

1992

FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS

David L. Gregory

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_human_rights



Part of the [Law Commons](#)

Recommended Citation

Gregory, David L. (1992) "FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS," *NYLS Journal of Human Rights*: Vol. 10 : Iss. 1 , Article 8.

Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol10/iss1/8

This Book Review is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

BOOK REVIEW

FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS

By Richard A. Epstein
Cambridge, Massachusetts
Harvard University Press (1992)
Pp. 530, \$39.95

*Reviewed by David L. Gregory**

Richard Epstein gets it substantially less than half right in his latest book, *Forbidden Grounds: The Case Against Employment Discrimination Laws*.¹ The prolific University of Chicago professor of law² brings his powerful law and economics libertarian critical perspective to bear on the contemporary legal structure that presumes to prohibit discrimination in employment on the basis of race, sex, age, and disability. That the legal regime, of which *Plessy v. Ferguson*³ is the pernicious paradigm, generally supported and reinforced the deeply racist apartheid sociology of the Jim Crow era, is correct. The balance of his theory, that contemporary legal prohibitions of employment discrimination are flawed, is itself deeply flawed.

A decade ago, in a lengthy article in the Yale Law Journal,⁴ Professor Epstein provided a comprehensive and controversial critique of the New Deal's National Labor Relations Act. In the article, Professor Epstein argued that the Act is unconstitutional, and as a far graver sin from the perspective of the Chicago law and

* Professor of Law, St. John's University School of Law.

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

² Professor Epstein has written scores of influential law review articles. Among his most influential books are *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); *MODERN PRODUCT LIABILITY LAW: A LEGAL REVOLUTION* (1980); *A THEORY OF STRICT LIABILITY*; *TOWARD A REFORMULATION OF TORT LAW* (1980).

³ 163 U.S. 537 (1896) (holding separate facilities for the races are constitutional as long as they are equal).

⁴ Richard Epstein, *A Common Law For Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357 (1983).

economics school, inefficient.⁵ The article infuriated the conventional centrists of the labor law academic community.⁶ It did not surprise the leftist critical legal theoreticians who had already attacked the New Deal's labor law regime.⁷

Now, Professor Epstein has launched what will surely be an even more controversial, "securely outside the mainstream"⁸ and "frontal intellectual"⁹ assault, on the prevailing orthodoxies which underlie legal prohibitions of employment discrimination. Some of his original argument against New Deal labor law has at least partially come to fruition in the past decade, as the Reagan administration's National Labor Relations Board vitiated many of the historic protections of the National Labor Relations Act.¹⁰

One of the most bitter consequences of the laissez faire economics mythology run afoul has been the marked decline in the percentage of workers represented by labor unions.¹¹ It has been accompanied by the disillusionment of a generation of workers, and the steady erosion in the living standards of the shrinking working middle class.¹²

Just as working people and their unions have recently shown

⁵ *Id.* at 1393.

⁶ See Julius Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983) (arguing that Professor Epstein overlooks salient questions about the efficacy of labor law in favor of an abstract model of the common law).

⁷ See David Gregory, *Working For A Living*, 58 BROOK. L. REV. (forthcoming 1993); Marion Crain, *Images of Power in Labor Law*, 33 B.C. L. REV. 481 (1992); Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992); Katherine Van Wezel Stone, *The Post War Paradigm in American Labor Law*, 90 YALE L.J. 1511 (1981); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265 (1978).

⁸ FORBIDDEN GROUNDS, *supra* note 1, at 499.

⁹ *Id.* at 6.

¹⁰ See David L. Gregory & Raymond T. Mak, *Significant Decisions Of The National Labor Relations Board, 1984: The Reagan Board's "Celebration" of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985).

¹¹ See Nelson Lichtenstein, *What Happened To The Working Class?*, N.Y. TIMES, Sept. 7, 1992, at 19.

¹² See THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (1991) (a detailed account of the decline of unions and wages over the last twenty years).

some signs of fighting back,¹³ so too will Professor Epstein's abstract, unreal hope for the demise of employment discrimination law ultimately be rejected. The road, however, between the warm, friendly reception this book is certain to receive in many quarters, including Justice Scalia's wing of the Supreme Court,¹⁴ and the final failure of Professor Epstein's agenda, promises to be extremely volatile and painful. Just as his pointed attack a decade ago on labor relations law has borne some bitter fruit, Professor Epstein's academic assault, at least in the interim, may have partial success. The stakes are high for all in, and concerned with, the world of work.

