

## The Road to Discrimination: Implications of the Thought of F. A. Hayek for Equal Employment Law

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Introduction.....	
I. F.A. Hayek: Theory and Principle.....	
A. Hayek and the Right to Discriminate.....	
B. Hayek’s Economic and Political Theory.....	
1. The Empirical Argument.....	
2. The Normative Argument.....	
C. Hayek’s Legal Theory.....	
II. The Employment at Will Doctrine.....	
III. The Federal Law Exception to the Employment at Will Doctrine.....	
A. Arguments against Federal Antidiscrimination Employment Laws.....	
B. Arguments for Federal Antidiscrimination Employment Laws.....	
IV. Antidiscrimination Is a Necessary Restriction on Liberty.....	
Conclusion.....	

### INTRODUCTION

In 1974, the Nobel Prize in economic sciences was awarded to Friedrich August von Hayek for his liberal economic theory.<sup>1</sup> Over time, Hayek expanded his economic theory to include complementary theories of politics and law. In his vast theoretical works, Hayek argues that legislation and community planning by government contravene the principle of liberty. His position against governmental interference with individual economic activity extends to prohibit governments from regulating discrimination in private employment. This essay contends that, although Hayek’s theories generally do not permit governmental intervention with the individual right to discriminate, antidiscrimination legislation is nevertheless necessary to protect substantive and procedural due process in private employment relationships against the default employment at will system in the United States.

Section I examines the tenets of Hayek’s economic, political, and legal theories that support the repeal of antidiscrimination laws. Section II describes the employment at will doctrine while concurrently examining arguments for and against this doctrine. Section III examines the federal antidiscrimination law exception to the employment at will doctrine. Section IV argues that antidiscrimination laws are a necessary restriction on the individual liberty of citizens.

### I. F. A. HAYEK: THEORY AND PRINCIPLE

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<sup>1</sup> ALLEN EBENSTEIN, *FRIEDRICH HAYEK: A BIOGRAPHY*, 261 (University of Chicago Press 2003). See also Nobel Prize Recipients, available at: [http://www.nobelprize.org/nobel\\_prizes/economics/laureates/1974/hayek-lecture.html#](http://www.nobelprize.org/nobel_prizes/economics/laureates/1974/hayek-lecture.html#) (last visited May 7, 2012).

F. A. Hayek rarely directly discusses employment antidiscrimination legislation. Hayek's position may nevertheless be gleaned from statements he made in recorded interviews, and as a logical consequence of his theoretical position. This section first examines Hayek's contention that governments should not interfere with the individual right to discriminate in the context of affirmative action and apartheid laws. This section then provides a chronological exposition of the tenets of Hayek's anti-regulatory philosophy. It begins by examining his economic and political theory in *The Road to Serfdom*. It then analyzes the legal theory in his subsequent *The Constitution of Liberty*, which he elaborates in his magnum opus, *Law, Legislation and Liberty*. The passages and arguments from these works are chosen to set the framework for Hayek's position that governments should not interfere with individual liberty by prohibiting discrimination in employment.

### *A. Hayek and the Right to Discriminate*

Hayek opposes governmental intervention with the individual *right to discriminate* in private contexts. The right to discriminate, according to Hayek, prohibits governments from promulgating laws that require individuals to discriminate privately and simultaneously prohibits governments from promulgating laws that restrict private discrimination. Strict adherence to Hayek's right to discriminate requires that all laws that require or prohibit the individual right to discriminate privately should be repealed, whether those laws be apartheid laws, affirmative action laws, or antidiscrimination laws such as Title VII of the Civil Rights Act of 1964.

The exact scope of Hayek's right to discriminate is uncertain, but it is apparent from his writings that he contends (at a minimum) that governments should not interfere with discrimination in employment by private institutions. Hayek contends that private educational institutions should be permitted to discriminate, but public ones should not.<sup>2</sup> Other aspects of Hayek's theories impute that the public-private distinction applies to other industries aside from education.<sup>3</sup> Hayek at a minimum advocates that private employers have a right to discriminate.<sup>4</sup> This is also in accordance with other facets of Hayek's theories of economics, politics, and law that resist governmental interference with the spontaneous order, and directed economic intervention in the dealings of citizens. According to Hayek, all governmental restrictions upon the economic relations of individuals within an economy, including restrictions upon the individual right to discriminate in private employment, should be avoided.

The exact scope of the right to discriminate, as described by Hayek, is uncertain but clarity about this question is not necessary to determine that restriction of the right to discriminate is necessary. Hayek at a minimum adopts a narrow construction of the right to discriminate, but there is also a broad interpretation. The narrow interpretation of the right to discriminate entails only non-governmental employers. The narrow interpretation of the right to

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<sup>2</sup> EBENSTEIN, *supra* note 1, at 294-295.

<sup>3</sup> See *infra*, Section I(C) (addressing the distinction between *nomos*, private law applicable to all, and *thesis*, public law applicable primarily to government, in Hayek's theoretical works).

<sup>4</sup> See RICHARD BOYD, *UNCIVIL SOCIETY: THE PERILS OF PLURALISM AND THE MAKING OF MODERN LIBERALISM*, 282-283 (Lexington Books 2004) (speculating an alternative position on Hayek; claiming that a prohibition on discrimination in employment, may satisfy Hayek's criteria); and JOHN TOUCHIE, *HAYEK AND HUMAN RIGHTS: FOUNDATIONS FOR A MINIMALIST APPROACH TO LAW*, 138 (Edward Elgar Publishing 2005).

discriminate never treats a government as a private employer, even when a government intervenes in the economy by hiring individuals to work for it. The broad interpretation of the right to discriminate extends to government employment in the marketplace, such as when a government agency hires employees. Under the broad interpretation, employment by a public institution constitutes private employment under some circumstances.

From Hayek's sparse writings on employment discrimination, it is unclear which interpretation he adopts, but it is apparent that, at a minimum, he adopts the narrow construction of the right to discriminate. This essay will not reach the response to this question because, as will be explained, regardless of the interpretation Hayek adopts, the right to discriminate is outweighed by the need to preserve substantive and procedural due process within the United States' predominantly employment at will system.

Hayek views legislation with skepticism and community planning by government in the form of economic regulation as contravening the principle of liberty. Despite the fact that the right to discriminate implies that antidiscrimination legislation should be repealed, Hayek is equally firm in opposing discriminatory legislation that interferes with individual liberty. When speaking, for example, of the apartheid law of South Africa, Hayek argues that the apartheid law, appears to be a clear and even extreme instance of that discrimination between different individuals which seems to me to be incompatible with the reign of liberty....[T]he fact that the laws under which government can use coercion are equal for all responsible adult members of that society. Any kind of discrimination — be it on grounds of religion, political opinion, race, or whatever it is — seems to be incompatible with the idea of freedom under the law. Experience has shown that separate never is equal and cannot be equal.<sup>5</sup>

Although Hayek's right to discriminate requires that antidiscrimination laws be repealed, Hayek views mandated discrimination with similar disdain. Hayek views mandated discrimination as an impermissible interference by the government with the liberty and economic relations of individuals.

Under the auspices of the Pacific Academy of Advanced Studies and the University of California, Los Angeles Oral History Program, several Nobel laureate economists, including Hayek, were slated for interviews as part of an oral history project.<sup>6</sup> As part of this project, in the late 1970s, Hayek gave a series of interviews to nine distinguished interviewers.<sup>7</sup> Throughout these interviews, Hayek responds to questions about his upbringing, his experience as a professor, his books, his relationships, and several other aspects of his life and thought.<sup>8</sup> Hayek also expresses his views as to affirmative action legislation in an interview with Mr. Tom Hazlett.

