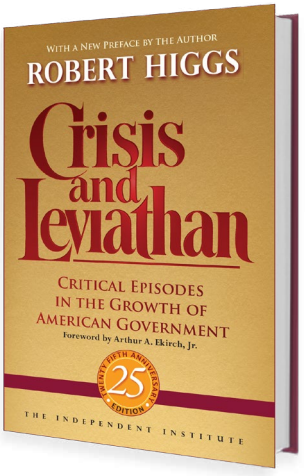
SUBSCRIBE NOW AND RECEIVE *CRISIS AND LEVIATHAN** FREE!

"***The Independent Review*** does not accept pronouncements of government officials nor the conventional wisdom at face value."
—**JOHN R. MACARTHUR**, Publisher, *Harper's*

"***The Independent Review*** is excellent."
—**GARY BECKER**, Noble Laureate in Economic Sciences

Subscribe to ***The Independent Review*** and receive a free book of your choice* such as the 25th Anniversary Edition of ***Crisis and Leviathan: Critical Episodes in the Growth of American Government***, by Founding Editor Robert Higgs. This quarterly journal, guided by co-editors Christopher J. Coyne, and Michael C. Munger, and Robert M. Whaples offers leading-edge insights on today's most critical issues in economics, healthcare, education, law, history, political science, philosophy, and sociology.



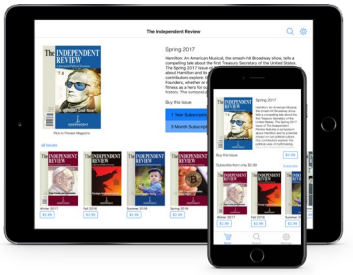
Thought-provoking and educational, ***The Independent Review*** is blazing the way toward informed debate!

Student? Educator? Journalist? Business or civic leader? Engaged citizen? This journal is for YOU!

*Order today for more *FREE* book options

SUBSCRIBE

Perfect for students or anyone on the go! ***The Independent Review*** is available on mobile devices or tablets: iOS devices, Amazon Kindle Fire, or Android through Magzter.



Download on the App Store | Available at amazon | Available on MAGZTER

INDEPENDENT INSTITUTE, 100 SWAN WAY, OAKLAND, CA 94621 • 800-927-8733 • REVIEW@INDEPENDENT.ORG PROMO CODE IRA1703

Liberty and Feminism

RICHARD A. EPSTEIN

What is the relationship between the status of women and the cause of liberty in modern times? The very tone of the question may suggest the anachronistic nature of this article. After all, the major battles over the status of women in the United States were fought long ago. They were, as it is sometimes difficult to remember, battles over civil capacity (for example, during the nineteenth century, the ability of married women to make contracts in their own right, to give evidence, to serve on juries) and over political capacity (for example, during the early twentieth century, the right of women to vote in political elections and to stand for office).

At the time, the resistance to these simple and self-evident claims was so great that in retrospect it is hard to fathom the political turmoil generated by such modest reforms. The strife was at least as great as the present-day contention over civil rights and affirmative action. Of course, the resolution of the major questions at issue by 1920 did not put an end to debates over the role and place of women in society. In this article I hope to give some sense of how the debate has progressed, and to indicate why the very arguments that rightly led to the legal reforms affecting the status of women during the nineteenth century militate against the demands for reform from the late-twentieth-century feminist movement. In stating this position, I do not mean to position myself in the vanguard of reaction. On the contrary, I believe that the progressive ideals of the nineteenth century remain just as progressive today.

The Basic Intellectual Framework

My political orientation is libertarian and laissez-faire, and the philosophical approaches I use to support that position are both utilitarian and consequentialist. These declarations require some qualification. In characterizing my position as

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago.

The Independent Review, v.IV, n.1, Summer 1999, ISSN 1086-1653, Copyright © 1999, pp. 5–17

libertarian and laissez-faire, I do not mean to embrace the smallest-government version of either philosophy. I consider indefensible the libertarian position that categorically excludes state provision of infrastructure and other public goods and condemns the use of the eminent domain power. The first task of government may well be to control the use of force and fraud, but the provision of public goods such as roads and courts requires the use of public power to assemble the lands and to insure open access. Taxation therefore becomes the preferred means for collecting revenue. That revenue, if spent ideally, would yield benefits to each person at least equal to the taxes paid. The eminent domain power could then be used to assemble parcels of land for common purposes in situations, such as highway construction, where individual owners have holdout positions that could block a project that serves the common good.

