Affirmative Action

The US Experience and Implications for New Zealand

Richard A Epstein

NEW ZEALAND BUSINESS ROUNDTABLE

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Richard A Epstein

RICHARD A EPSTEIN is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has also been the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution since 2000. Previously, he taught law at the University of Southern California from 1968 to 1972.

He has been a member of the American Academy of Arts and Sciences since 1985 and a Senior Fellow of the Center for Clinical Medical Ethics at the University of Chicago Medical School. He served as editor of the *Journal of Legal Studies* from 1981 to 1991, and as editor of the *Journal of Law and Economics* from 1991 to 2001.

His books include *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago, 2003), *Cases and Materials on Torts* (Aspen Law and Business, 8th edition 2000), *Torts* (Aspen Law and Business, 1999), *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books, 1998), *Mortal Peril: Our Inalienable Right to Health Care* (Addison Wesley, 1997), *Simple Rules for a Complex World* (Harvard, 1995), *Bargaining with the State* (Princeton, 1993), *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard, 1992), *Takings: Private Property and the Power of Eminent Domain* (Harvard, 1985) and *Modern Products Liability Law* (Greenwood Press, 1980).

Professor Epstein has written numerous articles on a wide range of legal and interdisciplinary subjects. He has taught courses in civil procedure, communications, constitutional law, contracts, corporations, patents, individual, estate and corporate taxation, Roman law, criminal law, health law and policy, legal history, labour law, property, real estate development and finance, jurisprudence, land use planning, torts and workers' compensation.

Introduction

Dr James Palmer,
partner, Russell McVeagh

It is my pleasure to welcome you to a lecture by Professor Richard Epstein, *Affirmative Action: The US Experience and Implications for New Zealand*.

We are delighted to have Professor Epstein with us. I was not sure how to introduce such a distinguished legal scholar who has written more than a dozen books and hundreds of articles and papers, so I asked my partner how to proceed. She read his list of publications very studiously at first. Then she started to skim-read a little, seeing book titles like *Skepticism and Freedom*, *Principles for a Free Society* and *Bargaining with the State*, and articles on tort law, constitutional law, employment law, taxation law, intellectual property law, health law, and many other topics. In the end she suggested that I simply introduce our guest as 'Richard Epstein, the well-known professor of microbiology', and see how he went.

I suspect Professor Epstein would do a great job on that subject. However, he is in fact the James Parker Hall Distinguished Service Professor of Law at the University of Chicago. He is a pre-eminent classical liberal scholar in the mould of Adam Smith and David Hume – an adherent of a philosophy that emphasises individual liberty and free markets and advocates a limited role for the state.

We are grateful to the New Zealand Business Roundtable for bringing Professor Epstein here today. This is the fourth out of 13 talks in a whirlwind five-day tour of three New Zealand cities. His schedule looks more like a film festival programme than an academic speaking tour.

I am delighted with the attendance at this lecture. Members of the audience represent the State Services Commission, the Human Rights Commission, Te Puni Kokiri, the Ministries of Justice and Education, Te Papa, Crown Law and many others. This turnout is a reflection of the calibre of our

speaker and the importance of his topic. Affirmative action is analytically complex, empirically cloudy, and emotionally charged. Therefore, Professor Epstein, we are delighted you are here to provide us with your views.

Affirmative Action
The US Experience and Implications for New Zealand

The relationship with anti-discrimination law

I have given some extra thought to the organisation of this lecture in view of the diverse emotions generated by the subject of affirmative action. A good starting point is to look at the relationship between affirmative action and general anti-discrimination laws. To appreciate my position on the former, you must understand my views on the latter.

I believe general anti-discrimination laws affecting private activities in competitive markets should be abolished. When I make such a declaration, some people assume I have revealed my hand on affirmative action. 'Gosh', they think. 'If this fellow opposes anti-discrimination laws so strongly, his opposition to affirmative action must be absolutely extreme.' However, this hasty conclusion demonstrates a persistent but instructive misunderstanding of the relationship between these two bodies of law. A more measured response would be to figure out why many people, including myself, oppose anti-discrimination laws with respect to private markets. The easy, conventional explanation would be that the critics of such legislation harbour the deep prejudices and resentments that the laws are designed to eliminate. This covert motivation would surely cause such people to be unremittingly hostile toward affirmative action: if they do not want to give a member of a minority group an even break within a market, why would they be prepared to give them an advantage in any area of human endeavour?

It is at this point that the argument breaks down. If you misunderstand the reasons why people like me oppose anti-discrimination laws, you miss out on the positive arguments for affirmative action in the US and New Zealand contexts.

