
**WE DON'T SERVE YOUR KIND HERE:
PUBLIC ACCOMMODATIONS AND THE MARK OF
SODOM**

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INTRODUCTION	929
I. PUBLIC ACCOMMODATIONS LAW AND PRIVATE PROPERTY	930
II. MISSISSIPPI, APARTHEID, AND PRIVATE PROPERTY LAW	933
III. CUSTOMER CHOICE AND EQUAL PROTECTION OF THE LAWS	941
IV. BURBCLAVES, FOQNES, AND KING WILLIAM	944
V. THE MARK OF SODOM	947
CONCLUSION.....	950

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.¹

—Justice Potter Stewart
Jones v. Alfred Mayer Co. (1968)

Those who say “What’s mine is mine, and what’s yours is yours”; this is the average [type of person], though some say this is the type predominant in Sodom.²

—*Pirke Avot (Ethics of the Fathers) 5:13*

INTRODUCTION

Two robots walk into a bar. I know, it sounds like a joke. But I am talking about the famous scene in *Star Wars* in which C-3PO and R2-D2 try to follow

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¹ *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 443 (1968) (upholding the constitutionality of a statute that mandated that all citizens have the rights of white citizens in private sales of property) (footnotes omitted).

² *ETHICS OF THE SAGES: PIRKE AVOT—ANNOTATED & EXPLAINED*, 5:13 (Rami Shapiro trans., 2006) [hereinafter *PIRKE AVOT*].

Luke Skywalker into a tavern. They are looking for a pilot who can take them to the planet Alderaan to fight the evil Emperor. Obi-Wan Kenobi and Chewbacca enter the bar with no problem but when Luke crosses the threshold with the androids, the barkeep stops them with a sneer. “Hey, we don’t serve their kind here,” he says to Luke, refusing to speak directly to the androids.³ “Listen, why don’t you wait out by the speeder,” Luke tells them, “we don’t want any trouble.”⁴

The scene is surreal. Moments before this act of exclusion, we are treated to the sight of many weird and wondrous beings filling the bar. They obviously come from different planets and are designed to intrigue and surprise us by their diversity. The scene is both familiar and strange. The band plays jazz we find familiar but the musicians look like praying mantises on steroids. It is our world and it is not our world. The camera moves to show us all kinds of creatures. In the face of the incredible multiplicity of beings of all sizes and shapes, the act of exclusion is at once familiar and shocking. At the same time, the gesture strikes the viewer as palpably absurd. Why admit the fellow who looks like the devil, the praying mantises, and the belligerent guy who starts a fight with Luke, but then draw the line at intelligent robots? Why would they, alone among the diverse clientele, be unwelcome? We realize we know nothing about the history and culture of a world that would be so welcoming to creatures that would surprise and frighten us while excluding androids we have come to view as our companions and comrades.

“We don’t serve their kind here.”⁵ This is a simple exercise of property rights. Or is it? Recently one of my students went to a club in Boston with two of his friends. The bouncer at the door would not let them in. “We don’t want your kind here,” he said, or something to that effect. It was *Star Wars* all over again. My student and his friends are Korean and that apparently bugged the bouncer. They were confused and asked him to explain and he said again that they were not wanted there. They asked to see the manager and, amazingly in this day and age, the manager backed up the bouncer. Not only did he not let them in, he used a racial epithet to express his animus toward Asians. It was 2013 and they were excluded from a bar in Boston because of their race.

I. PUBLIC ACCOMMODATIONS LAW AND PRIVATE PROPERTY

We are here to celebrate the fiftieth anniversary of the Civil Rights Act of 1964, of which Title II was the public accommodations law. Congress passed that law about a month after my tenth birthday. Fifty years is a long time but we are not talking about ancient history here. I recall segregation; I recall the passage of the public accommodations law. And fifty years is apparently not enough to change our understanding of property—at least not completely. In recent months, we have seen much controversy over a baker who did not want

³ STAR WARS (Lucasfilm 1977).

⁴ *Id.*

⁵ *Id.*

to sell a wedding cake to a same-sex couple and a photographer who did not want to take photographs at a same-sex wedding.⁶ They claimed both expressive and religious liberty to justify denying services to paying customers and they also asserted the right to run their own businesses as they saw fit, retaining the right to exclude customers whose identity or lifestyle they found objectionable.⁷ A similar claim was made by a web-based adoption service that sought to deny participation by same-sex couples.⁸ These businesses were open to the general public but apparently not *all* of the general public; the owners claimed the right to be selective in their choice of customers and they argued that constraints on their choice burdened their expressive and religious freedoms.⁹ As owners of property, they had the right to exclude and to waive that right selectively and in line with their religious values.¹⁰

If such arguments had been accepted in 1964, then we might still have segregated restaurants, hotels, movie theaters, and pools in the South. After all, segregationists claimed Biblical support for their position and the right to exclude unwanted strangers from their property was a core element of the claim. This argument has not only been revived by businesses seeking to deny services to LGBT¹¹ customers but apparently has some traction with five members of the Supreme Court. The recent case *Burwell v. Hobby Lobby*,

⁶ See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013); *Craig*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n Dec. 6, 2013), https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf.

⁷ See *Elane Photography*, 309 P.3d at 60 (“*Elane Photography* explains that it ‘did not want to convey . . . the story of an event celebrating an understanding of marriage that conflicts with [the owners’] beliefs.’”); *Craig*, No. CR 2013-0008 (“Respondents . . . contend that their refusal was based solely upon a deeply held religious conviction that marriage is only between a man and a woman Respondents contend that application of the law to them . . . would violate their rights of free speech and free exercise of religion . . .”).

⁸ *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D. Cal. 2007).

⁹ See *id.* at 1058 (“Defendants claim that compelling them to post plaintiffs’ profiles on their ‘web publication’ . . . would similarly constitute compelled speech”); *Elane Photography*, 309 P.3d at 67 (“*Elane Photography*’s choice to offer its services to the public is a business decision, not a decision about its freedom of speech.”); *Craig*, No. CR 2013-0008 (“Respondents therefore have no valid claim that barring them from discriminating against same-sex customers violates their right to free exercise of religion.”).

¹⁰ For a critique of those arguments, see Domenick Scudera, *How Is Discrimination a Religious Freedom?*, HUFFINGTON POST (Feb. 20, 2014, 6:52 PM), http://www.huffingtonpost.com/domenick-scudera/how-is-discrimination-a-religious-freedom_b_4814976.html.

