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Standing Firm, on Forbidden Grounds

RICHARD A. EPSTEIN*

The Articles contained in this issue are the outgrowth of the Symposium sponsored by the University of San Diego School of Law, and the Liberty Fund on my book, Forbidden Grounds: The Case Against Employment Discrimination Laws. It should be evident that these Articles express a good deal of disagreement with the thesis that I propounded in that book; namely, that the antidiscrimination laws which prohibit employer discrimination on the grounds of race, creed, sex, age, handicap, or indeed anything else, should be removed from the statute books insofar as they apply to private employers in competitive markets. I argued in Forbidden Grounds that the best set of overall social outcomes would come from a legal order that tolerated any form of private discrimination or favoritism, whether practiced by the most vicious and ardent white supremacist or the most dedicated proponent of diversity or affirmative action. One major theme of my book is that far more mischief is likely to come from government enforcement of any antidiscrimination law, regardless of its laudable content or its noble aspirations.

Forbidden Grounds was not written on the assumption that the competitive alternative to the present legal regime will yield perfect outcomes in all cases, or that markets will eliminate all adverse consequences of discrimination, or indeed of any other social practice that others might call into question. No set of human institutions could achieve that result, and none should be asked to try. Nor do I claim that competitive markets will, or indeed should, eliminate all forms of discrimination. Quite the opposite. I believe that in any

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complex employment relationship certain forms of private discrimination, certain forms of race, sex, age, and disability discrimination will continue to survive in various quarters, but that invidious forms of discrimination will not. One tendency of competitive markets is to drive out inefficient forms of behavior, with discrimination as with anything else. The appropriate strategy in all cases, therefore, is to open up markets to new entry as quickly as possible, to eliminate as many of the impediments on the employment relationship — unemployment taxation, the minimum wage, antidiscrimination law, most health and safety regulation — and to allow employers and employees to work their separate peace on mutually agreeable terms.

With the thesis just stated, I want to address some of the recurrent challenges to my position that were developed at the Symposium, including those written after the Symposium especially for this issue. In some cases I shall refer to the individual papers presented at the Symposium. In others I shall, without attribution, address the issues that were raised during the course of discussion, issues that need a principled response. The first half of this Article, therefore, deals largely with theoretical issues; the second half with empirical and historical ones. Part I explores the relationship between the utilitarian and libertarian bases of *Forbidden Grounds* in particular and of my own work generally. Part II looks at the supposed parallels between a prohibition on force and fraud on the one hand, and of discrimination on the other. Part III examines the proper legal response to the psychological harms caused by discrimination. Part IV addresses the symbolic harms and the social meanings conveyed by the social tolerance of discriminatory practices. Part V considers the possible extension of my view to public accommodations, housing markets, and retail automobile markets. Part VI examines the historical practices of discrimination, both in the South and the North, before the passage of the Civil Rights Act of 1964. Finally, part VII, with an eye toward transferable quotas, asks the troubling question, where do we go from here? In my view, the intellectual case for the total repeal of civil rights legislation is made only stronger when all the objections to *Forbidden Grounds* are taken into account.

I. UTILITARIAN OR LIBERTARIAN?

The most insistent theoretical refrain concerned the selection of the proper philosophical orientation for dealing with the antidiscrimination laws. In particular, Professor Brilmayer's article\(^2\) criticizes the apparent and unprincipled multiplicity of philosophical

orientations found in *Forbidden Grounds*. Her confusion on this subject is quite understandable, I think, given the evolution of my own legal views over the past twenty or so years. Rather than relate my slow transformation from a natural rights libertarian to a limited government utilitarian that has so occurred, I will content myself with stating my current position.

At the core of this position is the belief that legal rights are conscious human creations that are designed to maximize the overall level of utility in society; that the effort should always be made to create legal institutions which limit the use of public force to those tasks that are likely to promote broad scale advances in social welfare. The consequence of this legal framework is to yield to two major grounds for social intervention. The cardinal function of the state is to use public force to control private force, that is, to control individual aggression by one person against the person or property of another. By way of a corollary, the government should also limit the practice of various forms of fraud and misrepresentation. The second state function is to use public force to overcome the transactional obstacles that prevent voluntary arrangements from exhausting the potential gains from trade. Thus it becomes appropriate for the state to take private property for public use, with just compensation — compensation that need not be in cash — if the legislation in question provides benefits to each party at least equal to the property rights that they have surrendered. The scope of that government power is extensive on the one hand, but limited on the other. It allows for the use of state power to raise the taxes needed to fund a police force; and it permits the use of state power to supply a full range of public (nondivisible) goods and to control the behavior of private monopolies. Yet by the same token it prevents the use of government power, whether through taxation, regulation, or the modification of liability rules to take property, in whole or in part, from one party to give it to another.

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5. In its most extreme form this position prevents all forms of redistribution from one person to another. Such was the position that I adopted in Takings. *Id.* A fallback position is one that allows redistribution from rich to poor, and then only through the use of general tax revenues. The merits of these two positions (between which I continue to vacillate) require an extensive evaluation, but are largely irrelevant to any critique of the antidiscrimination laws.
The exact contours of these government powers are of direct relevance to this inquiry. It supplies the reason why the state should be allowed, indeed required, to use its force to prevent private violence by any individual or group against any other group. This position also explains why state prohibitions against monopolies may be appropriate. In all cases, it is necessary to ask whether the cost of controlling these private forms of misconduct is greater than the harms prevented. But with competitive markets, such as those that characterize most employment relationships, neither justification is available to the state. Under those circumstances, the thesis of Forbidden Grounds is that the process of mutual exchange within a system of well-developed property rights will yield better outcomes than any system of government intervention.

This basic framework is not libertarian in any thoroughgoing philosophical sense because it does not treat individual autonomy and mutual exchange as the bedrock values of a system of legal rules. But since any theoretical discussion of the antidiscrimination principle for private parties only arises after the problems of force, fraud, and monopoly have been solved, or at least put to one side, it is now appropriate to evaluate individual cases within the framework of the derived libertarian principle that stresses the strong nature of property rights and that treats freedom of contract with the same respect that it treats any other form of freedom, be it of action, conscience, or speech. The effort to demonstrate the counterproductive nature of intervention with the many doctrines of the antidiscrimination law—the attacks on government limitations of employer testing, on insurance, on mandatory retirement, on reasonable accommodation for disabilities—all gain their salience because they underscore the central premise of the book: when force, fraud, and monopoly are no longer in issue, state intervention results in net social losses, ones which can be demonstrated by a close examination of those practices required or prohibited under the current law.

In a sense, therefore, Forbidden Grounds presents a simpler analytical problem than I addressed in Takings: Private Property and the Power of Eminent Domain, for Takings seeks to resolve a set of problems that in principle never arises in a purely libertarian world: what are the uses and limits of forced exchanges. When Professor Brilmayer writes at painful length that she cannot tell whether my

6. I do not mean to suggest that there are no differences among the freedoms. It is far easier to subject property and contract to regulation upon payment of just compensation than it is to subject speech or conscience, even though the latter are not absolute. But for these purposes the basic point concerns not the ultimate level of protection but the initial level of respect that is accorded. Too often claims for deprivation of property and contract never receive any constitutional hearing at all.

7. Takings, supra note 4.
philosophical orientation was utilitarian or libertarian,\(^8\) she only displayed her unfamiliarity with my work — pardonable in anyone who is not committed to discrediting it. When she then tried, also at great length, to distinguish categorically between a libertarian position and a freedom of contract position,\(^9\) she displayed her basic ignorance of the libertarian tradition. All libertarians support freedom of contract: the central prohibition against force and fraud is concerned with the external imposition of legal obligations. There is no prohibition against the assumption of obligations by consent, for to be free today requires the ability to bind one's self tomorrow. Whatever weaknesses readers may find in \textit{Forbidden Grounds}, it is consistent in its philosophical approach.

II. FORCE, FRAUD, AND DISCRIMINATION

A second question that was constantly raised at the Symposium was whether it was possible to develop a conceptual framework that placed both force and fraud on the list of prohibited activities while keeping private discrimination off that list. The argument that I developed in \textit{Forbidden Grounds} withstood, I believe, the attacks that were made against it.\(^10\) The prohibition against force starts with the simple Hobbesian insight that all of us value our own survival and bodily integrity more than we value our ability to deprive other people of life or limb. It is therefore conceivable to construct a rational social contract whereby all parties renounce the use of force against all others, even though it is painfully clear that no express agreement to that effect could ever emerge from ordinary voluntary contracts that bind all members of society simultaneously.

In his contribution to this volume Professor McAdams chides me in harsh terms for placing any reliance on Hobbesian conceptions to account for my own, limited government view of the world.\(^11\) He notes both that ordinary consent cannot explain the operation of the social contract, and that in any event Hobbes himself was committed to an absolutist sovereign who could do whatever he chose, including imposing commands far more onerous than those contained in Title VII. His objection misses on both points. \textit{Forbidden Grounds} was not directed to the question of political obligation, but assumed that

\(^8\) Brilmayer, \textit{supra} note 2, at 107-09.
\(^9\) \textit{Id.} at 109-11.
\(^10\) \textit{Forbidden Grounds}, \textit{supra} note 1, at 28-78.
the state was in place. *Takings* was directed to that issue, and in it I described at length why I thought that, although Hobbes had set out the problem of political governance in its starkest form, a Lockean solution was far preferable to the one that Hobbes himself proposed. Such was the burden of chapter 2 of *Takings*, entitled *Hobbesian Man, Lockean World.*

Had Professor McAdams bothered to consult *Takings* he would have understood what I thought was plain enough from *Forbidden Grounds* itself: my invocation of Hobbes was addressed to the question why government was instituted among men, and not to the issue of what form of government should be instituted. It is simply false to argue that I “have sought to reinterpret or reformulate the argument of *Leviathan* to justify a government with some liberal protection of individual rights.”