Later I will talk about recent US Supreme Court decisions in the University of Michigan cases that upheld affirmative action programmes in a

generic sense, but mistakenly cast a stringent eye on the routine, non-individuated evaluative standards that had evolved in the larger of these programmes. First, however, I propose to explore the impact of anti-discrimination law on private institutions, and see what lessons we can draw. I spoke about anti-discrimination policies, both generally and in the specific context of age discrimination law, on my last two visits to New Zealand.[1] Understanding the pitfalls of anti-discrimination legislation will assist us in deciding how to deal with affirmative action in the public sector, especially in the two most important areas of employment and education.

My first reason for opposing anti-discrimination laws is that they invariably truncate freedom of association. I understand this liberty, within the classical tradition, to include the right to choose whom you wish to trade with and whom you do not wish to trade with. In this context, I do not want trade to be understood narrowly as a voluntary exchange of goods and services by sale or barter. Rather, for these purposes I use it in a second and broader sense that covers any mutual undertaking, whether or not for commercial or business purposes. That generalisation, moreover, does not undermine the force of my argument, but only shows one unsuspected element of unity between commercial and other forms of association. In all these contexts, the negotiations and bargains that occur when freedom of association is respected usually result in enhanced satisfaction on both sides. Trading will not generally occur if there is no mutual gain, whether financial or emotional. Because voluntary transactions are usually win–win, people will try to preserve trading relationships through the vicissitudes of time and fortune. In fact, there is a constant incentive for trading partners to expand the scope of opportunity for gains by improving such relationships.

In response to this broad claim for voluntary transactions, people raise the objection that the model breaks down because it does not account adequately for externalities affecting third parties. However, there is a sufficient answer to

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1 See Richard Epstein, *Human Rights and Anti-discrimination Legislation*, New Zealand Business Roundtable, 1996 and *Age Discrimination and Employment Law*, New Zealand Business Roundtable, 1999.

that proper challenge: generally speaking, externalities for third parties will be positive. If a healthy set of associations exists, the increase in wealth of the trading partners will create opportunities for other individuals.

Should we be concerned when somebody wants to participate in a particular trade, but is kept out by the other parties to it? That situation is of course quite different from one in which a third person tries to block an association of which they are not a part, which is a serious interference with a system of voluntary relations. But insofar as one deals only with the case where a potential trading partner wants to refuse to deal, then a critical point is that the principled opposition to anti-discrimination laws is subject to the condition that the markets in which they apply are competitive. In this situation there is no fixed limit on the number of individuals with whom you can trade. If somebody is excluded from a particular relationship that loss will typically be offset by new entry into the market by others (or an expanded presence by parties already in the market). In the end, various relationships will work side by side, and each of them will be win–win for its participants. The larger the market, the greater the number of potential trades and the less likely it is that someone will harbour such idiosyncratic tastes and preferences that nobody will want to do business with them. In this classical liberal scenario, the volume of transactions and possibilities of joint gain are maximised.

A forced association has the opposite result. By definition, such a relationship cannot be a lose–lose scenario because both parties would voluntarily tear it apart. However, a forced association will in general be a win–lose situation, causing all sorts of problems. The losing party will want to dissemble, to escape their obligations, or to argue that things are not as good or as bad as they seem. In general, this party will try to undermine the arrangement that they are obligated to preserve and promote. The 'winning' individual will be forced constantly to counter these strategies to try to maintain the one-sided relationship. This volatile, unstable situation will lead to a great deal of resentment, deceit and skulduggery. In the end, such associations will seldom be socially productive. Instead they will be wasteful, requiring an enormous amount of government supervision. Forced associations systematically yield more negative results than free associations.

To make the point clearer, let me stress a critical difference between discrimination and force, one which helps explain why a liberal administration should be far more concerned about the latter than the former. If any citizen could use force against anybody else, the fate of individuals would always depend on the actions of those members of the population who are hostile toward them. If you remove the most hostile person, the second-most hostile person will still remain a potent threat. We must have collective intervention against the use of force because it is impossible to rely on a system that would require each vulnerable person to enter into thousands of voluntary transactions to protect themselves against each person who would use force against them. Also the mere prospect of getting paid to hold off the use of aggression will have the unfortunate consequence of converting law-abiding persons into potential aggressors. It does not take a population full of unscrupulous people for the civil fabric to break down. It just takes a persistent cadre of aggressive individuals to destabilise social expectations across the board.

Discrimination in a competitive market involves exactly the opposite state of affairs. The people who matter the most are not those who wish to do you harm now that force and fraud are ruled out of bounds. By definition, those people can no longer touch you. Instead, the most important players will be those who wish to trade with you. Rather than focusing on the most hostile section of society, we concentrate on those who are the friendliest. This is a completely different strategic situation. A person who has many implacable enemies can still flourish.