This reference to the common good suggests the utilitarian foundations of the system. I do not conceive of utility as a detached entity or ideal that deserves respect in and of itself. Utility does not hover above the crowd and eliminate the need to see the effects that social policies and the creation of legal rights and duties have on various individuals in society. On the contrary, my account of the common good is intensely individual. It seeks to recognize that any government scheme that limits or controls individual rights should work for the benefit of all people so limited. The common good is one in which all individuals share as individuals. It is not one in which the majority controls the fates of the political minority by political fiat. The key task of political institutions and political theory is to identify and secure rights that work to this common advantage. It is to allow the majority to govern the state but not to trample the minority.

Working out the issues set by this agenda can be difficult. The takings law is exceedingly complex even with respect to the condemnation of particular parcels of land. It becomes even more complex when one considers the state regulation of land use, intellectual property, and the various markets for labor and commodities. For the moment, however, we can put these complexities to one side, for they have little to do with the battles over civil and political status that dominated the nineteenth century. The issues of civil and political capacity concern the ability of individuals to enter into ordinary business and social transactions and to participate in the general political life of the nation. They are the sorts of rights that can be guaranteed to all individuals even if the state does not adhere to any single sound principle of taxation and regulation.

The basic point is that the ordinary definition of liberty gives one not only the capacity to move about freely but also the capacity to better oneself through voluntary transactions. The logic of those transactions is that of mutual gain through mutual consent. We can agree that individuals have complex visions of themselves and of what actions or states of affairs serve their self-interest. Still, all can improve their lot through exchange by surrendering what they value less for what they value more. How could one defend a system that excludes any portion of the population

from these advantages? To be sure, in any particular case someone might be relieved by the exclusion from the economic arena of those perceived as competitors rather than trading partners. But if we consider the entrance of women into the marketplace (or indeed the entrance of any other group previously subjected to systematic exclusion), the overall balance of convenience tilts sharply in favor of free entry. New entrants are not merely potential competitors; they are also potential coworkers, suppliers, customers, and consultants. When they assume those roles, the new entrants enhance the vitality of the social system as a whole.

Exclusions in this situation operate as an internal barrier against free trade, with consequences no better (and arguably worse) than those arising from the formal exclusion of foreign goods and labor via taxes, tariffs, quantitative restrictions, quotas, and the like. The necessary consequence of the exclusion is that gains from trade are blocked by the artificial barrier, leaving the sum of production possibilities reduced with no evident distributional advantages to offset that social loss. Moreover, the classical prohibitions on women's contracting and women's suffrage gave rise to suspicion, distrust, and regret that could have easily been eliminated by removing the barriers to entry that everywhere frustrated the operation of competitive markets.

One reason why the nineteenth-century case for women's rights was (and is) so strong is that it dovetails neatly into any and all theories that recognize the limits as well as the uses of markets. For example, the arguments for and against an antitrust law that limits horizontal price-fixing or mergers scarcely touch upon this issue. One cannot conceive of a single argument in which the exclusion of women from the marketplace improves the resolution of such questions. Likewise for issues of taxation and regulation. Moreover, we can think of good reasons why systematic exclusion from the political process is likely to cause profound dislocations: what gain arises from a system in which all are bound by but only some participate in decision making? A dominant set of solutions leads all libertarians and utilitarians to support the progressive movements of an earlier age.

From Women's Liberation to Feminism

What has brought about today's split between the feminists and the free traders who march under the utilitarian and libertarian banners? The first point of separation pertains to the name of the movement. When the present wave of feminist activity burst on the scene during the 1960s, it was closely tied to the antiwar movement and the racial upheaval in the United States. For a time the movement gave recognition to its libertarian roots in its choice of name: women's liberation. The term hearkened back to the earlier crusades to remove the formal barriers to entry in both economic and political markets. But the name did not stick. It was always a bit too cute and refined for its purpose, and it projected a certain genteel quality inconsistent with the more hard-edged and programmatic tone of the modern movement.