Given this background of conflict and ferment, *Forbidden Grounds* is a 'must read' for everyone concerned with justice in the workplace. Professor Epstein is a lightning rod, but given the political shifts in the past decade, he is not a lone voice crying in the wilderness.¹⁵ What does Professor Epstein get right in his new book? After forthrightly stating his decidedly unorthodox position against employment discrimination laws, Professor Epstein seductively demonstrates how the Jim Crow apartheid regime was directly supported by the pervasive involvement of the government.¹⁶

The racist segregationist environment that supported the separationist legal order of *Plessy v. Ferguson*¹⁷ for almost a century could never have flourished without the broad cultural support of the government. Professor Epstein convincingly shows how the legal order and the racist sociology, with deeply imbedded pathologies of racism

¹³ See generally *Tentative Pact in Strike at G.M.'s Lansing Plant*, N.Y. TIMES, Sept. 29, 1992, at 4; Doron P. Levin, *G.M. Ultimatum to the Parts Makers Brings Showdown with Workers*, N.Y. TIMES, Sept. 5, 1992, at 1; Jonathan P. Hicks, *Still Bitter, Caterpillar Workers Return*, N.Y. TIMES, Apr. 21, 1992, at 16.

¹⁴ See *International Union, UAW v. Johnson Controls*, 111 S. Ct. 1196, 1216 (1991) (Scalia, J., concurring) (asserting that increased costs to the employer, by themselves, are sufficient to defeat Title VII challenges to employment practices). See also Antonin Scalia, *Commentary: The Disease as Cure; "In Order To Get Beyond Racism We Must First Take Account Of Race,"* 1979 WASH. L.Q. 147 (1979) (criticizing the entire practice of affirmative action as leading to pretense and self delusion).

¹⁵ See *International Union, UAW*, 111 S. Ct. at 1216 (Scalia, J., concurring) (supporting bona fide occupational qualifications based on employers' costs).

¹⁶ "Huge portions of American racial history are thus concerned not with the behavior of private markets as such but with the neutralization of the massive apparatus of state control over private behavior." *FORBIDDEN GROUNDS*, *supra* note 1, at 92.

¹⁷ 163 U.S. 537 (1896).

and the legacy of slavery, mutually complemented and reinforced one another.¹⁸ The extensive racist sociology could not have prospered for so long without at least tacit assistance of the government, and in this, he is undoubtedly correct. The cogency of Professor Epstein's historical analysis in this regard makes this the most powerful part of the book.

Professor Epstein then argues, by an ultimately failed analogy, that the pervasive influence of government today has likewise led to a plethora of ills: "reverse" discrimination, affirmative action, and the many other injustices and/or inefficiencies allegedly attributable to contemporary employment discrimination law.¹⁹ Seen from this perspective, when government went beyond the self-correction of removing impediments to a color-blind market, it fostered unlawful discrimination against employers and new groups of employees²⁰ in the modern civil rights era.

Ultimately, Professor Epstein's analogy fails. The fundamental historical premise upon which it is posited is flawed. In fact, contrary to Professor Epstein's perspective, during the *Plessy v. Ferguson* racist milieu there is little evidence that the government compelled employers to discriminate on the basis of race or sex. While discrimination surely did occur in the era prior to the Civil Rights Act of 1964,²¹ it was due

¹⁸ Professor Epstein states:

That is, the social and economic pressures could be and doubtless were, understood as an implicit threat that violence would be used if polite measures failed. The effectiveness of that private violence in turn depended heavily on the willingness of law enforcement officials to turn a blind eye to its prosecution, or indeed participate in it.

FORBIDDEN GROUNDS, *supra* note 1, at 96-97.

¹⁹ Professor Epstein states: "In the modern context [civil rights] has become a term that refers to the limits on freedom of association. It has thus repeated the fundamental official mistake of earlier generations by sanctioning active and extensive government interference in private markets." *Id.* at 500.

²⁰ Read: primarily white males. They are allegedly the new victims of discrimination under the regime of affirmative action. *Id.* at 415.