Nor did I make the elementary confusion between actual consent and the apparent consent in social contracts, a distinction that others have repeatedly exposed. To the contrary, my discussion in *Takings* criticized Locke for placing too much weight on the idea of consent, and urged that the just compensation formulation in the takings clause (which rests on the private law analogies to restitution) offers a more promising way to understand the forced exchanges necessary to make any social contract theory work.

McAdams’ misguided salvo to one side, how do we breath life into this social contract? Initially, the prohibition on the use of force is the central component of the transaction, but it is important to understand just what this entails. Initially, the social contract need not be one that strips away all natural advantages from those persons endowed with special skills or strengths. That object of apparent equality could be achieved, without obtaining peace, by forcing individuals to struggle with each other in mortal combat under a handicap system that equalizes the chances of success, but otherwise places no limitations on human behavior. Quite the opposite, all natural differences between persons in temperament, talents, tastes, and strength are preserved (so as to maximize the potential gains from

12. *Takings*, *supra* note 4, at 7-18. The first sentence of chapter 2 reads: “It may be odd to find in Hobbes, the defender of absolute sovereign power, one of the fathers of our constitutional system.” Id. at 7. Gregory Kavka’s view of Hobbes is much more fully delineated than my own, but from my reading of his excellent book, I do not think that there is much difference between us on what Hobbes meant, even though we might well disagree on what emendations should be made to Hobbes’ basic theory. See GREGORY S. KAVKA, HOBBESIAN MORAL AND POLITICAL THEORY (1986).


14. For one recent exposé of the dominance in consent, see Russell Hardin, *The Morality of Law and Economics*, 11 LAW & PHIL. 331 (1992). Again I have no disagreement on this point with Hardin, and only amazement that McAdams thinks that I do.

investment, labor, and trade) once the peace is secured. The reason there is in practice such a great affinity between classical utilitarians and social contract theorists is that both are after the same objective. The social contract theorist uses the logic of mutual exchange to devise arrangements that maximize utility for its participants. The utilitarian quickly realizes that general rules controlling force are the most urgent task that faces any social order, but also understands the importance of rules facilitating the gains from trade. Either way, the mutual renunciation of force is by itself a comprehensive peace treaty, not the first stage in some larger social transition to a Rawlsian world in which all natural differences are treated as morally arbitrary and morally irrelevant.

The question then arises whether this mutual renunciation of force carries with it the conviction attributed to it by social contract theorists. Lest anyone doubt that conclusion, I invite him or her to reside permanently in Hobbesian Gardens, where the conditions of the state of nature will be scrupulously observed so as to prevent these hardy denizens from ever concluding a binding contract of peace among themselves. There are many persons who in idle discussion might reserve the right to live in such a place, or insist that souls harder than themselves might choose to enter. But there are virtually none who would, if push came to shove, walk through that gate; and if they did, they would not be able to produce offspring who could carry forward their vision into the next generation. No amount of verbal fencing or clever deconstruction (just what do you mean by force and aggression, anyhow?) will induce anyone to alter their conclusion, and live so lonely and dangerous a life.

Fraud of course is a somewhat harder case. Every person has one additional layer of protection against some forms of fraud: don’t believe the con artist. But if given free rein, deception can be so cleverly crafted as to escape detection. Worse still, in this world people have only weak defenses against deception and intrigue committed behind their backs on the gullible, preoccupied, or indifferent. There are too many accounts of loyal servants of the Crown who have been led to slaughter by the false witness of a faithless royal advisor. Defamation at its worst is a deliberate lie with horrific consequences — and the fraud is always whispered about behind the victim’s back, but not told to his face. A mutual renunciation of that tactic is surely within the scope of any sensible social contract theory, especially when it is recognized that fraud is often used as an aid to force, as a way to disarm any determined resistance by an artful
campaign of disinformation: "these are not gas chambers, but show-
ers," was a line used more than once, and with deadly effect. The
challenge that I made at the Symposium is again put forward to
readers to ponder for themselves: if given the choice to live in a
world (a) without protection against force and fraud, or (b) without
protection from a failure or refusal to deal, or otherwise discriminate
on the grounds of race, sex, age, or disability, which would you pick?

That answer seems too clear to admit any doubt, and it is impor-
tant to recall briefly why: force leaves one exposed to the worst en-
emy, and once a contract is made, to the next worst and so on down
the line. Fraud likewise requires you to guard against those who
would take from you under pretext instead of coercion; and it ex-
poses all of us to the machinations of strangers. The refusal to deal
leaves one free to choose another trading partner, free of compulsion
and deliberate misinformation, and at most exposes us to a psycho-
logical sting, of which a great deal was made at the Symposium, and
which I address in part III. But the failure or refusal of X to deal
with you leaves you free to deal with A, B, or C. And the discrimina-
tion against you by X still allows you to take that offer if it is in your
own interest to do so, as it might often be. These perils pose no
threat to the social order, and it is not simply mere historical contin-
gency that the legal concern with private discrimination arose only
after it was thought that all persons were secure against force and
fraud.

My efforts to erect a sharp difference between force and fraud, on
the one hand, and private discrimination on the other have also met
with resistance in these pages. McAdams, for example, places the
term “force” in quotation marks because following or watching peo-
lple in public places could constitute “force.” Why not then, he asks,
the refusal to deal?16

It is, however, unwise to trouble ourselves unduly with some inter-
mediate cases. “Shadowing” another person falls very close to the
line, but it is conduct which in extreme cases can make people suffer
from extreme insecurity, and, so limited, it has rightly been held ac-
tionable.17 More generally, the line between permitted speech or con-
duct and an implicit threat of force is a vexed one that confronts
every liberal theory. It is worth noting that no fully satisfactory ap-
proach to labor and protest picketing has ever been developed be-
cause of the difficulty of locating the precise line between a peaceful

16. McAdams, supra note 11, at 244 n.11. He also notes the danger of “ritual
shunning or social ostracism,” id., which are taken up infra pp. 18-22.
manifest that the mere observation of the plaintiff in a public place does not amount to
an invasion of his privacy. But, under certain circumstances, surveillance may be so
‘overzealous’ as to render it actionable.”).
expression of disagreement on the one hand and an implicit threat of force on the other. The judgments in question are necessarily contextual, and inevitably some cases will fall close to the line. But not here: shadowing another individual is the antithesis of ignoring him, and nowhere in the history of the labor relations or the First Amendment has anyone ever held that a refusal to associate with another individual amounts to an implicit threat of force against that person.

Nor does McAdams advance his case by his discussion of Hobbes' view on "dishonoring." In the Hobbesian context, dishonoring an individual means according them less by way of respect than they think they deserve. The passage that McAdams quotes gives a fair rendition of the Hobbesian position, but it does little to advance his argument. One consequence of that dishonoring is that it could lead to resentment, and resentment in turn could lead to violence. McAdams then takes a leap to the position that we must prevent discrimination on the grounds of race in order to forestall the use of violence by those who feel (rightly, in his view) aggrieved by the slights that they have been made to suffer. "Where Epstein says that an act of "dishonoring" someone is not force — the victim still retains his 'life, limb, and possession' — Hobbes is keenly interested in the fact that it will predictably lead to the use of force." The bottom line is that "Hobbes' work provides considerable reason for thinking that, when they dishonor, refusals-to-deal are a powerful threat to the social order."

The quotations from Hobbes are not wrested from context, but McAdams' singular conclusion surely is. The first point is that Hobbes himself nowhere says that he would support any such theory that makes the refusal to deal a private wrong because it could lead to

20. McAdams quotes from Hobbes: For every man looketh that his companion should value him, at the same rate he sets upon himself; And upon all signes of contempt, or undervaluing, naturally endeavours, as far as he dares (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other,) to extort a greater value from his contempters, by dommage; and from others, by the example. Id. at 245 (quoting THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., 1991)).
21. McAdams, supra note 11, at 247 (footnote omitted).
22. Id. at 245.
the use of force in retaliation. After all, he is the most powerful exponent of the proposition that the value is subjective and the contracts should be entered into only when each side thinks that it gains more from an exchange than it loses. The antidiscrimination laws are suspect, in part, because they replace a regime of mutual gain with one of forced association. Worse still, McAdams’ own conclusion does not follow logically from Hobbesian premises. People feel dishonored for all sorts of reasons — for it is rare that the rest of mankind thinks as well of me as I think of myself. And one can be undervalued for reasons that have to do with low estimations of one’s abilities, or disrespect for one’s taste in arts. If dishonor may lead to force, then any expression of sentiment could be prohibited on this ground. An affirmative action program dishonors white males; its repudiation dishonors women and minorities. One party dishonors by refusing to hire another; yet the second person could dishonor the first by taking a job that the other does not want him to have. The cycle never ends, for all acts involve some form of dishonor and all, therefore, are prohibited.

So silly a position is not contemplated by Hobbes nor anyone else. The obvious rejoinder is that people should always seek to avoid insults and slights — a lesson from which McAdams could profit — but the legal prohibition should be directed at the initial use of force, not the disrespectful words that precede it. The English law of assault, from Hobbes’ day to the present, has long insisted that “mere words do not constitute an assault” unless there is some offer of force. And the modern constitutional law makes it quite clear that racial epithets, far more ugly than a simple refusal to deal, are not actionable under the First Amendment unless they fall within the narrow class of “fighting words,” that is, words that once again raise the specter of the imminent use of force. McAdams’ tortured logic does not justify the creation of an antidiscrimination law, but renders it unconstitutional under the First Amendment. And even if this argument justified Title VII, it could not do so selectively. Virtually all human conduct to which others take exception would have to be banned as well. Dishonoring, then, provides no way to expand the set of prohibitions against the use of force or fraud.