The shift in nomenclature, however, did not take place in a vacuum, given the parallelism between race and sex in the civil rights movement. The nineteenth-century version of the civil rights movement in race relations followed much the same path as the nineteenth-century women's movement. In order to allow slaves to assume the status of free individuals, one had only to abolish the institution of slavery. In the formative period of the women's movement, during the middle of the nineteenth century, abolitionism was *not* a program to grant freed blacks full civil and political rights. As Andrew Kull has written, "There were a hundred arguments to be made against slavery before anyone would necessarily reach the idea—occupying, then as now, a relatively remote level of abstraction—that the law ought not to distinguish between persons on the basis of color" (1992, 27). Indeed, one argument advanced in favor of the abolition of slavery was that it did *not* entail going further to embrace the ideal of the "equal protection of the laws." Rather, the point was that whites could rid themselves of the moral stain of slavery and racial domination without having to grant blacks full political and civil equality. Once the blacks were free, they could still be excluded from the vote and from public office. Likewise with respect to the sexes. Objections to the capacity to contract were more easily overcome than uneasiness about giving (as only men could) women the vote, where the implications for the diffusion of political power were far greater.

Equality of Opportunity or Result

By the 1960s, all legal obstacles to women's economic and political participation having been overcome, the dispute became focused on the true nature of equality. Within the earlier system there was little tension between liberty and equality. To insist that all persons have full civil and political capacity made liberty and equality perfectly consistent, just as the denial of some people's liberty to participate necessarily infringed on their entitlements.

Indeed, one of the great advantages of the earlier system had been that, because it focused on what came to be called with some derision the "formal" aspects of the system, the legal program for correction of the status quo ante and for implementation of powerful reforms was straightforward. In every area of life, de jure discrimination is much easier to understand and to attack than de facto discrimination. For de jure discrimination, the sufficient legal cure is to remove the disabilities under which certain individuals previously labored, allowing them to participate on the same terms as others. Equality of social and economic outcomes was never a feature of the system; participation rights and successful outcomes had no necessary connection. There was only the weaker but more profound assumption that the older distributions of power and privilege could not easily survive a massive infusion of new players into the system. The whole enterprise thus comported with the Hayekian insight that new entry necessarily changes the patterns of behavior for incumbents by destabilizing their cozy institutional arrangements.

In the legal system, however, a fundamental transition is never as tidy as this philosophical program might make it appear. Questions arise as to whether the transition from the old to the new regime has been successful or whether some political friction, resistance, or hostility has limited the value of the newly created legal rights. When outcomes differed, some observers inferred that opportunities must actually have differed as well.

To me, it seems obvious that equal opportunities will always yield unequal results. Nor will the differences in outcome be random within or across groups. Instead, in general, they will reflect powerful systematic tendencies. With respect to employment and social role differentiation by sex, the conclusion seems clear: a system of equal rights to participate in business and political life will result in differences of occupational choice and political behavior, among other things, as actual experience has amply confirmed.

In many cases, however, the difference in outcomes has not been taken as a response to systematic differences in preferences between men and women. Rather, it has been viewed as proof that the system itself does not operate in the proper fashion. One explanation is that "society" (often spoken of as some detached entity) distorts people's thinking so that the preferences underlying their behavior are not "authentic," no matter how deeply held. Instead, those preferences spring from acculturation and upbringing, which themselves operate improperly. To the psychological concerns about distorted preference formation some critics have added the usual suspects for market imperfections—asymmetrical information and improper discounting of future values—as well as unconscious discrimination, illicit stereotyping, unfortunate path dependence, ingrained cognitive biases, and of course glass ceilings—those things we can feel but cannot see.

As these notions gained currency the pressure mounted for aggressive regulatory action. In the United States, the first wave of so-called antidiscrimination regulation came in the mid-1960s with the Equal Pay Act of 1963 and the Civil Rights Act of 1964. To the latter the prohibition against sex discrimination was added not quite as a joke, but as a dubious stratagem by Southern senators determined to show the absurdity of prohibiting private discrimination on the basis of race.