¹¹ At the risk of “exclusion,” I will use both LGBT and “gay” to refer to persons whose sexual orientation is other than heterosexual or whose gender identity does not fit into the traditional categories of “male” and “female.” There are inevitable trade-offs between inclusive language and elegant, felicitous expression and I confess to sometimes erring on the side of simplicity and elegance.

*Inc.*¹² allowed a closely held corporation to deny insurance coverage for contraception to its employees because the owners of the corporation held religious beliefs under which such contraception was a form of abortion and that facilitating such insurance made them complicit in murder.¹³

For my purpose here, what matters about the *Hobby Lobby* decision is the way the Justices in the majority conceptualized property rights. Similar to how the spending of money is now the equivalent of speech for First Amendment purposes,¹⁴ the purchase of such health insurance represents an impermissible burden on the religious expression of the corporation and hence its owners. The close corporation—no matter how big, no matter how many employees, no matter how much it dominates a local economy—represents the property of the owners and is subject to their control.¹⁵ The Court assumed that owners have a right to decide how to spend their own money and the conditions on which they will—and will not—allow non-owners onto their premises.¹⁶

And yet the Supreme Court was careful to note that its decision in *Hobby Lobby* did not affect anti-discrimination laws, at least laws prohibiting racial discrimination. As the majority held, “The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”¹⁷ This holding suggests that property open to the public for the purpose of hiring employees is subject to reasonable regulations designed to ensure equal access to employment without regard to race. In effect, this line in the sand distinguishes the private home (where one can exclude people from one’s dinner party because of their race) from places of employment and, one assumes, places of public accommodation (where one cannot indulge in such discrimination). This means that the vision of property as under the control of the “owner” and subject to the owner’s “sole and despotic dominion,” as William Blackstone put it, *cannot be the model for all property*.¹⁸ Why is that?

¹² 134 S. Ct. 2751 (2014).

¹³ *See id.* at 2766, 2785 (holding that the Affordable Care Act’s contraceptive mandate violated business owners’ religious beliefs under the Religious Freedom Restoration Act).

¹⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (holding that per capita limits on political donations violated the First Amendment).

¹⁵ *See Hobby Lobby*, 134 S. Ct. at 2768 (“[P]rotecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.”).

¹⁶ *See id.*

¹⁷ *Id.* at 2783 (addressing the dissent’s concern about using religious practice as an excuse to discriminate).

¹⁸ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. Chi. Press, 1st ed. 1979) (1765-1769) (“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”). Some

The question is not rhetorical. The *Hobby Lobby* decision pointedly says nothing at all about sex, sexual orientation, or disability discrimination. And Senator Rand Paul famously said on the Rachel Maddow Show that civil rights laws are problematic because they impinge on both the property rights and the free speech rights of owners.¹⁹ The Supreme Court apparently agrees that owners of businesses can express their religious values and exercise constitutionally protected speech through the ways in which they run their businesses and spend their money, and that anyone who wants to work for them has to follow their rules, albeit with some exceptions.²⁰ You live in my house; you follow my rules. But access to the marketplace without regard to race seems to be an important, indeed crucial, exception to this principle. It is of the highest importance to understand why that is so and what it means for our system of private property. To do that, we should consider what the world would look like if that principle were not true.

II. MISSISSIPPI, APARTHEID, AND PRIVATE PROPERTY LAW

To this day, Mississippi has a statute that gives all businesses the right to choose their customers at will. At the risk of being pedantic, it is worth reading the statute in full.

(1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or

scholars have questioned whether Blackstone in fact conceptualized property rights as absolute. See Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 69 (1985); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998) (explaining the ways in which this famous quote deviates from Blackstone's actual description of the laws of England).

¹⁹ Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. CIV. RTS. & CIV. LIBERTY. L. REV. 91, 107 (2011) (stating that Senator Paul was soon forced to retreat from this assertion). Senator Paul's comment sparked extensive controversy. See Jeff Jacoby, Editorial, *Tough Stand: Freedom to Be Odious*, BOS. GLOBE, May 25, 2010, at 15 (defending Senator Paul's comment on libertarian grounds); Adam Nagourney & Carl Hulse, *Tea Party Pick Causes Uproar on Civil Rights*, N.Y. TIMES, May 21, 2010, at A1; see also Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1221-22 (2014) (criticizing Senator Paul's conception of property rights).

²⁰ See *supra* notes 12-16 and accompanying text (analyzing the *Hobby Lobby* decision).

employee of such public place of business does not desire to sell to, wait upon or serve. The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

(2) Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that “the management reserves the right to refuse to sell to, wait upon or serve any person,” however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this section.

(3) Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.²¹

The statute was passed in 1956, almost two years after the decision in *Brown v. Board of Education*,²² which was decided six days before I was born. The statute is still on the books and still in effect, at least to the extent it has not been preempted by federal statutes or rendered unconstitutional, a question I shall return to in a moment.

What would the world be like if this law were universal? The answer is that it depends on how widespread discrimination is and who owns places of public accommodation and who does not. Let us suppose discriminatory attitudes are widespread and land is owned primarily by white persons who harbor such attitudes. We know what such worlds are like because we have experienced them; they are the South before 1964 and South Africa at the time its anti-apartheid constitution came into effect in 1997, a scant eighteen years ago.

Professor Randall Kennedy vividly depicts that world in his article *The Civil Rights Act's Unsung Victory*.²³ To get ready to travel to South Carolina, Kennedy's parents packed an elaborate picnic to take in the car. They did so not for celebratory reasons or personal enjoyment, but because it was not clear that they would be able to find a place to eat when they got hungry. There might be restaurants along the way but many would not let them in or would serve them only at the back window or along with discourtesy, disparaging speech, and name-calling. There might not be hotels that would take them or

²¹ MISS. CODE ANN. § 97-23-17 (2011).

²² 347 U.S. 483, 493 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”); Act of Feb. 21, 1956, ch. 257, 1956 Miss. Laws 307.

