FORBIDDEN GROUNDS

THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS

RICHARD A. EPSTEIN

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To Eileen

For Everything

Preface

I came of age during the debates over the Civil Rights Act of 1964. My views on the subject at the time were quite conventional. I thought that the act was long overdue, that the patterns and practices of discrimination that existed in the South and around the United States were apt targets of legislative correction, and that the only hard questions about the Civil Rights Act concerned appropriate limits and techniques of implementation. In those early years I can recall only two occasions on which some of my contemporaries voiced any note of caution or uneasiness about the act itself.

For more than twenty years I did little to rethink my original position. But as the level of debate, discussion, and discord increased, my attention was drawn back into an area that was far removed from my immediate professional concerns. My original background, training, and inclination were those of a common law lawyer whose major project was to work out the correct relationships among property, contract, and tort law. I was quite content to leave questions of public law and public regulation to others, as long as I could understand the narrower domain I had carved out for myself. As my own work developed, however, I discovered that it was intellectually far more difficult than I had previously supposed to maintain the separation between private law and the grander questions of constitutional law and public regulation. Understanding common law rules required more sophisticated tools than an unflinching respect for the principle of individual autonomy on which my earlier thinking and work had rested.

In working out the exceptions to the autonomy principle in common law, especially as they related to individual actions taken by mistake or necessity (that is, imminent peril to life or property), I came, somewhat reluctantly, to the conclusion that some principle of social utility or welfare lay beneath much of the common law, and that this principle was powerful enough to account both for the areas of the common law where the autonomy principle has proved powerful and enduring and those where it

has not. Dealing with the strengths and limits of the autonomy principle slowly led me to think about various questions of constitutional law, and resulted in my book *Takings: Private Power and the Power of Eminent Domain,* which was published by Harvard University Press in 1985.

As I was thinking through the radical implications of that book, my intellectual uneasiness about the New Deal and the welfare state came by degrees to be carried over to the second wave of reform legislation of Lyndon Johnson's Great Society, including the civil rights acts, at least as they applied to matters of employment discrimination. The refusal to deal for any reason lies at the root of a system of freedom of contract, itself the centerpiece of any common law order based on the autonomy principle. The employment discrimination laws represent the antithesis of freedom of contract. Yet these laws do not fit into the categories of necessity or mistake that challenge that principle. Employment markets are largely competitive and hence regulation is not justified as a means to control monopoly or to protect workers against unwise choices made under conditions of necessity. Workers and employers generally have good information about the key terms of their relationships, so that regulation is not necessary to combat mistake, especially where the issues are unrelated to health or safety. The civil rights laws cannot be justified as full disclosure laws. As I examined the matter more closely, I could not shake my own initial conviction that the employment discrimination laws were an unjustified limitation on the principle of freedom of contract, notwithstanding the overwhelming social consensus in their favor.

It also became clear to me that there was no modern (that is, post-1964), sustained treatment that either defended or attacked the employment discrimination rules. So I decided to write that study. Over the course of writing the book, as I learned more about the operation of the civil rights laws, I found that my convictions only grew stronger. There is no adequate theoretical foundation or practical justification for the employment discrimination laws. The strong national commitment to the aggressive enforcement of the antidiscrimination laws is, I believe, mistaken. I chose the title *Forbidden Grounds: The Case against Employment Discrimination Laws* to indicate my opposition to the entire complex of modern civil rights laws and their administration. In my view, the only hard questions about the employment discrimination laws concern the types and magnitudes of the social dislocations that result from their vigorous enforcement.

The political response is, quite evidently, radically different from my own. I started writing this book in the fall of 1988, before the Supreme

Court handed down its controversial decisions in a number of civil rights cases, most notably *Wards Cove Packing Co., Inc. v. Atonio,* which effectively nullified the business necessity test as it applied in disparate impact cases. Since these decisions were handed down in the spring of 1989, there has been a determined effort in Congress to reverse those decisions, in order "to restore and strengthen" the prior edifice of the civil rights laws. During that debate no one chose, or dared, to advance any of the arguments developed in this book. Instead, both the Democratic Congress and the Republican Bush administration announced themselves four-square in favor of civil rights legislation in principle, and differed only on the scope and enforcement of the civil rights effort.

