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*You Can't Say That!: The Growing Threat to Civil Liberties From Antidiscrimination Laws*, by David E. Bernstein. Cato Institute, 2003, 166 pages + notes and index.

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# “Walk\*\*g Distance to Sy\*\*gogue”

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Bruce Ramsey

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Freedom of speech is the freedom to discriminate in the use of words. Antidiscrimination laws restrict the freedom to discriminate in the handling of contracts. Narrowly construed, the two kinds of law can coexist. But it is not a comfortable fit. In principle they are opposites, and each itches to expand into the territory around it. The result is warfare, which is the subject of *You Can't Say That!* The book's subtitle, “The Growing Threat to Civil Liberties from Antidiscrimination Laws,” suggests a call to arms.

The author, David Bernstein, is a professor of law at George Mason

University. He has already made his mark with *Only One Place of Redress*, an unusual book on how blacks made use of the property-rights jurisprudence of the early 20th century. Here he takes on a current issue, arguing forcefully that constitutional liberties are in danger.

His chapters cover antidiscrimination law and freedom of expression at work, artistic freedom, political speech, compelled speech, and speech on college campuses. He also covers the effects of antidiscrimination law on private organizations, religious schools, religious landlords, the right to privacy, and the right to be left alone.

All of these rights are under attack by egalitarians who have, he says, an “agenda of elevating antidiscrimina-

tion concerns above all others.”

Federal housing law says, for example, that you may not discriminate in the sale of a house. The first example in Bernstein's book had to do with his friend Sheldon Richman, whose brother got into trouble for placing an ad in a Jewish newspaper in Philadelphia for a house within “walking distance to the synagogue.” Local housing officials said the ad was discriminatory because it was an appeal to Jews, and most Jews are white. Officials also could have nailed Richman for appealing to people who walk, which might suggest to the officious mind a discriminatory intent against the disabled.

By this rule, I can write almost anything short of libel, slander, or a threat

on the president of the United States in this review, but if *Liberty* printed my ad for a house, I had better not say, "walk-in closet."

A few years ago, the newspaper industry in Oregon put out a booklet with lists of forbidden phrases (in red) and risky phrases (in yellow). Among the legally risky phrases were "walk-in closet," "quiet tenants," and "bachelor pad." I wrote a newspaper column making fun of the booklet, and a few others attacked it, and I am told the bureaucrats backed off. Faced with opposition, they sometimes do. It was alarming, though, how complaisant most newspapers were.

Bernstein sketches the history of antidiscrimination law. It started out as a specific measure to help blacks. Over the years, other groups pulled this blanket over them, claiming the same status. Slowly the specific measure developed into a high moral principle that it was wrong to "discriminate" against anyone anywhere (except maybe smokers). The enforcers of this doctrine, writes Bernstein, "increasingly viewed civil liberties as, at best, competing rights to be balanced against efforts to wipe out bigotry."

Citizens brought lawsuits to defend themselves, but through the Reagan and first Bush years, they consistently lost them. At about the time of Clinton's election, that began to change; some of the Reagan and Bush appointees began limiting the doctrine. It is now a battle joined, but far from

the dominant force, and it is culturally dangerous to allow the dominant force to squelch critics.

Most interesting is his chapter, which appeared in the December 2000 issue of *Liberty*, on the American Civil Liberties Union. The ACLU professes a belief in antidiscrimination law and civil liberties — a contradiction that calls out for resolution. Bernstein says the outcome could be very influential, because without the ACLU the Left,

one whole end of the political spectrum, would be taken over by the PC police.

Bernstein does not call for repeal of all antidiscrimination laws as interferences in the freedom of association. Richard Epstein has argued that, and Bernstein notes Epstein's argument without agreeing or disagreeing with it. But he very deftly takes the reader within one step of it. □

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won, either in the courts of justice or of public opinion.

Bernstein uses consequentialist arguments rather than appeals to first principles. Speech and press should be free, he says, because "allowing politicians to decide the scope of freedom of speech is simply more dangerous than any damage the speech itself may cause." Political power will be held by