Professor Evan Tsen Lee also attacks the force and fraud line as

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24. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see Gooding v. Wilson, 405 U.S. 518, 524 (1972) (unconstitutional to punish racial epithets that do not “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”) (quoting Chaplinsky, 315 U.S. at 573). For yet another example of egregious misconduct held protected under the First Amendment, see Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
underinclusive. But, properly understood, his asserted counter-examples only show the strength of the basic theory. A prohibition against the harboring of known felons may be a "consensual activity" that does no harm to the parties to it, but it is rendered illegal because it makes the apprehension of criminals more difficult than it ought to be: a serious third party effect. And drag races are stopped because of the obvious risks that they pose to other persons using the public highways. Likewise "fraud" is not simply a problem of imperfect information; nor is it just a subspecies of mutual mistake. It involves a deliberate manipulation of known information for private advantage. Often, fraud can disarm individuals so that they are unable to resist the actions of aggression by others.

The line between force and fraud on the one hand, and other forms of conduct on the other, is not perfectly hard-edged, but the doubts on intermediate cases should not be allowed to undermine the obvious conclusion that a refusal to deal never amounts to the use of force or fraud. Perhaps the law should treat certain refusals to deal as wrong, but if so, then the substantive grounds for that decision must be fully revealed and not hidden behind weak terminological arguments. By the same token, however, the case against the antidiscrimination laws is not established simply by showing discrimination is not a species of force and fraud. Nor is it clinched by showing that the case for an antidiscrimination law is weaker than the case for a prohibition on force and fraud. It may still be that all persons would think themselves better off with the mutual renunciation of the right to discriminate in exchange for the right to be free from discrimination by others. The formal possibility is there, but the underlying scenario cannot be demonstrated effectively. Pacts for mutual renunciation do not necessarily promise net social gain, independent of what is renounced. The mutual renunciation of hard work, good fun, or sexual pleasure may require no more from one than it does from another; but it could easily lead to the ruin of both.

A universal antidiscrimination norm surely cannot be so obviously dismissed, but in the end the case for it falls of its own weight. The default position in the absence of a prohibition against force is ceaseless conflict: the gains from social order exceed the resources that must be devoted to maintaining it. The default position in a world without a prohibition against fraud is one with public lies and private deceits. The default position in a world without some antitrust

protection is one in which some industries (but not all) will be marked by cartels and monopoly. The default position in a world without an antidiscrimination provision is a well-functioning competitive market. In the simplest terms, where are the gains that might justify the antidiscrimination law on the strength of the abstract antidiscrimination principle?

Professor Lee puzzles over the question of whether these gains are matters of perception or matters of reality. In practice it is of course hard to separate them out, just as it is hard to know whether the basic social commitment to the maintenance of order rests on perception or reality. But over time and with discussion, one hopes that a better appreciation of these issues will bring perception into conformity with reality. I recognize that the current political sentiments are in favor of the maintenance of the law. It is, therefore, important to recognize that the benefits they are said to produce are themselves difficult to identify or quantify.

Lee and others seek to identify these gains in the induced spur for minorities to invest in human capital. But there is no theoretical reason to believe that this claim is true, relative to a competitive market. If the overall levels of output are lower under an antidiscrimination law than without them, then the total returns to education should increase from the expanded opportunities created by the repeal of the antidiscrimination laws. Why expect that any group will not be able to find its own niche in this larger pie? From the individual point of view, moreover, the presence of an antidiscrimination law, especially one that treats certain classes of individuals as “protected,” could have precisely the opposite effect: it could induce people of ability not to give that extra effort because they think that they have it “made” anyhow. It is, therefore, not surprising that the empirical studies on the issue have not found any strong correlation between the employment discrimination laws and the investment in human capital, and that the increased investments that blacks made in education before the passage of the Civil Rights Acts show that market forces even in adverse circumstances can stimulate major investments in human capital. And with the current shortage of black Ph.D.s in a world of intensive affirmative action, there is

26. Id. at 204-05.
27. See, e.g., Cass R. Sunstein, Why Markets Don’t Stop Discrimination, 8 Soc. Phil. & Pol. 22, 29 (1990). After raising the basic point, Sunstein notes that the empirical evidence tends to cut the other way: “Blacks and women frequently appear to invest huge amounts of human capital even in sectors that treat them inhospitably.” Id. The explanation might be that if one expects hostile treatment, then it pays to be a bit better to overcome the poor reception. It is only if one thinks that opportunities are well-nigh hopeless that no investment will be made, and even then the investment in human capital may shift to another sector, not disappear altogether.
28. Frank James, Black Ph.D.s Too Rare in America, Chi. Trib., Feb. 2, 1994, at
little reason to think that Title VII has had or will have much, if any beneficial, effect on this score.

Nor do the supposed gains from Title VII come from the possible improvements that Title VII might make in the search process. McAdams asserts that black workers will be at a real disadvantage if only ten percent of the firms wish to hire them, but he seriously confuses the relevant economic issues. Thus, at times he veers unfortunately between the extremes of perfect ignorance and perfect information, when the true situation is surely in between. And at all times he writes as though the extensive affirmative action programs that are commonplace today had vanished from the earth. Nor does he understand that the effectiveness of a labor market for all participants will increase with the ease of entry and the dissemination of information. So long as employers are denied the kinds of information on which to make individuated judgments, so long as termination of new employees is clouded by legal complications, the search process will be worse for all employees than in an unregulated market. Unfortunately, the civil rights acts have added layers of complication far beyond those that could be created by any private market. Search today is far more difficult than ever before, and for all workers.

Finally, the social gains do not come in the increased administrative costs needed to operate any motive-based test of discrimination: the line between discrimination and incompetence is hard to police, and in principle every decision on hiring, promotion, and firing can now be second guessed. Nor do the gains come by using heavy-handed disparate impact tests to obviate the need for these motive-based inquiries that are themselves so costly and unreliable. Nor do

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A1 (noting that the number of black Ph.D.s is down 10% in the past decade and hovers around 2.5% of the total Ph.D.s given). James quotes Frank Morris of Morgan State as saying it's an "outrage" that scholarship funds go to foreign students, as if there were enough Americans, black or white, for scientific studies. Id. Thus, the Ph.D.s that are granted to blacks tend to be concentrated in certain disciplines such as education and social work. See Michael Hirschorn, The Doctorate Dilemma: Why There Aren't Enough Black Professors, NEW REPUBLIC, June 6, 1988, at 24, 26. "In 1986 no blacks earned Ph.D.s in geometry, astronomy, astrophysics, acoustics, theoretical chemistry, geology, aerospace engineering, or computer engineering." Id. More generally, blacks constituted less than one half of one percent of the science Ph.D.s. Over half the 1986 black Ph.D.s were in education. Note that the total number of black Ph.D.s was down 26 percent from a decade earlier. Id.; see also Peter Applebome, Goal Unmet, Duke Reveals Perils in Effort to Increase Black Faculty, N.Y. Times, Sept. 19, 1993, § 1, at 1 (the original 1988 Duke plan called for each of its 56 departments to have a black member by 1993; only eight departments reached that goal).

29. McAdams, supra note 11, at 251.
these gains come from making it impossible for firms to offer differential wage packages to take into account differential costs (e.g., higher injury rate, or lower customer satisfaction and the like) of one person against another. If it costs ten dollars per period to provide support for employee A and fifty dollars per period for employee B, the modern antidiscrimination law requires the employer to ignore this difference if (say) one worker is white and the other is black, but allows him to take it into account if both employees are of the same race.

These endless complications are, as Christopher Wonnell suggests, not simple matters of implementation that can be corrected in some technical revision of the Act and its administration. Rather, the risk of overreaching on civil rights issues is endemic to the enterprise itself. In a world in which concerns about autonomy and property are at a low ebb, power will pass into the hands of powerful interest groups. Once that happens, we should expect the consequence that Wonnell has noted: the law will be used “more as a sledgehammer than a fine tuning device.” A mild and moderate civil rights act is never in the cards.

These endless difficulties of definition and implementation reveal, I believe, a fundamental flaw in any effort to use social contract theory to formulate an antidiscrimination law. Each effort to make any contract or any choice necessarily involves discrimination: how else does one decide whom to marry, where to live, what to eat, or what to do? Any law that forbids all forms of discrimination is so hopelessly broad as to forbid all forms of self-expression and human action. So the statute must be confined to invidious forms of discrimination, and these only of employers, but never of employees, who retain all their other rights of choice no matter how corrupt the grounds of decision. So now the question is what forms of discrimination are invidious.

At the Symposium there was some consensus that the cases that fell within the “core” prohibition were discrimination on the grounds of race or sex. The ever-prudent Professor Andrew Kull urges in his brief Article that I moderate my position, abandon the frontal attack that calls for total repeal of the civil rights law, and stress the evident differences that exist between race, with its history of slavery, and the newer forms of “forbidden grounds” that have been added to the list. Yet how does one proceed with prudence as a guide? On these gains come from making it impossible for firms to offer differential wage packages to take into account differential costs (e.g., higher injury rate, or lower customer satisfaction and the like) of one person against another. If it costs ten dollars per period to provide support for employee A and fifty dollars per period for employee B, the modern antidiscrimination law requires the employer to ignore this difference if (say) one worker is white and the other is black, but allows him to take it into account if both employees are of the same race.

These endless complications are, as Christopher Wonnell suggests, not simple matters of implementation that can be corrected in some technical revision of the Act and its administration. Rather, the risk of overreaching on civil rights issues is endemic to the enterprise itself. In a world in which concerns about autonomy and property are at a low ebb, power will pass into the hands of powerful interest groups. Once that happens, we should expect the consequence that Wonnell has noted: the law will be used “more as a sledgehammer than a fine tuning device.” A mild and moderate civil rights act is never in the cards.