²¹ Title VII of the Civil Rights Act of 1964 proscribes employment discrimination on the basis of race, color, sex, or national origin. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

primarily to deep cultural racism, not to formal government mandate.²² The Jim Crow Era, with pervasive government support of the pathological sociology of racism, indeed was profoundly unjust. But it was, at least formally, ended in part by the activist intervention of transformed government on the side of the racially disadvantaged racial minorities.²³

The workplace today is a fairer place due to the transformation of the legal order and the role of activist government, initially via the Civil Rights Act of 1964, for the cause of justice. As Professor Epstein argues, without the active support of government, the Jim Crow racist era may not have flourished for almost a century.²⁴ But Jim Crow would nevertheless have flourished because of the pervasive social pathology of the United States. It is at this point that Professor Epstein's attenuated broad analogy fails.

Without a transformed government intervening against Jim Crow, the *Plessy* era of apartheid would have been perpetuated. Social justice through enlightened government can be an incredibly powerful force, as James Madison expressly recognized in the Federalist Papers,²⁵ the end of government is justice, not laissez faire capitalist mythology.

Both Professor Epstein and, *inter alia*, Vice-President Dan

²² See Herbert Hovenkamp, *Social Science And Segregation Before Brown*, 1985 DUKE L.J. 624, 625-26 (1985) (racist laws were a reflection of the prevalent racist attitudes).

²³ See VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1971) (a history of the government's response to the civil rights movement).

²⁴ Professor Epstein states:

In order to sustain the basic position that cultural and social norms are sufficient to sustain Jim Crow, it becomes necessary to abstract away from these pervasive threats [of violence] and to ask whether Jim Crow would have survived if southern whites had voluntarily relinquished their control over the ballot, the police force, the courts, and the other instruments of state domination. The prolonged fight to wrest control of these powers away from local majorities shows that they did not believe it could.

FORBIDDEN GROUNDS, *supra* note 1, at 97.

²⁵ THE FEDERALIST No. 51 (James Madison). ("If men were angels there would be no need for government . . . justice is the end of government.")

Quayle, apparently deny this core Madisonian wisdom.²⁶ Without the government's active role, this country's sociology, infected as it is by centuries of racism and sexism, would continue to debilitate aspirations to social justice in the workplace. The key point Professor Epstein utterly misses is a remarkably simple one -- there can be pernicious racist government, but there can also be good government resolved to remedy social wrongs.²⁷

The libertarian perspective allows, at most and at best, only minimalist government.²⁸ Accordingly, by Professor Epstein's reckoning, even if a well-intentioned government actively intervenes to attack workplace discrimination in the private sector, it will inevitably induce counterproductive inefficiencies into the private employment market.²⁹ Professor Epstein's libertarianism misses the fundamental point, because of the refusal to recognize that "inefficiency" is not necessarily synonymous with injustice. One either believes in or rejects the Madisonian role of government in the furtherance of justice.³⁰

The entire book can be reduced to, and premised upon, this core point: either one believes in or repudiates the role of government, in society and the market, in order to seek the furtherance and realization of justice. Professor Epstein denies government such a role, and equates even its best intentions with dysfunction and inefficiency.³¹ Fortunately, most people continue to believe and know that government has the capacity and the Madisonian responsibility to further justice, including justice in the workplace.

Professor Epstein divides the book into six major sections.

²⁶ See *Quayle Portrays New York as Symbol of Liberalism's Failures*, N.Y. TIMES, June 16, 1992, at 1 (speech by Vice-President Quayle blaming New York's myriad problems on liberal policies such as high taxes and rent control).

²⁷ Of course, some despair of fundamental and lasting positive change. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL; THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *AND WE ARE NOT SAVED* (1987) (powerful and poignant works by one of America's foremost legal scholars decrying the persistence of racism).

²⁸ See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

²⁹ "In practice the antidiscrimination laws impose an elaborate set of disguised subsidies, and these distort resource allocation just like any other sort of subsidies." *FORBIDDEN GROUNDS*, *supra* note 1, at 501.

³⁰ Coincidentally, it is Madison's profile in silhouette that the Federalist Society has adopted as its logo. The Federalist Society apparently chooses to overlook the ends of government that Madison upheld, despite its logo.

³¹ *Id.* at 149-50.

