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PUBLIC ACCOMMODATIONS UNDER THE CIVIL RIGHTS ACT OF 1964: WHY FREEDOM OF ASSOCIATION COUNTS AS A HUMAN RIGHT

Richard A. Epstein*

On its fiftieth anniversary, Title II of the Civil Rights Act of 1964 enjoys widespread social support on all sides of the political spectrum. That support is fully deserved to the extent that the nondiscrimination in public accommodations provisions offset the monopoly power of common carriers and public utilities, or neutralize the abusive application of public power and private violence to suppress the free entry of firms that would otherwise target minority customers in competitive markets.

The subsequent expansion of Title II's nondiscrimination principle becomes much more difficult to justify, however, when applied to normal businesses when segregationist forces no longer hold sway. In particular, these principles are suspect when applied to membership organizations that care about their joint governance and common objectives. In these cases, the principles of freedom of association should constitutionally protect all groups, even those that do not fall under the uncertain rubric of expressive associations.

The application of the modern antidiscrimination rules for public accommodations to Christian groups who are opposed to gay marriage on moral principle represents a regrettable inversion of the original purpose of Title II, using state power to force these groups to the unpalatable choice of exiting the market or complying with these modern human rights laws that prohibit any discrimination on grounds of sexual orientation. These rules should be struck down even if the other antidiscrimination prohibitions represent a group of settled expectations that no one today wishes to overturn.

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INTRODUCTION

The fiftieth anniversary of the passage of the Civil Rights Act of 1964 has been, and will continue to be, a source of remembrance and reflection. Like many people of my generation, I believed then, as I believe today, that its passage was a defining moment in American culture, which had for far too long tolerated state-sanctioned segregation backed by massive social intolerance. At the time, the civil rights movement had priorities that are accurately reflected in the order of its particular titles. Title I, which dealt with voting, was first and foremost on everyone's mind because the overt and systematic exclusion of African Americans from the polls was as complete an affront to full citizenship as anyone could imagine. Next in line was Title II, which dealt with the question of public accommodations. Title VII, which dealt with employment discrimination, was way down on the list, as it should have been.[1]

Title II was passed when memories were still fresh of the many indignities that had been inflicted on African American citizens on a routine basis. It took little imagination to understand that something was deeply wrong with a nation in which it was difficult, if not impossible, for African American citizens to secure food, transportation, and lodging when traveling from place to place in large sections of the country. In some instances, no such facilities were available, and in other cases they were only available on limited and unequal terms. As someone who came of age (quite literally) when the Civil Rights Act was passed, it is easy to recall how widespread moral outrage propelled the statute to its passage. The sit-ins in Southern and border states were still fresh in the memories of the general public.[2] Those memories come flooding back with

1. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (critiquing Title VII and calling for its repeal in competitive labor markets).

2. *See* Bell v. Maryland, 378 U.S. 226, 239-42 (1964) (remanding a case involving several criminal convictions resulting from a sit-in protest to the Maryland Court of Appeals

more recent historical accounts of the earlier times. Just recently, I read Isabel Wilkerson's *The Warmth of Other Suns: The Epic Story of America's Great Migration*, which contains personalized accounts of how difficult it was for black people, fearing violent retribution, to sneak out of the South on segregated trains in their efforts to make it to the North.[3] And Wilkerson's account of how Robert Joseph Pershing Foster was unable to find sleeping accommodations in Arizona on his migration to California in 1953 shows all too vividly that the practices of segregation extended far beyond the boundaries of the Old South.[4] Indeed, it can be taken as a vindication of Title II that its commands have rarely been the subject of litigation after the initial skirmishes on its constitutionality were decided shortly after passage of the Civil Rights Act.[5] The sign of successful legislative reform is its widespread social acceptance, which has certainly been the case for Title II.

In one sense, therefore, it is proper to treat the fiftieth anniversary of Title II as occasion for unrestrained celebration of legislation that has both met and exceeded the expectations at the time of its passage. But at the same time, the passage of a successful piece of legislation should give rise to at least some level of reflection about the principles on which that legislation rests and their soundness for general applicability. On this score, the inquiry goes off on two branches. For the first, it turns out that the original design of Title II contains its fair share of conceptual and practical difficulties, relating both to the terms of its passage on the one hand and its precedential value on the other. The paradigmatic case of Title II's application in 1964 was against monopolists who used their powers of exclusion to limit the options of politically vulnerable persons.[6] Historically, the dominant white segregationists who controlled the polls, the police, and all key government positions exercised in combination a level of state monopoly power that no simple public utility could hope to match. It was against the backdrop of this unified phalanx that the passage of the Civil Rights Act of 1964 has to be understood.

For the second, the resurgence of Title II-type obligations under modern "human rights laws" indicates a serious and regrettable reversal of fortune with respect to the basic function of this legislation. Under pressure from modern civil rights advocates, the worm has unfortunately turned, as people have lost sight of the evils that a public accommodations law should combat. The new application of the next generation of human rights law has the exact opposite

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for reconsideration in light of the supervening passage of city and state public accommodations laws).

3. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2011).

4. *See id.* at 206-10.

5. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

6. *See id.* at 261.

orientation: may the state force small and isolated businesses, often with Christian beliefs, to violate their bona fide religious beliefs in order to provide services in highly competitive market segments? The fact that the two problems are both seen to justify strong government intervention offers powerful evidence of an unfortunate change in the dominant social attitudes toward the public use of force.

In order to work out the development of this theme, I shall proceed as follows. In Part I, I shall set out in brief fashion the essential structure of Title II, which, at least in form, has become the template against which all modern human rights laws are measured. In Part II, I shall examine the substantive soundness of the modern civil rights laws when tested against the standards for antidiscrimination laws developed in various common law contexts. In so doing, I shall pay special attention to the controversial critique of public accommodation laws offered by the late Robert Bork in *The New Republic* in August 1963.[7] In Parts III and IV, I shall trace the evolution of public accommodations laws into human rights laws that first addressed the position of large organizations like the Jaycees and the Boy Scouts, but later extended their influence to small, often fundamentalist groups that are frequently powerless to protect themselves against the rigors of majoritarian political processes. In Part V, I shall address the new set of dangers that arise when governments, at both the federal and state levels, use their monopoly powers over highways and other public facilities to exclude those groups whose internal practices are inconsistent with the preferred set of public norms. A civil rights program that at one time protected individual liberty and choice has by degrees become an instrument of repression in the hands of public and private groups. Even on a celebratory occasion, therefore, it is important to keep our intellectual distance and subject it to some serious scrutiny, which is what this Essay attempts to do.

I. THE STATUTORY SCHEME

In order to put this inquiry into perspective, it is critical to set out the specific guarantees contained in Title II, paying special attention to their scope and underlying rationale. The initial section sets out the basic guarantee: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[8]

Once that is established, subsection (b) of the legislation then lists the types of accommodations that fall within the general ambit of the Act.

7. Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

8. Civil Rights Act of 1964, tit. II, § 201(a), 42 U.S.C. § 2000a(a) (2012).

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.[9]

These provisions have to be read in light of the narrow exemption that is found in subsection (e), which reads: "The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."[10]

In addition to these basic coverage provisions, Title II also contains subsections (c) and (d), which are intended to secure the proper constitutional basis for the substantive provisions just set out above. Thus subsection (c) offers a very broad definition of what it means for the "operations of an establishment" to "affect commerce," which includes the service at these establishment of interstate travelers or the use of food, gasoline, or other products that "move[] in [interstate] commerce."[11] Subsection (d) then gives a definition of the meaning of state action under the provision, which includes all conduct carried out under the color of state law or custom or required by any state or political subdivision thereof.[12] There is no question that these provisions received extra attention in order to avoid the fate of the Civil Rights Act of 1875,[13] which had been de-

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9. *Id.* § 201(b), 42 U.S.C. § 2000a(b).

10. *Id.* § 201(e), 42 U.S.C. § 2000a(e).

11. *Id.* § 201(c), 42 U.S.C. § 2000a(c).

12. *Id.* § 201(d), 42 U.S.C. § 2000a(d).

13. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883). Its basic provision read:

> [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to

clared unconstitutional in the *Civil Rights Cases* on the ground that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment."[14] Nor could the Civil Rights Act of 1875 reach those forms of private action that were outside the scope of interstate commerce as that phrase was understood at the time, which roughly speaking was limited to any journey that involved two or more states.[15] It is commonly overlooked—I plead guilty to the offense—that Title II does not explicitly apply to retail establishments,[16] which thus fall into a limbo between the explicit command of Title II and its narrower exception, which has been plugged in large measure by the human rights laws of the next generation.[17] It is worthwhile examining both the substantive soundness of the basic provisions of Title II and its constitutional basis in some detail. It is equally important to note that the Commerce Clause restraint drops out with respect to state human rights laws, even though the various property right restrictions on government remain very much in play.

II. SUBSTANTIVE SOUNDNESS

In the run-up to the passage of the Civil Rights Act of 1964, most serious commentators had little doubt about the moral imperative behind passage of Title II of the Act. In light of the earlier court precedents, they were far more worried about its constitutional foundations for congressional action. The notable exception to that consensus was the ever-contrarian Robert Bork, who in August 1963 wrote a scathing critique of Title II in the *New Republic* on the ground that it offended the basic principle of freedom of association, which he regarded as a fundamental norm of any sound political order. One key passage reads as follows:

> The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose on a minority its scale of preferences. The fact that the coerced scale of

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> the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Id. § 1, 18 Stat. at 336.

14. 109 U.S. at 11.

15. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 566 (1870).

16. The point is driven home at great length in Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1288-93 (1996).

17. *See infra* Part IV.A.

> preferences is said to be rooted in a moral order does not alter the impact upon freedom. . . . Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.[18]

That passage, especially its last four words, has provoked outrage that has spanned generations. Although Bork tried to distance himself from this piece, mere recollection of the phrase helped doom his 1987 nomination to the United States Supreme Court. Indeed, as recently as two years ago, that 1963 article formed part of the grounds for the People for the American Way, which played such a powerful role in derailing Bork's 1987 nomination, to denounce Mitt Romney for the bad judgment of naming Bork as one of the co-chairs of the legal advisory committee for his 2012 presidential campaign.[19] Nonetheless, it is worthwhile in placing this passage in context to see the strengths and weaknesses of Bork's broadside against Title II. The story yields a divided verdict.

Let us start with the positive. There is little doubt that Bork is correct on his major premise that it is difficult to conceive of how a society can flourish if it does not respect the basic principle of freedom of association—the fundamental right that all individuals, regardless of race, sex, or age, have to choose the persons with whom they choose to do business. The logic behind this freedom of association principle runs as follows: Any legal system has to contain rules that first keep people apart (so that they will not kill each other). Yet at the same time, people have to be able to engage in various relationships with other individuals in order to reap the gains from voluntary interaction.

Those gains can come about in two distinct ways. The first is through simple acts of exchange whereby one person sells goods or services to another. The basic economic logic of that exchange is that that the seller values the cash (or other nonmonetary consideration) received more than the goods or services surrendered, while the buyer values the goods or services received more than she does the cash used to pay for them. Both sides thus benefit from the transaction, and each is in a position to make better use of the consideration received than of that surrendered. The seller can choose to use his added wealth to acquire or

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18. Bork, *supra* note 7, at 22.

19. *See, e.g.*, Jamie Raskin, *Borking America: What Robert Bork Will Mean for the Supreme Court and American Justice*, PEOPLE FOR AM. WAY, http://www.pfaw.org/media-center/publications/borking-america-20 (last visited June 8, 2014).

make new goods for sale, and the buyer can use her goods either for consumption or resale. A successful transaction sets the stage for further beneficial interactions with each other and with third parties. Legal systems may huff and puff about the exact conditions for valid exchanges, but they all recognize the category of sales and, along with it, similar two-party arrangements like leases, mortgages, bailments, and the like.

The second source of potential gains does not involve transfer, but cooperation. Two or more individuals can pool their capital or labor in some form of partnership where they divide the gains as they see fit, typically in accordance with their respective contributions. These arrangements are governed by a full set of legal and social norms. The constant need for cooperation requires a higher level of affinity between parties. Many of their obligations are cast in the slippery but necessary terms of good faith; in essence, treat the welfare of your partner as equal to your own. One reason why parties are allowed to select their associates is that they pick those whom they tend to trust, which in turn creates a social glue that reduces the burden on the purely legal sanctions that are put in place to protect each trading partner against the potential default of others.

It is, of course, an open question just how much trust is involved in different kinds of relationships, or indeed among different relationships in the same class. As a rough generalization, people care a lot more about the choice of their long-term business associates than they do about the personal identity of people with whom they trade standard goods, at least in situations involving mass-produced goods. Hiring a worker is not like walking through the checkout line at Walgreens. But these general rules, even if sensible first approximations, are often subject to important exceptions. Some partnerships are large associations where the element of personal trust is relatively small. Some sales contracts dealing with customized goods may require constant cooperation between buyers and sellers in order to successfully execute the transactions. In other cases, the element of trust is needed in large purchases when payment comes before performance or vice versa. Some service contracts involve close relations; others do not. The point here is not to catalog exhaustively all the permutations that can and do arise in well-developed voluntary markets. It is enough in this setting to know that the parties themselves are sensitive to these issues, so that the selection of terms and conditions can be left safely in private hands. The more personal the relationship is, the greater the selectivity in the contractual parties. It makes perfectly good sense that the sound selection of contracting parties can substantially reduce the risk of contractual breakdown by calling into play a set of informal sanctions that will not work with perfect strangers.