When interviewer, Tom Hazlett explained the process of affirmative action in the United States, Hayek responded by asking Hazlett to clarify the meaning of "affirmative action,"

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<sup>5</sup> EBENSTEIN, *supra* note 1, at 294-295 (quoting *Conversation with Systematic Liberalism*, FORUM, 6-7 (September 1961)).

<sup>6</sup> The Hayek Interviews: Alive and Influential, available at: [http://hayek.ufm.edu/index.php/About\\_these\\_videos](http://hayek.ufm.edu/index.php/About_these_videos) (last visited May 7, 2012); and Transcripts to Hayek Interviews, available at: <http://archive.org/details/nobelprizewinnin00haye> (last visited May 7, 2012) (funding eventually fell short for this oral history project, but not before interviewing Hayek).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

inquiring of Hazlett if he meant by affirmative action to, “achieve non-discrimination by discrimination.”<sup>9</sup> After this inquiry and grasping the concept of affirmative action, Hayek then elaborated that:

civilization rests on the fact that people are very different...and unless we allow these differences to exist...we shall stop the whole process of evolution...if you try to make the opportunities of all people equal you eliminate the main stimulus to evolution....What you explained to me about the meaning of affirmative action is the same dilemma which egalitarianism achieves: in order to make people equal you have to treat them differently. If you treat people, so far as government is concerned, alike, the result is necessarily inequality; you can have either freedom and inequality, or unfreedom and equality.<sup>10</sup>

As Hayek explains in the preceding interview, he views affirmative action legislation as an impediment to progress and freedom. In the attempt made by affirmative action to make people equal, it restricts individual freedoms, and violates the principle of liberty. Hayek’s arguments in opposition to affirmative action and apartheid are equally applicable to antidiscrimination legislation. According to Hayek’s reasoning, antidiscrimination legislation, while promoting equality of opportunity, leads to impermissible restrictions on liberty. His anti-interventionist views are affirmed by the theoretical models in his various books, including *The Road to Serfdom*, *The Constitution of Liberty*, and *Law, Legislation and Liberty*. The following sections detail these theoretical models.

### *B. Hayek’s Economic and Political Theory*

The first publications of *The Road to Serfdom* were in Great Britain on March 10, 1944, and in the United States on September 18, 1944.<sup>11</sup> In April 1945, *Reader’s Digest* released a condensed version to its almost nine million subscribers.<sup>12</sup> *The Road to Serfdom* rapidly gained popularity, influencing politicians and academics alike. Margaret Thatcher, the former Prime Minister of Great Britain; former President of the United States, Ronald Reagan; and Nobel laureate economist, Milton Friedman all acknowledged Hayek’s influence upon their work and policy.<sup>13</sup> *The Road to Serfdom* gained in popularity throughout the economically tumultuous twentieth century, eventually being named one of the one hundred most influential books of the

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<sup>9</sup> Tom Hazlett Interviews Friedrich A. Hayek (November 12, 1978), available at: [http://hayek.ufm.edu/index.php?title=Tom\\_Hazlett](http://hayek.ufm.edu/index.php?title=Tom_Hazlett) (last visited April 22, 2012); and Transcripts to Hayek Interviews, *supra* note 6, at 324-43.

<sup>10</sup> *Id.*

<sup>11</sup> FRIEDRICH HAYEK, *THE ROAD TO SERFDOM*, 18-19 (Bruce Caldwell ed., University of Chicago Press 2007) (1944).

<sup>12</sup> *Id.*

<sup>13</sup> Stephen Foley, *Friedrich Hayek: Darling of the right is reborn in the USA*, THE INDEPENDENT (July 3, 2010), available at: <http://www.independent.co.uk/news/world/americas/friedrich-hayek-darling-of-the-right-is-reborn-in-the-usa-2017267.html> (last visited April 23, 2012); and HAYEK, *supra* note 11, at 259-263.

twentieth century by the New York Public Library.<sup>14</sup> From the early 1990s to the global economic crisis in the first decade of the twenty-first century, *The Road to Serfdom* and the constellation of Hayek's theories and policy recommendations, experienced a revival among broader constituencies of government leaders, scholars, and policy specialists in the United States and elsewhere as regulation and a struggling economy led people and economists to look for new solutions.<sup>15</sup>

Hayek originally intended to name *The Road to Serfdom* after the writings of liberal thinker Alexis de Tocqueville on the "road to servitude."<sup>16</sup> Hayek chose to incorporate "serfdom" instead of "servitude" into the title for purely phonetic reasons, but either word adequately designates the end of the historical progression described in his book.<sup>17</sup> Hayek's argument in *The Road to Serfdom* has both empirical and normative aspects. The empirical side of his argument is based on his perception of the thought progression that gave rise to the Nazi regime in early twentieth century Germany. The normative side of his argument is that Great Britain and the United States should avoid making the same mistakes that Germany made. Each argument is considered respectively in the following.

### 1. *The Empirical Argument*

Hayek attributes his empirical argument to his unique experience as a resident of multiple countries. At the time of writing *The Road to Serfdom*, Hayek lived roughly one-half of his adult life in Austria with close intellectual ties to Germany, and one-half in Great Britain and the United States.<sup>18</sup> After leaving Austria and experiencing the cultures of Great Britain and the United States, Hayek observes elements of socialist thought, central planning, and governmental intervention with the economy in Britain and the United States.<sup>19</sup> All are symptoms of what Hayek believes led to the totalitarian overtaking of Germany. Although observing these symptoms, Hayek is very cautious in his empirical argument, taking into account the fact that history will not necessarily repeat itself, but simultaneously recognizing that the dangers are afoot, and need to be addressed. As Hayek explains, "the forces which have destroyed freedom in Germany are also at work here and...the character and the source of this danger are, if possible, even less understood than they were in Germany."<sup>20</sup> The Hayekian "road to serfdom" begins with a democratic society that permits governmental intervention in the economy. The democratic society is overtaken by collectivist planning, resulting in a suppressed middle class. Once a middle class with wealth is reduced to poverty, it paves the way for a totalitarian regime

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<sup>14</sup> *No. 141: Road to Serfdom: 60th Anniversary of Hayek's Revolutionary Work*, CAROLINA JOURNAL (May 11, 2004), available at: [http://www.carolinajournal.com/opinions/display\\_story.html?id=1417](http://www.carolinajournal.com/opinions/display_story.html?id=1417) (last visited May 7, 2012).

<sup>15</sup> *Id.* See also Foley, *supra* note 13; and EBENSTEIN, *supra* note 1, at 266-306.

<sup>16</sup> EBENSTEIN, *supra* note 1, at 256, n. 18.

<sup>17</sup> Leo Rosten Interviews Friedrich A. Hayek (Part I) (November 15, 1978), available at: [http://hayek.ufm.edu/index.php?title=Leo\\_Rosten\\_Part\\_I](http://hayek.ufm.edu/index.php?title=Leo_Rosten_Part_I) (last visited April 23, 2012); and Transcripts to Hayek Interviews, *supra* note 6, at 76.

<sup>18</sup> HAYEK, *supra* note 11, at 57-59.

<sup>19</sup> *Id.* at 57-63.

<sup>20</sup> *Id.* at 58.

to overtake a populace in need of change and sustenance.<sup>21</sup> As Hayek describes, “Hitler did not have to destroy democracy; he merely took advantage of the decay of democracy and at the critical moment obtained the support of many to whom, though they detested Hitler; he yet seemed the only man strong enough to get things done.”<sup>22</sup> Hayek perceives the central planning and collectivist thought that resulted in the decay of democracy in Germany as present in the intellectual life of the United States and Great Britain.