²³ Randall Kennedy, *The Civil Rights Act's Unsung Victory*, HARPER'S MAG., June 2014, at 35, 35.

gas stations that would fuel their cars. To be prepared and armed, they would take with them *The Negro Motorist Green Book*, a publication by Victor H. Green that identified establishments that served African American customers.²⁴

In other words, they had to prepare to enter hostile territory where they were often unwelcome. More than that, they were disabled from accessing services that human beings need to live, including, food, shelter, bathrooms, and fuel. Their ability to travel was impaired, as was their ability to eat and sleep. Nor could they pass the day without encountering humiliating, degrading, and abasing interactions that conveyed the message, over and over, that your kind are not welcome here.²⁵ At the same time, facilities were available of a sort in the South and a family armed with the *Green Book* stood a chance of finding a private home or hotel where they could stay. What would have happened if such facilities were not available? What if almost all the land was owned by white persons who thought the races should be separate and apart?

That was the case in South Africa at the time of the adoption of the interim constitution in 1993 and was still the case in 1997 when the permanent constitution came into effect. Roughly ten percent of the people owned ninety percent of the land and the division was a racial one that had been created and imposed by law.²⁶ Imagine what things were like in 1997 in South Africa. The new constitution had abolished *apartheid*.²⁷ Gone were the laws that required segregation. Did that have the effect of destroying the *apartheid* system? The answer is no.

At that point, the law of private property was neutral; it did not limit access to land based on race nor did it require owners to make racial distinctions. But the *absence* of a law requiring exclusion based on race does not mean that *apartheid* was gone. If white persons own ninety percent of the land and continue to deny black persons access to their property, then *apartheid* would continue unabated *through the seemingly neutral operation of private property law*. If owners have the right to choose their customers and if they have the right to exclude anyone they wish from their property, then *apartheid* could

²⁴ See Kent Greenfield, *Hobby Lobby and the Return of the "Negro Travelers' Green Book,"* AM. PROSPECT (Mar. 26, 2014), <https://prospect.org/article/hobby-lobby-and-return-negro-travelers-green-book>, archived at <http://perma.cc/LE6K-JZ2N>.

²⁵ See Domenick Scudera, *This Is What Discrimination Feels Like*, HUFFINGTON POST (Feb. 27, 2014, 10:43 AM), http://www.huffingtonpost.com/domenick-scudera/this-is-what-discrimination-feels-like_b_4858240.html, archived at <http://perma.cc/6ZBM-CV7P>; see also Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (discussing the harms of racially discriminatory service in stores, the rhetoric of privatization as a response to racial issues, and racism as a crime).

²⁶ *Q&A: Land Reform in South Africa*, PBS (July 6, 2010), http://www.pbs.org/pov/promisedland/land_reform.php, archived at <http://perma.cc/Q48C-L9YT>.

²⁷ S. AFR. CONST. First Amendment Act of 1997 (establishing a bill of rights for all South African citizens).

have continued almost unabated through protecting the right of owners to exclude non-owners from their land. Employers could still have refused to hire people based on their race; public accommodations could have refused to serve people because of their race; real estate owners could have refused to sell or rent to buyers or tenants because of their race. Private property law would have been an effective tool to maintain a society based on racial caste.²⁸

That is the reason that the Mississippi statute is so appallingly out of place in 2015. It is based on a misplaced assumption about the nature of private property in a free and democratic society. It has been a long time since the Thirteenth Amendment was adopted and we have abolished not only slavery but also its “badges and incidents.”²⁹ It has been a long time since the Civil Rights Act of 1866 granted all persons the same right to contract as is enjoyed by white persons and granted all citizens the same right to purchase real and personal property as is enjoyed by white persons.³⁰ Those statutes have been interpreted to require places of public accommodation to grant entrance to customers without regard to race.³¹

On the other hand, most federal courts have interpreted the Civil Rights Act of 1866 not to require storeowners to treat customers equally without regard to race, finding no remedy when stores have engaged in racially discriminatory surveillance of customers, treated them to denigrating remarks, or denied them service.³² And the Civil Rights Act of 1964—the law we celebrate today—appears to provide no help here. It regulates inns, restaurants, gas stations, and places of entertainment but seems not to cover retail stores.³³ If no federal statute preempts Mississippi law, then it remains legal in the state of Mississippi to discriminate on the basis of race in treatment of customers in stores—that is, unless the Mississippi statute is unconstitutional. But how can a law that *fails to regulate owners* constitute an unconstitutional deprivation of equal protection of law? Where is the “state action”?³⁴ The state *requires* nothing; rather, it *empowers* owners to control their own property and it

²⁸ On the ways that private property rules embody public law values (including equality), see Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1260 (2014).

²⁹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (“For [the Thirteenth Amendment’s Enabling Clause] clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’” (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883))).

³⁰ 42 U.S.C. §§ 1981-82 (2012).

³¹ Singer, *supra* note 19, at 94.

³² *Id.* at 94-96 (arguing that courts have an inappropriately narrow conception of the right to contract).

³³ 42 U.S.C. § 2000a (mandating equal access to “lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments”).

³⁴ *The Civil Rights Cases*, 109 U.S. at 12-14 (“[T]he prohibitions of the [Fourteenth Amendment] are against State laws and acts done under State authority.”).

liberates them from regulation. Any discriminatory decisions are made by the owners, not the state. Even *Shelley v. Kraemer*³⁵ acknowledged that voluntary private acts of discrimination fall outside the Equal Protection Clause.³⁶

Perhaps we need not worry. Perhaps in this day and age, we can expect almost all businesses to eschew such discriminatory conduct and treatment. Norms have changed and it is simply bad business to treat customers with disdain. And even if a few bad apples hold onto such appalling treatment, customers can still boycott and shop elsewhere. The market will discipline such stores and the Internet will go wild in publicizing the conduct. Laws are hardly needed to control such behavior (one might argue). And those who persist will constitute a minority with little ability to make life difficult for African Americans. There is no need, one might think, for a new *Green Book*.³⁷

There are two problems with this argument. First, the idea that the market controls all invidious discrimination is, and has always been, demonstrably false.³⁸ The market responds to the attitudes of customers. If one were interested in profits, *and nothing else*, then the Mississippi law makes the existence of discrimination depend on the amount of discriminatory attitudes that exist in a given community. Such attitudes have waxed and waned with time. It is not as if there is no prejudice (say against Latinos) today. Discriminatory attitudes have persisted. Even today, few African Americans have lived without the experience of being accosted by the police, followed by security officers in a store, or treated badly from time to time by others who hold demeaning assumptions about them.³⁹ Studies show that unconscious

³⁵ 334 U.S. 1 (1948).