For a considerable period of time the debate between the two sides focused on the issue of "quotas." The Bush Administration insisted that the proposed amendments to the civil rights statutes would introduce a system of quotas into the civil rights law, but it never could explain why it was that quotas should be regarded as a bad thing. The Congress for its part denied that there was an explicit creation of quotas, but in turn it never could explain why the strict enforcement of the civil rights laws only in favor of protected classes would not lead employers to seek the safe haven of hiring by the numbers. The struggle in Washington bore all the marks of hard-fought interest group politics. In the course of the debate, neither side addressed any of the fundamental issues about the desirability of civil rights laws as such. The dangers they pose to open markets, competitive fitness, individual freedom, equal treatment before the law, and informed public discourse were passed by in total silence.

There was an impasse at the end of 1990 when President Bush vetoed the 1990 Civil Rights Act with evident reluctance. Yet the next year when faced with a new Congress, the President backed off his earlier position after the bitter confirmation battle over Clarence Thomas's nomination to the Supreme Court. The 1991 Civil Rights Act was signed on November 21, 1991, by a reluctant President under the watchful eye of a suspicious Congress. It was a joyless occasion, immediately marred by another round of intense political infighting over the scope of affirmative action programs within the federal government. In my judgment the compromise Act represents a clear victory for the aggressive enforcement of the civil rights laws. One purpose of the statute is to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)." The criticisms of *Griggs* that are contained in chapters 11 and 12

therefore have lost none of their relevance, given the Congress's thinly veiled repudiation of *Ward's Cove*.

The 1991 Civil Rights Act also makes a number of important practical changes that should be noted in passing. Thus the Act provides that: (1) "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice" (§703(m)(2)); where the improper motive has not influenced the employment decision, the court may grant declaratory and injunctive relief, and attorney's fees, but not damages, reinstatement, or other forms of specific relief (§706(g)(2)(B) (see pages 174-175)); (3) that race and gender norming shall be unlawful employment practices (§703(l) (see page 238)); (4) for compensatory and punitive damages, between $50,000 and $300,000, keyed to the size of the firm in cases of intentional discrimination (§1981); (5) that the statute of limitations in cases challenging seniority systems should begin to run only from the date that the violation occurred or adversely impacted upon an individual employee, whichever occurred later (§706(e)); (6) that the prevailing party can recover expert as well as attorney's fees (§706(k)); (7) that the protections of the Civil Rights Act now apply to both houses of Congress. The 1991 Act also contains an extensive codification of the extraterritorial effect of the Act; a major revision of its provisions on consent decrees (§703(n)), and a general provision that states: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with law" (1991 Act, §116).

The full set of changes wrought by the 1991 legislation will doubtless give rise to difficult problems of interpretation and application. How, for example, will a court thread the delicate line between voluntary affirmative action and implicit quotas? But the issues now squarely on the judicial agenda in no way address any of the substantive themes developed in this book. To be sure, any ambiguity on Congressional intent is dispelled for the future: there is no longer any doubt that disparate impact, business necessity, and affirmative action are part of the present civil rights law. Yet the historical evolution detailed in chapters 10 and 19 still show how the Supreme Court was able under the guise of interpretation to remake the color-blind 1964 Civil Rights Act in its own image. More important, the question of justification has been assumed away in the current political climate. The fundamental challenge to the civil rights legislation is whether the centralized system of employment relations is

superior to a decentralized system of market control. The White House never made these arguments; and the Congress never responded to them. I have not tried to rewrite the book in response to the most recent legislative developments, and there is no reason to do so. The strength of its arguments will have to be tested in nonpolitical markets.

In working through a book of this length and difficulty, I have incurred many debts. The first is to Francis O'Connell, Jr., who urged me to submit the original proposal to the Olin Foundation, which generously responded by funding two grants, one for the fall of 1988 and a second for the fall of 1989. These grants provided me with sufficient released time to complete the initial draft of this manuscript. The Olin Foundation has proved itself the ideal supporter of academic work, and its executive director, James Piereson, gave me constant encouragement and perfect freedom to complete a controversial project as I wanted to do it.