The language in which these interferences with market behavior were couched, however, was the language of opportunity and capacity, not that of equality of result. Supporters of the new regulatory efforts presumed that so long as private employers could indulge their taste for discrimination—notice how the term "taste" serves to trivialize the importance of the manifested preference—then we would not really have a level playing field. (The implicit assumption seemed to be that all employer preferences operated in the same, undesirable direction.) Laws were therefore required to make sure that each firm offered the same opportunities to all individuals.

The prohibition against discrimination by sex makes some sense in the public sphere—the state should not prohibit women from competing, nor should it subject

them to differential taxes or other burdens—but now it was carried over to private parties without any regard for the traditional public–private distinction in the law. No longer would the obligation to provide equal opportunity be fulfilled by the removal of state obstacles to participation in markets. Now it extended to employers, landlords, and others, who would be required to operate essentially as if they were governmental entities or public utilities, even though they do not possess any monopoly power in labor markets.

Why this transformation? The answer has much to do with the perennial tension between equality of opportunity and equality of result. The former ideal is relatively uncontroversial as an abstract proposition. And, notwithstanding the derision heaped on a concern for mere "formal" equality, that conception helped fuel the most welcome nineteenth-century reforms. But the relationship between equality of results and equality of opportunity has always been problematic. Can we have confidence that the opportunities are equal when the results turn out to be quite different in terms of, for example, overall wage levels, occupational distributions, and career paths?

The optimistic view of the early civil rights movement was that we would never have to face headon the implications of the choice between these two standards of equality. Rather, because individuals were basically the same in their capabilities and interests, the removal of barriers to opportunities would quickly translate into an equalization of outcomes across the characteristics over which discrimination was forbidden, including sex. The optimism on that front proved to be misplaced in the case of both race and sex discrimination. Equality of opportunity did not translate into identical results in occupational choices or wage levels. Why not? And what, if anything, should be done about the disparities?

The initial approach was to treat the matter as a question of evidence. In the prevailing conception, to discriminate is to treat differently two individuals, who are alike in critical respects because of some irrelevant consideration. To the extent that one expects (as I do not) that the elimination of irrelevant considerations leads to similar forms of behavior, then disparate choices and disparate degrees of success call at the very least for an explanation. So the early statutes made it appear that although the ultimate concern was the *intent* to engage in disparate treatment, such intent could be inferred from the observed differences in outcome.[1] Originally the inference was relatively weak, and in principle the charge could be dissipated if an employer could show that his practices did not involve any form of prohibited discrimination. Stated otherwise, the evidence as to actual practices could be used to overcome the inference from differential results.

1. See, for example, *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), 804: "Statistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [his] refusal to rehire [a dismissed employee] in this case conformed to a general pattern of discrimination against blacks." A similar logic has been applied in cases of alleged sex discrimination.

That equilibrium, however, was delicate, and with time the balance changed. The evidence about intention was slippery and, besides, it is commonly believed that people act on the strength of various stereotypes and subconscious preconceptions, some of which are said to be so ingrained that they continue to operate even after they are called to the attention of those who labor under them. So what is needed is a bright light to reveal the hidden discrimination, and that revelation can be achieved only by treating the outcomes as dispositive of the discrimination question, wholly without regard to any direct evidence of intent to discriminate. The movement from treatment to impact defines one of the major aspects of the modern intellectual feminist movement.

Different Endowments, Different Behaviors

Recall again the premise of the argument: in equilibrium, similar distributions should exist for men and women over all relevant dimensions of employment. But why should we make that assumption? The issue here is not a moral question, the tacit implication being that those who deny the argument are misguided in their perceptions of how the world ought to be. Rather, the issue is a predictive question: do women and men in the aggregate choose similar career paths? The answer has to be no. I would be amazed if any voluntary sorting mechanism, such as the one operative in a market economy, ever produced such a result for *any* two population groups, let alone two that differ in some major and visible way, such as by sex.

To proceed with the argument, assume that both men and women seek to maximize their utility by finding the personal and occupational path that best suits their tastes and other natural endowments. The assumption here is that individual self-interest (suitably modified to take into account family and friends) drives and explains the behavior of individuals of both sexes. But the common commitment to self-interest, suitably defined, does not lead them to behave in the same way. The behavioral differences stem, in part, from differences in the endowments. These differences are manifestly physical, but also in many ways psychological. The physical differences seem too obvious to dispute. Nor can they be overcome by changes in diet or exercise; the biology matters too much for such social responses to neutralize the evident differences. Moreover, why would we suppose that the psychological makeup of men and women is identical when their physical differences are manifest?