³⁶ *Id.* at 13 (“So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”).

³⁷ See *Brooks v. Chi. Downs Ass’n*, 791 F.2d 512, 519 (7th Cir. 1986) (finding that a place of entertainment had no obligation to serve the public because “the market here is not so demonstrably imperfect that there is a monopoly or any allegation of consumer fraud”); Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1290 (2014) (arguing for allowing “private groups to select their own members and govern their own organizations when they provided uniquely differentiated services in competitive markets”).

³⁸ See, e.g., Shalia Dewan, *Discrimination in Housing Against Nonwhites Persists Quietly*, *U.S. Study Finds*, N.Y. TIMES, June 12, 2013, at B3 (discussing subtle discrimination faced by nonwhite homebuyers and renters); Catherine Ruetschlin, *Markets Don’t Stop Racism but They Can Perpetuate It*, DEMOS (Aug. 21, 2014), <http://www.demos.org/blog/8/21/14/markets-dont-stop-racism-they-can-perpetuate-it>, archived at <http://perma.cc/DZ42-FHDU> (“The classically oblivious treatment of racism as an inefficiency that will be eroded in markets by the pursuit of profits has failed to produce results.”).

³⁹ See Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 1 (2003) (discussing the

discrimination continues to haunt us and that job applicants with equal resumes face different prospects because of assumptions about the race of the applicant.⁴⁰ Even my students and colleagues at Harvard Law School and alumni of Harvard University have faced such treatment.⁴¹

Of course this means that neither law nor markets are sufficient to eradicate invidious discrimination. We live, after all, in an age when discriminatory treatment is illegal in most of the country, including the overwhelming majority of states that prohibit discriminatory conduct of any kind in retail stores.⁴² That brings us to the second reason it is wrong to believe that we have no need for laws that prohibit discriminatory conduct in this day and age. The idea that one can “just go elsewhere” *misses the point entirely*. The question is not whether one can find a store willing to let you in and treat you with dignity.⁴³ *The question is whether one has a right to enter stores without worrying about such things.*⁴⁴ The idea that storeowners are the lords of their castles—empowered to control their territory, exclude whoever they wish, and treat those inside as they deem proper and appropriate—contradicts the idea that every person is entitled to the same right as is enjoyed by white persons to enter the *public world of the market* without being treated as a being who is not human or is a member of a lower caste.⁴⁵

Toward the end of the nineteenth century, a myth developed that the public accommodation duty to serve the public was based on the need to respond to monopolies in areas of transportation and inns where no alternatives might be available, yet the need for service was widespread.⁴⁶ That idea was used to justify narrowing the definition of a public accommodation to inns and

practice of consumer racial profiling and advocating the use of 42 U.S.C. § 1981 to combat it).

⁴⁰ Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 483-86 (2005) (examining the psychology of unconscious bias and its application in litigation strategy).

⁴¹ See, e.g., Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 20, 2009, at A13 (addressing the Professor Henry Louis Gates arrest controversy).

⁴² See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1437-39 (1996) (reviewing state statutes that prohibit discriminatory conduct in retail stores).

⁴³ *Contra* Epstein, *supra* note 37, at 1241, 1284 (arguing that public accommodation laws should combat monopolies but not interfere with discriminatory businesses, as long as competition leads to other businesses that do not discriminate—at least when segregationist impulses are not common).

⁴⁴ See, e.g., Singer, *supra* note 19, at 108.

⁴⁵ *Id.* at 108-09 (arguing for a “legal baseline that rejects market relations premised on unequal status”).

⁴⁶ See Singer, *supra* note 42, at 1390, 1404-06 (“[B]efore the Civil War, the rule that common callings—at least innkeepers and common carriers—had a duty to serve the public was universal . . .”).

common carriers; and, *not coincidentally*, this new conception allowed and encouraged new laws that allowed or required racial discrimination in places of entertainment, retail stores, and restaurants.⁴⁷ But that interpretation of public accommodation law as combatting monopoly does not accord with its historic origins, which were based on the moral obligation of businesses that were open to the public to serve the public without discrimination.⁴⁸ The monopoly theory suggests that, if we have competition, then “the market will take care of it” and new businesses will emerge that will serve the excluded group.⁴⁹ It assumes that such groups should be content to go to places where they are welcome. This theory is inconsistent with the actual reason for public accommodation laws. These laws are not about giving despised groups a market niche; they are designed to ensure access to the world of the market without regard to invidious discrimination.⁵⁰

Nor do public accommodation laws constitute invasive interferences with individual freedom or private property rights. Freedom of association is a bedrock constitutional principle but it is not a basis for claiming a right to establish market structures that are premised on invidious discrimination.⁵¹ Our constitutional structure distinguishes between areas of social and political life where groups are presumptively entitled to be exclusionary (such as religion or political associations) and areas of life where access without regard to race or other caste designations is presumptively prohibited—and the main area of life to which the equal access norm applies is the parts of the economy that are open to the general public.⁵²

We have difficult line-drawing problems, to be sure. A wedding band may want to specialize in Klezmer music for use at Jewish weddings. A bakery may seek to sell goods only for use in religious services and seek to limit its wares to Christians. Because the First Amendment protects religious association, businesses that serve *solely* religious purposes may be entitled to do so. But businesses that generally offer their services to the public for all types of service, religious or nonreligious, enter a different area of social life. A bakery that sells goods to customers of all types for all purposes may well be obligated

⁴⁷ See *id.* at 1391-95, 1402-03.

⁴⁸ See *generally id.* (detailing the nineteenth-century history of the public accommodation doctrine).

⁴⁹ See Epstein, *supra* note 37, at 1241.

⁵⁰ See Singer, *supra* note 42, at 1300-01 (arguing that owners have no general right to exclude people unreasonably if they open their property to the general public).

⁵¹ Epstein, for example, is wrong to suggest that public accommodation laws exceed their legitimate scope when they interpret “freedom of association” in an exclusionary manner in the marketplace. See Epstein, *supra* note 37, at 1247.

