Book Review - Forbidden Grounds: The case against employment discrimination law

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proper roles for public and private retirement income security is required before Eastern European countries may confidently follow Ghilarducci's urging to adopt her pension policy prescriptions.

The book does offer readers some insights, setting aside concerns about its framework and policy prescriptions. Ghilarducci's view of unions' role in the evolution of pensions in the U.S. is a perspective which, while idiosyncratic, has not been widely available in mainstream publications, and may prove interesting to those seeking a justification for directing pension funds toward nontraditional investments. However there is virtually no discussion of changes in pension coverage and type among nonunion workers. Also, the book will be frustrating for analysts seeking to follow up on factual and other references. For example, a couple of statistical series which extend into the late 1980s are referenced as having been taken from a 1980 publication, and some bibliographic entries are missing altogether.

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K Law and Economics

Richard Epstein is one of the champion debaters and most prominent libertarians in the legal academy, and these features are in full display as he makes the case that employment discrimination laws should now be repealed. Epstein's systematic attack stresses the mischief that is at times caused when rational employment practices—such as sex-linked pensions or mandatory retirement policies—run afoul of the staggering array of employment discrimination laws. Epstein is surely correct that the laws have proliferated in a Byzantine fashion, extending far beyond the intentions of the authors of Title VII of the Civil Rights Act of 1964, who were mainly interested in dismantling the oppressive segregationist regime of the American South. Epstein is weakest, however, in refusing to consider whether the core elements of antidiscrimination law play a useful role in addressing the painful and enduring social problems created by racism.

The book is artfully organized into six parts. Part I begins with an overall assessment of the value of competitive markets and how they work to reduce irrational discrimination. His discussion of the contrasting case of monopsonistic markets is used to justify the position that there should be no limitation of any kind on private discrimination, but that governments should be prohibited from discriminating on the basis of race or sex. While this distinction does have an underlying theoretical rationale, it conflicts with Epstein's overriding despair that, at reasonable cost, one can ever hope accurately to establish the existence of inappropriate discrimination.

Part II provides a historical analysis designed to show that, had the Supreme Court consistently promoted freedom of contract, many egregious governmental acts of discrimination that were sustained would have been struck down. In Part III, Epstein acknowledges the gains that blacks have achieved in the wake of the passage of Title VII, implicitly rejecting the work of those who have argued that black gains in the 1960s and 1970s were merely part of a long-term narrowing of the black-white wage gap caused by a narrowing in the black-white human capital gap. Controversially, he attributes the improvement to the success of federal law in destroying the racist interferences of Southern state and local governments. This thesis preserves his conclusion that, without the corrupting influence of government in the first place, there simply would be no problem to correct. Epstein rails against the Supreme Court (he does not note the irony that it was Nixon's Supreme Court) for expanding the definition of discrimination: the disparate impact standard, created in 1971, proscribes neutral practices, such as use of tests or other qualification requirements, that have an adverse impact on the employment prospects of minorities, unless the employer can justify the use of the practice in question. Epstein is convinced that this disparate impact standard imposes large productivity losses on employers, although his evidence is largely conjectural.

Part IV argues that the separate but equal doctrine that is so discredited in the context of race discrimination is more defensible in the
area of sex discrimination. He contends that government should not interfere with practices, such as rules concerning pensions and pregnancy leave, that are based on the legitimate cost differentials existing between male and female workers. Part V argues that if we are going to have a rule prohibiting discrimination, it should also apply to affirmative action. Because he would favor repeal of Title VII for private actors, though, Epstein would be willing to tolerate private, but not governmental, affirmative action.

Part VI analyzes the extensions of the antidiscrimination principle to the prohibitions against discrimination based on age and disability. Epstein argues that the costs of these prohibitions are so high because they often conflict directly with the goal of employers to find, at lowest cost, the most productive workforce available.

Although the book is elegantly written and logically organized, it is clearly the product of an advocate rather than a social scientist. Accordingly, its many sound points are often carried too far, and the evidence is marshalled in the style of a lawyer’s brief, where the weaknesses of one’s own case tend to be minimized or ignored.

While I share many of Epstein’s concerns about the burgeoning nature and at times costly excesses of federal antidiscrimination law, I am uncomfortable with Epstein’s “frontal assault” on the “broad antidiscrimination principle [that] lies at the core of American political and intellectual understandings of a just and proper society” (p. 1). Epstein is willing to dismiss this widely shared core belief with the wave of a hand. As William Baumol has reminded us in a different context:

In a profession committed to the position that we should not tell people what they ought to want, and that the utility functions, which we usually accept as given data, are what should enter the social maximand, it ill behooves us to reject such beliefs out of hand. Nor do they do violence to our methods, for we can surely treat anything which conflicts with such widely held beliefs as a detrimental externality which we know how to handle analytically. (Baumol 1982, p. 1106)

Of course, if one concedes that private employment discrimination imposes a massive negative externality, the theoretical case for a pure market approach to the problem of discrimination is undermined. At this point, a more particularized evaluation of the costs and benefits of antidiscrimination law is needed, but readers will have to look elsewhere to find this. For those who are insufficiently acquainted with the value of markets and the dangers and burdens that can flow from even well-meaning governmental interventions, Epstein’s book will be a rich source of new insights. In a remarkably readable style, he recounts the folly of the most dubious legal and administrative decisions committed in the name of advancing equality. The book fails, however, to give an accurate picture of the size of the inevitable distortions that result from governmental regulation. Does the law generate benefits for blacks and women, and at what cost? These crucial empirical questions need to be resolved through careful research and scholarly analysis.

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REFERENCE


L Industrial Organization

The economic theory of product differentiation.
By JOHN BEATH and YANNIS KATSOULAGOS.

Most markets are characterized by some degree of product differentiation. Even those few products that are physically identical often differ in nonphysical characteristics, such as the location of the seller and the contractual terms of sale. It may be surprising, then, that many textbooks still treat markets with differentiated products as a special case. This book provides a useful introduction for students who are interested in studying the majority of markets that are characterized by product differentiation. The topics considered cover most of the main approaches to modeling differentiated products markets and give a good idea of why product differentiation may arise.