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31. Id. at 270. Wonnell uses the phrase to refer to the effort of the law to reduce the number of mistakes in making decisions based on individual talents. Id. But it applies to the overall operation of the law as well.
32. Andrew Kull, The Discrimination Shibboleth, 31 SAN DIEGO L. REV. 195
the question of discrimination by sex, at one point Kull notes it is quite different from race discrimination because it was not supported by a Jim Crow regime, and at another point that it is just another form of invidious discrimination. Yet even to have honest doubts on the question of sex discrimination removes Kull from the political mainstream and puts him in the class of persons branded as extremists scarcely better than myself.

There is still the matter of political realism, which also cuts both ways. When Kull expresses well-founded doubts about disability and age discrimination, he fails to recall that there were no representatives of the disabled at the meeting, and that the oldest people in attendance at the Symposium were in their early to mid-fifties. Change the composition of the group and the definition of the core of discrimination will change with it. The Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) both enjoy enormous Congressional majorities, backed up by well-oiled political machines who claim insistently that discrimination on either of these grounds is just as invidious as discrimination on grounds of race or sex. The legislative response gives ample evidence of their clout: the sheer financial dislocations that are required to comply with the ADEA and the ADA are far higher than any similar requirements under the original Civil Rights Act of 1964. No one is entitled to make reasonable accommodations under Title VII, even though these are aggressively demanded under the ADA. If age and disability fall outside the “core,” then what accounts for their success, and how do we decide what falls within it?

At this point one can see the weakness of Kull’s strategy. Having yielded on the fundamental point of freedom of association, he is left with the construction of halfway houses and makeshift defenses that will seem attractive to some people and some interest groups, and

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33. Id. at 197-98.
34. Id. at 198 (treating invidious racial discrimination as the core of the statute). Note that the drafters of the 1964 Act saw a difference between the two cases because the bona fide occupational qualification defense applied only to sex, and not to race. 42 U.S.C.A. § 2000e-2(e) (West 1981).
totally unacceptable to others. He will in the end be utterly unable to present any coherent view of the world that will decide to stop application of the antidiscrimination principle here instead of there. Yet none of those difficulties arises in a world in which forced association in competitive markets is categorically condemned. Even after legal force is withdrawn from this area, it does not follow that moral discourse cannot continue. Persons who think that race and sex are different can arrange their affairs to reflect that judgment; others who think that disabilities and age are special problems can incline their efforts in that direction. The process is not buffeted by the harsh winds of majority politics, but allows for independent judgments such that small differences in popular mood can be registered by small differences in employment practices, without political jolts and discontinuities, and without the runaway tendencies of administrative agencies.

But it will be said that this approach ignores the enormous level of national consensus on the ostensible universality of the antidiscrimination principle, at least insofar as it applies to those core cases of race and sex (and which in practice covers age and disability as well). This point was in part acknowledged in *Forbidden Grounds*, which addressed just these issues in its introduction, entitled *Consensus and Its Perils*. But in a sense that characterization of the current situation gives too much away to the supposed harmony of status quo, for it masks the powerful and unyielding divisions of opinion about what should be the full shape of the law. Those who support color-blindness believe that private employers should not discriminate against *any* person on the ground of color. Yet by the same token they will not support any color-blind norm for employees who are allowed to discriminate as much as they like no matter how ignoble or invidious their motives. On the other hand, many supporters of affirmative action believe that it is permissible, and indeed desirable, to discriminate in favor of certain persons *because of* their race or sex. Affirmative action is not some minor perturbation of some universal antidiscrimination principle. It is not like a rule that says that even though the use of force against a stranger is prohibited, force used in self-defense is not. That substantive exception to the basic rule is consistent with its overall objective because it exempts no person from his basic legal obligations, and because it also reduces the total amount of force that will be used for aggressive purposes. For its part, the proponents of affirmative action are saying that the core prohibition applies to some but not all people for a variety of circumstances — contingent, historical, and programmatic — that defy simple categorization as part of any universal principle.

Worse still, even those who believe in some deviation from the antidiscrimination principle are at hopeless loggerheads as to what the
permissible exceptions should provide: what groups are entitled to preferential treatment; how much discrimination is appropriate; how long should it last; what social conditions; who should bear its costs? Does special treatment only allow persons to enter on favorable terms into large social groups, or does it also permit them to *exclude* others on grounds that they deem satisfactory? Over and over the questions were put: may religious employers insist that their employees participate in morning prayers? May Native American Indian Tribes have special workplaces for their members? May women choose female doctors? May Polish firms hire Polish workers? The answers one hears are always equivocal and evasive, seeking time, asking for clarification, making distinctions, mumbling excuses, and pleading for some reasonable, if undefined, accommodation. It is easy to see why: does it matter whether one deals with a main line religion or a fringe group? Does it matter if the physician is an obstetrician or an eye doctor? Does it matter whether the firm caters to clients who speak only Polish? And so on. The easy cases in which discrimination might painlessly be prohibited are the cases where it is not likely to be practiced. Why then institutionalize a process that requires fine-spun justifications in individual cases?

Still, the usual response is to try to work the cases out one at a time. I cannot find any good reason for the usual guilt, embarrassment, and hesitation that divides the champions of the antidiscrimination principle. The proper answer in all cases is that the principle of freedom of association allows all persons to choose their associates on the terms that they see fit. Whether I am pleased or offended at their choices is something that I am allowed to voice; it is something which might inspire me to refuse to deal with those who engage in practices that I deplore; and it may encourage me to persuade others to follow my lead, even perhaps to the extent of an organized campaign of picketing and boycotts, although these practices often come close to using force and intimidation. But discrimination by others does not afford me, or a majority sympathetic with my position, any grounds for coercing persons who disagree with my conclusion. The theory of mutual renunciation lends no support to any form of antidiscrimination law against private employers. It points strongly toward the principle of freedom of contract, not only for employers, but for all persons who wish to make gainful associations, regardless of status.
III. PSYCHOLOGICAL HARMs

Another criticism frequently hurled against *Forbidden Grounds*—with scant regard for the emotional tranquillity of its author—was that its overemphasis on the economic logic of competition revealed a regrettable ignorance of the psychological and symbolic effects of being rejected on the grounds of race or sex, especially for women and for members of minority groups. I think that my emphasis on the economic issues was surely consistent with the original impulse behind the 1964 Act, whose supporters were concerned with the loss in social productivity from what they regarded as an irrational exclusion of blacks from ordinary labor markets. Senator Clark said, "Economics is at the heart of the racial situation."39 And there was every reason to take him at his word.

Today's new emphasis on psychological harm should not be seen as a sign of strength, but rather as borne of the failure of the Civil Rights Act to deliver the economic benefits promised of it by its sponsors. The difficulties with high rates of black unemployment, especially among youths, the decline in overall levels of educational achievement, the rise in malaise, and the increase in criminal conduct are certainly features of the last thirty years, and none can be laid at the doorsteps of the isolated and silent opponents of the antidiscrimination laws. Indeed, I would argue that many of the reforms of the past thirty years have backfired in just the same way as the antidiscrimination laws: the higher social security and employment taxes, and the increase in minimum wage are some obvious candidates. But whatever the origins of today's social ills, these massive social failures render the classical justifications for the antidiscrimination laws far less compelling than they might once have appeared. Further, they have spurred the search for alternative justifications to fill the gap. The appeal to psychological harms is an effort to bring cases of failure or refusal to deal, or of discrimination, into the secure folds of external harm, where liability was traditionally awarded under the tort law. It reminds us again just how offensive many people find some discriminatory practices, whether done overtly or covertly.

In order to illustrate the level of harms involved, Professor Lani Guinier (before her subsequent fame) recounted a then recent incident told to her by an upper-middle class black professional woman of impeccable credentials, who had been falsely arrested for shoplifting by a lower-middle class white security guard, and who was led out of the store in handcuffs to public ridicule. The description of these events is surely deplorable, but what does it tell us about the

problem of discrimination in employment? Initially, it is critical to point out that this is not a case that goes without redress under the legal rules that I have defended. False arrest, false imprisonment, intentional infliction of emotional distress by extreme and outrageous conduct are all properly recognized as common law torts, wholly without regard to the race of either the plaintiff or defendant.

If the question is whether legal relief is available, then we can consult a well established body of legal rules. At one level the case seems to fall far short of the requirements of the tort of extreme and outrageous misconduct, if only because the defendant’s servant had a good faith belief that some offense had been committed and agreed to an immediate release once informed of the error by well-intentioned customers who had witnessed the entire affair.40 And actions for false imprisonment and defamation may be complicated by the existence of privileges that exist with good faith and probable cause.41 Whatever misfortune happened to that woman, however, falls far short of the loss of life, limb, and bodily function. A case of false detention is at best on the borderland of the tort law; it is not at its core. “Against a large part of the frictions and irritations of clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.”42

The obvious rejoinder is that this analysis is itself insensitive if only because it does not take into account the race, sex, and social class of the participants. It might be yet another instance where I “just don’t get it,” with the “it” having some self-evident antecedent. Yet for the slow afoot like myself, it is just not so clear what that added dimension is, for no one greets arrest and public humiliation with equanimity. When I related Gaunier’s story to a white male law professor, he commented that he had recently been led away by a security guard when he set off the burglar alarm while leaving a drugstore. It seemed as though a bottle of aspirin had fallen into the hood of his down jacket and had tripped off the alarm, which led to

40. See Restatement (Second) of Torts § 46 (1965). “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Id. at cmt. d.


his being taken into custody by a security guard. His response to the entire episode was one of deep humiliation and genuine fear, and whatever understanding he possessed about constitutional law or standard form contracts was of little assistance in dealing with the personal risk at hand. And he didn’t think that it much mattered that he was white; the security guard black, the store owner Hispanic. It was coming within a hair’s breadth of arrest for a crime he had not done that created the tangible sense of terror. I know that I can empathize with his predicament because I too would feel powerless in that situation; law degrees and scholarly publications do not help. I cannot say whether my friend’s fear or anguish was greater than that of a black woman also falsely apprehended, but for these purposes at least it hardly matters. These comparisons are always difficult to make, but the one perspective that is surely wrong is a baseline that treats white men as impervious to psychological harms stemming from false arrest.