⁵² See Singer, *supra* note 42, at 1421 (“The purpose of the [Civil Rights Act] is to afford equal access to businesses that serve the general public.”).

to serve the public regardless of the religion or sexual orientation of the customer.⁵³

This is not to say that legislatures may not make reasonable distinctions between businesses that are obligated to serve the public without discrimination from those that may be allowed to define their customer base more exactly based on religious practice or doctrine. It does mean that we must define the parts of social life where we allow owners to exclude based on religion, political views and affiliation, or other associational interests, from the parts of social life where we require owners to open their property to anyone who is willing and able to seek their services in a non-disruptive manner. One thing is clear: stores that sell their wares to the public, which are not religious establishments, are firmly on the public side of the line.⁵⁴

We live in a free and democratic society and that means that certain types of social relationships have been abolished. We no longer have slavery, feudalism, or dictatorial paternal control of familial property and family members (such as wives and children); we have abolished the fee tail, granted women rights in property acquired during marriage, and prohibited indentured servitude, titles of nobility, caste systems, and monopolistic control of land.⁵⁵ Laws outlawing these arrangements can only be effective if we also shape the law of private property to ensure that it cannot be a means to effectuate these banished social arrangements.⁵⁶

What is demanded by a free and democratic society is the right not to experience the humiliation of being turned away from a place open to all others because of characteristics about oneself that should be irrelevant to the opportunity to buy a shirt in a store. This does not amount to “forced association.”⁵⁷ That framing of the issue suggests that storeowners are free in a democracy to choose their customers at will. But that is not the case. Allowing stores to choose their customers at will deprives excluded groups from the freedom to walk into a store that appears to be open to the public and get service.⁵⁸ If “forced association” is at issue, then consider that the absence of a public accommodation law forces a patron to look for some other place that

⁵³ See Craig, No. CR 2013-0008 (Colo. Civ. Rights Comm’n Dec. 6, 2013), https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf (finding that a bakery is a place of public accommodation and required to serve the plaintiffs).

⁵⁴ See, e.g., *id.*

⁵⁵ See, e.g., U.S. CONST. art. I, § 9, cl. 8 (banning titles of nobility); U.S. CONST. amend. XIII (abolishing slavery); Singer, *supra* note 19, at 106-07 (arguing that these reforms established a legal baseline for a free society).

⁵⁶ Singer, *supra* note 19, at 107-08.

⁵⁷ Epstein, *supra* note 37, at 1256 (objecting to such laws because they lead to “negative-sum games”).

⁵⁸ See Singer, *supra* note 19, at 109.

will let her in.⁵⁹ Freedom is not just negative, or the freedom of property owners from regulation of use of their property; freedom is also positive and includes the freedom to enter the marketplace on the same terms as those who do not have to worry about arbitrary exclusion because of the color of their skin.⁶⁰

Telling someone they can just go to another store or try another nightclub is like telling someone to eat soup with a fork. It is a solution that does not solve the problem; it is an answer to the wrong question. The issue is not whether the customer is likely to find another store that will take her in. The question is whether a storeowner has a right, in a free and democratic society, to treat a customer like a pariah. The answer is no.

III. CUSTOMER CHOICE AND EQUAL PROTECTION OF THE LAWS

What does this mean for the Mississippi statute? It means that the statute harkens back to a way of life we have abandoned for good. The statute embraces values we have rejected and a conception of the marketplace and private property that is, in principle, incompatible with a society that has formally abolished the “badges and incidents of slavery.”⁶¹ But now the vaunted state action doctrine rears its ugly head. When the state *authorizes* choice, how is it *denying* rights? The answer has already been given. South Africa would have never gotten rid of *apartheid* if it had left private property owners free to discriminate on the basis of race in public accommodations, employment, and housing. Allowing owners to make choices when they control property that is rightly in the public sphere delegates sovereign power that cannot be delegated.⁶² It turns owners into lords and our Constitution prohibits any government to grant any title of nobility.⁶³

Aficionados of “original intent” theories of constitutional interpretation fail to understand the vast extent to which our norms of equality have changed over time. The Supreme Court has struck down laws that give husbands the power to control their wives’ property—laws that were commonplace both at the time

⁵⁹ *See id.*

⁶⁰ *See id.* (“It should be abundantly evident that the basic policy of United States law is to grant equal access to the marketplace without regard to race.”); Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA PHIL. (Mar. 5, 2012), <http://plato.stanford.edu/entries/liberty-positive-negative/> (explaining positive freedoms).

⁶¹ The Civil Rights Cases, 109 U.S. 3, 20 (1883).

⁶² *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 10-11 (1927) (arguing that laissez-faire judicial doctrine prohibiting minimum wage laws on property rights grounds passed “a certain domain of sovereignty from the state to the private employer of labor”).

⁶³ U.S. CONST. art. I, § 9, cl. 8; *see also* Joseph William Singer, *Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society*, 1 J.L. PROP. & SOC’Y 1, 13 (2014) (analogizing the modern treatment of immigrants to medieval nobility’s treatment of commoners).

the Equal Protection Clause was adopted in 1791 and when the Fourteenth Amendment came into force in 1868.⁶⁴ It has rejected the “separate but equal” doctrine⁶⁵ and segregationist zoning laws.⁶⁶ It has rejected discriminatory but facially neutral laws such as state laws that enforced racially restrictive covenants and prohibitions on marriage between persons of different races.⁶⁷ It has prohibited discrimination based on disability.⁶⁸

Complementing these historical changes in equal protection law has been expanding statutory protection from invidious discrimination. While the Civil Rights Act of 1964 has a short list of public accommodations, the Americans with Disabilities Act of 1990 has a much longer list that includes retail stores, doctors and lawyers’ offices, universities, and insurance companies.⁶⁹ I have previously argued that the 1964 Act is ambiguous as to whether its list is exhaustive or illustrative.⁷⁰ Given the changing statutory definitions of what is a public accommodation, I would advise any judge who confronted the issue to interpret the 1964 act to include retail stores. In my view, the 1964 act has been implicitly amended by the later statutes that clarify Congress’s current view about what is and is not a “public accommodation” with obligations to serve the public without invidious discrimination.⁷¹ Failing that, I would hold the Mississippi anti-public-accommodations law to be an unconstitutional denial of equal protection of the laws insofar as it authorizes places open to the public to deny service on the basis of race.⁷²

⁶⁴ See Singer, *supra* note 42, at 1299.

⁶⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We have now announced that such segregation is a denial of the equal protection of the laws.”).

⁶⁶ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment . . .”).

⁶⁷ *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that anti-miscegenation laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially restrictive covenants violates the Equal Protection Clause of the Fourteenth Amendment).