Of course, all men are not identical, nor are all women identical in these characteristics. I mean to say only that their overall distributions differ in predictable ways along many dimensions. Within each sex, individuals differ widely, and the distributions often differ by sex. Women have a longer life expectancy than men, but not all women outlive all men. Men are taller than women on average, but some men are shorter than most women. In both cases, the differences are likely to be most pronounced at the extreme tails of the distributions. So it goes for any trait on which it is

possible to array individuals, both within and across sex groups. But for present purposes the group differences, not the individual differences within groups, are decisive.

We should not expect any specific sex-linked difference in endowment to manifest itself in only a single dimension. Suppose, for example, that men are physically stronger than women. It would be odd if, notwithstanding their relative weakness, women were physically more aggressive than men. How would their interest be served by pursuing a course of action that exposed them to greater peril than men? There is no survival value in a mismatch of physical and psychological traits. Rather, the sensible hypothesis is that evolution favors the emergence of personality traits that are organized and developed to complement physical traits in an integrated whole. Of course social influences also play a role. But socialization should reinforce the basic evolutionary tendencies. It is not in the interest of parents to guide their own children along the path to self-destruction. One may question the strength of the correspondences, but surely they are not nil. With differences across different dimensions thus reinforcing each other, we should expect to see fairly systematic differences in the *aggregate* data, even though both groups contain certain notable exceptions. And so long as the largest payoffs go to individuals at one or both tails, we should expect that the few cases at the extremes will exert a disproprtionate effect on the aggregate data, whether they pertain to influence or wealth.

That said, we should not neglect the middle of the distribution, either. With respect to the integration of home and work life, it seems indisputable that women, as a group, have to (and want to) devote a greater portion of their resources to childbirth and child rearing than men do. Pregnancy and nursing, of course, lie exclusively in the female domain. Although it is possible to substitute technology for parental care, such substitutions typically do not equalize the amount of child-care time given by each parent. The psychological dispositions should on average match the capacity to provide care, so that women would have a greater desire (or tolerance) for this activity than men do. Within families, that differential does not imply that women do all the child rearing and men none. But it does suggest that if couples optimize in making their trade-offs at the margin, women will do more child rearing than men, given the women's tendency toward a greater fondness and ability for that activity. The egalitarian marriage therefore faces a systematic obstacle in that by demanding equal child care by husband and wife, it reduces the total "production" from marriage, which in turn reduces the gains from entering into that relationship. It is no accident that many people use the word "house-husband" with a tinge of bemused disdain.

The effects of differential commitment are not confined to the division of responsibility in raising young children. It influences other occupational and educational choices that complement and depend on family choices. Women often leave the paid labor force or reduce their workloads there during the years that their children are young. There is no reason to suppose that their husbands have ordered them to do so. The more plausible explanation is that desires and functions align, as noted earlier, so that relative to

men, women have a greater desire to remain at home for extended periods, even at the cost of some occupational and career advancement. In my view, that difference in career choices is voluntary in most cases. Indeed, it is part-time work to make ends meet that many women regard as the distraction when they have young children at home. Most women who don't work full time don't want to work full time.

Once such a choice has been made, it influences the patterns of investments that people make in the workplace and in training for work. There arises a differential willingness to take jobs with high-risk characteristics (especially over the dimension of time). That in turn leads more women than men to work on a piecework basis, with stable income, so that the residual risk bearers are disproportionately men. Over time this difference influences the earnings levels by sex, the nature of the professions into which women and men go, and, more critically, the roles they occupy within those professions. Even if all people were the same in every dimension but one, we would see major differentiation in career paths and outcomes arising from the principle of comparative advantage. As women gravitate toward flexible hours, men move more often into jobs that require long hours and extended travel. As men gravitate toward professions that require great physical strength, women gravitate toward other professions, including counseling and administration. If the differences express themselves across multiple dimensions (including, as I have argued elsewhere [Epstein 1990, 1992, 1993], the taste for risk), then we should see profound differences in occupational choices and career paths that will not abate even as women enter the workforce in ever greater numbers.