Viewed in this light, ignoring simmering issues of race, class, and sex is not a vice of the legal analysis, but a hidden strength. It would be quite ungainly and mischievous for the legal system to calibrate its rules on false arrest, for example, with a large matrix to take into account all the permutations of race, sex, and social class (of which only sex is dichotomous). The ability to formulate legal rules by conduct and not by status was thought by Aristotle to be one of the hallmarks of an advanced system of corrective justice, and his basic argument of the irrelevance of certain key social categories to legal analysis is surely correct.43 It may well be that one wants to speak at length on this incident as a reflection of the poor state to which race relations have sunk in America, or even to insist that there is some special pain that must be acknowledged in certain settings and denied in others. But if so, then one must be still more critical. It is worth noting, in Professor Guinier’s example, that all the other participants to the scene testified on behalf of the arrested woman and did not seek to cover-up for a coemployee. It certainly would be important to know how she was treated by the police and the magistrate to understand social attitudes on this question, and to know as well how frequently incidents of this sort happened and why.

Yet with all this said, what does Professor Guinier’s case tell us about the antidiscrimination law in employment? Precisely nothing. While the matters of race, sex, and class may add power to the narrative account, her story retains much of its punch precisely because it involves the use of force and public humiliation against the woman arrested. No story writer, however skillful, could weave together the elements of a bare failure or refusal to hire on the grounds of race

— the statutory offense — and preserve its narrative power unless she did what Professor Guinier did: make vivid the elements of aggression, detention, public humiliation, defamation, and deceit. One can violate the antidiscrimination law by politely saying that only persons who meet this standard are eligible for the job: “I am sorry if you have suffered any inconvenience, and I hope that you will be able to obtain a position elsewhere.” It is against that scenario that one has to assess the psychological harm: not on the strength of illustrations that themselves draw strength from the libertarian tradition that the antidiscrimination laws repudiate.

Note too, the further difficulties that do arise whenever the irreducible psychological harm from rejection is treated as a justification for government intervention. All the old questions about the scope of discrimination law are revived. Are only members of certain classes entitled to protection against these forms of harm? Surely all of us suffer some psychological harm from rejection regardless of race or sex. Even if the levels of harm differ across these groups, there may be wide variation within each category so that fragile white males may be more easily scarred than hard-nosed black females. Surely the constant continuation and gradation does not easily accommodate any categorical distinction between those whose harm prompts legal response and those whose harm is met with collective indifference.

Nor is it evident that these psychological harms are more serious than others that routinely go without redress. If I am told that I could not get an academic job because of my political views, I should be at least as angry as being told that I could not get it because of my race or sex. If I were subjected to a torrent of personal abuse during the course of an academic debate I might be more angry because of the aspersions cast on my scholarship than I would be at some silly statement that nothing a white male says is worth hearing — an objection that has become so trite and stylized so as to lose all emotive force. And I think that I would be more upset by far at some public tirade that announced that Jewish doctors were responsible for the spread of the AIDS virus among black persons. But in none of these cases would the aggressive application of the antidiscrimination law in employment offer the slightest amount of legal redress.

In general I think that the proper legal response is for all persons to learn to deal with offensive and rude statements without recourse
to law. In some cases the appropriate response is to ignore the challenge; in other cases it is to shout back; in still others is to be calm and dispassionate (surely not my nature) against the charges. But although it has been repeatedly said about libertarians that they would provide legal redress for psychological harms caused by rejection from jobs, no libertarian that I know has ever embraced that position — and if any has, he should be chastised (not sued) for his mistake. It should go without saying that where psychological harms are consequent on the commission of some genuine tort (including false arrest), then they should be fully compensable under ordinary tort principles. Once the defendant has crossed the boundaries of other persons, then the sound legal theory demands nothing less than complete protection for all forms of harm, regardless of race, to the extent that it is practicable for the legal system to do so.

IV. Symbolic and Social Meanings

The persistent concern over various forms of harm attributable to discrimination does not stop with the psychological harms to the victims of discrimination. It also extends to the more diffuse social and symbolic harms that follow from undertaking various forms of discriminatory actions. But again, no coherent theory justifies the public use of force against those whose actions affront those symbols.

The change in emphasis brought on by the symbolic challenge is not, however, without its difficulties. The original focus of the Civil Rights Act was on the creation of jobs, the improvement of working conditions, and the recognition of personal dignity on the job. The symbolic issue relegates these concerns to an inferior status and transfers thinking about the Civil Rights Act to the intangible spillover effects of private employment decisions on some larger social stage. It is as though the private act of discrimination, although lawful between the parties, creates a negative externality that itself justifies a government prohibition against the underlying practice.

Yet to state the point in this fashion is to run into a wholly new set of obstacles. Quite simply, the revised theory raises serious constitutional problems with freedom of speech. If one person wants to make a public statement that it is important to have affirmative action hiring in a colorblind legal universe, no one would say that this speech lost its protection because it sought to undermine a dominant

44. See J. Houlton Verkerke, Free to Search, 105 Harv. L. Rev. 2080, 2086 (1992) (reviewing FORBIDDEN GROUNDS, supra note 1) ("Epstein claims that the black worker can simply move on to the next potential employer, thus searching freely for a desirable job. Surely, however, this account ignores the denigration, frustration and anger that the victim of discrimination experiences.") (footnote omitted).
social consensus that was thought constitutive of our national identity. I take it that the Civil Rights of Act of 1964 would have been unconstitutional on its face if the sole justification for its passage had been to make it impossible for employers to show symbolic disrespect for the colorblind norm. Why then, when all else fails, do these symbolic losses become the reason for keeping the prohibition against discriminatory hiring? Even now, it is surely no violation of Title VII for someone to argue that the symbolic harms of Title VII are greater than its symbolic benefits. Even now it is surely no violation of Title VII for an employer to say that she resents the imposition of Title VII even as she complies with it in the individual case. Title VII will not be able to escape a constitutional thicket if it is justified as a means to exert central public control over the terms of debate on one of the major issues of our time. The very people who support Title VII (e.g., the American Civil Liberties Union) have been most vigorous in their efforts to preserve against all attacks the current constitutional understanding that deep and sincere private offense by some citizens offers no justification for stopping other people from burning their own flags on their own property.\textsuperscript{45} Title VII is in deep trouble indeed if one of its core justifications calls on public force to control the direction of public debate.

All of this does not necessarily require that everyone turn a deaf ear to claims of the deep social ills and hurts that are caused by various forms of social practices. In this regard, it is critical to note not only the uses, but also the limitations of legal theory. The central question asked by a legal system is not, do we think that this conduct is or is not desirable, laudable, benevolent, sensible, or wise? It is the much more focused and limited question, do we think that this conduct requires the public use of force as a proper social response? There are all sorts of things that many of us, perhaps all of us, think fall below the level of minimal acceptable social standards. Any account of social behavior that does not address rudeness, coarseness, insensitivity, impatience, boorishness, or intolerance is a thin and inadequate account indeed. But for these breaches of social understanding, it is proper and perhaps imperative that a level of social sanctions, one not backed — or overwhelmed — by the public use of force, be developed. Conversely, any account of social behavior that does not recognize the virtues of politeness, refinement, empathy, patience, respect, or openness is also sadly deficient.

With all this said, it does not follow that public force should be used to punish vice and to advance virtue. Other systems of social control should occupy that middle ground. With charitable giving, for example, we are most aware of the large unmarked terrain between compliance with legal norms on the one hand and the complete subjectivity of preferences on the other hand. The long tradition of imperfect (that is, binding on conscience but not legally enforceable) obligations is not just double-talk; nor is it just a transparent excuse to allow cheap and selfish individuals to keep a tight grip on what they have while others suffer. The obligation matters as an obligation even though it is imperfect. Just because a legal system is unable to grade and rank preferences in accordance with their ostensible worth does not require us to be morally indifferent to the way in which other people lead their own lives, or the way in which we live ours. There are certain choices (the choice between vanilla and strawberry ice cream) that may be regarded as purely private, but there are clearly other choices that do, and should, give rise to social sanctions.

This point must have some force with respect to the question of discrimination. The issue is one of enormous concern everywhere throughout society, and there is nothing that says that just because all private parties have an absolute right to choose their trading partners, they should revel in their right to discriminate or to exclude. People who have been on the wrong end of a social interaction in the one case will assume positions of power and influence in the next. They are not required to discriminate because the law allows them to do so. They can work to influence and change the private institutions of which they are a part to respond to the ills that they perceive under whatever theory of social meaning they embrace. They can make the prohibition of certain forms of behavior the defining wrongs of their own organizations without having the state ram a duplicate set of obligations down the throats of others.

It is possible that the law could reflect something of this social consensus without making the commands of Title VII wholly inflexible. Professor Ian Ayres makes the interesting suggestion that much good could come if the antidiscrimination norm were regarded as a default provision, as one that said that “unless otherwise stated” a

46. For a forceful statement, see Natural Law, IX ENCYCLOPEDIA AMERICANA 150, 151 (Francis Lieber ed., 1836) (unsigned article by Joseph Story), reprinted in JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THEORY 313, 315 (1971). Justice Story wrote:

We call those rights perfect, which are determinate, and which may be asserted by force, or in civil society by the operation of law; and imperfect, those which are indeterminate and vague, and which may not be asserted by force or by law, but which are obligatory only on the conscience of the parties.

Id. Story included charity and affection on the list of imperfect obligations.
given firm agrees not to discriminate on grounds of race, sex, age, disability, or whatever. But since the provision is a default provision, the firm will be allowed to contract out of that position by stating, for example, that it regards itself as entitled to hire and fire workers under a contract at will. In his view there are few, if any, firms that would ever want to affirm overtly their willingness to discriminate and to leave workers at their own mercy.