The most important goal of public policy in this context is to make sure that government officials remember how little they know about the internal dynamics of the full range of voluntary transactions. These transactions are all entered into by different parties, each with its own internal structure, history, and personnel. The organization makes its judgments with a full range of infor-

mation that is not obtainable by outsiders no matter how hard they work. Any internal conflicts of interest—so called agency costs[20]—of which there are many, are tiny in comparison with the conflicts of interest between the business as a whole and its regulators who have no stake in the financial viability of the firm. Decentralization of public institutions thus is the order of the day.[21]

It is therefore correct for any sound legal system to grant individuals freedom of choice in the full range of exchange and cooperative contexts. At one level, Bork's position was so correct as a theoretical matter that it is hard to see what the shouting was about in 1963. But shouting there was, and even when that subsides, there are valid sources of criticism. I will not talk at length about Bork's misuse of natural law theory, except to say that orthodox natural law theory lends no support to the proposition that "some personal preferences are rational, [and] that others are irrational."[22] Quite the opposite, it assumes that these preferences are personal and subjective and devotes its energy to articulating the set of rules in which these preferences can be maximized in the familiar fashion—controlling aggression and allowing for voluntary cooperation along lines that rest on a deeply utilitarian foundation.[23] But if we put his unnecessary philosophical digression to one side, there remain two important questions on which Bork falls short. The first is getting a proper theoretical understanding of the duties of common carriers. The second is adjusting social theory to take into account that the sometime manifest imperfection of power structures throughout the United States, but concentrated in the Old South, is about the institutional distribution of public powers. Both of these require some real explanation.

A. *Common Carriers*

One striking feature of Bork's 1963 article was that it was written at the time that he was immersed in his articulation of a general theory of antitrust law. The central tenet of that theory, which he developed in connection with Ward Bowman, Jr., was that the single worthwhile objective of antitrust law is the control of monopoly practices. Thus in one famous article, Bork wrote that the only value worth defending in the antitrust law was "the maximization of

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20. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 (1976).

21. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945).

22. Bork, *supra* note 7, at 22.

23. *See* Richard A. Epstein, *The Natural Law Influences on the First Generation of American Constitutional Law: Reflections on Philip Hamburger's* Law and Judicial Duty, 6 J.L. PHIL. & CULTURE 103, 112 (2011); Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 713 (1989) (pointing out the correspondence in key areas).

wealth or consumer want satisfaction."[24] That statement was echoed in many other articles that he wrote during this period, some alone and some with Bowman, whom he had first met when the two men were still at the University of Chicago.[25]

Normatively, I think that there is a great deal to be said for this approach. The office of antitrust law is to distinguish between competition and monopoly and to make sure that legal intervention promotes the former and hampers the emergence of the latter. When Bork entered the antitrust field in the early 1960s, most mainstream antitrust scholars thought that the law should serve all sorts of collateral objectives, including protecting small businesses against the rigors of competition.[26] Bork did much to counteract those diversions in the law, arguing against the common belief that the simultaneous pursuit of multiple objectives counts as some kind of social benefit. Bork was right to insist that the embrace of multiple inconsistent objectives often leads to intellectual confusion and the perpetuation of unwanted social losses.

It is therefore a matter of great irony that the most glaring defect in Bork's critique of Title II stems from his failure to recognize that antitrust law is not the only body of legal rules that is directed toward the control of monopoly. Of equal, or perhaps greater, importance is the legal response to the problem of natural monopoly that emerged somewhat earlier in the English law than did antitrust law, here in connection with those businesses that were, for good reason, deemed "affected with a publick interest."[27] The key historical text for these purposes is Lord Chief Justice Matthew Hale's *De Portibus Maris*, which introduced that phrase into Anglo-American law. The basic point was that in some situations the party who sets up a wharf or a crane may have, either by nature or operation of law, a monopoly in providing a particular good or service. In those cases, customers have no clear alternative place to go, so that the refusal to deal takes on far greater weight than it does in a purely competitive industry where there are many easily available options to purchase the same (or a very similar) good or service from a rival merchant. In those latter cases, it is

24. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966); *see also* Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 612 (1953); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 21 (1957).

25. For some of that history, see Richard A. Epstein, *Bork's Bowman, "Not Gone, but Forgotten,"* 79 ANTITRUST L.J. (forthcoming 2014) (on file with author).

26. *See, e.g.*, Robinson-Patman (Anti-Price Discrimination) Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (2012)) (seeking to deny large purchasers, then called chain stores, the advantages of volume purchases to the extent that they hurt smaller competitors).

27. MATTHEW HALE, *De Portibus Maris*, *in* A TREATISE, IN THREE PARTS (c. 1670), *reprinted in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS 1, 78 (Francis Hargrave ed., London, T. Wright 1787).

not even possible to practice price discrimination because the high demanders will by definition have an opportunity to acquire the same good or service somewhere else at the competitive price. At this point, it can be said with some confidence that the market supplies, via its rules on free entry and exit, all the protection that any person needs.

Those conditions do not hold with wharfs and cranes, and so the rule is otherwise. As Hale explains:

> If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are wharfs the only licensed by the queen, according to the statute of I. El. cap II. or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, [etc.,] neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only . . . .
>
> . . . But in that case the king may limit by his charter, and license him to take reasonable tolls, though it be a new port or wharf, and made publick; because he is to be at the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights.[28]

From this short passage, so is the business of general rate regulation born. The owner of these wharfs and cranes, or what became to be known as "essential facilities,"[29] is first subject to a limit on what he can charge. But by the same token, he is entitled to receive sufficient revenues to allow him to maintain his business. That basic condition in turn requires that he be allowed to recover the costs of his operation, both sunk and continuing, and make a competitive rate of return on that investment, lest he take his capital elsewhere. In modern terms, the obligation is to respect the commitments to charge reasonable and nondiscriminatory rates, typically called RAND or FRAND obligations, where the *F* stands for "fair."[30] The former requirement is to squeeze out the monopoly profits without exposing the regulated industry to the risk of confiscation. The latter requirement is intended to make sure that the monopolist does not use its power over price to discriminate between more and less favored customers, including such divisions by race.

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28. *Id.* at 77-78. I talk about these developments at great length in Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345, 346-50 (2013).

29. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989) (discussing the essential facilities doctrine).

30. *See, e.g.*, Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 876, 877 & n.2 (9th Cir. 2012) (using and explaining this terminology).

I have written at great length of the many pitfalls that befall any effort to set the rates needed to avoid the twin risks of monopolization by the firm and confiscation by the state.[31] But in these instances, much of the difficulty is eliminated by the nature of the problem. In dealing with routine passenger traffic, there is no reason to discriminate in the treatment that is given to two customers on the same train or bus. Any system of rate regulation can set the appropriate tariffs. But unlike cases where the cost of service depends on the nanature of the goods that are shipped, there is a strong presumption that there is no reason to vary the rates charged to different customers in order to prevent any form of cross-subsidization, which, although widely practiced, is not appropriate here any more than it is in competitive markets. The straightforward application of the nondiscrimination rule offers a powerful response to the dangers of racial segregation, without having to resolve the separate question of what rates should be regarded as reasonable. It is for that reason that the problem of setting rates for ordinary passengers is relatively easy, at least compared to the business of setting rates for public utilities, where different classes of users require, arguably, very different forms of treatment because of major differences in the cost of providing service to them. To be sure, any modern transportation (or hotel or leasing) system takes steps to allow rates to shift in response to changes in demand and cost, so that no one expects that all passengers sitting on the same airplane have paid the same price for their tickets. But if time of departure or time of ticket purchase or method of purchase matter in this market, race surely does not. It is hard to imagine any principled exceptions to this general rule, but, if any occur, they should be dealt with only when they arise, and not in setting the basic business framework. For example, unruly persons can be expelled from public transportation facilities for misbehavior, and if they engage in repeated offenses, they can be barred from use of the facilities altogether, even if that expulsion policy has some differential effect by race. On matters of sex, the historical record is a bit more complicated. In some documented instances, the boorish behavior of male passengers justified the use of special ladies' cars to forestall various forms of sexual harassment.[32]

The topic of common carriers deals extensively with various exercises of monopoly power, and thus overlaps with the topics of antitrust that preoccupied Bork at the time he wrote his *New Republic* article. To be sure, the antitrust solutions do not work well with common carriers. One major office of antitrust law is intended to prevent cooperation between firms that can operate as independent entities in competition with each other, which is why controlling cartelization is the chief objective of that body of law, as Bork himself repeatedly

31. Epstein, *supra* note 28, at 346-50.

32. *See* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920, at 280-82 (2001).

stressed.[33] But what is astonishing is that Bork never connected the dots between these two areas of law. The simple point here is that the nondiscrimination provision should only apply to those cases where firms exert monopoly power over certain markets, which includes the usual forms of public transportation. But elsewhere, doctors, lawyers, plumbers, hair stylists, and a thousand other occupations, none of which are mentioned by Bork, should in principle be out from underneath the antidiscrimination laws. Indeed, it is standard economic theory that sellers cannot price discriminate in competitive markets with standard goods because the disadvantaged purchasers will shift to another seller. To be sure, there are some tiny frictions in any real market, but these are so small that they can be safely disregarded in this context. It is therefore clear that we do not have to worry about the specter of forced association in the common trades with which Bork was so clearly concerned. He should have accepted the antidiscrimination principle of Title II, so long as it was confined to the monopoly-like situations to which it originally applied at common law. Stated otherwise, the general antitrust law is itself a *principled* limitation on the basic tenet of freedom of association insofar as it tells producers in the same industry that they cannot collude to reduce output and to raise prices. There is no reason why Bork should not have accepted that same principle for common carriers. It was his then-extreme version of libertarianism, not in evidence in the antitrust context, which got him into much of his trouble on questions of principle.

It is, of course, the case that Bork repudiated his 1963 article in his book *The Tempting of America*, where he wrote: "My position was incorrect because . . . there are no general principles to decide competing claims of association and nonassociation."[34] As was often typical of Bork, he leaped from one extreme to the other. In this context, the monopoly control position offers a principled way to deal with the rival claims. By moving to a kind of theoretical skepticism about this issue, Bork adopted a position that links all too well with his later affection for pure majoritarianism. If it turns out that no theory can resolve this profound difference, then the political majority might as well have the last say on that issue, at least until the winds of fortune shift in the opposite direction. In contrast, the monopoly control theory does not shift with the political winds, an important consideration given the massive shifts in political power since the passage of the Civil Rights Act of 1964, as is evident from the most cursory account of the historical realities leading up to the passage of that law.

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33. Bork, *supra* note 24, at 7.

34. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 80 (1990). My thanks to Brian Landsberg for this useful reference.

B. *The Historical Reality*

As is evident from the text of Title II, its focus on luncheon counters in restaurants—small businesses in highly competitive industries—indicates the weak fit between the traditional theory behind the antidiscrimination principle and the institutions to which it was targeted. If all that mattered was pure theory, individual owners of various diners could discriminate to their hearts' content, as their customers would simply move over to some rival establishment down the street that was prepared to extend them service. Yet it is very clear that pure theory does a very poor job describing the historical practices of the Old South, where, to say the least, the prospect of free entry as a check against monopoly power was a snare and a delusion. It is important to ask the question of why the standard economic theory of competition failed so abjectly in practice. That failure does not come from technical mistakes within the theory. Rather, the explanation depends critically upon the totalitarian nature of the Old South, and much of the rest of the United States, which undercut the assumption of free entry and exit on which the economic theory rests.

The point here is quite simple. So long as people are free to leave, they cannot be exploited by those who wish to continue to employ their services. Conversely, free entry into the South by Northern employers could have bid up the wages for labor above the rates that Southern employers acting in concert (and backed by the force of the state), the Ku Klux Klan, and a host of informal groups and gangs could have set. The basic insight is that a competitive market will work well in both directions because the fortunes of an oppressed group under open market conditions depend only on the attitudes of those who are *most favorably* disposed to it. The opinions of others groups do not matter since they are no longer in the hiring market. The conditions are very different when either private violence or political power sets wages and other employment terms. With the former, it is the *least favorably* disposed group that can determine the terms of trade. With the latter it is, roughly speaking, the median voter.

These avenues of political control were effectively exploited in the South prior to 1964. I wrote a short account of these laws in my 1994 article *Standing Firm, on Forbidden Grounds*, which answered my many critics as follows:

> The Emigrant-Agent Laws imposed heavy taxes on those agents who sought to encourage black labor to leave the South for more gainful employment elsewhere. If there were no market pressures operating for the exit, then presumably these statutes would have been unnecessary. As it was, they were unable to stem the flow of migrant labor from the South, but not for want of trying. Vagrancy laws were used as a means for forcing blacks to enter into labor contracts in the first place, by attacking so-called idleness, and contract-enforcement laws in Mississippi "required Negroes to enter into labor con-

> tracts by a specific day each January," and laws in other Southern states required employers to grant discharge to their black laborers before they could be hired by other employers.[35]

The standard blackboard account of markets does not delve into the operation of these rules but assumes, if only implicitly, that public institutions are well ordered. In this context, "well ordered" means that these institutions enforce the background norms of tort and criminal law so as to prevent various forms of private aggression against all citizens within the state, all of whom have, of course, full rights of access to the political system to help choose the people who will enact and enforce the laws. It also assumes that the major agencies of the state distribute the essential services such as gas, electricity, and telephone service on equal terms to all citizens. It further assumes that state public institutions will not turn a blind eye to private acts of violence that are intended to prevent other individuals from exercising their normal rights of association in the marketplace. The dysfunctional nature of Southern labor markets needs no further elaboration. No one can claim that this system of Southern governance was "well ordered."