From an empirical perspective, and without disregarding the potential for a black swan, Hayek surmises the forces that gave rise to the Nazi regime are similarly a threat to Britain and the United States. He contends that one should not hate the Germans for the actions of the Nazis, but rather one should reflect upon and admonish the ideas and doctrine that gave rise to the Nazis so that totalitarianism will not recur in other countries. The problem of induction is often explained in terms of the black swan.<sup>23</sup> One can spend one’s entire life viewing nothing but white swans, and, therefore, conclude that all swans are white. Nevertheless, one cannot entirely rule out the possibility that a black swan may one day appear, no matter how unlikely. In other words, one cannot deduce a generalized conclusion from a finite series of observations. Similarly, although Hayek perceives the progression towards serfdom in Germany, it does not necessarily follow that the same progression will occur in the United States or Great Britain. As he explains, “[a]ll parallels between developments in different countries are, of course, deceptive, but I am not basing my argument mainly on such parallels. Nor am I arguing that these developments are inevitable. If they were, there would be no point in writing this. They can be prevented if people realize in time where their efforts may lead.”<sup>24</sup> The need for realization and changing methodologies gives rise to the normative aspect of Hayek’s argument.

## 2. *The Normative Argument*

After identifying the potential problem empirically, Hayek develops a series of arguments in support of how governments should act to avoid the consequences that befell Germany. Although his arguments are economic in nature, they are fraught with elements of political theory. The justifications for Hayek’s normative arguments relate to how over-regulation affects a country generally and how over-regulation affects the mentality of individuals residing in a country. In determining how societies should be structured, Hayek appeals to the classical liberal tradition, contending that, “in the ordering of our affairs we should make as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion...”<sup>25</sup> Coercion for Hayek may take many forms, ranging from a strict socialist government such as in early twentieth century Germany, to looser conceptions of central planning and governmental

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<sup>21</sup> See generally HAYEK, *supra* note 11.

<sup>22</sup> *Id.* at 108-109.

<sup>23</sup> KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY*, 4 (ROUTLEDGE CLASSICS 2002) (1935); see also DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* (Tom Beauchamp ed., Oxford Publishing 1999) (1748).

<sup>24</sup> HAYEK, *supra* note 11, at 59.

<sup>25</sup> *Id.* at 71.

organization, such as Roosevelt's New Deal policies, the health care reform legislation of 2010,<sup>26</sup> or antidiscrimination regulations.<sup>27</sup> Regardless of the form, according to Hayek, governments should avoid such coercion whenever possible so as to allow for individualism to prevail, which in turn leads to innovation and prosperity.

The concept of "collectivism," for Hayek, entails socialism, but more accurately involves any method of governmental planning that leads to a redistribution of wealth. As Hayek explains: "[w]hat our planners demand is a central direction of all economic activity according to a single plan, laying down how the resources of society should be 'consciously directed' to serve particular ends in a definite way."<sup>28</sup> Planners are a broader concept than socialists according to Hayek, although the latter is entailed in the former, and throughout his works Hayek often interchangeably uses the two terms.

Planners have no place in liberal ideology, which presupposes that governments should only create the conditions within which individuals can thrive and can plan (as individuals) effectively, as opposed to planners who contend that governments must allocate resources through centralized planning in lieu of, or sometimes in conjunction with, limited individual planning.<sup>29</sup> This type of planning, which aims at redistributing wealth or resources, undercuts competition and, according to Hayek, "[a]ny attempts to control prices or quantities of particular commodities deprives competition of its power of bringing about an effective coordination of individual efforts, because price changes then cease to register all the relevant changes in circumstances and no longer provide a reliable guide for the individual's actions."<sup>30</sup> When referring to centralized planning, Hayek is most concerned with planning that impedes competition in the marketplace. Hayek believes that this type of centralized planning should be recognized as one step down the road to serfdom, acknowledged, and eliminated.

Hayek offers a society based on individualism as an alternative to centralized planning. He takes due care to distinguish individualism from negative connotations of "egoism" or "selfishness," but instead intends a much more practical meaning akin to the meaning of the classical liberals he reveres. That is to say, individualism can properly exist within a society that does not interfere with the economic decisions of its populace, thereby creating the conditions necessary for individuals to prosper in competition through pursuance of their own ideas, economics, and values. According to Hayek, an individualist adheres to the belief that individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others. It is this recognition of the individual as the ultimate judge of his ends, the belief that as

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<sup>26</sup> See e.g.: *Complexity is Bad For Your Health*, WALL STREET JOURNAL (April 9, 2012), available at: <http://online.wsj.com/article/SB10001424052702303302504577327752347952344.html> (last visited April 23, 2012).

<sup>27</sup> HAYEK, *supra* note 11, at 74.

<sup>28</sup> HAYEK, *supra* note 11, at 85.

<sup>29</sup> John Maynard Keynes, a contemporary of Hayek, is a proponent of centralized planning of this sort. Keynes's works are often seen as antithetical to Hayek, but there is nonetheless a documented history of mutual respect and admiration between Hayek and Keynes. See: Leo Rosten Interviews Hayek, available at: [http://hayek.ufm.edu/index.php/Leo\\_Rosten\\_Part\\_II](http://hayek.ufm.edu/index.php/Leo_Rosten_Part_II) (last visited May 31, 2012); and Transcripts to Hayek Interviews, *supra* note 6, at 120.

<sup>30</sup> HAYEK, *supra* note 11, at 86.

far as possible his own views ought to govern his actions, that forms the essence of the individualist position.<sup>31</sup>

Hayek's notion of individualism is integral to his view that governments should intervene neither with the economic choices of the populace nor with the distribution of resources.

Even as early as *The Road to Serfdom*, Hayek begins formulating his normative views as to the proper role of law within society. He provides a two-pronged argument in favor of what he in subsequent works refers to as a "spontaneous order" of law, composed of generally applicable rules, as opposed to specific orders.<sup>32</sup> In *The Road to Serfdom*, Hayek provides both economic and moral justifications for his view that governments should avoid centralized planning through law. The economic prong of Hayek's argument rests in the need for the predictability of general rules of law which are not intended to direct specific actions, but instead are broad enough so that individuals can plan within them, knowing full well the consequences of violations. These general rules "should allow the individuals freedom in everything which depends on the circumstances of time and place, because only the individuals concerned in each instance can fully know these circumstances and adapt their actions to them."<sup>33</sup> Because individuals in a particular circumstance are most apt to know the proper way to attend to the particular circumstance, governments should avoid promulgating specific orders that direct people to act in accordance with such orders when circumstances may not warrant the directed actions.

Hayek underpins his moral argument by the fact that lawmakers who create specific rules cannot be separated from the interests the lawmakers represent. By facilitating interests which, even if generally conceived, limit the planning of individuals or cause foreseeable consequences, the law "ceases to be a mere instrument to be used by the people and becomes instead an instrument used by the lawgiver upon the people and for his ends."<sup>34</sup> Hayek views centralized planning through specific orders that direct the people to consequences as both economically inefficient and immoral.

Hayek only briefly touches upon his detailed economic theory in *The Road to Serfdom*. He develops it in significantly greater depth in several other works.<sup>35</sup> However, the underlying economic and political position Hayek sets forth in *The Road to Serfdom* lays the macro position for his legal theory. The next section examines the intricacies of Hayek's anti-regulatory legal theory, as described first in *The Constitution of Liberty*, and then in his three-volume magnum opus, *Law, Legislation and Liberty*.

### C. Hayek's Legal Theory

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<sup>31</sup> *Id.* at 102.

<sup>32</sup> FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDERS*, 51 (University of Chicago Press 1983) (1973).

<sup>33</sup> *Id.* at 114.