Victor Fuchs's informative 1988 study, *Women's Quest for Economic Equality,* makes the basic point. To be sure, large numbers of women have entered the professions, most notably law and medicine, in recent years. But the divergent career paths of men and women become most striking when one looks at the organization of subspecialties.[2] There are far more women in family law than in contingent-fee tort litigation; far more in pediatrics or obstetrics and gynecology than in neurosurgery or orthopedic surgery. Perhaps some part of these differentials could be explained by sex discrimination within the various specialties, but if so, such an explanation should be made by presenting proof of specific acts and policies, not merely by making assumptions based on the numbers. In any event, it hardly follows that all forms of occupational differences can be explained by (improper or proper) behavior on the demand side. The selection effect works on the supply side as well. In choosing their career paths, women attach different weights to work and family than men do, and they take into account the differences in physiology and psychology between the sexes noted earlier. In this view, there is no iron social law that designates certain positions as male

2. Fuchs (1988, chap. 3) also notes that the gap in self-employed income is as great as in employee income, and that differences between the sexes in tips and commissions track the differences in wages. Discrimination by employers cannot explain these strong correlations.

and others as female. But differential pressures work at every stage of life in the choice of professions and of the roles played within the professions.

Private and Collective Preferences

The marketplace is only one arena. Public opinion is another. Nowadays, social pressures tend to work against the traditional divisions of labor. Commonly, women declare, and men agree, that greater female participation in certain professions and occupations would count as an unquestioned social good. So at the social choice level, government programs pushing in that direction receive widespread support: hence the carrot of affirmative action programs, many of which go beyond what the law requires, and the stick of antidiscrimination laws, many of which are enforced by parties too eager to infer discrimination when none exists.

But matters operate differently at the individual level. The same woman who thinks the major investment banks should have more female partners makes a personal decision that she does not want to put in the hours needed to reach that goal. She may want to stay at home more with her children, or just hate travel; she may dislike the grind and the constant confrontation of high-level negotiations. She may resist any suggestion that stereotypes are at work in this regard. Hers is just an individual judgment about herself; self-consciously, it is not one about the position of women in general, on which she takes the opposite view.

But careful psychological calibration hardly matters for these purposes. The operative question in all such cases is how often that same intellectual and emotional process leads to the same results. If most women go through the same process of thought and arrive at the same conclusion, then the tyranny of small decisions is at work. The landscape of family and occupational choices reflects not the big-picture views on equality of the sexes but the composite of small-picture views of what is best for me and my family. Hence, we have a quasi-public-choice explanation for the disconnect between political attitudes and personal behavior that does not require us to assume the irrationality or instability of preferences. Voting in accordance with their general preferences, people can easily support laws that rest on the presumption that any imbalances in labor markets are produced by social forces of discrimination. So the politics of the nation moves to the left, for women more than for men (Lott and Kenny 1998). But actual practices turn out to be more conservative than the rhetoric, because the sum of individual ground-level choices leads to behaviors that reinforce occupational and wage differences rather than undercut them. The long-term equilibrium is thus in tension. The sum of the private decisions will be treated as compelling evidence of discrimination that requires strong government remedies. But practices will prove resistant to such legal remedies because the dominant element consists of choices made by employees, not choices made by firms, as commonly supposed.

Why are women's politics systematically further to the left than men's, and becoming more so? At first glance, one suspects that the opposite should be the case. As women come to receive as much (or more) formal education as men, and as women enter the paid labor force in large numbers, their experiences should converge with those of men, and that convergence of experience should bring about a convergence of political views. But surely the opposite has happened. Why? Because when women enter the paid labor force their experiences are often *not* the same as men's, and that difference prompts different responses to what they observe.

Take the hottest issue of the day: sexual harassment. Americans spend as much time today trying to figure out the optimal rules of conduct with regard to sexual harassment as Americans of the late nineteenth century spent dealing with the far more serious dangers posed by industrial accidents—the loss of life or limb in the workplace. Yet the risks now seem largely to run in one direction. In principle, quid pro quo harassment (which, wholly apart from statutory prohibitions, could not survive under contract in the modern workplace) might take place with women as the aggressors and men as the victims. And in some cases it surely does. Yet, overwhelmingly, the publicized harassments run in the opposite direction. Similarly, the legal complaints regarding a hostile workplace environment are virtually all brought by women against men, or, more accurately, against corporate employers held accountable for the sins of male supervisors and coworkers.