I am also indebted to the many people who have read and commented on various portions of the book, or some of the articles that I have written as offshoots of the project. Gary S. Becker, Penelope Brook, John Donohue, Samuel Estreicher, Abner Greene, and Richard A. Posner, as well as several referees for Harvard University Press, provided me with detailed written comments on an earlier draft of the manuscript which proved invaluable as I worked through subsequent revisions. Douglas G. Baird and Walter J. Blum made helpful oral comments, and Elizabeth Bartholet, Gerhard Casper, Douglas Ginsburg, Michael Gottesman, Daniel Greenberg, James Gwartney, Andrew Kull, Saunders Mac Lane, Ellen Frankel Paul, Stewart Schwab, Steven Shavell, Cass R. Sunstein, and Stephen F. Williams provided valuable comments, either written or oral, on specific sections or chapters of the manuscript in its earlier form. I also received useful advice and guidance about the vast literature on various aspects of the employment discrimination laws from Ian Ayres, David H. Kaye, Glenn Loury, Paul Meier, Suzanna Sherry, and Stephen Stigler. Finally, I have benefited enormously from discussions of the issues involved in these cases with Frank H. Easterbrook, Michael W. McConnell, Geoffrey P. Miller, David A. Strauss, and other stalwarts of the Chicago round table lunches. The debts that I owe to these and other scholars should be evident on each page of the manuscript.

I have also benefited from the opportunity to present all or portions of the book at workshops and lectures over the past several years. I have thus discussed ideas for this book at The University of Chicago Law School, the Department of Economics at Florida State University,

Georgetown Law School, George Washington University, Harvard Law School, McGill University Law School, New York University Law School, Northwestern Law School, the University of Illinois Law School, the University of Pennsylvania Law School, the University of Pittsburgh Law School, the University of Toledo Law School, Virginia Law School, and West Virginia Law School. I would also like to thank the American Enterprise Institute, The American Law and Economics Association, The Cato Institute, The Federalist Society, and the Social Philosophy and Policy Center at Bowling Green State University for sponsoring the conferences and debates at which I have been able to present many of the central ideas contained in this book.

At The University of Chicago, my dean and friend, Geoffrey Stone, provided full support and encouragement for the research project. I owe a large debt of gratitude to William Schwesig and Charles Ten Brink, our reference librarians, who always seemed able to track down the obscure references that I needed to pursue. I have also been blessed with three extremely able and conscientious research assistants. David Lawson, who put in too many hours on the manuscript during the 1988–89 academic year, proved indispensable in talking through the original design of the manuscript, gathering material, and editing the text, all with great insight, skill, tenacity, and dedication. Thereafter in 1989 and 1990 I had the help, first, of Ellyn Acker and then of Abigail Abrahams, both of whom provided invaluable assistance, both substantive and technical, in seeing the manuscript into its final form. Finally, my secretary, Kathy Kepchar, struggled with an unwieldy manuscript on two different word-processing systems and was always able to create order out of chaos.

A special word of thanks is also due to Michael Aronson, general editor at Harvard University Press, for his support of this project and the manuscript that emerged from it. I also thank Amanda Heller, whose expert copyediting caught and corrected innumerable mistakes of both style and substance that crept into the manuscript during its many rounds of revisions, and Lauren Osborne and Susan Wallace, who saw the book through its final stages of production.

Finally, my wife, Eileen, and my three children, Melissa, Benjamin, and Elliot, showed great patience and understanding when a distracted husband and father was trying to work through the ideas contained in this book.

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Introduction: Consensus and Its Perils

The subject of this book is the proper place and scope of the antidiscrimination principle, especially as it applies to the employment relationship, in both the private and the public sector. There is little question that a broad antidiscrimination principle lies at the core of American political and intellectual understandings of a just and proper society, not only in employment but also in housing and public accommodations, medical care, education, indeed in all areas of public and private life. The consensus in favor of the principle is as wide as it is deep. Its implications profoundly influence the shape and efficiency not merely of American labor markets but also of our basic social institutions.

The cultural and historical reasons for this social consensus on discrimination provide powerful leitmotifs for the present legal discourse, especially on issues of race. The history of official and private discrimination in American life covers slavery in the South, the Civil War, Reconstruction, Jim Crow, segregation in the military, massive resistance to school desegregation, sit-ins and lunch counters, and struggles for the ballot.[1] The enormous successes in changing a misguided, and often hateful, pattern of race relations have all come through sustained government action, which often depended on the use of force. Even today frequent outbreaks of racial violence, conflict, boycotts, and demonstrations have ushered in a new spate of racial tensions greater than any that have existed in the previous twenty years. The symbolic role of an antidiscrimination statute in this context is not something that can be easily ignored or cast aside.

1. The relevant literature is vast. For some useful sources, see Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (1990); Richard Kluger, *Simple Justice* (1976); Charles Lofgren, *The Plessy Case* (1987); Andrew Kull, *The Color-Blind Constitution* (1992); C. Vann Woodward, *The Strange Career of Jim Crow* (3rd rev. ed., 1974).