The Civil Rights Act 1964

How do such associations form and reform in an open political and economic system? If we look back at the rhetoric surrounding civil rights in the United States, we discover the Civil Rights Act 1964 has a quaint anti-market tone. It says, in effect, that the principles under which people should contract with one another should be based upon some conception of individual merit and worth. The question immediately arises: what counts as merit? My contention is that a profound gulf lies between this meritocratic, state-imposed conception

and the way systems of sound management generally work in practice with respect to the appointment, promotion and retention of workers.

In any team, the intrinsic characteristics of each individual are not as important as the way people fit and work together. If you employ highly intelligent individuals who are asocial, you might get by if they were each locked away in an office, but you certainly would not want them to be a vital part of your organisation on an ongoing basis. Given 10 people who cooperate and one who does not, the destructive individual could spoil the atmosphere for the others and the entire operation could implode. It is very difficult to create an objective set of criteria for anti-discrimination laws that explain which individual characteristics matter and which do not.

In the United States in 1964, three particular characteristics that many argued should not matter were race, sex and national origin. If one examines the debate around the Civil Rights Act and even the text of the statute itself, it is obvious that this legislation would not have been passed in 1964 had it been made clear that preferential treatment or affirmative action would become permissible. The proponents of the legislation believed in a colour-blind principle and considered that there should be no deviation from that principle one way or another. To individuals who could not get a fair deal in the job market due to a poor education or disadvantaged background, the Civil Rights Act effectively said 'tough luck'. Such problems arose outside the workplace and were therefore not redressed by the legislation. Any remedy lay in the overall improvement of education and family support structures.

This colour-blind consensus prevailed for at most two or three years. However, by 1966 or 1967 most serious observers had concluded that it would result in a pace of societal integration that was too slow given the pressing problems that existed at that time. There were many race riots in the years that followed the Civil Rights Act. The level of political dissatisfaction was palpable. Therefore the intelligentsia – which had supported the colour-blind standard in 1964 – came to support some degree of affirmative action. I wish to stress that I agree with that judgment. The original design of the Civil Rights Act had become obsolete in a short time, showing once again how dangerous it is to

embed the deep moral convictions of a majority into the law. But once the retreat from the colour-blind principle becomes accepted, the real question is how affirmative action ought to be introduced and administered.

There were two ways affirmative action could have been established. Unfortunately, the United States took the wrong route. The right way would have been simply to repeal the Civil Rights Act. This would mean some people could discriminate against minorities if they wished. Everybody else could run affirmative action programmes on a decentralised basis free from government interference. That may not sound like a good result. But if you looked at the US landscape of the time, you would find that there were only one or two crank institutions determined to return to segregation. My attitude is that they should have been left alone to attract all the diehards, while making it easier for the rest of the country to be run without interference; the proponents of segregation would no longer have a voice within any respectable organisation. With that minority taken care of, everyone else could have figured out whether to introduce affirmative action and – if so – how far to go. There would be no need for government supervision, investigation or involvement. Rather, employers and employees would have more choices. Just as there is undoubtedly a market for affirmative action in the United States, there would be a market response to it. Indeed, even the use of the singular 'market response' misstates the situation. The market is not a collective entity like a state, but an assemblage of different firms, each of which would pick the response it felt was most appropriate for its own situation. No uniformity of approach would be required – or desirable.

To elaborate, every single firm understands there may be an improvement or a decline in profitability from affirmative action. For some firms prepared to pay the price, it might be the latter. Nobody unconnected with a private business has a right to say it must maximise its bottom line. If your firm wishes to engage in any sort of social project, the only people you have to persuade are your shareholders.

This approach has the refreshing advantage of candour. It allows people to say they choose to discriminate and give their reasons for doing so. Others who do not accept their reasoning can run their business in their own way. Such candour is missing from the New Zealand approach to discrimination and

affirmative action, which is characterised by redefinition and evasion. Here, the law says that anybody giving preference to individuals A, B and C for reasons D, E and F is not engaged in discrimination. This is a verbal game. Instead of candidly admitting that a form of discrimination is taking place and attempting to justify this form against others, there is a pretence that no discrimination is occurring. Those who support a colour-blind approach will now criticise this behaviour, with added fervour, as the worst form of verbal pyrotechnics. There is nothing more dangerous than a political debate whose proponents engage in such stratagems. People who believe in the principle of freedom of association should be entitled to defend their decisions on the ground that they are entitled to make discriminations that they think advance their own welfare.