He may well be right about the importance that the choice of initial positions has on the final outcome, even in a world of free contract. But I doubt very much that the present mass of civil rights laws would represent anything like the final position reached in a world of voluntary contracts. In dealing with age, for example, I am sure that firms would instantly restate by contract the mandatory retirement provisions that were (expressly, I might add) included in virtually all employment contracts. And surely most firms would be prepared to take a lot of heat in order to avert the enormous costs of compliance with the ADA. Even on the so-called core matters of race and sex, I have no doubt that sharpened pencils would quickly undo much of what the Civil Rights Act now requires. Disparate impact tests of liability would quickly go, and standardized tests would be introduced across the board. Class actions would be a thing of the past. Even in cases of intentional discrimination, some firms would insist on it: “All workers are required to participate in morning prayer meetings in accordance with . . . .” Finally, it is a nice question as to whether Ayres’ default provision should be set for or against affirmative action, and, if for it, whether it would contain some limitations on the extent to which it could be practiced.

Suppose, however, that the new default provisions are carried over word for word from the current law. I have no doubt that many firms would move with headlong speed to disclaim any intention of discrimination on certain lines in certain cases — the market pressures would be too great for it to do otherwise. But even here the default norm would be varied substantially. Complaints would be resolved internal to the firm by mediation or arbitration; damages would be sharply limited; and proof would be required by clear and convincing evidence. In practice, I think that many of these changes would develop even if the legal default provision were the traditional

one of contracts at will, for firms that depend on a steady stream of labor from all parts of the workforce can be expected to take strong steps not to be cut off from large segments of their market. Making the Civil Rights Act into a set of reversible default provisions is fine by me, for it unleashes the entire contractual mechanism to attack the problem. It is Ayres' companions in the civil rights movement, not me, who are likely to go ballistic over his proposal.

V. EXTENSIONS OF THE ANTIDISCRIMINATION PRINCIPLE INTO OTHER MARKETS

At the Symposium, another line of challenge to Forbidden Grounds attacked its ostensible reticence in dealing with levels of discrimination in other markets. Thus, Professor Ayres in this issue asks about the role of antidiscrimination law in three separate markets: public accommodations, housing, and automobile retailing on which he has done some extensive and well-publicized research. It is therefore useful to indicate how I would approach these areas in light of my positions taken in Forbidden Grounds.

A. Public Accommodations

During the debates over the Civil Rights Act of 1964, the rules governing public accommodations were front and center during the debate. The refusal of many firms in the hotel and transportation industries to serve blacks, or to serve them on equal terms with whites, was widely regarded as a national disgrace, and there was virtually no principled opposition to the extension of the civil rights acts in this area. At that time, the Act broke the dominance of these practices by a reception that was close to unanimous, with only a few marginal holdouts. As a matter of political prudence, it is often wise to follow the maxim that "if it ain't broke, then don't fix it," and for that reason alone the antidiscrimination principle simply appears beyond reproach.

Yet it turns out, as ever, that this position is one fraught with
hidden dangers. Once it is clear that discrimination is not to be tolerated in the area of public accommodations, then there is no principled hard-edged line of resistance to the ADA, and the enormous dislocations that it creates in dealing with those facilities, both public and private, covered under the Act. Discrimination is forbidden as a matter of principle, and it is only a hazy matter of cost and reasonable accommodation, as to which forms of discrimination are allowable, and how much. The benign statement of the principle thus opens the door to extensions that are far more controversial in their application and impact.

It is, however, possible in principle to ask the right questions about public accommodation laws to see whether or not they meet the standards set out in Forbidden Grounds. Here it follows that any use of private violence to keep those premises segregated (or integrated) should be met with the public force of the state. In principle, therefore, it might be possible to justify an antidiscrimination law by showing that it operates as a cheap and effective counter to private violence. In hostile climates firms that want to hire without discrimination may rightly fear that they will be attacked and intimidated by others who wish it to adhere to some rigid racial policy. The use of a strong antidiscrimination statute thus orders the firm to do what it chooses to do in any event, and gives it a cloak of protection against private threats that might not otherwise be so easily parried. “I had to do it or face legal sanctions,” is a way to do the right thing without owing up to it. If only a tiny fraction of all firms wished to remain segregated in any fashion, then this argument would carry some weight as a somewhat overbroad tactic to minimize the scope of private violence. Today, however, I suspect that this possible justification for government intervention carries little conviction, if it ever did: recall that segregation in Plessy v. Ferguson\(^5\) was mandated by state regulation that was opposed by the regulated firms.

The second potential justification for imposing the nondiscrimination principle on public accommodations is to counteract monopoly power. Historically this justification fits in quite well with the standard accounts of the subject. In earlier times there was often one carrier (a common carrier) and one inn for travelers on the highway, and their monopoly position (whether de jure or de facto) was properly countered, even when race or sex was not an issue, by a nondiscrimination provision. That nondiscrimination provision in turn had

to have some flexibility to allow discrimination that was cost driven. All travelers on the railroad or customers at the inn did not have to pay the same price regardless of the accommodations that they received. And if certain railroad runs were more costly than others, then the fares could vary accordingly. But no matter what, the common carrier and the inn received a quid pro quo to offset their nondiscrimination obligation. They were allowed to charge rates that permitted them a just return on their initial investment. The purpose of the legal rules was to offset the embarrassments of a system without free entry.

Today the situation is in most settings quite different, for virtually no inns and few carriers have any degree of monopoly power. At this point the theory developed in Forbidden Grounds suggests that the older nondiscrimination restraints should be lifted. And to what harm? Is there anyone who thinks that even one major corporation would adopt a policy of exclusion on the grounds of race or sex? Or if it did, that it could profit by that strategy in the marketplace? The intuitions about the irrationality of the practice are correct precisely because discrimination in these settings is a losing proposition for everyone concerned. Indeed a repeal of Title II\textsuperscript{52} (governing public accommodations) could have some symbolic benefit if large numbers of national firms adopted (as I predict they would) vigorous voluntary antidiscrimination principles of their own. Once it is clear that firms are taking this position on their own accord, it becomes somewhat harder to take the cynical view that these institutions are only doing the right thing because they are required to do so by law, and thus should receive no praise for their conduct.

The continued insistence on the nondiscrimination principle for private facilities in competitive situations has, moreover, serious negative spillover effects. The ADA, with its onerous obligations, is one illustration. In addition, the full range of private clubs and associations could easily be classified as public accommodations subject to the restrictions of the various antidiscrimination laws. Yet here do we really have a better society if everyone is forced to follow the same minimum constraints on admission rules? Is there no place for all women's clubs and associations, or for all black or Hispanic organizations? Should the law schools shut down their Black Law Students Association (LSA), Hispanic LSA, Asian LSA, Christian LSA, and Jewish LSA, and prevent any other organization from forming? And do we assume that persons who join these clubs and associations never join any other club that has open membership? Do we assume that there is no collaboration among groups?

In all these cases the principle of freedom of association matters for us all. Because it does matter, we ought to move with great caution before arguing for its abrogation in a broad class of cases. Whether or not I approve of the ends or means of some private organization should influence my decision to join, assuming that the organization sees fit to have me. And it may influence my decision whether to attend functions that they sponsor or host when not otherwise for membership. Other people face identical choices. If the tide of sentiment turns against these private associations, it will be duly registered in the decline in their numbers and influence. There is no reason to use coercive legislation to hasten a process that will assume far greater legitimacy if left to advance of its own accord.

B. Housing

Professor Ayres also claims that my position should logically lead me to support racially restrictive covenants of the sort that were first declared unenforceable in *Shelley v. Kraemer* on constitutional grounds. While there is an extensive learned debate as to whether the judicial enforcement of these covenants constitutes "state action" that triggers investigation under the Fourteenth Amendment, there is little disagreement today that such covenants should be banned by legislation, even if not reached by the Constitution. And they are.

Given my position on employment discrimination laws, it should come as no surprise that I take exception to the conventional positions, both as regards the constitutional interpretation of the equal protection clause and the political question of the reach of fair housing laws. Initially, the state enforcement of private covenants should not be regarded as a situation where the state "denies" any person the equal protection of the laws. On this point I differ from Dean Allen, who would deny state enforcement for all racially restrictive covenants, even though elsewhere, including employment relations, the state should stay its hand. As I read him, he would not require any person to hire any other for a job, nor would he refrain from enforcing ordinary employment contracts as written because some white workers received more favorable terms than black workers or the reverse: there is no explicit racial content to the promises made

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or to the contracts not made. And Allen certainly would not impose any of the now-fashionable restrictions on job testing in the workplace. But he claims that my position requires more than simple repeal of a statute. "His [Epstein's] proposal for a repeal of Title VII, accordingly, is actually a proposal to establish secure public protection for discriminatory contracts. It is not, then, the putatively negative proposition ('repeal the Civil Rights Act') but the daringly positive, proactive proposition, that society should give discrimination the force of law, that deserves closest attention."56

While his argument has a certain appeal, I think that it is a mistake to withdraw protection from this class of contracts, and to treat them differently from other private engagements which receive judicial protection. So long as all persons are entitled to enforce whatever covenants they choose to make, then the decision to exclude is theirs, and not the state's. The privilege, moreover, is universal, and there are surely many groups from the Congressional Black Caucus on down that have explicit requirements of race for membership. If we respect Allen's concern with explicit racial clauses, what about the Binai B'rith and the National Organization of Women? Under Allen's theory these groups could exclude whom they please without much difficulty because they are not seeking legal assistance to achieve their ends. But suppose a group member wanted to give certain confidential information to white outsiders in violation of internal rules; or suppose the state were asked to give an action in trespass against whites who sought to attend meetings from which they were excluded on grounds of race. In my view the state should award damages and grant injunctions in these cases just as it would in any other. It would of course be a scandal to enforce only some of these exclusive arrangements while denying legal protection to others. But Allen's argument is not directed toward selective contractual enforcement, but any contractual enforcement, and I assume that he would refuse to punish those contractual breaches in a color blind fashion, to blacks and whites alike.56

The diffusion of responsibility for the creation of these covenants, moreover, has important implications for the constitutional issues which, on matters such as these, closely track the policy debate. On this issue, too, the private initiation of the covenants is critical to understanding the overall legal position. Most concretely, the state does not deny any person equal protection of the law when it enforces equally the contracts made by all. To substitute the looser expression "state action" for the narrower term "deny" distorts the

55. Id. at 62.
focus of the equal protection clause, expands its scope vastly, and effectively obscures the critical question: who has denied a given person entrance to a certain parcel of land? In all cases, the court takes its marching orders from the landowners who have made the covenants. Restrictive covenants are property interests like any other, and their enforcement is in my view constitutionally compelled, on an even-handed basis, unless one of the traditional justifications for the nonenforcement of promises is available.