<sup>34</sup> *Id.* at 115.

<sup>35</sup> See e.g. FRIEDRICH HAYEK, *MONETARY THEORY AND THE TRADE CYCLE* (Kelley Publishing, 1966) (1929); FRIEDRICH HAYEK, *PRICES AND PRODUCTION*, (Routledge Publishing 1931); FRIEDRICH HAYEK, *PROFITS, INTEREST AND INVESTMENT: AND OTHER ESSAYS ON THE THEORY OF INDUSTRIAL FLUCTUATIONS* (Routledge & Keegan Paul Ltd. 1950) (1939); and FRIEDRICH HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (University of Chicago Press 1980) (1948).



Many are familiar with Hayek's economic and political theory, but as some have posited, he "tried to drive" without understanding the mechanics of legal theory, and by leaving his primary field, subjected himself to significant criticism.<sup>36</sup> Perhaps Hayek overlooked certain points of law in his legal analyses, but his legal theory nevertheless remains largely consistent with his economic theory. On this basis, some defend him against critics by contending that these critics erroneously separate Hayek's legal theory from his economic theory, and in order to understand his legal position, one must first understand his economics.<sup>37</sup> According to some commentators, "the underlying inquiry that drove all of Hayek's research...asked how individuals coordinate their economic activities with those of others under varying institutional arrangements. The economic way of thinking in Hayek's rendering leads us to focus not on a set of behavioral postulates, but instead on how alternative institutional environments impact individual and group behavior."<sup>38</sup> This inquiry into coordination, according to these commentators, is equally applicable to Hayek's legal, political, and economic thought. Hayek's work considers how the institutions of law and politics affect the economic and other behaviors of individuals under their purview.

Hayek sets forth the foundation of his legal theory in his 1960 book, *The Constitution of Liberty*,<sup>39</sup> and further elaborates it in his three-volume set, *Law, Legislation, and Liberty*,<sup>40</sup> which was released beginning with Volume One in 1973, Volume 2 in 1976, and Volume 3 in 1979.<sup>41</sup> Hayek comments in the introduction to Volume One of *Law, Legislation, and Liberty* that he did not know he was going to write the three-volume set in 1960, otherwise he would have reserved the title, *The Constitution of Liberty*, for it.<sup>42</sup>

In relation to the argument that Hayek's theory requires the repeal of antidiscrimination legislation, Hayek's conception of the rule of law in chapter fourteen of *The Constitution of Liberty* is pertinent.<sup>43</sup> In this discussion, Hayek identifies attributes of a "true law" and discusses the institutions necessary to safeguard individual liberty. Hayek subsequently elaborates upon these three criteria in Volume One of *Law, Legislation, and Liberty*, wherein he explains the criteria of a "true law."<sup>44</sup> Hayek examines the requirements of law in terms of *nomos* (private law), which he describes as the law that evolved within the spontaneous order, and exists without

<sup>36</sup> John Hasnas, *Hayek, The Common Law, and Fluid Drive*, 1 NYU JOURNAL OF LAW & LIBERTY 79, 110 (2005). See also Richard Posner, *Hayek, Law, and Cognition*, 1 NYU JOURNAL OF LAW & LIBERTY 147 (2005); and John Hasnas, *Confusion about Hayek's Confusion: A Response to Morison*, 2 NYU JOURNAL OF LAW & LIBERTY 241 (2007).

<sup>37</sup> See e.g. Scott A. Beaulier, et al., *Knowledge, Economics, and Coordination: Understanding Hayek's Legal Theory*, 1 NYU JOURNAL OF LAW & LIBERTY 209 (2005).

<sup>38</sup> *Id.* at 216.

<sup>39</sup> FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (University of Chicago Press 2011).

<sup>40</sup> HAYEK, *supra* note 32; FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE*, (University of Chicago Press 1976); and FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY, VOLUME 3: THE POLITICAL ORDER OF A FREE PEOPLE* (University of Chicago Press 1979).

<sup>41</sup> *Id.*

<sup>42</sup> HAYEK, *supra* note 32, at 3.

<sup>43</sup> HAYEK, *supra* note 39, at 308-328.

<sup>44</sup> HAYEK, *supra* note 32, at 94-144.

reference to a particular will. *Nomos* is distinguished from *thesis* (public law), the law that governs the structure of organizations (particularly, governmental organizations); *thesis*, unlike *nomos*, is the product of deliberate human design.<sup>45</sup> Hayek considers *nomos* to be law applicable to all, whereas *thesis* is law that provides specific orders often through legislation or regulation (and frequently to governmental officials).<sup>46</sup> All forms of law do not fall neatly into one of these two categories, however, but some laws have characteristics of both *nomos* and *thesis*.

Antidiscrimination legislation is a form of what Hayek refers to as *social legislation*. Social legislation takes potential rules of private law, *nomos*, and transforms them into rules of public law, *thesis*, through governmental planning.<sup>47</sup> Social legislation, although a hybrid of *nomos* and *thesis*, should be examined under the criteria Hayek sets forth for a “true law” because its purported rationale for promulgation is based in *nomos*. Hayek contends that a “true law” must satisfy three criteria in order to be unobjectionable: (1) a true law must be general and equal; (2) a true law must be known and certain; and (3) a true law must promote freedom by safeguarding the private sphere.<sup>48</sup> All three criteria must be satisfied in order for a law to be a true law. In the case of antidiscrimination legislation, neither the first nor the third criterion is satisfied.

Antidiscrimination legislation is neither general nor equal. Hayek contends that social legislation plays a role in destroying the principle of equality, a necessary quality of true law.<sup>49</sup> Social legislation typically aims at giving some class a benefit to correct past discrimination, to provide governmental services to classes in need, or to direct private activity to specific ends.<sup>50</sup> This distinguishing of classes in order to benefit some over others violates the principle of equality. Social legislation, such as antidiscrimination law, violates the principle of equality.

Social legislation is typically not general because it singles out groups of people, often to correct past wrongs, but, under some circumstances, even a non-general law may be a true law. Antidiscrimination law identifies groups of protected classes, such as race, sex, national origin, disability, color, and pregnancy. This identification of groups of people, and granting of particular privileges to them, is in direct violation of the principle of generality. Although on its face, antidiscrimination law violates the principle of generality, Hayek designates a narrow, two-

<sup>45</sup> *Id.* See also Linda Raeder, *Liberalism and the Common Good: A Hayekian Perspective on Communitarianism*, 2(4) THE INDEPENDENT REVIEW 519, 528 (Spring 1998).

<sup>46</sup> HAYEK, *supra* note 32, at 94-144.

<sup>47</sup> *Id.* at 141-143. See also HAYEK, *supra* note 39, at 308-328.

<sup>48</sup> HAYEK, *supra* note 39, at 312-320. See also HAYEK, *supra* note 32, at 122 (Hayek clarifies these three criteria to include the following properties “which will of necessity belong to the law as it emerges from the judicial process: it will consist of rules regulating the conduct of persons towards others, applicable to an unknown number of future instances and containing prohibitions delimiting the boundary of the protected domain of each person (or organized group of persons). Every rule of this kind will in intention be perpetual, though subject to revision in the light of better insight into its interaction with other rules; and it will be valid only as part of a system of mutually modifying rules. These rules will achieve their intended effect of securing the formation of an abstract order of actions only through their universal application, while their application in the particular instance cannot be said to have a specific purpose distinct from the purpose of the system of rules as a whole”).

<sup>49</sup> *Id.* at 142. See also Ronald Hamowy, *Law and the Liberal Society: F. A. Hayek’s Constitution of Liberty*, 2(4) JOURNAL OF LIBERTARIAN STUDIES 287, 291 (1978).