Openly acknowledging discriminatory criteria is highly advantageous in administering intelligent affirmative action. There is only one way to run a completely colour-blind programme: you ignore race and use other criteria to decide whether to hire or to fire. However, there are countless ways to run an affirmative action programme: a point system, an outreach programme, a differential salary system, a mentoring system, and many more variations. When it is decided that affirmative action should be a state function rather than a decentralised function, somebody must determine which mode of discrimination is appropriate and why. Other issues come into play, such as whether some forms of discrimination might be publicly condemned for being excessive, notwithstanding a general policy of affirmative action.

A centralised affirmative action programme is likely to fail for the same reason that practically all forms of centralised regulation fail in employment or educational contexts: the variations among organisations practising affirmative action are so important that a programme appropriate for one will be inappropriate for another. Even within a single educational institution you may need one policy on affirmative action for students, another for general staff, and a third for academic faculty. Perhaps some institution or its divisions will want to go in for even more specific policies. In universities it is easier to operate affirmative action programmes in the arts than in the hard sciences. When state intervention is absent, people inside institutions can take advantage of their local knowledge.

The public sector

So far I have discussed affirmative action within a private competitive market. I have indicated why it will work far better where there is no anti-discrimination legislation to muddy the waters than it will in a system that first prohibits certain practices and then mandates others, creating a covert industrial policy with respect to race relations.

What should we do with affirmative action when it comes to the public sector? Under the traditional view there is not much difference between public and private sector economics. The Civil Rights Act 1964 abolished the distinction between public and private in respect of discrimination. Before this legislation it was widely accepted that discrimination in public affairs was unlawful. The Act made discrimination in private markets unlawful as well.

On closer examination, however, differences between the public and private spheres are apparent. It is perfectly sensible to argue that private organisations ought to be allowed to run their affairs in any way their owners see fit, free from government interference. However, a government agency taking in taxpayers' money presents a different set of problems. I believe it is defensible for government agencies and government-sponsored institutions to engage in affirmative action in some areas. However, the argument needed to justify this conclusion is a little complicated.

The first point to note is that the problem here is in large measure due to prior decisions by governments to become involved in certain activities that they do not need to undertake in the first place. For example, I can see no strong reason why education, particularly at the higher levels, ought to be a state function. I think a system of private universities would operate well. Even at the lower levels a private education system could do at least as well as, or better than, a public system. In considering affirmative action or race preferences, do we want to treat educational institutions – which provide services that, the public rhetoric notwithstanding, are largely private good goods – in the same way that we would treat the core public functions of government such as the building of infrastructure, the enforcement of contracts and protection against crime? In respect of those traditional functions I do not see a case for affirmative

action. I doubt that anybody would use an affirmative action framework to argue that members of race A should be punished with 10 years in prison for murder, whereas murderers from race B should only receive five years. When it comes to the enforcement of criminal law and access to infrastructure such as roads, most people believe in a colour-blind society because they see the potential for misuse of the state's coercive power to shift income and opportunities from one group to another, without any offsetting advantages.

However, the world is a starkly different place when the government ceases to act as a regulator and becomes a participant in the market in the same fashion as private organisations. In the United States there are large numbers of private employers and large numbers of public employers; large numbers of private universities and large numbers of public universities. If we focus just on universities for a moment, it is clear that no major, responsible US university will adopt a colour-blind policy unless mandated to do so. If you were to repeal every anti-discrimination law tomorrow, affirmative action policies would continue unabated in just about every university in the land. The level of support for affirmative action is strong, and such programmes are deeply entrenched. To be sure, the critics of affirmative action are vocal, but they have not been able to drum up any consistent widespread support. The people who quarrel over its details are in general committed to its purpose, and they succeed precisely because they do so on their own initiative, without government mandate.

Some people believe the public sector is special. But is it special when it goes beyond its core public good roles, where it occupies a monopoly position, and is instead in competition with the private sector? I believe it becomes problematic to insist that, within a market environment, state institutions should be subject to restrictions that are not applicable to private organisations. Thus if the University of Chicago believes it must run affirmative action programmes to do the best by its students and alumni, why should the University of Illinois – which gets 10 percent of its money from state revenues but otherwise operates on similar lines – be told that it must adopt a colour-blind system? It is impractical and absurd for two institutions in direct competition to be subject to radically different legal regimes. The small amount of public support does not justify that kind of categorical distinction.

The US Supreme Court

Now that I have explained how I would approach this issue, I can say with perfect confidence that the US Supreme Court thinks about affirmative action in a contrasting fashion. Let me explain what it did in the University of Michigan cases because I believe the Court's particular defence of affirmative action had both the enormously positive effect of clearing the waters – and the deleterious effect of putting forward arguments that were so preposterous that they gave succour to affirmative action opponents.