⁶⁸ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding that the city denied the respondent’s building permit on the basis of animus against the mentally disabled, and that such a denial violated the Equal Protection Clause of the Fourteenth Amendment).

⁶⁹ 42 U.S.C. § 12181 (2012).

⁷⁰ See Singer, *supra* note 42, at 1412-24.

⁷¹ See *id.*

⁷² Cf. JOHAN VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY* (2014) (exploring recent developments in constitutional jurisprudence in various nations that incorporate regulation of private relationships); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670-71 (2014) (arguing that constitutional equality norms have consequences for laws that create or reinforce class inequalities and oligarchic concentrations of power or that prevent

Wesley Hohfeld taught us that privileges are as much laws as rights are laws.⁷³ Privileges confer liberties and may seem to remove state regulation.⁷⁴ Under that view, law only reaches so far as it coerces us to act in one way or another. That means much of life is unregulated by law and beyond the reach of the Equal Protection Clause. But Hohfeld taught us that liberties are laws insofar as they leave others vulnerable to the effects of the exercise of those liberties.⁷⁵ Recall that South Africa could and would have continued apartheid if private property owners were free to exclude others at will. The Mississippi statute denies equality because it denies persons the “same right to contract” and to “purchase real and personal property” as persons who do not face systemic discrimination. Those with the right to exclude exert power over non-owners and this exercise of a right to exclude is not a self-regarding act. Done in concert with others’ acts, it creates a racial caste system.

The Mississippi statute was designed to promote a racial caste system. It enshrines a right that is incompatible with the law of a free and democratic society that treats each person with equal concern and respect and which rejects racial caste, *apartheid*, and segregation. The Mississippi statute, if it means what it says, would require someone to write and to publish an updated *Green Book*. As things stand, LGBT persons actually need such books. About half the states allow discrimination based on sexual orientation and no federal law stands in the way of such discrimination.⁷⁶ Many websites describe places where gay people can feel welcome and implicitly or explicitly let people know where they are not wanted.⁷⁷ We have not moved entirely beyond the world where the *Green Book* was needed.

individuals from having an equal chance to acquire wealth and participate in economic life); Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 390-91 (2003) (arguing that the “law” part of “equal protection of law” includes common law and that includes the law of private property and other laws that regulate relations among persons); Stephen Gardbaum, *Where the (State) Action Is*, 4 INTL. J. CONST. L. 760, 762 (2006) (discussing various conceptions of the application of constitutional norms to relations among private parties and laws regulating those relationships); Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1023-24 (2014) (arguing that rule of law ideals require attention to questions of substantive equality in social relationships).

⁷³ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-37 (1913) (discussing the relationship between privileges and rights); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (analyzing Hohfeldian theories of rights).

⁷⁴ See Hohfeld, *supra* note 73, at 30-37 (“[A] privilege is the opposite of a duty.”).

⁷⁵ See Singer, *supra* note 73, at 987-89 (“[I]f A has the privilege to do certain acts or to refrain from doing those acts, B is vulnerable to the effects of A’s actions.”).

⁷⁶ JOSEPH WILLIAM SINGER, PROPERTY §2.6.4, at 78 (4th ed. 2014).

⁷⁷ See, e.g., GAYFRIENDLYGUIDE.COM, <http://www.gayfriendlyguide.com> (last visited Apr. 24, 2015), archived at <http://perma.cc/FWN6-HYJN> (listing businesses that are “genuinely gay-welcoming”).

We spend so much time lauding freedom of choice that we sometimes forget that “[w]e hold these truths to be self-evident, that all [human beings] are created equal” and that a society that has abolished lords and commoners and racial caste has made a decision of consequence to daily life.⁷⁸ Our fundamental commitment to the equal status of all persons means that some property rights cannot be created in a free and democratic society. And the Mississippi statute therefore is not a “deregulatory” law that grants owners freedom to act as they like. It is a regulatory law that *establishes a private property right that is itself inconsistent with equal protection of law*. The Mississippi statute does not deregulate or liberate; it empowers individuals to create property rights that entail domination over others. It authorizes oppression and that cannot withstand equal protection analysis, as I understand it.

Giving owners the freedom to treat customers as they wish and to exclude on any basis they choose is incompatible with the minimum standards for social and civil relationships characteristic of free and democratic societies that have abolished racial castes. Such societies do not allow apartheid to operate through means of private property law. *No law, including private property law, can establish a caste system*. Property that is not open to the public is not subject to equality norms but property that is open to the public becomes subject to the law of civil rights.⁷⁹ The freedom to exclude someone from a public accommodation on the basis of race is simply not a property right that a free and democratic society can recognize, any more than it recognizes titles of nobility or heredity public offices. And any statute that authorizes the creation of such a property right is therefore unconstitutional.

IV. BURBCLAVES, FOQNES, AND KING WILLIAM

Neal Stephenson’s *Snow Crash* is one of the most ingenious and influential science fiction novels ever written.⁸⁰ In addition to describing the Internet and Second Life before they even existed, he imagined a world of fragmented sovereignty and absolute property rights.⁸¹ In his fictional world, the United States no longer holds full sovereignty over its territory; rather, sovereignty is divided among many claimants that include corporations, churches, and private

⁷⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷⁹ See Singer, *supra* note 19, at 93 (positing that our conception of the obligations that businesses have changed after the passage of the Civil Rights Acts).

⁸⁰ NEAL STEPHENSON, *SNOW CRASH* (1992); see also *The Word on Snow Crash and Google Earth*, REALITYPRIME (Sept. 27, 2007, 1:07 AM), <http://www.realityprime.com/blog/2007/09/the-word-on-snow-crash-and-google-earth/>, archived at <http://perma.cc/6FXT-9BA8> (explaining how *Snow Crash* inspired aspects of Google Earth).

⁸¹ See STEPHENSON, *supra* note 80, at 24 (describing the “Metaverse,” a fictional analogue to the Internet).

armies.⁸² The land is dotted with “Burbclaves” or private, enclosed towns that exercise the right to exclude and rule absolutely within their borders.⁸³ Those towns may ally with each other and give their citizens the freedom to enter their scattered towns and territories. One could be a citizen of McDonald’s, for example, or the Catholic Church and be accepted in the Burbclaves that pledge allegiance to those sovereigns.