Is it? Once again it is difficult to make any categorical judgment about the matter. Private violence is one means of keeping certain people out of certain neighborhoods. Where that is found, only one public response is acceptable: the state must vigorously protect all citizens who wish to gain access to the private property that they have purchased, or to which they have been invited — period. The public roads are a common over which all can pass on even terms, and any effort to deny any person his right of passage should be understood as a mortal threat to the social contract and treated accordingly. But restrictive covenants are not generally found in that context. The more likely ground of dispute, therefore, is whether a set of restrictive covenants covers a large enough segment of the relevant market that its use represents some form of monopoly power, properly attacked on traditional antitrust grounds. In this context, the possibility of successful attack will be much improved if the restrictive covenants are fortified on the outside by a set of zoning restrictions that prevent other developers from entering the market in nearby locations.

These scenarios hardly exhaust the universe of possibilities, however, and where none of these conditions is satisfied, then these covenants should be enforced like any other, by a state judiciary that is unconcerned with their content and their symbolic effect. And the housing markets will, I think, be the better for it for three reasons. First, there are some important gains in allowing those persons who wish to live by themselves to do so. If there are religious communes, or persons with strong environmental or recreational interests, why should they be forced to congregate with the rest of us when they want to go their separate way? And what of black separatist groups that wish to be free of white influences? Here again it becomes dangerous to attempt to make any public distinction between allowable and nonallowable forms of discrimination. It is just best to let all groups decide what they please. Once they are allowed to do so, then the governance task in other segments of the market will be easier.
because the variation of tastes of the remaining individuals will be smaller than would otherwise be the case. If persons with strong racial biases, of whatever sentiment, move into separate communities of their own, then governance in mainstream communities will be easier to maintain, just as it is in employment settings.  

Second, the prohibition against racial restrictive covenants places strong limitations on the ability of private developers to promote desired racial and social integration. Once the decision in Shelley was handed down, the question arose whether private parties could enter into “benevolent” or “well-motivated” race-conscious covenants. A group that wishes to integrate a large housing project is always aware of the problem of the “tipping point.” As Professor Robert Cooter demonstrates anew in his Article, typical organizations house individuals who have widely different preferences for the racial mix. If there are one hundred units, it may be that one white person will remain only if there is no black person in the unit. If one is admitted, he will then move out. His departure, however, will unnerve another white person who is almost as unsettled by the prospect as the first. His departure in turn could trigger the departure of a third, and so on down the line until all leave. The situation is a tragedy because before the unraveling it could well be the case that a substantial number of white residents are quite happy to reside in a building that is, say, fifty percent black, but not more. A system of racial restrictive covenants that requires that the population of black residents be kept at between thirty and fifty percent (or whites at between fifty and seventy percent) could well stabilize the situation and prevent the flight from taking place. If the court were agnostic about the content of restrictive covenants, then these would be enforced without hesitation. But once Shelley is the dominant precedent, then courts must decide whether all covenants with explicit racial content fall, or whether only those with invidious motives fall. And most courts have concluded the latter.

Any per se decision in favor of invalidation is quite costly. Either many individuals are forced to endure segregated housing projects that most people don’t quite want, or it becomes necessary to use very costly and inefficient proxies to maintain the appropriate racial balance. In practice this strategy is far from foolproof, but one possible, if costly, strategy is for landlords to keep certain types of units

57. See Forbidden Grounds, supra note 1, at 61-67.
60. See Progress Dev. Co. v. Mitchell, 286 F.2d 222 (7th Cir. 1961).
off the market until others are rented in ways that establish the stable racial mixture of the structure. In practice, this usually means that the expensive units are rented first to more well-to-do white families before others are able to move in. The consequent loss of occupancy and the disingenuous behavior of rental agents surely count as costs of the entire exercise. And for whose benefit?

Third, the easy precedent for intervention on these grounds is capable of mischievous expansion to other areas that do not have the same controversial overtones as race. One illustration is housing projects for senior citizens. The requirement that these units take children unless all members are over sixty-five has the unfortunate consequence of shutting senior citizens into tighter ghettoes than would otherwise be required for their personal security. As with public accommodations, academics are often too confident that they can identify a core to the antidiscrimination principle, when in practice they cannot. On this matter it is hardly wise for them to try. The usual argument for freedom of contract (and association), subject to the standard constraints of force, fraud and monopoly, should carry the day.

C. Retail Car Sales

The last market Professor Ayres looks at is automobile retailing. Here he refers extensively to his own studies of the automobile resale market which reported that blacks and women on average paid larger mark-ups for new automobiles than did white men. The study in question was not based on observed market data, but on comparisons between the offers that matched testers received from these dealers. In one sense, the study seems to be of little assistance to his own thesis. There was no evidence of systematic animus-based discrimination against blacks or females, and some evidence that these buyers got their best offers from white male salesman. Even if the difference in outcomes does persist along racial or sexual lines, it is not clear what follows: it could be, empirically, that Ayres has only shown, without explaining how or why, that blacks and women are not as good bargainers as white men.

For Ayres that significance lies in the evidence that his data furnishes to undermine the proposition that in competitive markets all

61. See FORBIDDEN GROUNDS, supra note 1, at 63-65.
62. Alternative Grounds, supra note 47, at 76-84.
buyers should be expected to pay about the same price.\textsuperscript{63} During the
course of the Conference, many of us asked whether his results could
be replicated in a closer study of actual market transactions. At that
time no empirical study of that sort had been done, but more re-
cently a very systematic study of the issue has been prepared by
Penny Koujianou Goldberg which is in evident tension with Ayres' 
broader empirical claims.\textsuperscript{64} Goldberg was impressed by the care that
Ayres used in instructing his testers, and in my estimation underesti-
mated the importance of using independent testers who do not know
the purpose of the test and who do not share in the ideological
presuppositions of its principal investigator. But she was nonetheless
troubled by the fact that only 20 percent of his negotiations resulted
in completed transactions.\textsuperscript{65} In fact, in his sample there were appar-
tent contracts (i.e., a verbal agreement on the price that was not
binding) in only 25 percent of the cases with white males, and in 15
percent of the cases with the remainder of his sample. The market
would be in a state of perpetual turmoil if huge percentages of po-
tential buyers were unable to buy cars at all. A technique of testing
that leaves so many incomplete transactions cannot be an accurate
replica of a functioning market.

Goldberg was conscious of this difficulty and therefore ignored all
aborted negotiations to look at data derived solely from completed
sales in actual markets. She used as her guide the Consumer Expen-
diture Survey which "includes an extensive set of household charac-
teristics as well as details about the stock of owned vehicles,
purchase of new and disposal of old cars, trade-in, financial etc. that
allow me to control for buyers' different backgrounds, financial abil-
ity and previous experience in bargaining for a new car. As measure
of price discrimination I use the absolute and relative difference be-
tween the transactions prices reported in the consumer expenditure
survey and the suggested retail prices quoted in the Automotive
News Market Data Book."\textsuperscript{66}

At this point it is best to state Goldberg's conclusion in her own
words:

The results are strikingly different from the ones reported in Ayres. All
variables referring to race and sex are statistically insignificant and often
have signs opposite to the ones reported in Ayres. The natural question is
then, "how are these finding consistent with Ayres' results?" This paper

\textsuperscript{63} Id. at 84.
\textsuperscript{64} Penny Koujianou Goldberg, Dealer Price Discrimination in New Car
Purchases: Evidence from the Consumer Expenditure Survey (working paper, April
1994, mss. in possession of author).
\textsuperscript{65} Id. at 1.
\textsuperscript{66} Id. at 2.
shows that the lack of evidence in favor of race or gender price discrimination found in the micro data can be reconciled with Ayres' findings.\textsuperscript{67}

At this point, Goldberg then makes a critical distinction in the distribution of reservation prices for white males on the one hand and for minorities (including women) on the other. Both groups have the same median price figures, which is captured in her finding that there is no price discrimination. But while the means of the two populations are essentially identical, the variations about those means are not. For reasons that she cannot fully explain, it appears that minorities have a wider dispersion around the mean than do white males.\textsuperscript{68} Once dealers know (or intuit) that difference then they should adopt different negotiation strategies for the two groups: they should start (as did Ayres’ testers) with high prices to all minority customers, in the hopes of picking up that portion of the distribution with high reservation prices, and then settle for less than the mean with respect to others that have lower prices. That strategy carries with it some costs, which are not worth incurring for the white male population whose distribution is more closely concentrated around the mean. The possibility then arises that the dealers got their signals crossed because they faced a set of minority testers who did not bargain the way in which their experience told them that real minority buyers bargain. The dealers did not pick up the new signals and kept to the old strategies, which could explain why there were so few completed transactions and a higher median price for minority testers.