To understand what is at stake it is necessary to view these issues through the lens of the standard, if unappreciated doctrines of US constitutional law that offer a series of general propositions about what states can and cannot do. The interpretation of these powers comes not from the text of the Constitution itself but from an extrajudicial construction known as the degree of scrutiny applied to legislation tested against the constitutional provisions. Under a system of strict scrutiny, in order to make a particular violation of a constitutional right sustainable you must show a powerful state justification for a highly important end that could not be achieved by any less restrictive means. At the opposite end of the scale to strict scrutiny is the so-called rational basis test. This term of art is not meant to signal that doctrines will survive scrutiny only if they meet so logical or rational a test. Quite the opposite, the test says that if you can provide any reason to support a programme it can be regarded as constitutional, no matter how many strong and valid reasons can be arrayed against it. Under strict scrutiny one bad reason knocks the programme out, while under rational basis one good reason keeps the programme in. There is an enormous difference in outcomes because there are usually many arguments for and against a particular programme. The power to select which arguments count thus predetermines the outcome in the vast run of cases.

When it comes to the equal protection clause, which is essentially about colour-blindness and public policy, the Supreme Court does not take very seriously the distinction between the core functions of a classical liberal state and those of the modern managerial and regulatory state. Therefore it is forced to apply a principle of strict scrutiny with respect to racial differences. If you

applied this approach to affirmative action, I have no doubt that every affirmative action programme in the United States would have to be struck down. Could you run an institution on a colour-blind basis and still teach physics, maths, sociology and so forth? Of course you could. Indeed, some people would argue you would run a better educational system with a lesser degree of affirmative action (or indeed without any) because there would be greater homogeneity in ability groupings. Affirmative action would not survive a strict scrutiny test.

At this point the appropriate course is to question the premise that the strict scrutiny principle ought to apply when the state is engaged in activities similar to those of its competitors. A commonsense rule might be that when the government is providing services of a private good nature and none of its competitors in the private market adopts a certain practice, the government cannot adopt it either; but when they do, it is allowable. Under this test, many affirmative action programmes would sail through. What actually happened, however, was that the Supreme Court understood the institutional point but refused to recognise the intellectual framework that made it intelligible. It wrote a decision that went something like this: 'We believe in a standard of strict scrutiny with respect to affirmative action and we think that standard has been met. Why? Because we received a lot of *amicus curiae* briefs, some from the military and others from corporate leaders, and all of them favour affirmative action in their own organisations.' That is not an argument. It is just a vote. The judges did not give particular reasons for their decision. But it became obvious to the Supreme Court that if every major institution in the United States were engaged in some form of affirmative action, it would be a serious matter to tell all of them that the political system required them to cease and desist. The parade of *amicus curiae* briefs legitimated the practice in the eyes of the Court's majority.

The judges went on to say, in effect, 'The University of Michigan assures us they believe there will be no affirmative action programmes in 25 years and we take them at their word'. Any rational observer could see that this went beyond a failure to apply strict scrutiny; it was not even a proper use of rational basis. This was a situation where the judges were simply willing to let things

be, even though the need for affirmative action programmes is as great now as it was 25 years ago. The result was that conservatives (who believe in a colour-blind principle as a rule of positive law, which is not a libertarian position) became irate. Almost everybody else simply shook their heads in disbelief at the Court's decision, and then let out a big sigh of relief because they had ducked a bullet: they did not have to re-engineer their internal programmes from the ground up in the face of what would have been massive resistance.

Decentralisation

To me, the secret to running a successful affirmative action programme is to decentralise decision making. In this regard public institutions often do a worse job than private institutions because they are dependent upon politicians and a political system for appropriations. It is not uncommon for a university chancellor and deans to feel forced to make decisions that reflect what they perceive to be the external political reality rather than the internal needs of an institution. Therefore I would add a caveat to this uneasy blessing of affirmative action: decisions should be made internally by the appropriate educational units, and not be driven or required by state mandates.

California demonstrates the difficulties states have in getting things right. Under the old regime, the state constantly pummelled schools to have affirmative action programmes. In some cases they went to grotesque extremes in hiring policies. There was even a debate about whether non-Hispanics could enrol in Hispanic studies or whether they would so pollute the academic environment in the name of diversity that they should be excluded. Then a referendum passed which swung everything the opposite way: no affirmative action whatsoever would be allowed. This led to general resistance and the introduction of many fake standards in ostensibly race-neutral policies to get around the law.