Stephenson also invented the idea of the franchise-owned quasi-national entities (“FOQNEs”).⁸⁴ These corporate entities effectively declared independence from state and federal law and became sovereigns of their own. Inside its territory, the law of McDonald’s rules supreme, immune from external regulation.⁸⁵ The law of the road was another thing entirely; roads are privately owned and you can choose which road company you want to use.⁸⁶ Once you do, you follow their rules—or their lack of rules.

Why do I bring up Neal Stephenson and the *Snow Crash* world? I do so because the Mississippi statute depicts a world that could devolve into the world of Burbclaves and FOQNEs. That world resembles the feudal state created by William the Conqueror. King William granted lords power over their territory; that power combined what we would consider to be sovereign governing power with the rights that go along with ownership of property. Such lords had the right to exclude others and to rule absolutely inside the manor as long as they complied with their obligations to the king. The same is true of the Burbclaves and FOQNEs. They not only control land; they *rule* it. They determine *who* can enter and *what* they can do there. While that seems innocent when applied to the private home, it leads to pernicious consequences when extended to whole towns or suburbs.

Rather than existing as a citizen of a state who has the freedom to travel, to choose where to live, and to know that one will be treated equally with others wherever one chooses to settle, the *Snow Crash* world is a world of castes. You must petition to become a citizen of a FOQNE or other fragmented state.⁸⁷ *If they let you in*, you have the protection they offer; if they do not let you in, you are out in no man’s land or some corporation’s road. It is not clear that there is a place where you are entitled to be. And as Jeremy Waldron taught us, “[e]verything that is done has to be done somewhere.”⁸⁸ If property law does not ensure access to property *somewhere*, then the law has outlawed your

⁸² See *id.* at 44-45.

⁸³ See *id.* at 6 (describing the undesirability of living outside of the Burbclaves); *id.* at 13 (illustrating how security police exclude outsiders); *id.* at 48 (portraying a Burbclave police officer threatening deadly force against a protagonist).

⁸⁴ *Id.* at 14-15.

⁸⁵ *Id.* at 44-45.

⁸⁶ See *id.* at 7.

⁸⁷ See *id.* at 6-7.

⁸⁸ Jeremy Waldron, *Homeless and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

existence. It has made a person illegal. Democracies may regulate conduct but they cannot make it illegal for a person to exist. In the *Snow Crash* world, where you can travel depends on *where you are welcome*. Burbclaves that have many locations allow their citizens relatively open freedom of movement but those that are small or do not have many locations therefore have citizens that cannot leave *without depending on the kindness of strangers*.

What does it mean to never know, when one enters a store, whether one is welcome? How does it affect us if we cannot count on being able to buy food, or clothing, or a computer? How will our life chances and worldview change if our ability to obtain the things we need depended on how much prejudice there was against us? I grew up in the state of New Jersey because my father could not find a company that would hire a Jewish engineer in the early 1950s. But the federal government hired Jews at the Electronics Command at Fort Monmouth, and both Bell Laboratories and Edison Laboratories hired Jewish engineers. My father and mother left New York City because no one would let them in. New York did not prohibit discrimination in employment against Jews. This means it authorized the creation of private property rights that were closed to those of a certain caste. Without a job one cannot eat or live. New York adopted a law that freed its companies to discriminate. That authorized New York to create property rights that gave companies power over others. Because New York adopted this private property system, my father and mother could not stay there. *New York evicted my parents*.

We live in a world that still retains a high degree of discrimination against gay people. And almost half the states have no laws prohibiting discrimination on the basis of sexual orientation; nor do federal laws provide such protection.⁸⁹ Some gay people can avoid discrimination by covering or staying in the closet. They can “pass” and enter commerce in secrecy. Of course, that kind of self-suppression has a cost.⁹⁰ And in those states that do not have antidiscrimination laws, LGBT persons who cannot pass, or do not want to do so, never know as they walk down the street what stores will welcome them or who will become violent if they hold hands or express affection in public. The world is uncertain, the welcome mat invisible, and life often nasty and brutish. Safe places are becoming more common. Anyone who enters a place like Provincetown, Massachusetts, can experience what it is like to walk into a free state where people do not have to hide and where they do not have to fear exclusion or rejection from the properties we need to enter during our daily

⁸⁹ *Employment Non-Discrimination Act*, HUM. RTS. CAMPAIGN (Dec. 18, 2014), <http://www.hrc.org/resources/entry/employment-non-discrimination-act>, archived at <http://perma.cc/9TE7-LS9R> (“There is no federal law that consistently protects LGBT individuals from employment discrimination; there are no state laws in 29 states that explicitly prohibit discrimination based on sexual orientation . . .”).

⁹⁰ Brian Krans, *Coming Out of the Closet Could Help You Live Longer*, HEALTHLINE (Feb. 4, 2013), <http://www.healthline.com/health-news/coming-out-increases-mental-well-being-020413>, archived at <http://perma.cc/XL9B-R4AK> (stating that people who are open about their sexuality “experience fewer symptoms of depression, anxiety, and burnout”).

lives. Public accommodation laws, including the 1964 Civil Rights Act, intend to create such a world; they intend to destroy or prevent the establishment of Neal Stephenson's fragmented reality and partial citizenship. One cannot live freely, safely, or comfortably if one needs a *Green Book* to travel through one's day.

V. THE MARK OF SODOM

The only time the Supreme Court considered the question of whether public accommodation laws violate the U.S. Constitution because they constitute takings of property without just compensation was in the case of *Heart of Atlanta Motel, Inc. v. United States*.⁹¹ In that case, the Court dismissed the takings claim in a single sentence. The opinion explains simply: "Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary."⁹² The cases cited by the Court concern cases where the need for government regulation was evident and important and the uncompensated burden on the owner was justified by the reasons underlying the public regulation. As to public accommodations laws that prohibit race discrimination, the public interest is apparently compelling, so clearly so that the majority of the Supreme Court in *Hobby Lobby* could dismiss, in another single sentence, the idea that anyone might assert religious interests in racial discrimination in employment.⁹³ "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."⁹⁴

While one might argue that the interest in equal access to public accommodations, employment, and housing justifies limiting property rights, a more appropriate conclusion is that "[p]roperty rights serve human values. They are recognized to that end, and are limited by it."⁹⁵ Contrary to what Senator Paul believes, civil rights laws do not limit property rights.⁹⁶ They

⁹¹ 379 U.S. 241, 261-62 (1964) (upholding a public accommodations law on basis of the Commerce Clause).