The stress on aberrant social institutions is not in evidence in the contribution of Samuel Bagenstos to this Symposium. Instead, his defense of Title II depends on his "postrealist" views of private property when he writes:

> In a postrealist world, we understand that regulation is not incompatible with private ownership. Laws delimiting the rights and obligations of property owners and those with whom they deal do not, in Paul's phrasing, make the government the owner of the property. Indeed, the institutions of property and contract depend on background legal rules delimiting those rights and obligations and enforcing them in cases of breach.[36]

The inspiration for this passage was Rand Paul's objection to Title II of the Civil Rights Act on pure freedom of association grounds. At the time of Paul's statements,[37] and since then,[38] I have taken Senator Paul to task on exactly the

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35. Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 42-43 (1994) (footnotes omitted) (quoting William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31 (1976), *reprinted in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 317, 322 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988)).

36. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1222 (2014).

37. Richard A. Epstein, *Rand Paul's Wrong Answer*, FORBES (May 24, 2010, 12:48 PM), http://www.forbes.com/2010/05/24/rand-paul-rachel-maddow-opinions-columnists-richard-a-epstein.html.

38. Richard A. Epstein, *My Rand Paul Problem: Why Classical Liberalism Is Superior to Hard-Core Libertarianism*, DEFINING IDEAS (Feb. 3, 2014), http://www.hoover.org/publications/defining-ideas/article/167496. It turns out that Senator Paul does not categorically oppose the income tax, which on that issue at least means that he is not a hard-core libertarian, although his proposal is far less progressive than the current law. *See* Richard Ep-

two points that are in issue here—the economic structure of common carriers and the deplorable institutional arrangements in the United States at the time of the passage of the Civil Rights Act. Bagenstos points out that property and contract depend on legal rules for their articulation and enforcement, but the conventional rules of property and contract promote the protection of individual zones of autonomy and the security of exchange, both of which were utterly absent in the South. Unfortunately, civil rights laws displace these beneficial common law institutions with a set of rules on forced exchange in cases where monopoly issues don't apply. The objection to these rules is that they lead to negative-sum games, not that they regulate property. The thought that forced-association laws "may serve broader interests in democracy, freedom, and the operation of a system in which individuals have an opportunity to acquire and exchange property"[39] is whistling in the dark. Market competition poses no threat to democratic institutions. But partisan struggles over forced associations do.

Civil rights laws grounded in the problem of monopoly power supply a far firmer basis for economic and political stability alike than the misinformed postrealist critique.[40] Far from any universal structural defect in competitive markets, these background considerations of institutionalized segregation make it painfully clear that competitive markets in the standard sense are not easily maintained or supported. Start with a voting system that is wholly skewed to members of one race who bear extensive levels of animus to individuals of another race. Any allusion to the system of equal justice before the law is an illusion in the face of systematic political domination. The reason why Justice John Marshall Harlan mounted so powerful an appeal to the norm of "color-blind" justice in *Plessy v. Ferguson* is that this elementary principle had been violated in connection with the imposition upon carriers and customers alike of the requirement that black and white passengers be carried in separate railroad cars, or at least in separate sections of the same car.[41] The imposition of antimiscegenation laws is a violent affront to the ordinary principles of freedom

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stein, *Re: My Rand Paul Problem*, RICOCHET.COM (Feb. 11, 2014, 8:57 AM), http://ricochet.com/main-feed/Re-My-Rand-Paul-Problem.

39. Bagenstos, *supra* note 36, at 1222.

40. For one defense of this proposition, see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 84-111 (2006) (explaining the damage that cartelization has imposed on labor and agricultural markets). To see how rate regulation done right can address the monopoly problem, see Epstein, *supra* note 28, at 345-46.

41. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

of association, which apply as much (if not more) to marriage as to any other relationship. The simple point here is that the exercise of state power was exerted in a race-conscious fashion that blocked rights of free association of all citizens white and black.

Unfortunately, the dangerous consequences of *Plessy* are often obscured by extensive discussions of the then-fashionable tripartite distinction between civil, social, and political rights to which Bagenstos devotes much of his Essay. He quotes Mark Tushnet for the basic distinction as follows: "The core civil rights included the rights to sue and testify; social rights included the right to select one's associates; voting was the central political right."[42] As an analytical matter, the civil-social distinction is not quite right because it has nothing to do with the line between legal and social obligations. The more accurate line seems to be that in this context, civil rights refers to rights that deal with the enforcement of claims within the legal system, and social rights with the ability to exercise rights of free association that people can enjoy without having to go to court to enforce them. But the distinction is said to gain traction because of the use to which Justice Brown put it in *Plessy*:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[43]

Yet this passage makes a mockery of the notion of freedom of association implicit in the notion of social rights when it equates law "permitting, and even requiring" these interactions. Laws *permitting* the freedom of association, at least outside the common carrier situation, are consistent with the libertarian framework, and in the South their most important application would have been to protect blacks and whites who sought to associate together from state sanction or private abuse. But, as Bagenstos notes, the true crime of *Plessy* is that it "*required* race segregation in public conveyances and in schools,"[44] a profoundly anti-libertarian conception. The distinction between civil and social rights is a sideshow. The key notion is that, properly qualified by common car-

42. Bagenstos, *supra* note 36, at 1210 (quoting Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987)) (internal quotation marks omitted).

43. *Plessy*, 163 U.S. at 544.

44. Bagenstos, *supra* note 36, at 1212.

rier rules, the principle of freedom of association is fully protected by the common law rules of property and contract.

It remains therefore critical to note the threats to the social rights of all individuals posed by segregation. Southern states systemically augmented their powers by how local officials ran their local governments, especially in their control over various common carriers and public utilities. Governments exercise power over the ability of businesses and residences to access roads, electricity, gas, and water. In each of these cases, governments have control over the kinds of institutions with monopoly power that are properly subject to general regulation. But the regulation that is required offers open and equal access to all persons. It is not a system that allows for political actors to deny service covertly to those private firms that do not toe the segregationist line. One reason why the Southern system remained as tight as it did was that most local businesses supported the status quo ante and thus had nothing to fear if they implemented segregationist policies. But at the same time, new businesses, especially from the North, that might have been tempted to enter the local market to take advantage of depressed black wages were well advised to stay out lest local government intrigue cut their key services at the most inopportune time. Of course, the local utility could apologize profusely when service was disrupted or curtailed, but what remedy lies when the legal system is itself dominated by champions of segregation?

The disruption of public services was in turn supplemented by the use and threat of private violence against those who tried to stand up to the dominant political forces. A friendly gesture by a white person to a black friend could lead to dangerous consequences. As youngsters in the North in the 1950s, with no direct connection to the South, we knew well that so simple an act as purchasing gas from a black-owned filling station could lead to a beating or worse.

At this point, it is only necessary to put together the pieces. The practice of freedom of association cannot survive in a society that has corrupt electoral institutions, corrupt provision of public services, corrupt use of public force, and unrestrained use of private violence. The hard question in these settings is to ask exactly what legal changes should be made. In one sense, the thought that some nondiscrimination principle could gain hold through legislation seems laughable. Indeed, it was only because federal legislation could work, with much huffing and puffing, to override state legislation that the local monopoly was broken. In this regard, it is worth noting that the 1962 decision in *Baker v. Carr* provides powerful evidence of the tenacity of those who held undue power to insulate themselves from institutional reform.[45] The party that controls the local franchise can continue to redirect power and resources to its favored con-

45. 369 U.S. 186, 190-96 (1962) (detailing how the 1901 apportionment formula remained in place for sixty years notwithstanding huge population shifts).

stituency. It was only by going outside the system that the legislative solution had a chance.

There were three possible lines of attack against these entrenched segregationist institutions. The first of these was the use of private rights of action and public prosecution against those who used force. In speaking of the remedial issues, Bagenstos asks: "Even as of 1964, if the problem was a cartel that enforced discrimination by businesses via threats, violence, and harassment, why is the proper libertarian response not to directly target the threats, violence, harassment, and monopoly, so that business owners will be truly free to choose whom to serve?"[46] No one should claim that these direct actions should be precluded. The harder question is whether they should be regarded as sufficient, as his question seems to imply. Bagenstos's way of setting up the problem fails to grasp the difficult remedial choices of under- and overenforcement. Private rights of action against a variety of individual persons are hard to enforce, especially in a system where the levers of power are in the hands of the champions of segregation who approve of the current arrangement. The matter therefore required federal intervention, which worked much better than any form of case-by-case remedy through the tort system. To be sure, there may be some overbreadth in relying on federal intervention, but the rapid extent to which the major retailers and restaurants fell into line showed that the broader response was the best option. It is only a hard-line libertarian who would rely solely on ex post damage actions or criminal sanctions in the individual case. The classical liberal approach is far more flexible on the choice of remedies.

At this juncture only two lines of attack remained, and there was no reason not to use both of them. The first of these was to go after embedded sources of political power. The second was to prevent its most vicious manifestations. On the first point, it was manifestly the right decision to start the attack on segregation through a reform of the electoral system. At the time that Title I was passed, nothing fancy was intended or needed. The explicit exclusion by race was a staple of Southern artifice, and it did not matter whether it was done overtly or stealthily. The practices had to stop. In dealing with these remedial choices, the challenge is always to thread the needle between remedies that are too tough and those that are not tough enough. This issue of remedial design is important for answering the question, for example, of whether to have special preclearance rights in Title I of the Civil Rights Act.[47] Interestingly enough, the preclearance procedures of the Voting Rights Act of 1965,[48] have no analog in

46. Bagenstos, *supra* note 36, at 1226-27.

47. *See* Pub. L. No. 88-352, tit. I, § 101, 78 Stat. 241, 241-42 (codified as amended at 42 U.S.C. § 1971 (2012)).

48. Pub. L. 89-110, §§ 4-5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. §§ 1973b-1973c), *invalidated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013). The controversies here continue with the recent Supreme Court decision in *Shelby County*.

the context of public accommodations. Instead, the major issues of overenforcement in the public accommodations context relate only to the choice between public and private enforcement or some combination thereof.

Yet it would be a mistake to think that it was sufficient to prevent long-term abuse without tackling the short-term problem of the systematic denial of service in many places in the Deep South and elsewhere. The key point here is to note that many of the strongest supporters of Title II were the large firms that would be regulated by it. It is not that these firms thought it was good in itself to surrender power to the federal government. Rather, it was their clear perception that only federal intervention could hold at bay those local officials and local citizens that could be expected to shut down their operations by hook or crook if the firms tried to integrate their facilities. Viewed in this light, the dominant motive for the passage of Title II came from parties whose basic commercial interests were undermined by segregation and who wanted government protection at the federal level against the depredations by public and private forces at the local level.[49] Thus just as the railroads did not want to be subject to state segregation laws in the 1890s, so in the 1960s, the next generation of businesses wanted to be out from under the thumb of those dangerous and reactionary elements who prevented them from integrating their facilities, which they desperately wanted to do.

Viewed from this perspective, the question with respect to Title II was whether it went too far or did not go far enough. Even those who thought that Ollie's Barbecue had in principle the perfect and absolute right to turn away customers on account of race had to recognize that the first order of business was to make sure that those firms that wanted to integrate could not be blocked from doing so by state officials and private violence.[50] In this respect, the defense of Title II at the time of its enactment was on decidedly second-best grounds: a statute that is not needed in a perfect world is much needed in an imperfect one. The weight of history makes it impossible to leap from state-imposed segregation to a perfectly voluntary market. In light of the past, it was

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49. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 375 n.127 (1997) (collecting sources).

50. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (rejecting Commerce Clause objections to Title II on the ground that Congress had a rational basis for finding that racial discrimination in restaurants affected interstate commerce). The Commerce Clause argument here, which is said to follow from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), bears no relationship to *Gibbons*, which was limited to interstate journeys. But if the stakes were high in *Wickard v. Filburn*, 317 U.S. 111 (1942)—whether to uphold key provisions of the Agricultural Adjustment Act—they were unbearable in this case. For my views on the correct reading of the Commerce Clause, see, for example, Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 28 (Nathaniel Persily et al. eds., 2013).

better to move too fast rather than to go too slow. No one today need reject the judgment that was made some fifty years ago.

The situation on the ground in 1964 therefore called for extensive measures to undo a broken and corrupt system. But remember that none of those violent episodes around the time of the passage of the Civil Rights Act of 1964 did anything to undermine the basic relationships that as a matter of first principles should govern a society with sound public institutions, including properly elected public officials, a disinterested police force, a professional public administration, and strict control over private violence. The politics that surrounded Title II of the Civil Rights Act did not clearly distinguish between the first- and second-best rationales for its implementation, for at the time there was no pressing need to do so. But times change, and background conditions can change with them. On each of the key measures—voting, public administration, policing, and private violence—the abuses were largely eliminated, in large part due to some of the extraordinary measures imposed in the immediate aftermath of the Civil Rights Act.