Decentralisation would result in a substantially different debate. It would eliminate the meta-level argument about whether there should be any affirmative action programmes. This would be positive: the debate is simply too divisive. At the institutional level, discussion would focus on what kind of programme, if any, ought to be implemented. Instead of debating major questions of high principle which lead to conflict, it is better to debate smaller questions of trade-

offs: should we go further or cut back, given our experience to date? When I was briefly an interim dean running an affirmative action programme, I learned that if you make it perfectly clear that you do not want to abolish an entire programme it is much easier to achieve rationalisation and retrenchment, if needed, because your actions will not be seen as a first step toward elimination.

The moral turns out to be clear. Affirmative action should be understood as a business and management problem to be addressed in a business-like way, rather than as a matter of high principle where everybody has to swear allegiance to a single objective or be excommunicated. In respect of race, the United States, by a circuitous route, has essentially come to a relatively strong voluntaristic solution. Each organisation tends to go its own way.

Sex discrimination

With sex discrimination, by contrast, the adoption of the equivalent of a colour-blind policy has had strikingly intrusive implications. We have said that, particularly with respect to interscholastic or intercollegiate activities, there must be equal rates of participation by men and women because that is the only way to be sure that institutions are working on a sex-blind basis. The level of animosity, bitterness and division over intercollegiate athletics is much greater than that caused by affirmative action policies on race. Central planners decree that women and men of college age want to engage in intercollegiate sports in equal proportions. Reality is different. In practice, men are nearly twice as likely to prefer sports than women, who choose other activities in greater numbers, such as dance and exercise programmes. The only institution that was prepared to fight a federal decree so at variance with experience on the ground was Brown University, which had a female general counsel and a female president. They got killed in the courts in trying to defend their right to decide which athletic programmes should be cut and which retained. There is a constant and ongoing guerrilla war over these issues. The reason is simple: when you make universal policies from the centre and ignore supply and demand conditions in the field, you are engaged in Soviet-style industrial planning. The only way that approach can be enforced is with the heel of a boot.

Take note of the following irony. With respect to affirmative action, the central government – through necessity or choice – trusts decentralised units to make their own decisions. This system generally works well. On the other hand, the imposition of a sex-blind or colour-blind norm is violently coercive, notwithstanding its ostensibly neutral name, and the result is dissent and rebellion. This reinforces the general lesson I talked about at the beginning. When associations are voluntary, people will work to keep them alive. When coercion is imposed, the result is a dogfight in which everybody becomes embroiled. The only way to achieve civil peace is through decentralised decision making. It will never be reached through industrial policy. Whether we discuss mandatory affirmative action or mandatory colour-blindness, what should make you suspicious is the mandatory element. If you minimise force you will maximise welfare. That is as true of race relations as it is of everything else.

Implications for New Zealand

Let me finish with some observations on the New Zealand situation, given as an outsider. The Treaty of Waitangi has arisen as a topic in many of the lectures I have delivered here. My understanding of the Treaty is different from the dominant view today. At least in its English version (and I recognise there is some tension between this and the Maori version), the Treaty provides for undisturbed protection of Maori assets and full exclusive rights to lands, fisheries, forests and so forth for Maori families, individuals, tribes and chiefs. I believe that is exactly what was meant. I find it hard to identify any intention in the Treaty to deal with matters of voluntary relations between individuals. Rather, the Treaty said that past property rights would be protected and guaranteed by the sovereign.

Some people talk about observing the principles of the Treaty. I do not think these exist. The Treaty was a device for organising a transition. There were two separate systems, and it was an attempt to integrate them. The vested rights that existed under the first system had to be protected. There was to be a unitary system of law for future rights. That was the point of Article Three: every person would be a subject of the British Crown. I think reading principles into the Treaty, such as a principle of partnership, is incorrect as history and unwise as policy. There are many situations in which inherited

difficulties with land entitlements and the like are relatively unimportant. It seems to me that the greatest opportunity for anybody, regardless of their cultural background, comes from the array of choices – for example, in employment and training – that open markets can provide.

Turning to human rights issues more generally, I note that the terminology used in New Zealand to discuss human rights is different from that used in the United States. In this country the labels are 'direct discrimination' and 'indirect discrimination', while we Americans talk – I think with more precision – about 'disparate treatment' and 'disparate impact'. Whether one calls it indirect discrimination or disparate impact, the law in this area is troublesome. Firms have many common practices with disparate impacts. When these practices are called into question by legislation, the law acts as a tax on voluntary relationships and reduces both the probability of their creation and the gains that people can obtain from the relationships that are still created. Figuring out how to balance and coordinate values is certainly difficult. There is no single right answer for every situation where disparate impact laws are in play. However, I would attempt to reconcile the principle of freedom of association and the principle of non-discrimination by making the following point: where there is competitive choice and many options for any individual, there is no particular reason to worry about discrimination by A because the individual can resort to B. If you try to set rules regarding youth workers or disabled workers, the net effect will often be to reduce the number of opportunities for young and disabled people. Firms will rationally shun these relationships because of the net costs of complying with the rules. The evidence in the United States on this matter is clear. For example, the percentage of employed disabled people has gone down since the passage of the Americans with Disabilities Act in 1990.