Why not allow such interrelationships to be governed by the employment contract, which could stipulate the procedures and penalties for various forms of violations? Because the political forces that call discrimination in general a social problem will not relent with respect to practices that, if anything, look more like personal aggression than a refusal to deal for reasons of sex. Forces of political economy press in the same direction. The established women in the workforce may like the anti-harassment rules and benefit from the protection they afford. The women who are willing to take the risks of harassment for the gains of employment are not allowed to compete by agreeing to work on different terms.

Yet who has the political influence? Surely it is those who belong to powerful organized groups. Perhaps we have here a clear conflict of interest between women belonging to different groups, similar to the conflicts that often divide men. Or perhaps other forces are at work as well to reinforce women's left-leaning political alignment. Women may easily identify with the lack of power and believe that government intervention is needed to offset the advantage that men possess. But even that factor does not explain why on all sorts of other issues women as a group favor higher levels of political intervention, usually to offset differences in wealth or advantages. Part of the explanation may stem from women's generally greater (perhaps for biological reasons) aversion to risk. In their private lives, women are more likely than men to believe that cooperation works better than competition, so why not in government as well?

Surely no single explanation can account for all the political differences between men and women, but a number of particular differences may reinforce each other.

The persistent differences between the sexes lead to both behavioral and attitudinal differences. The effects are not cabined into some tiny area of human life, but influence all our experiences and interactions. We must oppose the common view that equality of opportunity, rightly conceived, necessarily and properly brings about equality of results. More specifically, we should not try to tinker with the outcomes of markets by imposing the strong norm of equality of results, which we cannot and should not achieve, given the differences of preferences and abilities of men and women. The existing patterns are not driven by exploitation (which, like the ether of classical mechanics, becomes ever more difficult to detect). Rather, they are driven in the main by informed choices at the micro level. To legitimize outcomes, we must revert back to the older libertarian theories of justice, which Robert Nozick (1974) described as leading to a distrust of all pattern principles of justice. Rather than posit our knowledge of what the ends should be, we should let the process run as it will, taking care to see that no major impediments interfere with bargaining and career choice.

The nineteenth-century program that abolished formal legal impediments to entry was roughly consistent with that normative view, which is no surprise inasmuch as Nozick's own theory of justice—justice in acquisition, justice in transfer, and justice in rectification—corresponds closely with traditional theories of property, contract, and tort, of which he had little direct knowledge. Of course, in individual cases we should be alert to the risks of duress, misrepresentation, and incapacity that can skew contractual preferences in untoward ways. But these small perturbations, of immense complexity in litigation, do not matter much in understanding the broader patterns of society, for they operate in only a small fraction of cases, and even then in ways that are independent of the concerns about male–female differences in education, income, occupation, and career path. Having opened the way for unimpeded bargaining, we can conclude with confidence that outcome differences are a source of social strength and a sign of a free society. It is when we see the lockstep progression of men and women (or indeed of any groups, whether defined by race, religion, national origin, or other identifiers), that we should infer that government mischief has interfered with the interplay of autonomous choices through voluntary exchange and association—choices that remain critical for the preservation of a free society.

References

Epstein, Richard A. 1990. The Varieties of Self-Interest. *Social Philosophy and Policy* 8: 102–20.

———. 1992. Gender is for Nouns. *DePaul Law Review* 41: 981–1005.

———. 1993. Some Reflections on the Gender Gap in Employment. *Georgetown Law Journal* 82: 75–88.

Fuchs, Victor. 1988. *Women's Quest for Economic Equality.* Cambridge, Mass.: Harvard University Press.

Kull, Andrew. 1992. *The Color-Blind Constitution*. Cambridge, Mass.: Harvard University Press.

Lott, John R., Jr., and Larry Kenny. 1998. How Dramatically Did Women's Suffrage Change the Size and Scope of Government? Manuscript.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.