The major transformations over the past fifty years should spark a normative reexamination of the scope and impact of Title II. In this regard, it is useful to set the two rationales for the application of Title II against the various institutions that are covered by it. The best practical argument for Title II was that it functioned as a corrective against private force and public abuse in government. The best theoretical argument for Title II was that an antidiscrimination rule was needed to offset institutions that wielded monopoly power. In principle, that rationale is as good today as the day it was uttered. But the economic landscape has changed in ways that have eroded the strength of traditional monopolies, at least those not backed by government force. One feature of advanced technology is that it reduces the number of firms and industries that hold monopoly power. In the Middle Ages, the one inn on the road from London to Oxford held a monopoly position. But today the view that any hotel, motel, or inn possesses monopoly power is odd in an age when customers typically move by car, plane, or bus, with lots of choices of where to spend the night. The eating establishments listed with such precision in Title II[51] also operate in a competitive industry, which is surely the case with the movie theaters, concert halls, and arenas that are found everywhere. The original justifications for civil rights enforcement have become weaker. Yet ironically, the scope of the law has become ever more extensive.

III. THE EXPANSION OF TITLE II AND KINDRED STATUTES

With the adoption of Title II, it is important to see how its statutory definition of a public accommodation squares up with the traditional account of a

51. *See* 42 U.S.C. § 2000a(b).

common carrier. The expansive nature of Title II's definition becomes clearer when its scope is contrasted with the smaller class of businesses that were covered under Hale's "affected with a publick interest" test before that test's demise in *Nebbia v. New York* in 1934.[52] To keep *Nebbia* in perspective, it is critical to contrast it with *Chas. Wolff Packing Co. v. Court of Industrial Relations*, decided in 1923.[53] Under the conventional wisdom of the day, the classification of a business as one affected with a public interest was thought to give the state the power to regulate its rates so long as those rates were not confiscatory. The precise holding in *Wolff* was that a small packing house in Kansas, whose wages a state statute sought to regulate, was not "affected with a public interest" because it fell into none of the traditional regulated categories.[54] The first two categories involved the traditional common carriers and inns. But all the action in this case took place with respect to a third category:

> Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.[55]

After offering that definition, Chief Justice Taft, writing for a unanimous Court, listed cases illustrating the types of concerns that were covered.[56] These started with grain elevators, which were thought to have a "'virtual' monopoly" in *Munn v. Illinois*,[57] a case that played a key historical role by transforming *Allnutt v. Inglis* into a principle of American constitutional law.[58] The list also

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52. 291 U.S. 502, 536-37 (1934) ("[T]here is no closed class or category of businesses affected with a public interest . . . . So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . .").

53. 262 U.S. 522 (1923), *abrogated by Nebbia*, 291 U.S. 502.

54. *See id.* at 543 (describing the packing house); *id.* at 533 (describing the state statute); *id.* at 535 (listing the traditional regulated categories); *id.* at 539, 544 (suggesting that the packing house probably does not fit into any of those categories).

55. *Id.* at 535.

56. *Id.* at 535-36.

57. 94 U.S. 113, 131 (1877); *see also* Brass v. North Dakota *ex rel.* Stoeser, 153 U.S. 391, 399-405 (1894) (applying *Munn* and *Budd v. New York*, 143 U.S. 517 (1892), to uphold North Dakota's regulation of grain elevators); *Budd*, 143 U.S. at 543 (explicitly reaffirming *Munn* and upholding New York's regulation of grain elevators); Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884) (citing *Munn* for the proposition that local governments may regulate "one who enjoys a virtual monopoly").

58. *See Munn*, 94 U.S. at 151-52 (citing Allnutt v. Inglis, (1810) 104 Eng. Rep. 206 (K.B.) 210-11; 12 East 527, 538-40) ("From this case it appears that it is only where some

included cases affirming state regulation of matters such as water companies[59] (which should in any event be lumped with public utilities), banks subject to customer runs,[60] more controversially, large insurance companies doing business in a competitive market,[61] and rent-controlled housing units, but only in times of emergency.[62] Thus, Chief Justice Taft's definition was much narrower than the one that was eventually adopted in Title II.

In light of the argument developed in Part II of this Essay, the key question then arises whether the peculiar constellation of political and legal forces prevents free entry into particular geographical markets. Racially motivated zoning laws may have those effects. But ordinarily, population mobility counteracts any nascent form of monopoly power in ordinary business establishments. The number of business choices is very high so that the case for Title II becomes quite thin over many areas of its operation. Nor can it be said that a strong set of formal and informal sanctions makes it impossible for any particular firm to serve members of minority groups. We are long past the days when Robert Joseph Pershing Foster could not find accommodations in Arizona for the night out of fear of what others might do.[63]

The competitive market works well when supported by well-ordered public institutions, whose formation undercuts the case for retaining Title II. But in the area of its original application there is no need whatsoever to take on that heroic battle. Within the class of institutions originally targeted by Title II in 1964, its effect has caused no visible inconvenience. Some of these public accommodations remain common carriers, at least for some fraction of their markets, as with certain airline and railroad routes. But even those institutions that have no or weak monopoly power still resemble common carriers in certain key ways. Look at the way in which admission to a movie theater or amusement park is

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privilege in the bestowal of the government is enjoyed in connection with the property, that it is affected with a public interest in any proper sense of the terms.").

59. *See* Van Dyke v. Geary, 244 U.S. 39, 47-48 (1917).

60. *See* Noble State Bank v. Haskell, 219 U.S. 104, 113, *amended by* 219 U.S. 575 (1911).

61. *See* Ger. Alliance Ins. Co. v. Lewis, 233 U.S. 389, 411-15 (1914). I regard this case as wrong on rates because of competition, but proper on security of premiums given the risk of default.

62. *See* Block v. Hirsh, 256 U.S. 135, 155 (1921). Chief Justice Taft joined the dissent in this five-to-four decision, *see id.* at 158 (McKenna, J., dissenting), which was thought to rest on short-term emergencies but has become massively abused under New York stabilization laws, in which the emergency comes like clockwork every three years. The current law calls for the end of control only when the vacancy rate reaches five percent in any category. *See* Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAW § 8623 (McKinney 2014). The provision was last reenacted in 2011, extending the law for another four years. Rent Act of 2011, ch. 97, § 1-a, 2011 N.Y. Laws 767, 767 (codified as amended at UNCONSOL. § 8623).

63. *See* WILKERSON, *supra* note 3, at 206-10.

determined: it is strictly and solely by the ability to pay, subject to certain limitations on age (for admission) and sex (for washrooms). Even though these institutions are not common carriers, their proprietors have no interest in reviewing customer resumes before selling tickets to the latest show. Quite simply, it is in their interest to take all comers on the same terms just as common carriers have traditionally done. Loutish or menacing behavior can still result in ejection with cause, so that these operations proceed more or less without a hitch. Why repeal a benign statute in order to raise symbolic hackles? The contrast between the common applications of Title II and the intrusive and mischievous preclearance procedures under sections 4 and 5 of the Voting Rights Act could not be more vivid.

The potential application of Title II is fraught with far greater risk, however, when enforcement challenges organizations that do not operate lunch counters and movie theaters, for in these cases rival interests come into play. That principle was recognized in the run-up to Title II in connection with one hard-fought exemption from Title II: an exception for "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence."[64] Each of these specific conditions was the result of a hard-fought compromise over the status of Mrs. Murphy's much-debated boarding house. To get the pulse of the times, read this uneasy account of the struggle from the vantage point of the passionate defender of Title II:

> Already there was grave concern over the wide-spread newspaper talk that the public accommodations section would be gutted, possibly by an exemption for "small" public accommodations. "Mrs. Murphy's boarding house" with a few rooms was one thing, for her right of privacy cut across the [black person's] right to a room. But a general exception for all small public accommodations was something else again. A [black] laborer entering a small diner could be quite as hungry as a [black] banker seeking service at the Waldorf [Hotel in New York].[65]

The scope of that concession was limited to situations where people were justly concerned about their privacy and safety when asked to live and work in close proximity with each other. People do check references before accepting boarders. The point of this exception under Title II was to carve out the cases where personal preferences matter most, while leaving subject to the law the large inn or hotel, where the impersonal nature of the business makes for few of

64. Civil Rights Act of 1964, tit. II, § 201(b)(1), 42 U.S.C. § 2000a(b)(1) (2012).

65. Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963-1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 49, 55 (Robert D. Loevy ed., 1997) (alterations in original).

these close interactions. Basically, the deal worked, and the exception has had no significant role to play.

The same type of concern was also raised with respect to "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [which defines the institutions covered by Title II]."[66] Clubs are different beasts because they all have distinct organizational objectives, membership rules, and complex internal governance structures. These organizations never relate to their members in the same way that hotels, restaurants, and movie theaters relate to their customers. In clubs and other voluntary organizations, people care a lot about whom they associate with. The type of open seating that works on airplanes won't work in organizations that choose to assign seats at their annual banquet. No defender of the nondiscrimination provision believes that all these organizations should, or could, run on the same principles as the traditional business.

The original application of public accommodations laws to common carriers, narrowly defined, covers those cases where claims for associational preferences are at their weakest. At that point, the social losses, if any, created by imposing a nondiscrimination norm hardly seem to be of any concern, given the smooth implementation of the program once the restrictions were in fact put into place. Indeed, it is hard to tell whether Title II protected the preferences of individuals who opposed segregation but were afraid to speak out, whether it added legitimacy to the nondiscrimination principle, or whether it just matched the change in public sentiments reflected by the widespread and growing political support for the statute itself.

The next question is how the broad reach of the new antidiscrimination principle plays out in other cases that are covered by a very broad definition of what counts as a public accommodation. Take the example of private clubs, organizations which are generally open only to members, which means that someone has to take the time to decide who is in and who is out. The membership process itself gives firm evidence that people care more about who is a member of their club or church than they do about the identity of the person next to them in the checkout line. Put otherwise, the question is whether these private institutions should be treated like the common carriers of old when the arguments of freedom of association that cut against the characterization grow far stronger. Not only is there a complete absence of monopoly power, but there is also a concern with internal operations that just does not arise in the earlier civil rights cases. Nonetheless, the next generation of antidiscrimination cases ignored these critical differences.

66. § 201(e), 42 U.S.C. § 2000a(e).

IV. FROM PUBLIC ACCOMMODATIONS TO HUMAN RIGHTS

A. *Jaycees and Boy Scouts*

The first of the new wave of cases was the 1984 decision in *Roberts v. United States Jaycees*, which involved a decision by the Commissioner of the Minnesota Department of Human Rights to strike down the Jaycees' decision to limit itself to male members only.[67] The moniker "human rights" shows how far the law has moved from the original concern of the nondiscrimination rule for common carriers developed at common law. Under the new definition, human rights do not include rights of property and free association, but impose an obligation not to discriminate against outsiders in certain businesses or accommodations[68]—including retail stores,[69] which are not explicitly covered by Title II.[70] In his Essay, Bagenstos claims, "As Joseph Singer has shown extensively, the common law doctrine before the Civil War in many jurisdictions at least plausibly prohibited *any* discrimination by *any* business holding itself out as serving the public."[71] Bagenstos, however, provides no citation to a particular passage that supports that conclusion, which Singer tentatively defends on a mix of normative and historical grounds that in the end are not sufficient to displace the common view to the contrary.[72] It is also unclear what it means under

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67. 468 U.S. 609, 614-15 (1984).

68. The Minnesota Human Rights Act at issue in *Roberts*, for example, imposed an obligation not "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.* at 615 (quoting MINN. STAT. § 363.03(3)) (internal quotation marks omitted).

69. Minnesota's statute applied (and continues to apply) to every "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind." *Id.* (quoting MINN. STAT. § 363.01(18)); *accord* MINN. STAT. § 363A.03(34) (2013) (retaining that same language).

70. *See* Singer, *supra* note 16, at 1288-93.

71. Bagenstos, *supra* note 36, at 1225.

72. Singer writes:

> Businesses other than inns and carriers dealt in necessities such as salt, food, materials to make clothes, and services such as medical care. Denial of such goods and services would have caused great hardship precisely because there was often no more than one general store or doctor in the area, thereby constituting as much of an effective monopoly as the inn or stagecoach. In addition, many businesses other than inns and common carriers were required to obtain licenses or franchises from the state in order to operate.

Singer, *supra* note 16, at 1292-93. But even if there were no close substitutes, the services in question were not of the standardized variety.

It is exceedingly doubtful that the physician was treated as a common carrier. *See, e.g.*, Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) ("In obtaining the state's license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's

this common formulation for any business to "hold[] itself out as serving the public." The standard rule on common carriers prohibited them from making any contrary public reference. But as to ordinary retail shops, if they posted a sign regarding whom they refused to serve, that action itself might well have removed them from the class of public accommodations.