Part one is devoted to critiquing the conventional rationale supporting government involvement to root out employment discrimination in private employment markets.³² Professor Epstein argues that discrimination can be rational, efficient, and fundamental to the freedom of contract principle upon which much of his libertarian political philosophy is based.³³ Freedom of association is critical, and the government's employment discrimination laws interfere with that principle, according to Professor Epstein.³⁴

Part two, the best part of the book, comparatively assesses the Jim Crow era with that of the modern civil rights era and examines the role of activist government in each milieu.³⁵ Each of the remaining four parts are respectively devoted to race³⁶ and sex³⁷ discrimination, affirmative action,³⁸ and the "newer" forbidden grounds of age and disability discrimination.³⁹

In each of these aspects, Professor Epstein maintains that the government applies force and coercion through the employment discrimination laws. Thus, he argues, it violates the classic libertarian principles of freedom of contract and freedom of association.⁴⁰ Professor Epstein argues that the activist government's role is unprincipled, as are the employment discrimination laws enforced to the detriment of employer free choice.⁴¹ He further claims the market is colorblind when the government remains outside the market.⁴² The contemporary evil and dysfunction occurs when the government imposes its artificial preferences upon a few privileged classes, to the detriment of broader free choice.⁴³ Professor Epstein concludes that employers

³² *Id.* at 15.

³³ *Id.* at 28.

³⁴ *Id.*

³⁵ *Id.* at 89.

³⁶ FORBIDDEN GROUNDS, *supra* note 1, at 145.

³⁷ *Id.* at 267.

³⁸ *Id.* at 393.

³⁹ *Id.* at 439.

⁴⁰ Professor Epstein states: "An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all." *Id.* at 3.

⁴¹ *Id.* at 66-67.

⁴² FORBIDDEN GROUNDS, *supra* note 1, at 39-40.

⁴³ *Id.* at 77-78.

are de facto pressured by fear of quota-based litigation to hire less efficient, less qualified workers, thus diminishing the nation's international competitiveness.⁴⁴ These propositions are a gross exaggeration of the reality⁴⁵ and they miss the obvious alternative: employers can improve skills of all current workers. Thereafter, they can promote largely from within the resulting skilled work force.

Little of what Professor Epstein says is new to the ongoing debate over political economy and public policy. Professor Epstein merely applies the basic libertarian and laissez faire rationale to contemporary employment discrimination. Although he writes with obvious elegance and passion, Professor Epstein has largely repackaged the failed arguments made decades earlier by corporate elites against minimum wage and hour laws, social security, and any other form of protection provided for workers by government legislative mandates.

The New Deal's achievements, from all appearances, will endure long after the already rapidly receding spirit of the failed Reagan regime. In many ways, Professor Epstein's book represents the last hurrah of the spasmodic decade of the eighties, the final gasp of the rapacious corporate elites to be "left alone" to associate freely to achieve their supposed "efficiencies." In fact, as others have empirically demonstrated,⁴⁶ the employment discrimination laws may indeed be efficient, rather than as Professor Epstein argues, dysfunctional.

As most who work for a living already know, justice in the workplace cannot be fully quantified or reduced to the merely tangible. Neither Professor Epstein nor anyone else can "win" or "lose" arguments for justice in the workplace (or elsewhere)⁴⁷ based solely

⁴⁴ *Id.* at 234-35.

⁴⁵ John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (the increase in employment discrimination litigation involves discharges rather than hiring practices and individual rather than class actions).

⁴⁶ See John J. Donohue, III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PENN. L. REV. 523, 548 (1987) (finding that Title VII yields net gains even when it is assumed that the Act will not drive discriminating employers from the market).

⁴⁷ Perhaps the most bizarre and furthest reach of the Chicago law and economics genus to date is the effort by Professor Epstein's former law faculty colleague and fellow prominent law and economics champion, Judge Richard Posner, to extend the law and economics "rational" approach to those most emotional and "irrational" of all activities, sex and sexuality. See RICHARD POSNER, *SEX AND REASON* (1992). The Posnerian

or even primarily on the quantifiable or the "verifiable." Professor Epstein's purported empirical rigor will fail, because he urges the rejection of civil rights symbolism.⁴⁸ Such is an especially bizarre position for any lawyer to take, knowing that symbol, image, and perception often dictate subsequent political, economic, and legal realities. Professor Epstein states that "the best way to take into account the full range of symbols, good and bad, noble and vain, is for the legal system to ignore them all -- mine and yours alike."⁴⁹ Alas, Professor Epstein and his disciples join President George Bush in deriding the "vision thing."