However, in a monopoly situation, a non-discrimination rule becomes a potential response. It will not be perfect in every case but will make sense in many. On the other hand, employment and educational opportunities are not governed by monopolistic structures. Therefore, the gains from trade arising from applying the freedom of association principle can only be reduced by the system of taxation and cross-subsidy implicit in discrimination laws.

To what extent do differences between US and New Zealand democratic structures affect these arguments? We have a written constitution and you do not. This certainly makes a difference to the way laws are validated. In this talk I have used US cases, not to promote US constitutionalism as the model to emulate, but to show that the constitutional standards have served as a huge impediment to getting things right because they did not recognise the difference between a government's core functions and its managerial and business operations. How do we translate this to the New Zealand setting? One would forget about the equal protection clause and instead examine the norms that exist here and ask: how would parliament handle these issues? As in the United States, I think it should opt for the principle of decentralised decision making.

Decentralised decision making does not mean the state has nothing to do with affirmative action. Rather, it means that public bodies can adopt their own policies. What should be resisted is a single directive from the centre to disparate public agencies telling them how they ought to behave. Decentralisation brings better incentives and more local knowledge on the ground. This applies to both the public and private sectors. I do not believe New Zealand has gone far enough to structure affirmative action in this form.

For private employers or local governments there is no good reason why a set of preferences should be linked to remedying any past wrongs. This has the unfortunate consequence of spawning what I call a 'wrong-mongering' industry. In my professional work, I have met experts hired by local governments wishing to engage in affirmative action programmes, and the job of those experts is to explain how their predecessors engaged in invidious forms of discrimination 50 years ago, for which a new programme would be the remedy. This approach involves dredging up all sorts of historic grievances and is not needed to justify such a programme. If we think that a particular organisation will perform better with a diversity programme, for example, we should just implement it. Tying it to past wrongs is needless. The whole point of decentralisation is that you do not need to justify a programme with a narrow set of publicly acceptable, hard-to-prove arguments. Any sort of reason can be put forward, so long as you can obtain the consent of the individuals involved. Decentralised affirmative action programmes work best

precisely because trade-offs are being made by people who have knowledge of what they are giving up and what they are receiving. Choices are not determined by people remote from the place where they will have effect, or by the peculiar dynamics of race or national culture, but by a desire to create the best incentives and obtain the best information to make an organisation function better.

I do not think the differences between the US and New Zealand democratic systems matter greatly. This is not a constitutional versus parliamentary issue. The principles of liberalism transcend the differences. The actual responses and contracts in a decentralised system will be different in particular cultures, but the legal framework in which these decisions should be made is fairly standard. Outcomes will differ somewhat but the principles should not.

Questions

You acknowledged that affirmative action can come at a cost. It may be better for a university not to have an affirmative action policy or for an employer not to employ on such a basis. It seems to me that costs will exist in most cases. Therefore institutions that are not highly prone to cost factors will be much more likely to adopt affirmative action. Universities are a good example. Due to endowments, they can take a very long view. However, other institutions will have an economically rational, short-term focus. Does this pose a problem for your voluntarist argument?

Actually, I believe that things work the other way round. I have been involved in university administration. The University of Chicago has endowments that have thousands of claims on them, and we simply cannot satisfy them all. Although we have a long-term view, our focus is also on attracting students for the next semester. We operate in an intensely competitive environment.

The factors you mention do not add up to a simple conclusion about the benefits of running an affirmative action programme. Some businesses will have incentives to implement affirmative action. Consider a large business selling in multiple markets. It may well make commercial sense for it to run a strong affirmative action programme. Customers have different tastes and preferences with respect to the way products are packaged, sold, delivered and promoted in different regions. With my white, Jewish, tin ear from Brooklyn I will not do a good job trying to sell to former sharecroppers in the South. You will want to match employees to their markets, so they gain the trust of customers and understand local factors. Employees must also converse and cooperate with each other inside the firm to establish standard practices and work

routines. Business necessitates a level of trust and cooperation for survival. Firms that fail in this regard will lose market share or go out of business.