But the legal relevance of this diversion is uncertain. Even though it is crystal clear that the Minnesota Human Rights Act covers retail establishments, the fit between the Jaycees and the statute still looks less than ideal, given the objectives of the Jaycees to "foster the growth and development of young men's civic organization in the United States."[73] The Jaycees also entertained a variety of similar objectives, which surely qualify it for treatment as a tax-exempt organization under § 501(c)(4) of the Internal Revenue Code, which applies to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."[74]

Notwithstanding the Jaycees' extensive social program, the Commissioner took the position that the Jaycees was covered by the Minnesota Human Rights Act.[75] The Jaycees then mounted its constitutional challenge against the Act in federal court, which in turn certified the question to the Minnesota Supreme Court. The state supreme court held that the Jaycees was covered by the statute because the Jaycees organization

> (a) is a "business" in that it sells goods and extends privileges in exchange for annual membership dues; (b) is a "public" business in that it solicits and recruits dues-paying members based on unselective criteria; and (c) is a public business "facility" in that it conducts its activities at fixed and mobile sites within the State of Minnesota.[76]

The manifest differences between organizations like the Jaycees, with their substantive programs, and the standard movie theater is too evident to require any serious discussion, for these organizations are not just open to the public upon payment of a fee. When the case reached the U.S. Supreme Court, Justice Brennan was alert to the serious issues raised, but he nonetheless overruled the Eighth Circuit, which had struck down the statute,[77] by holding that the Jaycees fell on the public accommodations side of the line. In Justice Brennan's view, the only escape from that classification involved intimate associations on the ground that only family relations give rise to "deep attachments and commit-

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analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark."). *Hurley* is not cited in Singer's article.

73. *Roberts*, 468 U.S. at 612 (quoting the Jaycees' bylaws).

74. I.R.C. § 501(c)(4)(A) (2012).

75. *Roberts*, 468 U.S. at 615.

76. *Id.* at 616 (quoting U.S. Jaycees v. McClure, 305 N.W.2d 764, 768-74 (Minn. 1981)).

77. *See* U.S. Jaycees v. McClure, 709 F.2d 1560, 1561 (8th Cir. 1983), *rev'd*, 468 U.S. 609.

ments" that require a "high degree of selectivity" and "seclusion" and thus merit legal protection.[78] He concluded:

> As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.[79]

Yet why? No one quarrels with the view that intimate personal associations should not be subject to any antidiscrimination norm. Could it really be a criminal offense to deliberately refuse to marry a person because of his or her religion or national origin? But nothing that Justice Brennan wrote addressed either of two key questions about the extension of that principle beyond these core cases. Thus he did not explain why this law should go beyond the standard definition of public accommodations to ordinary businesses that operate in competitive environments. Nor did he explain why the law, if it does go beyond those businesses, should extend to organizations like the Jaycees. In dealing with both questions, the relationship of employer to employee, and of employees to each other, is worlds apart from the standard firm-to-customer relationship. It is for just this reason that the provisions regulating discrimination in employment are, to say the least, far more difficult to apply than those set out in Title II.

As a working generalization with many exceptions, civic leagues like the Jaycees have to govern relationships of large numbers of individuals with wide variations in tastes and sentiments. Any decision to let the state force an association of one person or group on an organization necessarily has serious negative consequences for the persons within the organization who lose some control over their organization when subjected to this state imposition. The range of sentiments and tastes is vastly expanded by the change in membership, which makes it harder to reach consensus on matters of common concern. The original members, who may have given years of service to their organization, are thus left with the choice between running an operation in ways that compromise their principles, leaving the organization, or shutting it down altogether.

Yet the need to permit one group to break down the doors of another institution cannot be justified on the ground that they have no place else to go. There are no transactional barriers to letting the new members in, and just that change in membership policy would happen if in fact the change in composition were a win-win situation for the outside applicants and the current members. The fact that this transformation does not happen across the board is evidence that the Minnesota Human Rights Act imposes win-lose types of deals,

78. *Roberts*, 468 U.S. at 619-20.

79. *Id.* at 620.

which are always harder to maintain given that one side is always intent on altering the deal in order to improve its terms of trade. The results are not unique to these so-called public accommodations, but also extend to any organization where the mandate is imposed on the one side for the benefit of the other. This happens, for example, when employers have to deal with unions on a good faith basis, even when the union has (as the exclusive representative of the workers[80]) monopoly power over the firm, including the power to abrogate preexisting contracts with workers.[81] A similar result happens under rent-control statutes that require landlords to renew their leases against their will with terms that promise them far less by way of rent than a market rate. Indeed, we should expect nothing less than this kind of antisocial behavior. The party subject to the imposition is right to protest the use of force directed its way, so that it will use every means within the law (and, regrettably, some beyond it) to rid itself of a losing contract, either by breaking off the relationship or changing its terms of trade. It is for this reason that ordinary contracts at will, which are terminable at any time by either side, routinely have great durability. A set of constant incremental adjustments allows both sides to share in the gains, which reduces the desire of either side to defect from the agreement.[82] Of course these contracts often do dissolve as one party finds that it no longer wants to deal with the other. But these are clean breaks that are not marked by prolonged struggle involving strikes, lockouts, and other refusals to deal, which are routine in labor law cases.[83] Quite simply, external force by the state is always necessary to keep win-lose arrangements from blowing apart, which introduces new levels of social uncertainty and new layers of administrative oversight.

The question is whether there is reason to incur these long-term destabilization costs. Letting one organization exclude potential members does not prevent outsiders from joining or forming countless organizations that do not use sex or race or any similar criterion for admission. Indeed, it was surely the case that many members of the Jaycees in 1984 were also members of organizations that admitted women as full and equal members. There were in all likelihood many women's organizations that did not admit men on equal terms. It is no credit to the United States to limit by legislation the diversity and types of organizations that can be formed for all sorts of nonbusiness reasons to those

80. 29 U.S.C. § 159(a) (2012).

81. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) (imposing a collective bargaining agreement on dissenting employees by abrogating preexisting contracts).

82. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

83. *See, e.g.*, Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 237-38 (1970) (enforcing a no-strike clause by injunction, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act); Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 301-02, 318 (1965) (allowing an employer to "lock[] out" his employees during a labor dispute in order to bring economic pressure in support of his bargaining position).

groups which meet the approval of the Minnesota Commissioner of Human Rights, who shows scant respect for the rights of individuals to form their own organizations as judged by their own rules and standards.

Consistent with this view, it would be a deep mistake to require any large all-women association to admit men. Philosophically, it could well be more dangerous to decide that such organizations were entitled to a pass from the general antidiscrimination law because of the legacy of discrimination against women, which is then viewed as creating a historic debt that can never be paid off. The world is a better and more confident place if voluntary organizations can choose their own admission requirements and change them in accordance with the wishes of their membership. Indeed, in a world of free association, no organization is exempt from changing social pressures, and each must adjust its membership provisions to take into account that social risk. At a guess, all-men organizations pay a higher social price for exclusion than comparable groups for women. The members and boards of such organizations have to think long and hard before they decide to reduce the potential membership base of their organizations. And should they make the decision to preserve their exclusive membership lists, the only persons who should be in a position to challenge that decision are their own members, in accordance with their internal rules. In a heavily competitive environment, the fact that some group is able to become and stay large only means that it has adopted a successful formula for governing its internal affairs. Its success does not mean that it has to forfeit control over the policies that have guided it to date.

The decision to treat the Jaycees as a business was made in large part because Justice Brennan had his eye on the status of large business operations that are right now subject to extensive antidiscrimination norms. Justice Brennan was well aware that the principle of freedom of association finds no place under either Title VII of the Civil Rights Act of 1964 or the collective bargaining procedures outlined under the National Labor Relations Act.[84] There is no monopoly justification for either of these flat restrictions on the principle of freedom of association;[85] nor is there any easy way to administer the appropriate good faith standards of negotiation. There are of course vast differences in how the two statutes operate, and each therefore can be subjected to forms of specif-

84. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

85. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 11-14 (1915) (striking down a state law that required employers to engage in mandatory collective bargaining with unions); Adair v. United States, 208 U.S. 161, 172-73 (1908) (holding that the Fifth Amendment protects the right to enter or refuse to enter into contracts). For my defense of these decisions, see Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370-75 (1983).

ic criticisms that could not be lodged against the other.[86] The Civil Rights Act often relies on disparate impact theories that have high error rates in determining improper motive. The National Labor Relations Act often provides insufficient protection for dissenting members of the bargaining unit.[87]

Yet it is a mistake in a discussion of this sort to concentrate on these differences. What matters is the common mistakes that make both of these regimes a threat to individual liberty and a massive drain on the productive capacities of the residents of United States, who are duty-bound to enforce laws that make their businesses less responsive to the needs of their shareholders, customers, suppliers, and, all too often, their present and prospective employees.[88]

In grappling with these thorny issues, it is clear that the dim voice of Robert Bork did not echo in the ears of Justice Brennan, who at no point sought to apply any general test of social welfare to see if the changes wrought by the Minnesota Human Rights Act counted as a social improvement under either the Pareto or Kaldor-Hicks tests for social welfare.[89] At this juncture, moreover, it does not matter which of these two tests is chosen, because rules like the Minnesota Human Rights Act generate a large set of social losses through the destabilization of competitive markets with administrative systems that are more costly, less efficient, and more vulnerable to political intrigue than the ordinary firms that they displace. Nor is it sufficient to say that these laws produce some unquantifiable positive externalities for third persons in society at large, since the laws displace common law rules which produce even greater benefits by doing something that no system of government coercion can hope to accomplish: namely, increasing the opportunities for voluntary trade with all sorts of third persons. The rationale for freedom of association is not limited to intimate or small associations. It extends to every organization under the principle that mutual gain through cooperation is a principle that lies at the heart of a free society. It should surely rank high on the list of human rights.

The other cases in the *Roberts* line illustrate the same weaknesses of its tripartite classification of associations. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[90] the Supreme Court upheld California's Un-

86. I have raised these specific criticisms in numerous places. *See generally, e.g.*, EPSTEIN, *supra* note 1 (critiquing Title VII); RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT (2009) (critiquing the National Labor Relations Act).

87. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (denying workers control over their own individual grievances). As a student, I criticized *Vaca* in Note, *Individual Control over Personal Grievances Under* Vaca v. Sipes, 77 YALE L.J. 559 (1968).

88. The last qualification is needed because unions can only survive with the support of a majority of their workers, which leads them to adopt highly inefficient work rules, hurting some current employees and keeping out prospective employees.

89. For the standard definitions of Pareto and Kaldor-Hicks efficiency, see, for example, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17-20 (8th ed. 2011).

90. 481 U.S. 537 (1987).

ruh Civil Rights Act, which required Rotary Clubs to admit women, over claims based both on due process "freedom of private association" and on First Amendment "freedom of expressive association."[91] Similarly, in *New York State Club Ass'n v. City of New York*, the Supreme Court, speaking through Justice Byron White, rejected a federal constitutional challenge to New York City's Human Rights Law, which prohibited discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement," but specifically exempted "any institution, club or place of accommodation which proves that it is in its nature distinctly private."[92] That basic requirement was in turn subject to an exemption for certain clubs with fewer than four hundred members.[93] In both of these post-*Roberts* cases the legislature based its human rights law on the state's compelling state interest in eliminating discrimination by various clubs and other public accommodations in order to improve chances of equal opportunity for women and minorities.[94]

Initially, it seems clear that the organizations at issue in *New York State Club Ass'n* could not credibly be described as "distinctly private" as that term is used in New York City's Human Rights Law. But it hardly follows that this law can be justified by the threadbare efforts to identify the "compelling state interest" that justifies this limitation on associational freedom. There is of course no reason to think that all clubs and groups practice discrimination on grounds of sex or race so that some, indeed many, membership opportunities are available to all women and minority groups, who also have, and often exercise, the option to form their own exclusive groups. The freedom of association pertains to these groups as well, so that there can be no claim of formal inequality across various lines of race and sex. Nor should the government ever take the position that under the First Amendment the only reason to exclude individuals is because they do not share the aims and ends of the organization, whatever those may be. It is exceedingly difficult for outsiders to understand the culture and ethos of private organizations, which may place great weight on the very traits that public accommodations laws regard as irrelevant. But the question still remains why any outsiders have the right to pass judgment on the membership rules and social behaviors of groups of which they are not a part.

Of course, no group should be immune from criticism because of its policies of either admission or exclusion. But the threshold to engage in those activities, always open to all, is far lower than the threshold that has to be crossed to engage in acts of state coercion that are in fact far more intrusive than the gathering of names that was rightly invalidated in *NAACP v. Alabama ex rel.*

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91. *See id.* at 544 & n.2, 545-47.

92. 487 U.S. 1, 4 & n.1, 5 (1988) (quoting N.Y.C., N.Y., ADMIN. CODE §§ 8-102(9), -107(2)) (internal quotation marks omitted).

93. *Id.* at 6 (quoting ADMIN. § 8-102(9)).

94. *See id.* at 5-6.

Patterson.[95] In these cases, it is the wrong inquiry to ask whether the admission of new members will influence the public positions of particular bodies, which may or may not be the case. The key point is that any change in membership can lead to changes in the governance structures and internal norms that current members prize. The ultimate defense of freedom of association is that it does not require group members to justify their actions to legislatures who may not share in their beliefs. In most cases of compelling state interest one restricts speech for fear of imminent violence or systematic fraud. But it is dangerous business to assume that exclusion blocks the economic advancement of women and minorities or that open admission advances it. Like the Jaycees, the New York State Club Association and the Rotary Club advanced positions that probably lost internal support of group members shortly after they were announced. But far from justifying state coercion, that process of internal transformation of membership rules offers a reason why compulsory membership rules should not be imposed by government: there is no compelling state interest in changing norms that often change by voluntary means, especially when none of the clubs in question have anything close to the monopoly position that normally is needed to justify the application of an antidiscrimination norm. The effect of these laws is to reduce the richness and heterogeneity of our voluntary institutions, without any assurance that the forced membership rules will have the slightest effect on the desired levels of economic integration and economic parity—goals that have proved as elusive after the passage of these statutes as before.

