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The Discrimination Shibboleth

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Discrimination by age or disability bears little resemblance to the invidious distinctions prohibited by the Civil Rights Act of 1964. When rules requiring compensatory treatment of certain classes of employees are characterized as laws prohibiting "discrimination," the description serves primarily to disguise the policy choices being made and the costs they impose.

The trouble with the Symposium on *Forbidden Grounds*¹ was that we so rarely managed to get beyond the starting point of race. Twenty professors spent most of two days discussing Richard Epstein's most heterodox claims about racial discrimination in employment: precisely the arguments that a majority of the participants were prepared to dismiss out of hand. This was a comfortable but regrettable arrangement, because it is the subsequent chapters of the story, considering employment discrimination on grounds other than race, that are the more genuinely controversial.

An expanding range of employment decisions has come to be condemned as "discriminatory" on the strength of a civil rights analogy that is notably deficient. That is, we now prohibit as "discrimination" a variety of practices — bearing on the employment of the elderly and the disabled, as well as on some terms of employment for women workers — that are qualitatively different from the kind of "discrimination" that people agreed to prohibit in 1964. The policies served by the new prohibitions are different from those that justify a prohibition of old-fashioned, invidious discrimination on the basis of

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1. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) [hereinafter *FORBIDDEN GROUNDS*].

race or sex; intelligent analysis requires that the new policies be accurately identified and evaluated on their own merits. A blanket characterization of such measures as laws against “discrimination” that vindicate the “civil rights” of protected classes tends, on the contrary, to disguise the social and political choices being made. This may be one of the reasons the characterization has persisted.

Forbidden Grounds contains a wealth of provocative argument on these issues, which our Symposium discussions scarcely touched. The book itself is largely to blame. Not content with a conservative attack on the law of employment discrimination, Professor Epstein has mounted a radical one — the terms of which oblige him to deny the necessity of government intervention to prohibit even overt, invidious discrimination on the basis of race. Epstein’s arguments on this point lead him where very few readers will follow. They lead him, moreover, away from the more tactically advantageous position from which to challenge the modern panoply of antidiscrimination laws, which is to point out the extent to which the new regulation diverges from the classical antidiscrimination model.

Roughly summarized, *Forbidden Grounds* advances the case that the costs of employment discrimination are commonly overstated, while the costs of employment discrimination laws are greatly underestimated. Professor Epstein’s faith in the market economy leads him to argue that a regime of unfettered freedom of contract would produce greater utility than does our current system of pervasive regulation. With regard to much of present-day antidiscrimination law — in which age and disability have now joined race and sex as “forbidden grounds” for employment decisions — many readers will find the demonstration persuasive. Virtually all readers, by contrast, will feel that the historic core of the civil rights statutes — the hard-won prohibition of invidious racial discrimination in private employment and public accommodations — was a justifiable and necessary instance of government intervention to overcome discriminatory preferences that the free market, in the era of segregation, reflected only too faithfully.

Professor Epstein’s refusal to make that one critical exception is what derailed the Symposium and what will make *Forbidden Grounds* a book more notorious than read. He refuses, that is, to admit that even overt racial discrimination in employment makes a special case justifying legislative interference with freedom of contract. This is partly a political judgment. Professor Epstein, I think it is fair to say, would estimate both the socially acceptable level of private racial discrimination, and the social cost of government interference with freedom of contract on this particular point, higher than would most observers. This is defensible but visibly uncomfortable ground, and *Forbidden Grounds* offers a variety of palliatives.

One of these is the claim that largely preoccupied the Symposium: that under a regime of pure freedom of contract, the incidence of racial discrimination in private employment and public accommodations would have been relatively slight, even in the segregated South prior to the Civil Rights Act. To deal with the historical fact of persistent discrimination — not notably undermined by the economic advantages available to nondiscriminating firms in a free market — Epstein argues that the free market was an illusion. Discriminatory employment practices, he asserts, were encouraged by state action (from Jim Crow laws to the minimum wage) and by private coercion unchecked by the state. Absent “excessive state power and the pattern of private violence, intimidation, and lynching”² that limited the employer’s (or the innkeeper’s) freedom of action, racial discrimination could not and would not have survived. Had there been genuine freedom of contract in the segregated South, in other words, the Civil Rights Act of 1964 would not have been necessary.³ Suffice it to say that this is a view of the history and circumstances of racial discrimination (including circumstances within the memory of many readers) that very few people will be willing to accept.