<sup>50</sup> HAYEK, *supra* note 32, at 141-143.

pronged exception to the generality principle: non-general laws may be justified, according to Hayek, if they do not single out particulars and if both individuals within and outside the singled-out group are in favor of the distinction.<sup>51</sup> Hayek describes the first criterion as, “a true law should not name any particulars, so it should especially not single out any specific persons or group of persons,”<sup>52</sup> and the second criterion as, “[s]o long as...the distinction is favored by the majority both inside and outside the group, there is a strong presumption that it serves the ends of both. When, however, only those inside the group favor the distinction, it is clearly privilege; while if only those outside favor it, it is discrimination.”<sup>53</sup> A law that satisfied these two criteria satisfies the principle of generality through this limited exception.

It is arguable that antidiscrimination law in the United States may satisfy the two criteria excepting antidiscrimination legislation from the principle of generality. One could argue, for instance, that the first criterion is satisfied because classes of people, such as those identified in antidiscrimination legislation are not particular groups, but rather are more broadly construed. Further, it may be argued that the second criterion is satisfied because the majority of those inside and outside the identified classes are in favor of antidiscrimination legislation. These arguments, however, are not likely to pass muster because the classes of individuals identified in antidiscrimination legislation are particular classes (which are no more than large, singled-out groups). Even further, there is not empirical support for concluding that the majority of both those inside the groups and those outside the groups are in favor of antidiscrimination legislation. The federal or state legislatures pass these laws, but this does not necessarily imply that the majority of the population, those inside and outside the group, supports the legislation. Whether this narrow exception to the generality principle is satisfied or not, antidiscrimination legislation does not satisfy the equality principle and it does not satisfy the promotion of freedom principle.

The principle that true laws promote freedom by safeguarding the private sphere is not satisfied by antidiscrimination laws. The promotion-of-freedom principle generally forbids the promulgation of specific orders by the state (that coerce private individuals). A true law should promote liberty by preventing governmental encroachment upon individuals acting within the private sphere. As Hayek explains, the impetus of the rule of law “is to limit coercion by the power of the state to instances where it is explicitly required by general abstract rules which have been announced beforehand and which [are] applied equally to all people, and refer to circumstances known to them.”<sup>54</sup> Coercion of the state must be limited to only the situations when it is absolutely necessary. Antidiscrimination laws do not satisfy this promotion-of-freedom principle which prohibits state coercion directed towards the private life of individuals. To the contrary, antidiscrimination laws impose specific requirements upon the actions of private individuals.

Hayek’s criteria for a true law are not satisfied by antidiscrimination legislation. Antidiscrimination legislation does not satisfy the equality principle, does not satisfy the promotion- of-freedom principle, and likely does not satisfy the generality principle (but even if antidiscrimination legislation is found to fall into the narrow two-pronged exception to the generality principle, the failure to satisfy either of the other two principles is sufficient to require

<sup>51</sup> HAYEK, *supra* note 39, at 222-223; *see also* Hamowy, *supra* note 49, at 291.

<sup>52</sup> *Id.* at 222.

<sup>53</sup> *Id.* at 223.

<sup>54</sup> F. A. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW*, 34 (Cairo: The National Bank of Egypt Publishing 1955); *see also* HAYEK, *supra* note 39, at 8.

repeal of antidiscrimination laws). Antidiscrimination laws are antithetical to the legal, economic, and political theory of Hayek. The next section examines the employment at will doctrine in the United States. It is followed by a discussion of the antidiscrimination law exception to the employment at will doctrine, concluding that despite Hayek's warnings, antidiscrimination laws are necessary to protect the rights of employees within the United States.

## II. THE EMPLOYMENT AT WILL DOCTRINE

The default rule governing employment relationships in most of the United States is the employment at will doctrine. Employment at will originated in the United States, with an important reference to it in the 1877 treatise by Professor H. G. Wood on master-servant law.<sup>55</sup> In this treatise, Professor Wood stated, "[a] general or indefinite hiring is prima facie a hiring at will."<sup>56</sup> The employment at will doctrine is not adopted by most Western European nations.<sup>57</sup> Employment at will permits both the employer and employee to sever the employment relationship at any time and for any reason, for good cause, bad cause, or no cause at all.<sup>58</sup> Employment at will is largely in accordance with Hayek's view that individuals in a given situation are best equipped to navigate their particular situation, and determine the scope, existence, and termination of their relationships. According to Hayek, if governments regulate individuals in unpredictable circumstances such as employment relationships, then governments are infringing the individual liberties of the employer and employee.<sup>59</sup>

Although the basic principles of employment at will are in accord with Hayek's theory, the many exceptions to the employment at will doctrine are antithetical to Hayekian economic, political, and legal theory. During the mid-twentieth century, judges began carving out exceptions to the employment at will doctrine, permitting wrongful termination claims under specific circumstances.<sup>60</sup> Today, states vary in their exceptions to the employment at will doctrine, but some permit wrongful termination actions to proceed for various reasons, including: termination in violation of public policy, termination in retaliation for whistleblowing, termination in violation of employee handbook procedures, termination for refusing to violate codes of professional conduct, termination for refusing to commit a crime, or even termination in violation of an employment contract.<sup>61</sup> In all states it is illegal to terminate an employee in violation of state or federal statutory law, including antidiscrimination laws.<sup>62</sup>

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<sup>55</sup> Daniel O'Donnell, Jr., *Employers Beware: The Missouri Court of Appeals Takes a Bite Out of the Employment-At-Will Doctrine*, 71 MO. L. REV. 823, 826-827 (Summer 2006); and H. G. WOOD, A TREATISE OF THE LAW OF MASTER AND SERVANT, 272 (John D. Parsons Jr. Publishing 1877). See also Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 520 (Winter 2004).

<sup>56</sup> WOOD, *supra* note 55, at 272.

<sup>57</sup> O'Donnell, *supra* note 55, at 826-827.

<sup>58</sup> *Id.*

<sup>59</sup> See Section I, *supra*.

<sup>60</sup> O'Donnell, *supra* note 55, at 826-827.

<sup>61</sup> ROGER MILLER & GAYLORD JENTZ, FUNDAMENTALS OF BUSINESS LAW, 467-469 (Cengage Advantage Books 8<sup>th</sup> ed. 2010).

<sup>62</sup> *Id.*

The employment at will doctrine led to academic debate, with some commentators supporting its necessity for a free market system, and others claiming it as an archaic doctrine that violates due process. The remainder of this section examines the arguments for and against employment at will. In addition to the Hayekian argument in favor of non-regulation of employment relationships on the basis of economics, morality, and anti-collectivism, there are at least five arguments in favor of employment at will, with countervailing views against. These arguments involve opposing views as to: (1) freedom of contract; (2) utility or efficiency; (3) consent; (4) proprietary rights; and (5) distribution.<sup>63</sup> The following discussion considers each of these positions.

There are strong arguments both for and against the employment at will doctrine based in principles of fairness and freedom of contract. Proponents of the employment at will doctrine contend that freedom of contract and principles of fairness override the need for due process in the termination of an employment arrangement. Due to the mutuality of freedom that the employment at will doctrine entails, with both the employee and employer maintaining the ability to sever the relationship in favor of more lucrative or otherwise preferable opportunities, the arrangement is fair to both parties. Governmental intervention in marriage, political preference, and religion are generally considered reprehensible, and so, too, is such intervention in employment. Basic principles of fairness and contractual freedom require that at-will employment relationships be permissible without governmental intervention. Notwithstanding this, as in all contractual relationships, there are limits to the freedom, including prohibitions against fraud, and public policy violations for which either at-will party can seek relief.<sup>64</sup>

Critics of the employment at will doctrine argue that, despite the overarching importance of freedom of contract, if either party to the at-will relationship acts arbitrarily, the other party's freedoms are restricted. This is particularly the case when an employer acts arbitrarily, leaving an employee without a means of sustenance, and perhaps even limiting job prospects for the future.<sup>65</sup> For these critics, employment at will deprives the parties and especially the employee of life, liberty, and property without a fair hearing particularly when an employer acts arbitrarily when terminating an employee.