Given the way the law has developed, however, the logic of voluntary association does not apply in any across-the-board fashion. *Roberts* and its progeny have made it clear just how contingent freedom of association is on the predilections of judges. Nonetheless, that willingness to extend human rights laws to new situations has not foreclosed further development of the rules limiting freedom of association. In *Roberts*, the Jaycees did not put much emphasis on the distinctive nature of its operation. Chances are it would have changed course quickly anyhow. It is harder to be confident about that judgment with *Rotary Club of Duarte*. But there are other larger organizations that have a stronger sense of mission, which does cut against the antidiscrimination law. That clash came to a head in *Boy Scouts of America v. Dale*, which asked whether the New Jersey Law Against Discrimination prohibited the Boy Scouts from excluding James Dale, an assistant scoutmaster, on the grounds of his

95. 357 U.S. 449 (1958) (holding that the First Amendment right of freedom of association prevented the state attorney general from forcing disclosure of the NAACP's membership lists).

homosexual orientation.[96] The relevant law is broad with respect to the organizations that it wishes to cover when it provides in part: "All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . affectional or sexual orientation . . . ."[97] The New Jersey Supreme Court held that the Boy Scouts were indeed covered by the statute even though, as an organization, they had no fixed place of operation.[98]

A quick glance at the New Jersey Supreme Court's opinion shows no qualms whatsoever about this state-law finding, so powerful in its mind was the antidiscrimination norm. But take the standard principles of freedom of association seriously, and the organization doesn't look like a common carrier in light of its mission statement:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:
>
> Scout Oath
>
> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.
>
> Scout Law
>
> A Scout is:
>
Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent.[99]

96. 530 U.S. 640, 644 (2000). For an earlier statement of my views, see generally Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000).

97. *Id.* app. at 661-62 (quoting N.J. STAT. ANN. § 10:5-4). The language cited was in effect in 2000 when *Dale* was decided, and the language remains the same today. *See* N.J. STAT. ANN. § 10:5-4 (West 2014).

98. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1210-11, 1230 (N.J. 1999), *rev'd*, 530 U.S. 640; *see also Dale*, 530 U.S. at 646, 661 (construing and reversing the New Jersey Supreme Court's opinion).

99. *Dale*, 530 U.S. at 649 (internal quotation marks omitted) (quoting the Boy Scouts' mission statement).

Not many railroads could remain in business if their passengers all had to sign on to that program. Nor can one claim with a straight face that the Boy Scouts looks like an ordinary for-profit business. Nor is it possible to subscribe for a second to the odd property-based view that all that Dale sought from the Boy Scouts was some form of an "easement" to join their organization.[100] An easement only allows entrance onto the property that would otherwise amount to a trespass. It permits, for example, individuals a right of way to walk or ride across the land of another without recrimination. But no easement has ever allowed a party to participate in the operation or governance of a servient tenement, which is exactly the claim that Dale made against the Boy Scouts.

It is necessary to take a step back to see why the claim of freedom of association is strong here: just ask what would happen if whites in Alabama had claimed an "easement" to join the NAACP, which would have been a thousand times worse than the actions demanded in that case by the state's attorney general—disclosure of membership lists that he could easily use to gin up grounds for retaliation against the membership.[101] It was the perception of that risk which made the Court's decision to reverse the Alabama court's order one of the most warmly greeted of its time, even though it is a bit of a stretch to wrench the notion of "freedom of association" out of the constitutional provision that protects the right of the people "peaceably" to assemble.[102] The better way to approach that issue is to posit that the right to freedom of speech only makes sense if people can cooperate in a common venture to create and advance that speech. Accordingly, the First Amendment protection is linked to the standard justifications for freedom of association, which allow individuals to pool their resources in all lawful endeavors through joint effort.

This point gains real immediacy in this case because we know that the Boy Scouts is an organization that is selective about its choice of members and the value structures to which they adhere. To treat an organization that has extensive social and instructional activities as a common carrier is even more strained here than it was with *Roberts*, given the huge internal divisions within the organization regarding whether to keep the ban on gay scouts and troop leaders. At this point the losses to the insiders are truly large, which is one reason why its internal blocs stand their ground, even against each other. The ultimate question therefore was whether New Jersey could apply its aggressive antidiscrimination law against the Boy Scouts, as the state court was prepared to do, taking note of the costs of discrimination on those excluded, but without reckoning on the benefits to the organization itself.

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100. *Cf.* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1552-53 (2008) (proposing this view of *Dale* and discussing its implications).

101. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

102. *See* U.S. CONST. amend. I.

When the issue came to the Supreme Court, the calibers of analysis under modern constitutional law were changed. The decision of the New Jersey Supreme Court was reversed by a five-Justice majority because the Boy Scouts was not, in the Justices' eyes, some nondescript, no-account organization like the Jaycees. Given the bifurcated structure of American constitutional law, the Boy Scouts could claim a higher level of protection as an expressive organization by virtue of its explicitly moral orientation, which raised the case, perhaps, from the area of undifferentiated social liberties to that of a preferred freedom. In dealing with this issue, Justice Stevens in his dissent exhibited the fatal confusion of claiming that only an organization that is passionate about its beliefs is entitled to claim special protection on freedom of association grounds. Unfortunately, that position then creates the unpleasant absurdity that a change of internal policy after major deliberation could strip an organization of its First Amendment rights.[103] The decision thus has to be up or down on that question, and it was up by the small majority of five-to-four where the majority thought that the expressive nature of this organization exempted it from the New Jersey Law Against Discrimination.

The question is what to make of this decision. To Bagenstos, *Dale* represents the camel's nose under the tent. He thinks that it is the first step on a long-term effort to use the First Amendment to dismantle Title II by insisting that all types of association are expressive and thus entitled to receive First Amendment protection, on the ground, say, that "[s]erving an African American customer in a restaurant side by side with white customers sends the message of equal citizenship of blacks and whites at least as strongly as admitting gay members to the Boy Scouts sends the message that homosexuality is acceptable."[104] It is worth noting that no one in the thirteen years after *Dale* has sought to make this argument to overturn Title II. Indeed, the common response of *Dale* defenders on this point, as embodied in the work of Seana Shiffrin and Dale Carpenter, is to insist that the line between expressive and business associations is clear enough that this slippage will never take place.[105] Their separate efforts to draw just this line are undoubtedly in good faith because they are both strong defenders of Title II as it applies to commercial situations, as

103. *See Dale*, 530 U.S. at 676 (Stevens, J., dissenting) ("[The Boy Scouts] never took any clear and unequivocal position on homosexuality. . . . At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."). For criticism of Justice Stevens's dissent, see Epstein, *supra* note 96, at 138; and Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 845-51 (2005).

104. Bagenstos, *supra* note 36, at 1229.

105. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1517-18 (2001); Shiffrin, *supra* note 103, at 876-77.

Bagenstos himself notes.[106] Given the attitude of the courts, I think that it is fair to say that politically this line will stand against future attacks.

Even that prediction, however, does not answer the normative question of whether that line ought to stand once we move away from the restaurant situation to other situations that give rise to more serious disputes over policy objectives and admission requirements for organizations like the Boy Scouts. On this score, Bagenstos has to explain why it is better to force the Boy Scouts to admit gay members, when in the aftermath of that decision members engaged in an immense internal struggle and worked hard to find the proper response to this burning dispute. Today gay members will be admitted to the Boy Scouts,[107] and the organization will not, or at least has not, imploded, its membership having gone down only six percent.[108] So the question remains, which resolution is preferable? A command-and-control operation from the states and the federal government or the imperfect give-and-take process of internal deliberation that produced results more successful than anyone on either side of the debate had dared to hope. It was only the decision in *Dale* that allowed this second, less coercive resolution.

B. *The Small Business Problem*

The remaining issue is whether or not the category of expressive organizations could, or should, extend to other commercial firms of all descriptions. I have already indicated that it is highly unlikely that anyone would wish to apply it to restaurant situations. But the same is not true with respect to a wide range of employments, some of which involve intimate, or at least deeply personal, interactions between employers and employees. In dealing with this

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106. Bagenstos, *supra* note 36, at 1231.

107. Adele M. Banks, *A Boy Scout Schism?*, ONFAITH (May 28, 2013), http://www.faithstreet.com/onfaith/2013/05/28/will-there-be-a-mass-exodus-of-religious-groups-from-the-scouts/20866 ("Now that Boy Scout delegates have taken their long-awaited vote and permitted openly gay Scouts, will there be a mass exodus by religious groups?"). The answer to the article's question is probably "no."

108. A recent article noted:

> The Boy Scouts of America experienced a modest dip in membership in 2013, but not the mass exodus that some social conservatives predicted while it was considering changing its membership policy on gays.
>
> Boy Scouts membership fell by 6 percent last year, leaving it with nearly 2.5 million youth members and 960,000 adult members.
>
> Reasons for the attrition, which is slightly greater than the 4 percent losses in 2012 and similar-sized declines in several previous years, are not fully understood but are likely related to the divisive vote on admitting openly gay youths to Scouts as well as a 60 percent increase in annual membership dues.

Cheryl Wetzstein, *Boy Scouts Shrink 6 Percent After 1 Year of Allowing Gay Members*, WASH. TIMES (Feb. 12, 2014), http://www.washingtontimes.com/news/2014/feb/12/boy-scouts-shrink-6-percent-after-1-year-of-allowi.

question, Bagenstos takes issue with the position advanced by Carpenter and Shiffrin, and insists that the line between ordinary and expressive employments will be exceedingly difficult to maintain in practice given the wide range of business types along a continuum.[109] Indeed, I think that Bagenstos is right on just this point for a wide range of establishments: think of health care personnel and personal trainers, contexts in which most people have deep preferences as to the people with whom they interact. There is no question that many customers use information about race, national origin, religion, sex, and sexual orientation to decide whom to patronize. These choices are bundled in with deep notions of identity politics. I know of no one who thinks that this set of customer choices should be limited by any human rights law. So why have a different rule on the opposite side of the relationship, where the preferences may in some cases be just as intense?

To be sure, many people will say that businesses have a profit motive that makes them less willing to act on these preferences. But that is precisely the point. Knowing that in most cases they will be eager for business, the sensible result is to let them choose their own customers so that these choices will sort themselves out quite nicely. Where these identity issues do matter—largely in small firms, one suspects—the businesses may pay a financial price in order to act in accordance with their own beliefs. There is no need therefore to reserve any such associational privilege under the First Amendment to "expressive" activities.

It should be clear that I don't think that Carpenter and Shiffrin are making some kind of strategic retreat because "they recognize that a frontal attack on Title II of the Civil Rights Act is a political nonstarter."[110] I think that they are making their argument in complete good faith because they believe that the distinction is both correct and sustainable. On that issue, however, I think that Bagenstos is correct—but only conceptually—that the line will not hold. Similarly, my own position is not a sneaky attempt to challenge Title II. It is a frontal assault that rests on the explicit and emphatic defense of the older view that only the presence of monopoly power should trigger a generalized obligation of universal service on nondiscriminatory terms. In my view, any conceptual effort to subdivide associations into three separate categories, some of which receive higher levels of constitutional protection than others, is doomed

109. *See* Bagenstos, *supra* note 36, at 1208 ("[O]ngoing legal developments—both in the area of public accommodations law itself and in the litigation surrounding the Affordable Care Act's 'contraception mandate'—are poised to undermine this expressive-commercial distinction. If these challenges succeed, *Dale*'s freedom-of-association principles will threaten the core of public accommodations law—including, perhaps, Title II itself." (footnote omitted)).

110. *Id.*

to face not only serious line-drawing issues, but also the greater sin of intellectual incoherence.

Here is why. The standard theory of freedom of association writ large is that the members of the organization get to determine its purposes, its mode of operation, and the composition of its membership. So long as transaction costs are low, as they typically are, the refusal to deal does not represent any form of market failure, but only the revealed preferences that the gains to the outsiders are smaller than the perceived losses to the insiders. We make that conclusion not because we collectively weigh their preferences on some exquisite scales of justice, but because we observe that there has been no deal.

In contrast, the modern view applies antidiscrimination laws to those organizations so long as they do not meet some state-determined standard of "expressiveness," which flies directly in the face of that traditional understanding, and thus leads to the obvious question: what should be done in those cases in which standard business associations—family partnerships, private corporations, and small firms with single owners—are organized to serve both religious and secular ends, or whose principals seek to take into account their own religious beliefs in choosing the goods and services that they offer to the market? This pattern of behavior is perfectly consistent with neoclassical economics, which recognizes that parties may choose to take the gains from cooperative activities in nonpecuniary forms. It is not as if these organizations will go out of business; after all, they are not looking for the last dollar in market transactions. But it does spell trouble down the road for these groups when faced with challenges as to how they interact with their customers.