Employment discrimination laws, however, are premised upon a vision of a future workplace with justice for all. As then-Governor Bill Clinton powerfully recalled the scriptural injunction in his acceptance speech at the Democratic National Convention on July 16, 1992, without a vision, the people perish.⁵⁰

Ultimately, Professor Epstein would deprive the people of vision, or more precisely, resubstitute the weary and warped *laissez faire* "vision" of corporate business elites' economic advantage at the expense of their workers. Employers, catering to customer and client "preferences" and in turn reflecting deeply embedded racism and sexism, may well be able to charge a premium, willingly paid by its discriminatory clientele, to continue to discriminate. Moreover, they may be able to absorb any "inefficiencies" caused by discriminatorily refraining from employing, on the basis of race or sex, some of the best workers otherwise available.⁵¹

Professor Epstein's book is removed from the lives of ordinary working people. He naively believes that employers who discriminate

quantifiable approach continues to fall on hard critical times. See James Gordon, III, *Cardozo's Baseball Card*, 44 STAN. L. REV. 899 (1992) (criticizing Posner's quantification of the eminent jurist's career as evidencing the inherent distortion in his method).

⁴⁸ FORBIDDEN GROUNDS, *supra* note 1, at 488-89.

⁴⁹ *Id.*

⁵⁰ *Transcript of Speech by Clinton Accepting Democratic Nomination*, N.Y. TIMES, Sept. 17, 1992, at A15.

⁵¹ This refutes the basic law and economics principle that the free market will "punish" the discriminatory employer's inefficiencies for refusing to hire some of the best workers because of their race or sex and ultimately drive these discriminatory employers from the free market. The classic argument was made by Professor Gary Becker. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

will be punished for their inefficiencies by the omniscient market. This is absurd. According to Professor Epstein, employers who prefer to discriminate are lawfully engaging in certain "preferences" which are legitimate in the "free" market.⁵² Therefore, Professor Epstein posits, the government should step aside in favor of the "free" market's operations.⁵³ The government remains an ogre for Professor Epstein when, in fact, centuries of racist pathologies in the society, not the government, are primarily responsible for the perpetuation of discrimination. Incredibly, Professor Epstein is seemingly oblivious to the pervasive social reality of racial and gender discrimination. Private choices have consistently and perniciously discriminated, often on the basis of race.⁵⁴

If there were no modern federal Civil Rights Act, private discrimination in employment would continue to run rampant. Bigots will always be with us in an imperfect world. Yet, the purpose of government, through the Madisonian application of employment discrimination law, is to check the influence and operation of private bigotry in the employment markets to the greatest possible extent.⁵⁵ Professor Epstein violates the Madisonian principles upon which much of his basic legal philosophy is supposedly grounded. It is no answer for him to cite a few admittedly outrageous excesses as representative of the alleged complete dysfunction of contemporary employment discrimination laws.⁵⁶

For one who urges the disavowal of symbolism, Professor

⁵² FORBIDDEN GROUNDS, *supra* note 1, at 42-43.

⁵³ *Id.* at 44.

⁵⁴ *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (42 U.S.C. § 1981 affords a remedy for racial discrimination in private employment); Norwood v. Harrison, 413 U.S. 455 (1973) (state may not subsidize racial discrimination by private schools); Shelley v. Kraemer, 344 U.S. 1 (1948) (finding unconstitutional racially restrictive covenants in the sale of private real estate).

⁵⁵ *See* Donohue, *supra* note 46, at 538.

⁵⁶ *See* DINESH D'SOUZA, ILLIBERAL EDUCATION (1991) (focusing on some extreme cases of 'politically correct' hiring practices in colleges and universities). *But see* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (criticizing D'Souza's examples as not typical of current employment practices).

Epstein uses the symbol of the 'imperial victim,'⁵⁷ to characterize those who have achieved entry into employment through modern employment discrimination laws. "Anyone who works in academic circles, and I dare say elsewhere, knows full well that *all* the overt and institutional discrimination comes from those who claim to be the victims of discrimination imposed by others."⁵⁸

This is patently outrageous, especially given the pathetic absence of minorities from the law faculty of Professor Epstein's law school, the University of Chicago.⁵⁹ He concludes the book by stating that "the modern civil rights laws are a new form of imperialism that threatens the political liberty and intellectual freedom of us all."⁶⁰

In fact, Professor Epstein's argument is a rehash of the failed corporate workplace imperialism of the *Lochner v. New York*⁶¹ era, an epoch that, one hopes, had its last hurrah during the decade of Reaganism. If not, perhaps the eradication of employment discrimination laws will be the precursor to the repeal of the Thirteenth Amendment! After all, as the racist majority of Harvard and Yale Law School graduates⁶² reminded the 'imperial victims' in *Plessy*,

⁵⁷ "The civil rights law thus speaks of a perpetual state of dependence of a group of people who need constant state intervention to redress what would otherwise be their permanent inferior status in the marketplace." FORBIDDEN GROUNDS, *supra* note 1, at 498.