Reluctant to acknowledge legitimate grounds for overriding the principle of freedom of contract even in our national history of slavery and racial subjugation, Professor Epstein opposes all employment discrimination laws, disdaining to make even what might be called the “easy” exception for “Title VII as originally enacted.” This conceptual purity puts *Forbidden Grounds* in a peculiar straitjacket. Insistence that all employment discrimination laws are bad, without exception and for essentially the same reasons (even if bad to a greater or lesser degree), carries the paradoxical implication that employment discrimination by race, sex, age, and disability is fundamentally a single phenomenon. That implication takes the argument in precisely the wrong direction. By resisting the historical justification for any exception to his position, even in the core case of race discrimination in the Jim Crow era, Professor Epstein spurns the substantial assistance offered by history to anyone who is inclined to criticize modern-day discrimination law. The first point suggested by the history of the subject is surely that the circumstances of slavery and racial segregation were unique, and that laws prohibiting discrimination by sex, age, or physical ability have claimed successive places under the civil rights umbrella on the strength of an analogy

2. FORBIDDEN GROUNDS, *supra* note 1, at 93.

3. See generally, FORBIDDEN GROUNDS, *supra* note 1, 91-129.

that is progressively attenuated. An argument along these lines is implicit in the later chapters of *Forbidden Grounds* — examining employment discrimination on grounds other than race — but Professor Epstein pursues it with one hand tied behind his back.

Within the notorious *Forbidden Grounds* there is another, more conservative book: not the book Richard Epstein wrote, although he has already written most of it. The opening of this book-within-a-book is supplied by the reader, and it consists of a simple question. Leaving aside the question of discrimination by race — which our history of slavery and segregation must inevitably put in a class by itself — why do we now prohibit other forms of discrimination in private employment? There may be good and sufficient reasons to forbid various kinds of discrimination on the basis of sex, age, or physical disability, but what is most striking about the nonracial “forbidden grounds” is how substantially they diverge from the race discrimination paradigm.

Conceived and explained at the level of public debate, Title VII in 1964 imposed no costs; its only effect was to enjoin an injury. Because skin color is ordinarily irrelevant to job performance, and because (the point was stressed) employers remained free to use any nonracial criteria for employment decisions, the outward burden on employers was merely that they cease to do a gratuitous wrong. (Thoughtful observers no doubt realized that a prohibition of discrimination imposed a variety of costs on the employer and his white employees, including the problems of a racially mixed work force and the interference with the employer’s ordinary freedom to run his business as he liked. Given the historical and political context of racial discrimination, however, it was not thought inequitable that costs of this order be left to lie where they fell.) The political consensus of 1964 was that racial discrimination involved a distinction without an economic difference, and that such discrimination might appropriately be forbidden.

The most remarkable feature of our employment discrimination law since 1964, I would suggest, is that it was so quickly extended beyond the initial prohibition of invidious discrimination by race or sex, where it forbade what were understood to be distinctions without a difference, to encompass instances of what is (at least arguably) noninvidious discrimination — thereby prohibiting distinctions *with* a difference. The precise boundary between invidious and noninvidious employment discrimination is notoriously difficult to perceive and correspondingly controversial: this is the battleground occupied by “disparate impact” as a test for racial discrimination,⁴

4. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *FORBIDDEN GROUNDS*, *supra* note 1, at 205-41.