⁹² *Id.* at 261 (citing *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168-69 (1958) (holding that wartime restrictions during World War II on the operation of gold mines did not constitute takings); *Omnia Com. Co. v. United States*, 261 U.S. 502, 510 (1923) (holding that government interruption of a steel production contract for wartime needs during World War I did not constitute a taking); *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 551 (1870) (holding that paper money printing during the Civil War did not constitute a taking)).

⁹³ *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2783 (2014).

⁹⁴ *Id.*

⁹⁵ *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (overturning criminal trespass convictions for defendants who walked on to a farmer's land to give medical and legal aid to indigent farmworkers).

⁹⁶ See *supra* notes 12-16 and accompanying text.

define what property rights can exist in a free and democratic society. They establish the structural baseline, the infrastructure of a society that is committed to granting equal protection of the laws.

In the world of King William and in the world of FOQNEs, property rights are as absolute as the various powers that be can make them. Those who own/rule towns can act as they please with their own—and with those they allow to enter their domains. *But that is not our world.*

In *our world—the world where we hold some truths to be self-evident*—the power to exclude or to treat someone in a disparaging manner because of their race does not extend to business property open to the public. It is not a property right that can be recognized or granted legal recognition in a free and democratic society. It is incompatible with a society that has abolished racial caste and which ensures in its Constitution that all persons are entitled to equal protection of the laws—a right interpreted by the Reconstruction Congress as encompassing the rights to contract and to purchase personal property on the same basis as is enjoyed by those who have not suffered historic discrimination.⁹⁷

A state that pretends to grant everyone equal rights but that in effect denies a segment of the population the liberties, the freedoms, the securities associated with daily life deals in tarnished goods. We might better understand this point by considering a *midrash*, a rabbinic story, about the reason for the destruction of the town of Sodom. The rabbis argued that Sodom was destroyed *because it did not understand the limits of property rights*.⁹⁸

The Talmud says that the person who is strict about property rights says “[w]hat’s mine is mine, and what’s yours is yours.”⁹⁹ But then the Talmud goes on to say something startling: “some say this is the mark of the people of Sodom.”¹⁰⁰ For a religion like Judaism that accepts private property, that makes the injunction not to steal one of its ten most central commands,¹⁰¹ how could respect for “mine and thine” be the mark of a people so irredeemable that God saw fit to destroy them?

Ezekiel explains that Sodom was rich but cruel. “[S]he and her daughters had pride, surfeit of food, and prosperous ease, but did not aid the poor and the needy.”¹⁰² The rabbis tell us the people of Sodom prohibited charity; they took “what is mine is mine” to an extreme. When the people of Sodom saw a young

⁹⁷ See *supra* note 30 and accompanying text (discussing the effect of the Civil Rights Act of 1866).

⁹⁸ See *PIRKE AVOT*, *supra* note 2, at 5:13 (“Those who say ‘What’s mine is mine, and what’s yours is yours’; this is the average [type of person], though some say this is the type predominant in Sodom.”).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (contrasting one who is strict about property rights to the fool, the saint, and the wicked types) (translation by author).

¹⁰¹ *Exodus* 20:15 (“Thou shall not steal.”).

¹⁰² *Ezekiel* 16:49.

woman give food to a starving neighbor, they burnt her alive.¹⁰³ Charity was against the law in Sodom.¹⁰⁴ What is mine is mine and what is yours is yours.

The rabbis tell us further that the people of Sodom gave coins to the poor but they wrote their names on those coins.¹⁰⁵ When the coins were offered to the storeowners for bread, the shopkeepers would see the names and refuse to accept the marked money.¹⁰⁶ The poor had money in their hands, but no one would take it, no one would sell to them, no one would let them in, and the poor would die in the street.¹⁰⁷ And then the residents would come to take back their money.¹⁰⁸

The Talmud tells us that what is mine is mine and what is yours is yours.¹⁰⁹ But the Torah also tells us: *Al tonu ish et akhiv*. Do not wrong your brother.¹¹⁰ This commandment is the source of many Talmudic regulations mandating fair transactions in the marketplace. And the obligation extends to strangers as well as kin. After all, Leviticus 19:34 tells us that “[t]he stranger who resides with you shall be as one of your citizens; you shall love him as yourself.”¹¹¹ We are obligated to treat others as we would want to be treated. That principle applies as much to the marketplace as to other areas of life, and it applies to strangers as much as it does to citizens.

Our society embraces these norms by requiring all laws to recognize the equal status of each person. The society that provides stores and businesses open to the public cannot contradict that message by allowing owners to exclude people unless they have good reason to do so. The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; to do so is to offer the public marked money. It is to convey the promise of a free and open society and then take the prize away from the despised few. A free and democratic society abolishes titles of nobility, outlaws social castes and racial apartheid, and promotes equal access to the free market.

¹⁰³ MIDRASH RABBAH, Genesis (Vayera), 49:6 (Rabbi Dr. H. Freedman, trans., Soncino Press 3d ed. 1983).

¹⁰⁴ *Id.* at 49:6 n.3 (“[T]hey had strictly forbidden charity . . .”).

¹⁰⁵ See THE BABYLONIAN TALMUD: SEDER NEZIKIM, SANHEDRIN, 109a.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ PIRKE AVOT, *supra* note 2, at 5:13.

¹¹⁰ Leviticus 25:14 (“When you sell property to your neighbor, or buy any from your neighbor, you shall not wrong one another.”); JPS HEBREW-ENGLISH TANAKH (Jewish Publication Society 2000).

¹¹¹ *Id.* at 19:34.

CONCLUSION

Markets are free not because they are unregulated but because they are open to all. Property is private not because owners can do anything they like on their property but because property law promotes the legitimate interests of persons who have chosen to live together in a free and democratic society that ensures that each person is due equal concern and respect. Private property that is open to the public and which serves the public provides a vehicle for social life as well as economic production and distribution. Because we do not have a racial caste system, public accommodations must be open to all. Public accommodations law is not a nice extra that we can be happy the Congress passed in 1964. Nor does it limit the rights of property owners. It defines what property rights are compatible with the truths that we hold self-evident and our commitment to freedom, equality, and democracy. The public accommodations law of 1964 has become, and will always be, a bulwark of our democratic system of government and our free and democratic way of life. That is why the Mississippi anti-public-accommodation law cannot mean what it says and that is why it cannot serve as a legal basis for discrimination in a retail store.