study of cooperation than conflict. This is surely a strange claim by the author of a valuable, though undeservedly neglected, book, *The Social Dilemma*, which demonstrates the value of the economic approach to international relations. Bernholz examines the ability of economic reason to illuminate international relations, arguing in the process that balance-of-power systems with several states are more stable than either bipolar systems or multipolar systems with many states.

For the most part, these essays work well as surveys of existing literature: they expose the reader to a lot of different material in the fields being surveyed, and they provide a good supply of references for those interested in further examination of particular topics. The editor is quite right to claim that economics provides a general framework for a unified social theory. This book does a good job of conveying that claim to those who are already predisposed to accept it. However, I doubt that it will prove to be a suitable homiletical instrument for taking that claim before those not so predisposed, because for the most part these essays do not engage the alternative approaches to the subjects that are examined here. But to say that, is simply to say that much work remains to be done in securing general recognition of the universality of the economic approach.

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Forbidden Grounds: The Case Against Employment Discrimination Laws
Richard A. Epstein
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Discrimination law in the United States is a quagmire of legislation, judicial interpretations, and federal agency edicts that seemingly defy rational treatment. Since the passage of the Civil Rights Act of 1964, and particularly its Title VII outlawing employment discrimination, Congress has seen fit to enact additional antidiscrimination statutes to protect pregnant women, workers over the age of forty, disabled government workers, and most recently, disabled individuals in the private sector.

The judiciary's creative impulses have only added to the complexity. Courts have repeatedly approved affirmative action as a putatively short-term fix for historical discrimination, despite clear language in the 1964 Act averring that nothing therein required preferential treatment or inferences of discrimination from statistical comparisons. Judicial alchemy surmounted Title VII's requirement that intent be proven before an employer could be convicted of discrimination, by affixing to the act the concept of "disparate impact." Thus, employment practices that were

fair in appearance could nevertheless fall afoul of Title VII if they had a "disparate impact" on protected minorities or women. The Americans with Disabilities Act of 1990, written in purposely vague language, invites ad hoc, case-by-case judicial decisionmaking, as employers are left at the mercy of test cases on what is or is not "reasonable accommodation" for a handicapped employee or job applicant. On this one act alone, consultants are enjoying a feeding frenzy as panicky employers seek some protection, however illusory, from exposure to compensatory and punitive damages for violations of standards that have yet to be elaborated.

Into this morass steps Richard Epstein, with undoubtedly his finest work to date. *Forbidden Grounds* is a truly impressive effort, and one that should be much more appealing to libertarians than *Takings: Private Property and the Power of Eminent Domain*, Epstein's previous venture into legal quicksand. While many libertarians found *Takings* frustrating for its foundational admixture of rights talk and utilitarianism, and its consequent vacillations, what is most appealing, in contrast, about *Forbidden Grounds* is its foundational consistency. The theoretical framework that Epstein erects is at once pellucid yet brilliant, and sturdy enough to navigate through the whole panoply of employment discrimination issues: from race to sex discrimination, disparate treatment to disparate impact, sexual harassment to pensions, pregnancy to affirmative action, age discrimination to disability discrimination.

Epstein constructs his edifice upon an organizing principle—freedom of contract—that generates a legal regime that is the antithesis of a regime built upon a competing antidiscrimination principle. Freedom of contract, as he defines it, "allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all." Under such a regime the state's principal function is to "ensure that all persons enjoy the civil capacity to own property, to contract, to sue and be sued, and to give evidence." The state prohibits the use of force and fraud, and its reach extends barely much further. No special "status-based" rights need be created, no rules to limit the "zone of freedom" of employers, landlords, and manufacturers. Individuals are left free to engage in trade with others or not, as they alone see fit, subject only to the requirement that they meet their freely chosen contractual obligations.

Freedom of contract's antipode is the antidiscrimination principle, which breeds an interventionist and expansionist regime with which we are all too familiar: a regime of "forbidden grounds" in which the state bars private employers from considering certain properties of a person—race, sex, age, national origin, religion, handicap, and in some venues, sexual orientation—in making employment decisions. This principle is as universally accepted as it is rarely defended, Epstein observes, and thus it is ripe for scrutiny, particularly of the sort refined by the law-and-economics movement, with its concern for minimizing costs and generating

efficient legal rules. With law and economics' weapons for the analysis of social policy in hand—transaction costs, information costs, agency costs, moral hazard costs, and political costs—Epstein undertakes a forced march through the battlefields of employment discrimination law. To prevail, he must vanquish "the entire apparatus of the anti-discrimination laws" as they apply to private employers.

Epstein's journey from the Hobbesian state of nature to Lockean self-ownership of one's labor (now given a "deeper functional justification" than Locke's natural rights) to the development of the common law on labor relations to his final call for the repeal of Title VII is intricate, inventive, and intellectually compelling. Of particular theoretical interest is a chapter on "Force, Discrimination, and Free Entry," in which he deploys the economists' concept of comparative advantage to analyze the labor market. He demonstrates that even if private discrimination exists, market pressures on the marginal employer will push him to break ranks and hire from the disfavored pool as the favored pool of potential employees gets winnowed down. The worth of each laborer is determined, he argues, by the trading partner who most values his services, and thus in a large, diverse labor marketplace, those employers with a taste for discrimination will have little effect on the disfavored, who will have many other options open to them.

Anti-discrimination laws of various sorts, especially those like the Equal Pay Act of 1963, which commands equal pay for equal work, will operate to distort those natural market forces by preventing the disfavored from offering their services at lower rates, and thus will hurt their intended beneficiaries. Another effect of anti-discrimination laws is to limit the information that employers are permitted to gather about particular employees. Ironically, then, restrictions on testing and interviewing promote the very stereotypical decisionmaking that they were intended to eliminate.

Epstein's discussion of "Rational Discrimination in Competitive Markets" will undoubtedly exasperate both the old, Hubert Humphrey-type liberals who championed the Civil Rights Act as the harbinger of a "color blind" society and the newer welfare-state liberals who have abandoned that aspiration in favor of preferential treatment and proportional representation. The former will likely find distasteful Epstein's argument that since individuals do show preferences for identification with people like themselves, homogeneity of the work force within firms (as within condominium associations) is both rational and efficient, and thus voluntary discrimination is likely to persist over time in competitive markets. The latter will recoil at his argument that a perfect match between the racial composition of the firm and the surrounding community, rather than being the hallmark of a successful anti-discrimination regime, is instead a signal that the gains from trade through specialization have not been realized, that the market is underdeveloped, and that

government regulation has wrought dangerous effects. Both might find disturbing Epstein's willingness to accept people as he finds them, replete with whatever tastes and preferences for discrimination that they might have. But he presents an argument that cannot be lightly dismissed for "allowing persons to sort themselves voluntarily by inclination and taste."

Forbidden Grounds marshals in virtually every chapter a no-holds-barred challenge to today's orthodoxy. Recalling the often vituperative, ad hominem reviews that *Takings* received, and surmising that welfare-state liberals care more deeply about the anti-discrimination agenda than they do about eminent domain and regulatory takings, my initial hunch was that *Forbidden Grounds* would either be ignored by reviewers or garner even more scandalous reviews than its predecessor. Happily, neither seems to be the case, for the book has been reviewed widely in the legal journals and beyond, and for the most part civilly. It remains to be seen, however, whether *Forbidden Grounds* will have the impact that it deserves; whether it will be a work in legal thought like Robert Nozick's *Anarchy, State, and Utopia* in political philosophy: a work that every serious writer must take into account, if only to disparage. On its merits, it manifestly deserves such standing, for it is truly a path-breaking effort.

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