by "bona fide occupational qualifications" that distinguish between male and female employees.⁵ But whatever the difficulty of charting the outer boundaries of invidious discrimination, modern-day employment discrimination law has plainly left them behind. It is relatively easy to justify a statutory requirement that employee health benefits cover maternity-related expenses.⁶ It is much less obvious that their exclusion constitutes invidious discrimination on the part of the employer.⁷ When a court or a legislature determines that periodic retirement income (as opposed to its annuitized value) must be equalized for male and female employees,⁸ or that "the incremental cost of hiring women [in this instance, because of a greater susceptibility to certain work-related injuries] cannot justify discriminating against them,"⁹ or that employers may not impose a mandatory retirement age, or that workplaces must be modified to provide reasonable accommodation for physically disabled employees, the lawmaker is no longer forbidding the kind of discrimination that makes a distinction without a difference. On the contrary, the requirement in each such instance is that the employer adopt a practice favoring employees in the protected class, providing what is in effect a subsidy intended "to correct imbalances that are not created by the employment relationship."¹⁰

Ethics and social policy may dictate that we devise social insurance to defray the costs of maternity, or that we subsidize the jobs of the elderly and the disabled, but the appropriateness of such choices is at least less self-evident than the fairness of prohibiting distinctions without a difference. Given the relative visibility of the associated costs, we might have expected that extending this series of employment subsidies would be politically difficult. It seems on the contrary to have been remarkably easy. An important part of the reason is surely that we have agreed to refer to these subsidies as laws prohibiting "employment discrimination" and advancing the protected employees' "civil rights."

When a mandatory retirement age or the absence of a wheelchair

5. Civil Rights Act of 1964 § 703(e), 42 U.S.C. § 2000e-2(e) (1988); see FORBIDDEN GROUNDS, *supra* note 1, at 283-312.

6. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988).

7. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); FORBIDDEN GROUNDS, *supra* note 1, at 329-49.

8. See *Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702 (1978); FORBIDDEN GROUNDS, *supra* note 1, at 313-28.

9. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

10. FORBIDDEN GROUNDS, *supra* note 1, at 342.

ramp is described as “employment discrimination” — the term we still use to describe the refusal to hire on the basis of skin color — language is being used to disguise, rather than to clarify, the political choices being made. The interesting question is why this disingenuous strategy has been politically successful. No one who notices the issue can really equate these new forms of “employment discrimination” with the 1964 kind: people are not that gullible. The widespread popularity of laws against “employment discrimination” more likely indicates that the political consensus in this country genuinely favors subsidized employment for certain classes of fellow-citizens with whom it is easy to sympathize. Even were it described in unvarnished terms, such a policy accords well with political views that clearly are widely held: a conviction that personal fulfillment requires access to the job market; a belief in the dignity of labor; and a willingness to help those who help themselves.¹¹ Calling the program “antidiscrimination” rather than “subsidy” has the useful consequence that it removes the cost from the government budget, so that to most people it looks free. The linguistic evasion is tactful as well. No one wants to be told that his job is being subsidized, relative to the jobs of fellow-workers; the polite way to describe the relationship is therefore to say that the recipient’s civil rights are being protected against discrimination. Assuming that the end result is really what most people want, and it may be, the worst thing about the modern law of “employment discrimination” may be no more than the violence it does to the language.

The book-within-a-book of *Forbidden Grounds* makes an impressive case that the cost of these subsidies is higher than is generally appreciated, that the need for them is less, and that if the political consensus were better informed we would not employ these back-door techniques to subsidize people’s jobs. Such an argument is intensely controversial: far more so, I would say, than Professor Epstein’s claims about the historical persistence of race discrimination under market pressure, because it lies so much closer to policy choices that might reasonably be made differently.

The expansive vitality of “discrimination” as a vehicle for social reorganization — and the need to explore its unexamined political premises — seems to me, in retrospect, the real subject of *Forbidden Grounds*. The Symposium never got that far. Preoccupied with arguments about race discrimination, we never reached the point of examining the uses to which the discrimination analogy is now being put. The protean forms of modern-day “employment discrimination”

11. Considerations of this kind are aptly evoked in Jerry Mashaw’s article for the Symposium. See Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 233-36 (1994).

probably reflect something of the same embarrassment. Until the nation reaches more substantial agreement on the question we started with — what we mean by race discrimination and what we propose to do about it — it seems likely that most uses of the word “discrimination” will continue to escape rigorous definition.