The second round of arguments is based in the maximization of utility or efficiency by employment at will arrangements. As this argument goes, the benefits of employment at will outweigh the disadvantages of the doctrine. That is to say, "the rights under the contract at will are fully bilateral, so that the employee can use the contract as a means to control the firm, just as the firm uses it to control the worker."<sup>66</sup> The proponents of employment at will resort to utilitarian principles of net maximal gain in their justification for the doctrine. These proponents argue that due process rights in employment will result in increased costs to employers and decreased wages, as opposed to meeting the preference of employees with larger salaries.<sup>67</sup> These commentators argue that net maximal gain is achieved through employment at will, which avoids employer cost increases and permits for the payment of larger employee salaries.

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<sup>63</sup> Patricia Werhane & Tara Radin, *Employment at Will and Due Process*, in *ETHICAL THEORY AND BUSINESS*, 266-275, 269 (Tom Beauchamp & Norman Bowie eds., Prentice Hall, 6<sup>th</sup> ed. 2001); and Richard Epstein, *In Defense of the Contract at Will*, 51 *THE UNIVERSITY OF CHICAGO LAW REVIEW* 947, 953-982 (Autumn 1984).

<sup>64</sup> Epstein, *supra* note 63, at 953-955.

<sup>65</sup> Werhane & Radin, *supra* note 63, at 270.

<sup>66</sup> Epstein, *supra* note 63, at 957.

<sup>67</sup> Werhane & Radin, *supra* note 63, at 271.

Opponents of the employment at will doctrine regard the proponents' contention that due process in employment relationships will increase employer costs and decrease wages as unverified assumptions. There is no evidence to support the assessment that initiating due process for employees will result in increased costs for employers; moreover, although some employees may prefer larger salaries instead of due process, it is not necessarily the preference of all.<sup>68</sup> In order to justify the assertions of higher employer costs and lower employee wages, the proponents of employment at will need to provide more evidence, and not just unverified assumptions.

The third round of arguments concerns the implicit or explicit consent of the employee when engaging voluntarily in an employment at will arrangement. An employee voluntarily chooses to engage in the duties associated with taking a particular job, including the duty of loyalty to the employer, with consensual knowledge that he or she is an at-will employee.<sup>69</sup> In response to this voluntariness argument, some contend that voluntary arrangements imply reciprocal obligations. That is to say, that both the employee and employer have reciprocating duties of loyalty, trust, and respect as moral agents entering into a voluntary arrangement. In this way, employment at will is a mutually restrictive relationship bound by these underlying moral requirements.<sup>70</sup>

Argument four surrounds the employer's proprietary rights in the labor obtained by virtue of working employees. This argument claims that "proprietary rights of employers guarantee that they may employ or dismiss whomever and whenever they wish... [When terminating an employee] the employer is not denying rights to *persons*. Rather, the employer is simply excluding that person's *labor* from the organization."<sup>71</sup> Nevertheless, labor in an employment at will relationship requires a person who provides that labor. A person providing labor cannot be separated from his or her productivity. When an employer terminates the costs associated with the labor, the employer is in fact terminating a person, a rational being. Employers must avoid arbitrariness in terminating rational beings by providing reasons to employees for their termination.<sup>72</sup>

The final argument involves issues of distribution. Some argue that employment at will infringes on the liberty of individuals, and that the change to for-cause or due process termination requirements will advance individual liberty interests.<sup>73</sup> By permitting security in employment positions, a result may be the equalization of distribution. However, opponents argue that employment at will applies to all individuals, regardless of the rank of the individual, including heads of companies and entry-level workers. Thus, according to these commentators, there is currently no misdistribution resulting from employment at will.<sup>74</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 269.

<sup>70</sup> *Id.* at 270.

<sup>71</sup> *Id.* at 269.

<sup>72</sup> *Id.* at 269-270.

<sup>73</sup> Epstein, *supra* note 63, at 977 (citing Lawrence Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06, 1413-14, 1435 (1967).

<sup>74</sup> *Id.* at 977-979.

Despite the strong positions on both sides of the preceding arguments, according to Hayek, the principles of a true law, including equality, generality, promotion of freedom, and predictability, require that governments avoid restricting the freedom of individuals to terminate employment relationships by imposing coercive due process requirements on employers. Hayek holds that governmental interference with economic activities limits the freedoms of individuals. According to Hayek, regardless of the occasional bad employment situation, the freedom to engage in and terminate employment relationships, and thus to engage in free competition and individual planning, overrides the potential disadvantages of employment at will. This paper next turns to federal antidiscrimination laws. It then examines how, despite Hayek's observations, employment antidiscrimination laws promote substantive and procedural due process within the at-will employment system in the United States.

### III. THE FEDERAL LAW EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE

The federal law exception to employment at will provides qualifying employees, regardless of whether they are at-will or not, with grounds to bring suit if they are terminated in violation of federal antidiscrimination laws.<sup>75</sup> There are many federal laws that give rise to exceptions to the employment at will doctrine,<sup>76</sup> and many state and local laws that provide antidiscrimination protections,<sup>77</sup> but this section focuses exclusively on federal antidiscrimination laws.<sup>78</sup> Federal antidiscrimination laws prohibit discrimination in employment, including hiring, firing, and the terms and conditions of employment, on the basis of the protected classes of: race, sex, religion, color, national origin, disability, pregnancy, and age.<sup>79</sup> If an employer bases an adverse employment decision, including termination, upon one of these protected classes, then the employee may bring legal action against the employer under the federal antidiscrimination law exception to the employment at will doctrine. Federal antidiscrimination law is a point of scholarly debate with some commentators arguing it should be repealed and other commentators arguing it should remain in force. The following sections consider the merits of these arguments.

#### *A. Arguments against Federal Antidiscrimination Employment Laws*

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<sup>75</sup> There are pre-qualifying conditions for some federal antidiscrimination laws to apply. For example, for an employee to bring action under Title VII to the Civil Rights Act of 1964, the employer must employ at least 15 employees. Some state antidiscrimination laws have a lower threshold or no threshold at all.

<sup>76</sup> These laws include (non-exclusively): Title VII to the Civil Rights Act of 1964, The American With Disabilities Act, The Age Discrimination in Employment Act, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, the Pregnancy Discrimination Act, the Family Medical and Leave Act, The Worker Adjustment & Retraining Notification Act, the Fair Labor Standards Act, and the Civil Rights Act of 1991.

<sup>77</sup> The arguments in this section are equally applicable to state and local antidiscrimination laws, but because the states and local jurisdictions vary as to the scope of protections, as well as which classes are considered protected, to simplify matters, this essay will focus solely on federal antidiscrimination laws.

<sup>78</sup> For the purposes of this essay, federal antidiscrimination laws are generally construed to include the following, although other laws provide non-discrimination protection under various circumstances: Title VII to the Civil Rights Act of 1964, The American With Disabilities Act, The Age Discrimination in Employment Act, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, the Pregnancy Discrimination Act, and the Civil Rights Act of 1991.

<sup>79</sup> *Id.* (non-exclusive compilation of protected classes of pertinent federal laws).