⁵⁸ *Id.* at 503.

⁵⁹ In 1991, the distinguished African-American jurist, Judge Leon A. Higginbotham, Jr., refused to participate in The University of Chicago Law School Moot Court Competition to protest the fact that the school had no minority professors among its tenured ranks. Carol Jouzaitis, *U. of C. has 1st Black Prof Since '50's*, CHI. TRIB., May 2, 1991, at 1.

⁶⁰ FORBIDDEN GROUNDS, *supra* note 1, at 505.

⁶¹ 198 U.S. 45 (1905) (finding a legislative limitation of the workday for bakers unconstitutional).

⁶² While most of the *Plessy* Court received honorary law degrees from Harvard or Yale, four of the majority had earned degrees from one of the schools or had undergone some training at either institution. Chief Justice Fuller had attended lectures at Harvard. WHO WAS WHO IN AMERICA 431 (Vol. 1 1943). Justice Horace Gray received his LL.B. from Harvard in 1849. *Id.* at 479. Justice Henry Billings Brown attended lectures at Harvard and Yale. *Id.* at 148. Justice Shiras received his A.B. from Yale in 1853, and his LL.B. in 1856. *Id.* at 136. Justice D.J. Brewer, who did not hear the argument or participate in the case, received an A.B. from Yale in 1856 and an A.M. in 1859. *Id.* at 1120.

subordination and inferiority are merely states of mind!⁶³

Modern civil rights law which protects against employment discrimination is one of the United States' major contributions to the emerging and evolving post cold war international legal order. Rather than acquiesce to Professor Epstein's lack of vision, the United States should be the paragon of workplace justice for the international legal order. Most of the nations in Asia, Africa, and Europe would do well to emulate our leading international example of broadly prohibiting sex and age discrimination, protections against which the United States has led the world.⁶⁴

To dismantle our governmental achievements and once again tolerate the role of private market discriminations in employment would be a profound tragedy. It would give new life to the corporate imperialists of the Reagan era. The Reaganites have wrought havoc on society for a decade and we will be paying for their pathological excesses for decades to come.⁶⁵

⁶³ See *Plessy v. Ferguson*, 163 U.S. 537 (1896). The *Plessy* Court stated:

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

Id. at 542.

⁶⁴ Japan has traditionally not provided legal protections against age or sex discrimination. See WILLIAM GOULD, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* (1984). Neither has the European Community matched the protections against employment discrimination achieved in the United States. See Donald C. Dowling, *Preparing for the Internationalization of U.S. Employment Law Practice*, 43 LAB. L.J. 350 (1992); *How Does Europe Regulate Power Within its Corporations? What Might the Answer be for the U.S.? An Essay and Review of European Company Laws: A Comparative Approach*, 12 NW. J. INT'L L. & BUS. 601 (1992). In the future, the federal courts may subordinate the United States law to the international law regime, which continues to privilege employers. See *Fortino v. Quasar*, 950 F.2d 389 (7th Cir. 1991) (discrimination on the basis of Japanese citizenship as authorized by treaty is not actionable under Title VII as discrimination on the basis of national origin).

⁶⁵ See HARRY FIGGIE, JR. & GERALD SWANSON, *BANKRUPTCY 1995* (1992); John Judis, *The Red Menace: And now for Something Completely Bankrupt; U.S. Budget Deficit*, THE NEW REPUBLIC, Oct. 26, 1992, at 26 (citing the increase of the deficit during the Reagan years from 1.7 percent of Gross National Product to 6 percent); Douglas Jehl

At all costs, neither can the nation afford to regress to the private market discriminatory system that Professor Epstein would not find troublesome, and indeed would welcome. Professor Epstein's argument, if successful, would return us to *Plessy*, but without the 'color blindness' of Justice Harlan's dissent.⁶⁶ All to the contrary! Professor Epstein's private market would reintroduce private discriminations run riot, with Madison's vision of government seeking justice wholly abandoned in the process. Fortunately, the era for Professor Epstein's argument has come, and one hopes, has finally and irrevocably gone.

& James Risen, *Reagan Legacy of Deficits seen as Curbing Bush Action*, L.A. TIMES, Nov. 8, 1991, at 1 (indicating that the accumulated deficits of the Reagan era created "budgetary gridlock").

⁶⁶ "In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