This point was brought home with great vividness in the recent New Mexico decision, *Elane Photography, LLC v. Willock*, where the state supreme court applied its human rights law to a business owned by a fundamentalist Christian who refused to take pictures at a commitment ceremony—gay marriages are now recognized in New Mexico but were not at the time—between two lesbians, Vanessa Willock and Misti Collinsworth.[111] It is worth stressing the upside-down quality of the New Mexico law. Antidiscrimination laws should be condemned because they force unwilling associations. The moral case for same-sex marriage rests on the very libertarian principles that are offended by

111. 309 P.3d 53, 58-59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). In another recent development, a Colorado administrate law judge refused to dismiss an antidiscrimination charge against a bakery that would not supply a wedding cake for a same-sex ceremony. The intrusion here seems smaller, but the whole point of a strong freedom of association principle is to keep the legislature or the courts from drawing these lines. *See* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008 (Colo. Civ. Rights Comm'n Dec. 6, 2013) (ALJ), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf, *aff'd*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_--_commissions_final_order.pdf.

the New Mexico human rights laws. Marriage is an intimate form of association that the state cannot forbid by the use of its monopoly power over the licensing system. Nor should any broad reading of the morals head of the police power upend that conclusion.[112]

But for these purposes, the New Mexico Supreme Court took the soundness of the law as given. Thus, as the facts unfolded, Willock put in a request that Elane Photography be the photographer for the event, which Elane Huguenin, co-owner and lead photographer, refused on clear religious grounds. At that point, Collinsworth followed up with an e-mail asking about Elane Photography's availability, without disclosing that her request was for a same-sex commitment ceremony. Once Huguenin replied that the company was available, she had irrefutable evidence that the earlier refusal was based on grounds of sexual orientation.[113] The couple found services elsewhere, as one would expect in a competitive market as large as Albuquerque. But when the matter was turned over to the New Mexico Human Rights Commission, Elane Photography was hit with a $6,637.94 award in attorney's fees,[114] which the plaintiffs later waived.[115] But what of it? If this violation stands, Elane Photography is then at risk of future complaints by other potential claimants, and of fines from the New Mexico Human Rights Commission that can be collected. In effect, the result of this case could be to force Elane Photography to choose between violating its religious beliefs or going out of business, all as a result of a lawsuit that never should have been brought in the first place. *Elane Photography* is a classic version of the test-case setup.

And for what? In looking at this case, it is clear that this was a deal that neither side wanted. Just imagine if Elane Photography had taken the job without telling Willock and Collinsworth of Huguenin's religious preferences, and Huguenin then had showed up bedecked with bold Christian paraphernalia and signaled to all the guests that she did not approve of the relationship. Why invite anyone to a commitment ceremony who is not committed to the cause of which it is a part? On ceremonial occasions like this, the line between the personal and impersonal starts to blend. Notwithstanding this context, however, the New Mexico Supreme Court had no difficulty in deciding that "a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the [New Mexico Human Rights Act (NMHRA)] and must serve same-

112. *See generally* Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75 (2004).

113. *Elane Photography*, 309 P.3d at 59-60.

114. Elane Photography, LLC v. Willock, 284 P.3d 428, 433 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53, *cert. denied*, 134 S. Ct. 1787.

115. *Elane Photography*, 309 P.3d at 60.

sex couples on the same basis that it serves opposite-sex couples."[116] It stressed that the standard here is the same as it is with discrimination on grounds of race. It then rejected the First Amendment defense "because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[117] With rare exceptions,[118] liberal commentators commended the decision on the ground that the antidiscrimination laws would be gutted if all sorts of expressive commercial organizations could claim exemption from its operation.[119] Libertarian groups have taken the opposite position, holding that the act of photography itself constitutes a form of expressive behavior that is indeed protected by the First Amendment.[120]

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116. *Id.* at 59.

117. *Id.*

118. *See, e.g.*, Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law*, 88 S. CAL. L. REV. (forthcoming) (on file with author). Andrew Koppelman writes:

> Businesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory. That cost will make discrimination rare almost everywhere. Employers—some of whom also object to recognizing same-sex marriages—should not however be allowed to discriminate in providing benefits for their employees, such as denying health insurance to same-sex spouses. You can find another wedding photographer, but you only have one insurance plan. . . .
>
> I've been a gay rights advocate for more than 25 years. Here, for the first time, I make common cause with my longtime adversaries. I've worked very hard to create a regime in which it's safe to be gay. I'd also like that regime to be one that's safe for religious dissenters.

Id. I welcome Andrew Koppelman's vigorous defense of *Elane Photography*, but have these observations about his overall position. First, I don't think that the notice requirement will deter businesses like Elane Photography. They will instead announce that they welcome everyone's business on all matters except gay weddings, which they refuse to do on grounds of religious conscience. Many people might come to them because they sympathize with the position. Second, I don't think that Koppelman points to a viable distinction between wedding photographers and employers. To be sure, there are fewer goods bundled into a short-term stint with a photographer, but there is also extensive competition in labor markets. Workers can shift jobs, and they can surely acquire specialized coverages outside the employment relationships. Labor markets are not monopolistic, so that freedom of association should remain the rule.

119. *See* Adam Serwer, *The New Plot to Take Down Gay Rights*, MSNBC (Sept. 25, 2013, 5:40 AM), http://www.msnbc.com/msnbc/the-new-plot-take-down-gay-rights ("'It's impossible to draw a line here between an expressive commercial service and a non-expressive commercial service. Almost any commercial interaction we have today involves the expression of words or pictures or talking,' said Josh Block, an attorney with the American Civil Liberties Union. 'People once argued that they had a religious or associational right to refuse to serve black people in an integrated manner, and those claims were rejected.'"). So if the line cannot be drawn, why use the antidiscrimination laws at all? In most cases they are not needed given business imperatives, so underenforcement is no insuperable obstacle, even if overenforcement is.

120. Ilya Shapiro, *We Support Gay Marriage but Oppose Forcing People to Support It*, CATO AT LIBERTY (Nov. 2, 2012, 1:45 PM), http://www.cato.org/blog/we-support-gay-marriage-oppose-forcing-people-support-it.

That position was argued with great conviction by Dale Carpenter, Eugene Volokh, and the Cato Institute, who claimed that photography is an expressive activity that should receive First Amendment protection,[121] relying on both Justice Jackson's famous opinion in *West Virginia State Board of Education v. Barnette*[122] and the Court's well-known decision in *Wooley v. Maynard*.[123] Despite the Supreme Court refusing to grant certiorari, I commend these efforts because of their laudable attempt to shoehorn associational freedoms into the First Amendment, but recognize all too well that Bagenstos has a field day in explaining all the complications that will result in policing the line: "As anyone who has ever hired a caterer for a wedding, bar mitzvah, or other occasion knows, catering has inevitably expressive elements."[124] The typical wedding must have dozens of contractors.[125] Is it only the camera crew that is protected? What about the makers of the wedding cake and the car valet staff?

Bagenstos's colorful prose should, however, lead him to endorse the exact opposite conclusion. Why face these issues of classification as a matter of public law when the parties in this fiercely competitive business can sort matters out themselves? There are few error costs, given market pressures, in defending freedom of association across the board, and massive disruptions caused by defending the NMHRA, which tramples over the all-too-human right of freedom of association. As a matter of first principles, there should be no need to locate these cases on the right side of the *Dale* line that for legal purposes ought not to exist in the first place. Normatively, the correct rule is that freedom of association is a generalizable value that holds in all competitive markets; the effort to apply the antidiscrimination laws in that domain is a giant form of overreach, no matter whether the lines of difference are race, religion, or sexual orientation. This position applies a fortiori to those persons who reject a request for services on bona fide religious grounds, but it is not limited to them. This position also applies to all sorts of services, not some subclass like photography that may just be given preferred First Amendment status on freedom of speech grounds. There is virtually zero risk of systematic exclusion when competitive substitutes are available, so that using the broad freedom of association principle produces few error costs. If most organizations regard these distinctions as abhorrent, it is all the *more* important to allow those who differ to go their separate ways. Customers have lots of options to choose from, while the practitioners of certain beliefs have few choices of their own if forced to engage in prac-

121. *See* Brief of Amici Curiae Cato Inst., Eugene Volokh, & Dale Carpenter in Support of Petitioner at 3, Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2013) (No. 13-585), 2013 WL 6665006.

122. 319 U.S. 624 (1943).

123. 430 U.S. 705 (1977).

124. Bagenstos, *supra* note 36, at 1235.

125. *See id.*

tices that they find offensive to their religious beliefs in order to stay in business.

Nor is it possible to sugarcoat the New Mexico court's ruling by claiming that Elane Photography brought the law down upon itself when it opened its business to the public. The argument, which has a long history in civil rights litigation, claims that the phrase "offers its services to the public" carries with it the clear implication that Elane Photography accepted the duty not to discriminate the moment it opened its doors for business. Put otherwise, no one who is in favor of this law thinks that it could be avoided if below "open for business" was the sentence "we reserve the right to choose our own customers." (Ironically, the New Mexico Supreme Court said that Elane Photography could post a notice that it will respect the law that it doesn't agree with.)[126] Note that this sentence could *not* be posted by a common carrier that indeed has just that duty to serve on reasonable and nondiscriminatory terms. That difference in the two settings is recognized by the common law distinction between offers and invitations to treat,[127] such that it is not credible to say that Elane Photography has somehow voluntarily offered its services to any or all members of the public.

That outcome represents, moreover, the standard position in competitive markets that each person—whether merchant or customer—is the master of his offer; the firm has the unqualified right to turn down any business proposition, just as the potential customer can choose for whatever reason the firms that it wants to deal with. Surely Willock has no duty to accept Elane Photography's offer to work on any project whatsoever if she takes offense at its policy not to photograph gay marriages—no questions asked. That right is shared by all other members of the public. No one claims that someone who puts out a request for services has committed herself to hire a contractor without regard to his religious or sexual preferences. It is therefore odd to posit some "humiliation and dignitary harm"[128] as a trump on the side of a disappointed customer, without recognizing that the mandated services now impose humiliation and dignitary harm on business proprietors who are also human beings: why else is Elane Photography fighting this case? These issues are hot. They can spur widespread boycotts and other actions against the firm—think of Chick-fil-A.[129] The decision to override private associational preferences based on the allegation of soft

126. *Elane Photography*, 309 P.3d at 59.

127. *See* Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689, 691 (Minn. 1957); Moulton v. Kershaw, 18 N.W. 172, 173 (Wis. 1884).

128. *Elane Photography*, 309 P.3d at 64.

129. *See, e.g.*, Kim Severson, *A Chicken Chain's Corporate Ethos Is Questioned by Gay Rights Advocates*, N.Y. TIMES (Jan. 29, 2011), http://www.nytimes.com/2011/01/30/us/30chick.html?pagewanted=all (describing gay rights advocates' attacks on the firm for its anti-same-sex marriage position).

harm thus founders. Those harms are created on the one side in the attempt to limit them on the other.

The correct analysis therefore requires looking at both sides of the relationship before making some judgment on both social efficacy and dignitary harms. That point is also correct on more general grounds. The first point is that it is likely that Willock and Collinsworth could not pay enough money to Elane Photography to overcome its objection. Nor could Elane Photography pay enough to Willock and Collinsworth to make them change their minds. This dispute is not over money, but fundamental values. But what lesson can be learned from the observation that it is difficult for two parties to bargain themselves out of impasses? In this situation, the correct default rule is that the two sides go their separate ways.

That choice of default rule becomes more salient as the number of potential parties increases. Thus if Elane Photography is under a duty to serve all comers, it cannot not afford to buy off the long queue of gay and lesbian couples that come to its door asking for financial payment. But if Elane Photography has the right to exclude for any reason, then selective admission of chosen persons becomes the norm on which free association can rest. So giving owners the right to exclude others reduces the bargaining complications that would otherwise ensue, which in turn eases the path to competitive markets as others jump in and offer to serve the customers that Elane Photography will not. The point here applies across the board. It is not an answer to say that by this logic Elane Photography could refuse to serve black customers, which is within its rights, just as it is for any firm to refuse to serve white customers, or to refuse to serve any firm that does not engage in a systematic policy of nondiscrimination. Once again, the principle of freedom of association applies across the board once the issues of monopolization and the abuse of state power are put to one side. In all cases, competitive firms will fill the supposed gap.

The overall system works far better with strong property rights and of course the strong protection of individual autonomy in all personal dealings. It is for that reason that in ordinary property arrangements elsewhere, it is the duty of the outsider to win consent, not the duty of the owner to buy off all outsiders that she does not wish to admit. So the standard rule is that the cattle owner has to keep the cattle out of the farmer's land, and not the other way around. Armed with the right to exclude, the landowner can decide which, if any, outsider to let in to graze on his land.[130] Those who do not like the situation can go elsewhere. Elane Photography does not have any dominant market position in Albuquerque, New Mexico. Huguenin should be allowed to run her business in peace.

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130. Kenneth R. Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 J. LEGAL STUD. 149, 172-74 (1987).