The arguments against federal antidiscrimination employment laws focus on the most influential federal antidiscrimination employment law, Title VII of the Civil Rights Act of 1964, which covers both private and certain public actors. These arguments align closely with Hayek insofar as they concern only the repeal of aspects of federal antidiscrimination employment laws that affect private actors in competitive markets. As discussed, Hayek, at a minimum, opposes antidiscrimination legislation that prohibits discrimination by private actors.<sup>80</sup> Hayek's right to discriminate extends, at a minimum, to private employers,<sup>81</sup> and this right to discriminate is in accord with Hayek's theories of economics, politics, and law which resist governmental interference with the spontaneous order, and oppose directed economic intervention in the dealings of individuals. The arguments against federal antidiscrimination laws include: (1) free market competition; (2) regulatory impediments to liberty; (3) exorbitant costs to society; and (4) obsolescence. The following discussion considers each of these arguments.

The free market competition argument holds that individuals working in a free market will be prone to promote diversity in order to reach the largest market. Principles of free market competition require that individuals be permitted to enter and exit the market without barriers. To assume that certain races and religions will only do business with each other is contrary to principles of market economics, including the need to expand market opportunities as much as possible, and the need to diversify in order to attain the largest market. Due to the competitive necessities of diversification, there is no need for antidiscrimination laws that limit freedom of choice and independent planning.<sup>82</sup> This argument aligns closely with the classic liberal position that governmental regulation impedes liberty, and that "we are in a world in which all persons have secured a liberty of the person by a prohibition against the use of force."<sup>83</sup> According to these commentators, by prohibiting governmental coercion in the marketplace, market participants will naturally diversify in order to maximize profit potential.

The second argument in favor of repeal concludes that people should have the right to associate with or disassociate from whomever they please, whenever they please. Employment discrimination laws infringe upon individuals' abilities to freely determine the scope, beginning, and end of their employment relationships. The coercive governmental intervention that restricts individual planning and choice violates principles of liberty.<sup>84</sup> This second argument is classically Hayekian insofar as it condemns governmental interference with the economic activities of the populace, and promotes individual planning within the private sphere.

The third argument in favor of repeal of the antidiscrimination laws relates to the exorbitant costs antidiscrimination laws pose to society. In 2010, the Equal Employment Opportunity Commission (EEOC) received the largest number of filings in history, and this number was exceeded in 2011.<sup>85</sup> Simply to operate the EEOC on an annual basis costs the

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<sup>80</sup> See Section I *supra*; and EBENSTEIN, *supra* note 1, at 294-295.

<sup>81</sup> *Id.*

<sup>82</sup> Richard Epstein & Erwin Chemerinski, *Forum: Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 S. CAL. INTERDISC. L. J. 349, 349-356 (1993).

<sup>83</sup> *Id.* at 352.

<sup>84</sup> *Id.* at 349-356.

<sup>85</sup> See EEOC Enforcement Statistics, available at: <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited May 12, 2012); and Allison Lin, *Discrimination Complaints Reach All Time High*, MSNBC (January 24,



federal government hundreds of millions of dollars, in amounts that steadily increase almost every year in operation.<sup>86</sup> The costs to companies defending employment discrimination claims are also exorbitant, often reaching hundreds of thousands of dollars per an individual claim. Thus, the costs associated with maintaining an equal employment opportunity system outweigh the limited benefits that may arise by virtue of such a system.

As the fourth argument goes, the antidiscrimination system is obsolete. As one commentator explains:

There were some gains attributable to the passage of the civil rights statutes in the years before 1975. I think that it is fair to say that virtually all of those gains had to do with the dismantling of the apparatus of segregation as it existed in the old South, and with the change in union practices throughout the country. But by the same token, if you look at the post-1975 period, there are two critical findings that are in close correlation with each other. There is both a relative stability in black/white wage differentials, and a decline in the overall level of wage growth.<sup>87</sup>

The purpose of the antidiscrimination legal regime was to correct past wrongs, and to make up for a history of discrimination within the United States. According to these commentators, the antidiscrimination laws assuaged these past wrongs, so it is time to move beyond these correctional methodologies that are costing the United States huge financial sums to maintain, and infringing upon individual liberties. Although these four arguments against antidiscrimination laws are formidable, there are also strong reasons to insist upon the continuation and enforcement of antidiscrimination legislation. The following section details this position.

### *B. Arguments for Federal Antidiscrimination Employment Laws*

The case in favor of the continuation and enforcement of antidiscrimination laws is even stronger than the formidable case opposing them. The stronger case addresses the arguments made by opponents of federal antidiscrimination legislation and provides additional reasons in support of prohibitions against discrimination. There are several reasons to disbelieve that freedom of competition and liberty concerns will result in a society that does not discriminate. Prior to the enactment of the Civil Rights Act of 1964, discrimination was pervasive. Well-educated and qualified individuals could not attain positions simply because of the color of their skin, their gender, or their religion.<sup>88</sup> The United States' government attempted a non-interventionist regime prior to 1964, and it failed.

In addition to failing to prevent discrimination in employment, freedom of competition and liberty come up short as to promoting diversity. Instead, a regime promoting the right to discriminate may result in members of dominant ethnic groups overtaking the market place, leaving qualified individuals without employment.<sup>89</sup> As one commentator explains:

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2012), available at: [http://bottomline.msnbc.msn.com/\\_news/2012/01/24/10225036-discrimination-complaints-reach-all-time-high?threadId=3327752&pc=25&sp=25](http://bottomline.msnbc.msn.com/_news/2012/01/24/10225036-discrimination-complaints-reach-all-time-high?threadId=3327752&pc=25&sp=25) (last visited May 12, 2012).

<sup>86</sup> EEOC Budget Statistics, available at: <http://archive.eeoc.gov/abouteeoc/plan/budgetandstaffing.html> (last visited May 12, 2012).

<sup>87</sup> Epstein & Chemerinski, *supra* note 82, at 356.

<sup>88</sup> *Id.* at 356-362.

<sup>89</sup> *Id.*

The reality is that because of prejudice, employers discount the skills and talents of minorities. Because of prejudice, employers discount the skills and talents of women, or Jews, or gays and lesbians. And as a result, when prejudice is pervasive throughout society the market system repeatedly undervalues contributions of these individuals and as a result these people never get hired as they should.<sup>90</sup>

Prejudice will not simply disappear because of free market principles that may give rise to the need to diversify to gain the competitive edge. To the contrary, many deserving individuals may be unable to find, keep, or improve their employment situation due to prejudices and bigotry. The primary justification for repeal of antidiscrimination laws, the promotion of freedom of competition, does not solve the underlying problem of discrimination.

Perhaps one may move as Hayek did, and contend that in private enterprises, individuals have the right to discriminate. It is a right equally available to all people, regardless of ethnicity, creed, nationality, or gender. Because the right to discriminate is available to all people, it promotes true equality. Further, according to Hayek, discrimination in private enterprises is a right, so presumptions as to its immorality should not be made without further justifications. To presume discrimination is wrong is begging the question of whether it is wrong or not. Those in favor of antidiscrimination legislation need to develop a better moral justification than arguing that discrimination is wrong, and legislation is needed to stop this wrong. Discrimination will, after all, continue whether or not such legislation exists. In response to this Hayekian argument, there are at least six additional arguments in favor of antidiscrimination laws: (1) fairness, (2) equality, (3) opportunity costs to society, (4) success of laws, (5) optimization, and (6) due process. The following discussion analyzes each of these arguments, respectively.