At Goldman Sachs in London, my wife found that one employee was an Indian-born graduate of the University of Chicago Laboratory School, where she herself works. Within 30 metres of this graduate's desk were employees from 15 different nations. He made the obvious point that if people could not get along with other nationalities, they were no use to Goldman Sachs. It is an important message: if you are operating internationally in a global economy you must develop a level of tolerance, cooperation and understanding, or you will not succeed.

Does this mean affirmative action will exist everywhere? No. There are other forces at play that go in the opposite direction. Think, for example, of small, family-run businesses with close, informal lending and bonding relationships. Immigrant associations often run on this basis. Each generation is subsidised by loans from the previous generation, and a network of church and family affiliations ensures difficulties are smoothed over. Firms may deal primarily with members of their own ethnic community. This is natural and efficient.

I do not see a one-size-fits-all solution as appropriate. We see variation within firms, cities and nations, and across nations. The arguments in favour of decentralised market responses – better incentives, better information and better cooperation – apply to affirmative action just as they do elsewhere.

When somebody produces an argument that 'X is special and deserves special treatment because …', they are generally wrong. Housing is not special. Agriculture is not special. And race is certainly not special. They each require different responses but not different institutional arrangements. The dominant questions involve coercion, competition and monopoly. If you stop coercion, encourage competition, and think hard about regulating monopoly, you will get better outcomes than you would if you tried to tinker with the private arrangements of everybody.

New Zealand is grappling with the relationship between the principle of non-discrimination and a principle of preferential treatment that some believe the Treaty of

Waitangi embodies. I understand that in the United States the arrangements that arose out of treaties with indigenous Americans are immune from consideration under the equal protection clause. Is that the case, and should it be?

There are innumerable complexities involved, making it impossible to summarise all the issues. However, some important points can be made.

Many treaties were made with American Indians. Although no two are alike, something they generally have in common is an explicit guarantee of territorial sovereignty, and that has been respected. Recently this has given rise to unease because sovereignty with respect to internal affairs – the laws of marriage in a tribe, for example – has been used to distort the competitive balance in industries such as gaming. Many Indian reservations have given licences to gaming facilities that escape the general regulations within a state. That imbalance in competition has created some resentment.

The total Indian population in the United States is between one and two million. Many indigenous Americans have left reservations. Intermarriage has occurred. The tribes are not unified. They come from different geographical locations, and many have little income. American Indian issues and tribal relations do not loom large in the American consciousness. They are dwarfed by general questions of race by virtue of our history of slavery. I am hard pressed to think of any equal protection claim in an important case that involves American Indians. The cases regarding indigenous rights are mainly property cases.

One controversy that does crop up is whether compensation paid for past damages should be retained by a tribe or distributed to individual members. This issue causes debate because of what has been called the ethnic externality question: do you believe the preservation of a tribe has a collective value independent of the welfare of individual members? If you give the money out to individuals, many will leave the tribe and blend in with the rest of society. Restitution will spell the end of the tribe as a cohesive unit. Therefore, there is a powerful tribal movement to centralise resources so that only people who participate in tribal activities get to share the money. In that sense the governance issue with respect to the Indian tribes has been important.

However, in general such issues have receded in importance in the United States whereas they seem to have grown in importance in New Zealand.

I think it was Voltaire who observed people of many nationalities trading happily with each other at the London stock exchange while in other parts of the world they were killing one another. Is it the case that the worst examples of racial discrimination and aggression have occurred when governments have been involved?

For trade to take place, people have to be happy with the deals they strike. The only way you can get something from someone else is to give them something in return. The dynamics of trade are interesting. An unfortunate outgrowth of the naive version of rational choice theory is the belief that the only thing that people care about in a transaction is cash on the barrelhead in return for goods and services. Anyone who has observed human interactions understands that the psychology of a transaction involves indefinables such as respect, courtesy and trust. A successful trader knows these are the basis of any ongoing relationships.

In my short time as interim dean I learnt that these qualities were a prerequisite for succeeding in any purposive task. If racial animosity reared its head in any form, it had to be stamped out instantly or there would be endless recriminations. Private sanctions are powerful in dealing with such problems. Firms can handle them either by active management of relationships or by separating people into different groups. There is no dominant solution. Nevertheless the basic insight is that voluntary associations and competitive markets will, taking into account all values – subjective and objective, moral and intangible – generally outperform government coercion. The best maxim is live and let live. If a female Maori entrepreneur wants to hire an all-female Maori workforce, the law should not stop her from doing so. Voluntary arrangements are most conducive to social harmony. Exclusion carries a price tag, but it is a low price compared to the price associated with the resentments from forced associations.