The question then arises as to what should be done going forward. In one sense the damage was already done once the New Mexico Human Rights Commission put the issue in play. In retrospect, it should have just ducked the issue by invoking the constitutional doctrine of avoidance given the inevitable clash of this human rights law with religious liberties. At this point, the matter might have been defused without inviting frontal assaults on Title II. But once on the books, *Elane Photography* provoked many conservative and religious organizations to back an extension of Arizona's Free Exercise of Religion Act[131] to cover not just religious assemblies or entities, but also ordinary individuals, associations, partnerships, and corporations. One such bill, Arizona Senate Bill 1062,[132] passed, only to be vetoed by Governor Jan Brewer who stated, correctly in my view, that the bill "has the potential to create more problems than it purports to solve."[133] She did so on the urging of prominent political leaders—including Arizona Republican Senators John McCain and Jeff Flake, and former Republican presidential nominee Mitt Romney—as well as major corporate and business interests, "including Delta Air Lines, the Super Bowl host committee and Major League Baseball," which feared a backlash against the state.[134]

There is at least one deep irony in this collective rejection of Arizona Senate Bill 1062. The firms and individuals who opposed the legislation had no desire whatsoever to take advantage of its protections. That fact alone explains why the bill itself posed no threat to the established patterns of business. Indeed, if the governor had signed off on the bill, all companies that were uneasy with the new state of affairs could have taken binding pledges to continue to do business just as if the legislation had never passed. Their behavior makes out

131. Ch. 332, 1999 Ariz. Sess. Laws 1769 (codified as amended at ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2014)). Arizona's Free Exercise of Religion Act is modeled off the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). RFRA was held unconstitutional as it applies to the states in *City of Boerne* on the ground that it sought to give primacy to Congress's interpretation of the substantive guarantees of the Fourteenth Amendment, when the last word on that question belonged to the Supreme Court. *See* 521 U.S. at 536. But the law continues to apply against the federal government, where no constitutional issue is raised. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, 439 (2006). In addition, at last count, nineteen states have enacted state analogs to RFRA. *See* Reid Wilson, *Mississippi Passes Arizona-Style Religious Freedom Bill*, WASH. POST (Apr. 1, 2014, 9:18 PM), http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/01/mississippi-passes-arizona-style-religious-freedom-bill.

132. S.B. 1062, 55th Leg., 2d Sess. (Ariz. 2014).

133. Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014, 11:13 PM EST), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill.

134. *Id.*

the case for why the legislation is in principle unnecessary. But these firms were only interested in returning to the settled set of social expectations that antedated the legislation.

There is much pragmatic sense in their position. As I have argued elsewhere, constant practice may give rise to a *prescriptive* constitutional right that is formed in much the same way as the long use of a right-of-way can create a prescriptive easement.[135] But as with prescription, the right should only go as far as the established social practice, which has never covered situations like *Elane Photography*, where the equities between the parties lie so much in favor of the firm. No doctrine of settled expectations should sanction this new legislative development. Indeed, the case for protection starts with the observation that now Elane Photography is part of a discrete and insular minority under footnote four of *United States v. Carolene Products Co.*[136] Its minority religious views need constitutional space between it and the relentless ambitions of an ascendant gay rights movement that seems to have quickly forgotten that its members were once on the receiving end of the unthinking and abusive exercise of state criminal law. Nothing in the court's decision in *Elane Photography* allays this fear of a new wave of authoritarian abuse.

This pragmatic plea for the status quo ante leaves untouched the question of how this issue should be resolved as a matter of first principles. On that score there is no reason to be coy or pragmatic. As a matter of first principles, Title II of the Civil Rights Act should be regarded as unconstitutional as applied to *all* voluntary organizations in well-functioning markets. Civil rights laws are turned upside down when used to harass small businesses with minority viewpoints. At this point, the Robert Bork of 1963, who was so wrong about public accommodations in the Old South, is unhappily vindicated by the careless way in which statutory duties to serve are extended far beyond their original purpose of coping with monopoly power in common carrier situations.

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135. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 68-71 (2014).

136. 304 U.S. 144, 152 n.4 (1938). Recall the basic passage, which was written in the context of a futile challenge to a filled milk regulation, just after the 1937 revolution:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (emphasis added) (citations omitted).

V. GOVERNMENT DISCRIMINATION

The decision to pick on small and isolated groups is not just a function of antidiscrimination law as it applies to private parties. It has also arisen in connection with government actions that overtly and consciously discriminate against small groups that wish to retain their organizational preferences. In these cases, the dominant question involves the actual or potential application of the doctrine of unconstitutional conditions.[137] That principle states in its canonical form that even if the state has the power to grant or deny a certain privilege, it may not have the power to grant that privilege contingent on certain conditions that are constitutionally suspect. The scope of the doctrine is broad because it arises whenever the government exerts monopoly power or control over some essential facility normally open to the public at large. In constitutional language, these cases of government ownership often involve the operation of public forums, including streets, parks, and halls, where people are allowed to congregate. In all of these cases it has long been held that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[138]

The reference to the public trust in this case is the signal that fiduciary duties are involved so that the state cannot pick and choose between the groups that are allowed to engage in political activity on public premises. In essence, there is no particular obligation to open the premises to all comers, but there is a duty to act in a fair and nondiscriminatory way with respect to said groups, whose conduct is only subject to time, place, and manner restrictions.

It thus becomes clear that in allowing groups to enter onto the public highway, the relevant government authorities cannot discriminate among potential applicants on the grounds of their own political or associational preferences. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* the question was whether the Massachusetts public accommodations law could require the South Boston Allied War Veterans Council to include the gay, lesbian, and bisexual group in its parade, to which the answer was "no."[139] The state as the holder of the monopoly resource—here the streets—is under the nondiscrimination duty to all comers, including those private groups that discriminate on grounds that offend the Massachusetts statute. In effect, *Hurley*

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137. For my views, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 3-12 (1993).

138. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

139. 515 U.S. 557, 569 (1995).

is a modern instantiation of the earlier and proper application of the nondiscrimination principle against the state.

A narrow majority of the Supreme Court lost sight of this lesson in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, where the scene of action switched to Hastings College of Law, which acted to exclude a tiny Christian Legal Society (CLS) chapter from various privileges that were extended to other Hastings groups on the ground that CLS required its members to affirm that they adhered to the teachings of Jesus Christ and were opposed to "unrepentant homosexual conduct."[140] There is no question that a private institution in Hastings's position should be allowed freedom over whom to admit and the terms on which that admission should be based. There is no doubt that if Hastings sought to exclude fundamentalist Christians from its student body, that total ban would amount to a form of viewpoint discrimination that would be struck down. But as a public institution that doles out public subsidies, it is much more closely analogous to a state monopoly because of its ability to tap into public funds to support its operations. The question then arises why, in this "limited public forum" to which only Hastings students were invited,[141] it could exclude this tiny group from the usual benefits and privileges that Hastings bestowed on more powerful groups, including Outlaw, a society of lesbian, gay, bisexual, and transgender students.[142]

In defending that result, Justice Ginsburg insisted that Hastings could exclude from its list of "Registered Student Organizations" all groups that refused to adopt an "accept-all-comers policy" on the ground that said policy "encourages tolerance, cooperation, and learning among students."[143] But she never explained why an organization had to admit into membership individuals who did not share its fundamental mission. CLS was a tiny group vulnerable to political crosswinds in a sea of hostile students. It was quite willing to allow others to attend its meetings, but not to join its governance structure, which is exactly right. The organization could not survive once a fifth column was guaranteed membership rights, which it could use to stack the organization with its own supporters.[144] Justice Ginsburg thought that it was one thing merely to exclude people from benefits and another to impose direct losses upon them.[145]

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140. 130 S. Ct. 2971, 2980 (2010) (internal quotation marks omitted). For my views, see generally Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2009-2010 CATO SUP. CT. REV. 105 (2010).

141. *Christian Legal Soc'y*, 130 S. Ct. at 2991-92.

142. 1 Joint Appendix at 236-45, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 372139 (listing "Registered Student Organizations").

143. *Christian Legal Soc'y*, 130 S. Ct. at 2978-79 (internal quotation marks omitted).

144. *See id.* at 3019-20 (Alito, J., dissenting).

145. *See id.* at 2986.

She would never take that position for law schools that wanted to exclude socialists from the faculty or student body. But the choices that are allowed to private institutions in competitive markets are not available to state-run institutions that receive subsidies and other forms of public support for which there is no private alternative available to CLS or anyone else.

The key point about the doctrine of unconstitutional conditions is that it limits the power of state choice when the state acts as a common carrier in the use of its monopoly power. The only justifications that allow for discrimination are those that the state could apply through direct regulation of private activities. It could refuse to allow groups to join if they posed the threat of force or fraud. Otherwise the only difference between the open public forum in *Hague v. Committee for Industrial Organization* and *Hurley* and the limited public forum of Hastings is that admission (under nondiscriminatory rules) can be restricted to potential law students, who as a group have privileges above and beyond those granted to outsiders. Within this framework it is clear that the great tragedy of *Christian Legal Society* is that it allows the government to act as a discriminating monopolist against weak and vulnerable groups, precisely because, as in *Elane Photography*, the government forces those small groups to toe its own collectivist line on discrimination. How quickly we forget.

Nor is this an isolated instance. One current battle with the health care law is whether the statute can force religious institutions to supply contraception and abortion services to female employees even if it is inconsistent with the religious beliefs of the organization, usually as represented by its dominant family shareholders.[146] That debate is extensive and wide ranging, and it is often cast in terms of whether the "boss" should be able to determine the sexual practices of female employees.[147] But the reality is that the "boss" in this case is the government that seeks to force organizations to make expenditures that they don't want in order to serve state but not private ends. In this case too, the correct response is for the government to understand that it cannot condition its grants and regulations on any idea that suits its fancy. Instead it must follow the widely rejected principle that in exercise of its monopoly power, it cannot deny government benefits to practices that it could not ban directly,[148] which covers this case. Antidiscrimination laws should never be used as a government club against recalcitrant individuals in their everyday lives.

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146. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.) (en banc) (presenting this issue), *cert. granted*, 134 S. Ct. 678 (2013).

147. For a brief account, see EPSTEIN, *supra* note 135, at 470-75.

148. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (conceding that the school's decision to ban interracial dating was constitutionally protected, but that its right to a religious tax exemption was not).

AN UNHAPPY CONCLUSION

In the English language the word "discrimination" once had two meanings, the first of which is in danger of being lost. In its positive sense, discrimination refers to persons of taste and discrimination who can draw the right lines for setting preferences of places to go, things to like, and people to choose as company. In its negative and now standard sense, discrimination is always against some group, where it is thought that some bad or invidious motive accounts for the behavior.

There is some truth to both of these definitions, and the task of legal analysis is to decide when this or that form of discrimination should be allowed. It is very risky to permit any single group, public or private, to be the arbiter of good or bad taste. So the ultimate lesson to learn here is to try to decentralize the use of power in good Hayekian fashion,[149] which in turn requires an extra dollop of suspicion in organizing social relationships. The common law response to this development, which was to impose duties of nondiscrimination on parties with monopoly power over relatively commoditized goods and services, was a good first cut into this problem. It meant that people could not be kept out of railroads and off the electrical grid, but it also allowed all private groups to select their own members and govern their own organizations when they provided uniquely differentiated services in competitive markets. That represents in my view the correct division between government regulation and private freedom of association.

Those principles in part drove the earlier applications of Title II of the Civil Rights Act, where a combination of public abuse of essential facilities and private violence posed a mortal threat to the individual liberties of vulnerable citizens, often on grounds of race. Title II of the Civil Rights Act offered a sensible first response in this respect. But with the increase in power of the civil rights movement, the more recent applications of antidiscrimination law have had a very different purpose. There have been many aggressive attempts to achieve state-mandated nondiscrimination over a wide range of business and social institutions that are bereft of monopoly power and that have distinctive purposes and objectives that rightly resist any form of state standardization. In this sphere, the situation is topsy-turvy. Antidiscrimination law now is a threat to the diversity of our private institutions. It allows the state to impose nondiscrimination obligations on weak and powerless individuals, institutions, and firms that only wish to be left alone. It then compounds the mischief by insisting that its key control over basic public facilities allows it to impose its will on private institutions that are powerless to resist its combination of direct controls and fines. It is indeed a sorry state of affairs that a great norm intended to blunt

149. *See* Hayek, *supra* note 21, at 526.

private power has now become a tool to allow all-too-powerful institutions to stamp out those groups that oppose their vision of the good society.

I have no doubt that any group that wishes to buck the dominant social sentiment must face the risk that it will lose popularity and business to people who are offended by its views. The application of public opinion in just that regard is an essential safeguard of our social institutions, but only so long as those same sentiments are allowed to the minority group that wishes to distance itself from the majority. There should be free and open competition in the world of ideas and behavior. But it also must be remembered that this process need not generate a unity of views on key questions of gay rights any more than it must generate a uniform view of whether Macs are better than PCs, or the reverse. The interplay of social forces is well equipped to figure out what distribution of power goes to which group.

The modern application of public accommodations and human rights laws pushes too far and too fast in the wrong direction. There is little doubt that sex discrimination has become a dirty word in many quarters. It is equally clear that the opponents of gay marriage are losing the public debate as well. It is surely correct to support gay marriage for the reasons noted above. The state has a monopoly over marriage licenses and should not discriminate between various candidates for marriage, which is why libertarian organizations are and should be firm supporters of requiring the state not to discriminate between couples in its exercise of monopoly power. But the state becomes the source of discrimination when it fines and punishes those who wish to exercise their own rights of association. Those rights should be broad and firm. They should not depend on whether an organization is or is not expressive, is or is not religious in orientation, or is or is not engaged in political speech. Our authoritarian human rights acts have to be recalibrated so that they protect one of the most fundamental of human rights—the right to associate, or not to associate, with people of one's own choosing. It is that lesson that we have to relearn on the fiftieth anniversary of the Civil Rights Act of 1964.