Discrimination without legal recourse is simply not fair to its victims, violates equality, and poses significant costs on society. Individuals who are terminated, not promoted, or even not hired due to their gender, religion, color, national origin or any other protected class are human beings with inherent dignity, i.e., apart from the superficial legacy features to which people have imputed identity and association. As one commentator argues, “[t]hink of the loss of human potential in that person [who is discriminated against]. A person is not able to pursue his or her calling and find fulfillment because of discrimination. Think of the enormous dignity harm to that person who can't get a job or can't get a promotion because of discrimination.”<sup>91</sup> Individuals who are treated poorly due to class membership are still human beings. Because of employment antidiscrimination laws, human beings have legal recourse and psychological relief against abhorrent acts of discrimination.

The argument based on fairness goes hand-in-hand with the second argument in favor of equality. The United States' laws are based on fundamental principles of equality before the law. Individuals are not given the equal opportunity to live the American dream because of discrimination, prejudices, and bigotry. Antidiscrimination legislation prevents societal harm by valuing uncompromised equality of opportunity to all individuals regardless of class membership.<sup>92</sup> Antidiscrimination laws are necessary to promote true equality under the law, including equality of opportunity.

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<sup>90</sup> *Id.* at 357.

<sup>91</sup> *Id.* at 359.

<sup>92</sup> Epstein & Chemerinski, *supra* note 82, at 359.

The third argument in favor of antidiscrimination laws is that the opportunity costs to society of potentially successful individuals who are never permitted the opportunity to attain that success is significant. These costs far outweigh the relative costs of the EEOC system and lawsuits. The expensive lawsuits may be justified because they permit class members the ability to seek redress for their wrongs.<sup>93</sup> As one commentator explains, “[w]e will never be able to measure the people who didn’t look for a job because they know of discrimination...Society loses terribly when there’s discrimination.”<sup>94</sup> The potential gain to a society for promoting equal opportunity to all significantly outweighs the costs of maintaining an equal opportunity law regime. Antidiscrimination legislation promotes fairness, increases equality, and decreases the significant costs to society as a whole.

The antidiscrimination laws make a difference in promoting the advancement of minorities within the United States. After the passing of Title VII of the Civil Rights Act of 1964, “with regard to almost every professional category, the number of minority employees went up as a result of employment discrimination laws.”<sup>95</sup> What is just as important as, if not more important than, the increase in minority positions, is that the antidiscrimination laws provide individuals with the constant reminder that discrimination is wrong. Moreover, antidiscrimination legislation gives class members knowledge that if they are discriminated against, there is recourse. Aside from the legal recourse, the psychological benefits to classes traditionally discriminated against cannot be measured in mere numbers. Nevertheless, the increase in minority employees across all professional categories can be measured. As one commentator explains, “[e]ven if the employment discrimination laws are nothing but a symbol, their symbol is one society must continue to have.”<sup>96</sup> If the government were to repeal antidiscrimination laws, imagine the fallout. It would be a message to the populace acknowledging the permissibility of discrimination, a message that the government certainly does not want to send to its people.

Argument five concerns the role antidiscrimination laws play in promoting optimization of market potential. Antidiscrimination laws aid in ensuring that all individuals, regardless of protected class, are given equal opportunity within the market. By providing equal opportunity to all individuals in the marketplace, each market participant is permitted to maximize his or her potential, which, in turn, leads to a more efficient and properly functioning marketplace. Discrimination arbitrarily prohibits market participants from attaining their full potential, and, in this way, leads to sub-optimization of the marketplace.<sup>97</sup>

Finally, and perhaps most important, antidiscrimination laws provide victims of discrimination both substantive and procedural due process in the United States’ predominantly employment at will system. Employment at will permits the termination of individuals for any reason or no reason at all, and even for morally wrong reasons.<sup>98</sup> Although exceptions to employment at will are proliferating, the government must protect individuals who are victims of

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 361.

<sup>96</sup> *Id.* at 362.

<sup>97</sup> The author thanks Professor Lester Myers of Georgetown University for pointing out the importance of market optimization, and how antidiscrimination laws play a role in increasing efficiency.

<sup>98</sup> Werhane & Radin, *supra* note 63, at 271.

arbitrary terminations based on animus towards protected classes. Although there is little recourse for individuals arbitrarily fired, there is some recourse for individuals terminated for morally wrong reasons, so long as antidiscrimination laws exist. By providing this recourse, antidiscrimination laws promote substantive and procedural due process for victims of discrimination. Victims of discrimination are given the opportunity to be heard, a fair hearing before an impartial tribunal (either administratively or in court), and the opportunity to seek redress for their grievances.

In sum, antidiscrimination laws promote fairness and equality, decrease opportunity costs to society, have a track record of success in the United States, promote market optimization, and promote substantive and procedural due process. The next section explains why antidiscrimination legislation is a necessary restriction on liberty.

#### **IV. ANTIDISCRIMINATION LEGISLATION IS A NECESSARY RESTRICTION ON LIBERTY**

F. A. Hayek lays out the road to serfdom as a road that may end with a totalitarian state if decisions are not made to prevent this catastrophe. If, however, Hayek's alternative pathway is strictly followed, the road leads to a state of unbridled discrimination. The alternative pathway Hayek provides is justified by the claim that restrictions on the right to discriminate and freedom of association contravene individual liberty. However, the benefits, including liberties, gained from employment antidiscrimination laws, outweigh any potential restrictions on liberty.

Hayekian theory contends that the right to discriminate is infringed by antidiscrimination legislation. Primarily, it is not established that there is a right to discriminate. Even assuming, *arguendo*, that there is a right to discriminate, the benefits of restricting discrimination through antidiscrimination legislation far outweigh the liberties lost by virtue of limiting the right to discriminate. Protected class members who would not be able to achieve their full potential because of discrimination are provided with equality of opportunity, fair treatment, and due process. On balance, these liberties, benefits, and variety of other positive attributes of antidiscrimination law significantly outweigh the putative liberties lost by limiting the right to discriminate.

Second, although Hayekian theory contends that governments should not restrict freedom of association through employment antidiscrimination laws, antidiscrimination laws do not limit freedom of association. Hayekian theory holds that antidiscrimination laws infringe upon the individual right of market participants to freely begin and end their market relationships as they deem appropriate. According to Hayek, governmental interference with the right to freely associate contravenes individual liberty. To this point there is significant merit. Governments should not interfere with individual decisions regarding who individuals may participate with in the market, but simultaneously governments should not prohibit individuals from engaging in the market with whomever they please.

Antidiscrimination laws create conditions whereby anyone can engage in the marketplace with anyone else, regardless of protected class membership. Antidiscrimination laws make it possible for individuals to freely associate with each other as they see fit, and provide remedies for individuals who refuse to engage with others in the marketplace solely because of protected class membership. By punishing individuals who choose not to associate freely with members of protected classes, antidiscrimination laws actually promote, instead of limit, freedom of association. The promotion of freedom of association, the increase in equality of opportunity, the

increase in fairness, the preservation of due process, and the variety of other benefits of antidiscrimination law significantly outweigh the restrictions of putative liberties asserted by Hayek.

## **CONCLUSION**

A strict reading of Hayek strongly supports a position for the repeal of antidiscrimination legislation. This is not to say that Hayek was a bigot, but instead, that Hayek's theories require non-governmental intervention with the right to discriminate and non-interference with individual rights to plan and sever employment relationships as individuals see fit. Hayek's theories are equally applicable to laws, such as apartheid, that require individuals to discriminate against each other. In either case, governmental intervention is impermissible. The road to discrimination follows a path of strict adherence to Hayek's classically liberal principles, while not taking into account the need to rectify past discrimination committed in the United States. The benefits of antidiscrimination legislation significantly outweigh the potential restrictions on liberty. For these reasons, despite Hayek's warnings opposing governmental intervention with economic activities of the populace, the road to discrimination is one that must not be travelled.