of tobacco companies.

The ADA has imposed perhaps the greatest demands of constructed equality by explicitly requiring that employers take reasonable measures to make the disabled equal. Rather than the early Title VII insistence that employers disregard the traits of protected workers, the ADA requires employers to identify the traits of the disabled that undermine their productivity and to seek whenever possible to overcome these traits. The ADA has paved the way for the possibility that economically disadvantaged minorities such as blacks, whose position as the central focus of employment discrimination law has gradually diminished, will employ the ADA's rationale to argue that the effects of the factors that have undermined their productivity — including very poor schooling and broken families — are now to be corrected by employers. Although the conceptual groundwork for this step has been laid, the fracturing of the consensus forged by the civil rights movement may render this next step unattainable in the current political environment.