Goldberg’s results show how difficult it is to control for unanticipated biases in dealing with testing markets, but even she does not seek to examine buyers’ bargaining strategies in automotive markets. As these were the focus of the Ayres experiments, they are worth a bit more attention here. Initially, only, if some residual element of monopoly power remains, is it sensible for buyers to resort to the extraordinary tactics deployed to purchase a car. Rarely in practice will the determined buyer, regardless of race or sex, simply negotiate on price. The bidding strategies used in Ayres’ tests therefore constitute only a tiny subgroup of the full range of market techniques. It is, for example, commonplace for buyers to undertake elaborate efforts to arrange auctions and to otherwise play dealers off against each other; or to indulge in Oscar-like episodes of play acting and bluffing, as people bring their tool kits and their mock mechanic

\textsuperscript{67} Id. at 2.
\textsuperscript{68} Id. at 2-3, 29-33.
friends into the dealer's showrooms in order to influence the price. If only a small fraction of buyers adopt strategies that turn only on price, then any inferences drawn from his data are correspondingly compromised.

Nor does Ayres take into account the complexities on the selling side of the market. There is no reason to assume that the selling patterns of dealers remain constant across the model year. Will dealers behave the same when there is a hot new model on the floor, as they will when they are trying to close out old models? How does advertising influence the behavior of both buyers and sellers? And, most importantly, how does the compensation system for sales representatives influence their behavior? And how effectively will any system of government intervention be to stop the perceived abuse without imposing heavy costs on the industry as a whole?

On this last point, the evidence is clouded. There is, to be sure, some evidence that dealers are moving (without regulation) to “no dicker stickers” in the window, which surely eliminate any possibility of discrimination. But the practice is far from uniform today, and there is at least some reason to believe that Ayres’ preferred method — requiring disclosure of dealer’s cost and then requiring a fixed markup of inventory — could wreak havoc with the conventional mode of sale in the retail car market. The value of a car on the dealer’s floor is not simply measured by its price. Inventory can fluctuate with demand and supply after the car is obtained. Disclosure of that information would provide only limited value to the customer but could not prevent some negotiation between the parties thereafter. The dealer will still insist on a substantial price if the demand is high and may well be willing to let cars go at or below cost if the demand is low. In addition, the dealer has to face the question of motivating sales representatives to move the car. Normally this is done by selling the car twice, first informally to the sales representative, and then afterwards to the customer. The sales representative’s compensation is the difference between the two numbers. It is not easy to figure out how to motivate sales personnel to sell cars if their compensation is not tied to their performance. The two-tier system of pricing in effect gives the sales representative a 100 percent commission over a fixed cost to him. It may, of course, be worth while to incur these costs if the new program could reduce some of the anxiety in new car buying, but that is a business decision.

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70. With thanks to Robert Cooter for a dinnertime explanation.
71. FORBIDDEN GROUNDS, supra note 1, at 54.
that should be driven by business concerns. It is not a legal decision driven by fears of racial discrimination. Is it worth trying to force the creation of new systems of selling in order to obviate a problem which if Goldberg's conclusion is correct, is an artifact of Ayres' system of data collection?

VI. HISTORICAL EVIDENCE

The battle over the antidiscrimination norms extends to the historical evidence. One of the contentions in Forbidden Grounds that has set off the most spirited debate is that the preservation of invidious forms of discrimination in the Old South is best explained by the failure to meet the preconditions for a regime of free contract. Throughout the South there was heavy state regulation of private conduct on grounds of race; and there were extensive levels of private violence, often aided or condoned by public officials. Taken in their entirety, my claim is that this system of pervasive state control and private violence made free entry by rival firms impossible in Southern labor markets before the effective abolition of Jim Crow by the Civil Rights Act of 1964.

Before reviewing the present controversy it is important to indicate why the matter is regarded as so important for the debate. If the thesis that I have advanced is correct, then the alternative thesis must be wrong: that thesis says that the strong set of cultural norms that supported discrimination against black persons was self-sustaining even in the absence of public and private force. If that proposition is correct, then it becomes far easier for proponents of Title VII to contest the claim that the mechanism of competition can deliver desirable social outcomes. If workers of equal skill and ability will not be able to attract equal wages for equal work, then state regulation may be an important tool for making markets more responsive to economic needs even after the passing of Jim Crow. But if the use of cultural and social pressures alone are not sufficient to account for the outcomes under a Jim Crow regime, then a very different interpretation of the historical evidence is warranted. Now, the initial burst of advance for black labor after 1964, especially in the South but also in the North, is better explained by the pro-market operation of the Civil Rights Act, which in its early days brought down the coercive mechanisms, public and private, that prevented

the formation of a free market.

So how, then, does the evidence stack up? Here one point concerns the formal content of the labor law in the Old South. An examination of the statute books of the Jim Crow states reveals only one explicit segregation law that is directed to employment markets, the 1915 South Carolina statute that instituted the regime of separate but equal in textile plants.\(^3\) One inference that might be drawn is that the absence of any explicit, race-based prohibitions on employment meant that no legal force was directed toward the employment relation. That was the initial conclusion reached by Professor Ayres in his acerbic review of Forbidden Grounds that appeared in The New Republic.\(^4\) And it has been stressed by other commentators as well.\(^5\)

Nonetheless, I still believe that the opposite case is far stronger. The initial point is that these revisionist accounts of the Jim Crow are at sharp variance with the usual accounts of the period. Here it is, I think, sufficient to quote from just one capsule summary about Jim Crow written long before Forbidden Grounds was published. Professor Kenneth Karst is not known as an unstinting friend of free markets, and he is a strong supporter of the modern civil rights establishment. Yet his account starkly contradicts the assertion that public coercion and private violence were not needed to maintain segregated workforces in the South. He writes:

Jim Crow illustrates the main technique of nativist domination: the enforced separation of members of the subordinate cultural group from a wide range of public and private institutions that, in the aggregate, constitutes "society." Racial segregation in the American South was the successor to slavery and the Black Codes, both of which had been decisively made unlawful by congressional legislation and the Civil War amendments. In this historical context it is easy to see Jim Crow for what it was: a thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial case by means of a systematic denial of belonging. Jim Crow law extended from disenfranchisement to prohibitions on interracial marriage and imposed racial segregation everywhere: schools, courtrooms, buses, restaurants — indeed, all places where people of both races otherwise might interact in public. Private racial discrimination also played an important role in maintaining the caste system, producing segregation in housing, employment, and public accommodations, and leaving a legacy that, even

\(^3\) S.C. Crim. Code § 45 (1922).
\(^4\) Price and Prejudice, supra note 47, at 31.
\(^5\) See, e.g., Verkerke, supra note 44, at 2091. Professor Verkerke writes: With the exception of the South Carolina textile employment segregation law, all of the statutes to which Epstein refers involved areas of economic and social life other than labor markets . . . . Contrary to Epstein's hypothesis, the absence of discriminatory statutes mandating employment segregation suggests strongly that there was no hole to be patched in that area. In the labor market, at least, other forces sufficiently enforced the segregationist norm.

today, remains only partially remedied. Lynching was the system’s ultimate weapon, and it was by no means a wholly private enterprise.  

Karst gives his due the place that private discrimination has in the scheme, but the strong emphasis in the quoted passage is on the constant and pervasive system of domination and coercion which is backed in the end by the use of violence. In light of this description, it is worth bringing a public choice perspective to the interconnections between the public and private acts. As Karst points out, the Jim Crow South featured regulation in a large number of important markets: marriage, education, and transportation for starters. Karst also makes due note of the Jim Crow laws that systematically excluded blacks from voting in any elections (including the critical state and local elections), and that the formal power structure from sheriffs to judges was entirely dominated by white persons who supported the segregated structure. The obvious question to ask is, why assume that these Southerners were content to allow a regime of laissez-faire to dominate in employment markets when they were so insistent on imposing racial caste distinctions in all other areas of Southern life? I know of no theory of human motivation or of public choice that would start with the assumption that the key actors all had a split personality. If coercion was necessary to maintain white control over the labor markets, then we should expect to find it, at least if we know where to look.

The question, therefore, is to see whether it is possible to identify other mechanisms that might be available to segregate and to control Southern labor markets. Here the first thing to do is to look for various statutes and rules neutral on their face which could be impressed into the service of propping up Jim Crow. Some powerful evidence is gathered on this question in David Bernstein’s contribution to this symposium. Bernstein details the connection between the systems of public education (rigidly controlled under Jim Crow) and the entrance requirements set by unions for membership and by state boards under their licensing authority. He notes what should be regarded as commonplace: the license boards often did not serve to protect with unflinching loyalty the interest of the public at large, but responded to union pressures which “used the licensing statutes to prevent blacks from gaining licenses in professions in which they

were once numerous — particularly, though far from exclusively, in the South — and to prevent blacks from getting a toehold in other fields."

Bernstein also notes that the use of neutral laws for partisan purposes is an old theme in constitutional law. As long ago as *Yick Wo v. Hopkins* the Supreme Court was confronted with the economic perils that licensing statutes posed. In that case, the Court struck down on equal protection grounds a licensing statute whose requirements were ostensibly aimed at preventing fires but were used to close down Chinese laundries that operated in wooden buildings while non-Chinese laundries in wooden buildings were allowed to operate. The key feature was the differential enforcement of the law, which itself was neutral on its face. But that decision, while important, did not have the effect of striking down all licensing laws whatever, for the Supreme Court shortly after *Yick Wo*, allowed licensing statutes for physicians, and during the misnamed *Lochner* era routinely sustained a wide range of licensing statutes.

The risk of differential enforcement posed by *Yick Wo* is endemic to the area of licensing. It should be perfectly obvious that same strategy could have been used in the South during the height of Jim Crow, and Bernstein details with a numbing thoroughness the effect of the licensing laws on physicians, plumbers, and barbers.

As applied to physicians, the licensing laws induced a sharp decline in the numbers of blacks able to enter the profession. Thus the number of black physicians in the South, which had been rising before 1910, leveled off and eventually declined as the black medical schools were shut down by the American Medical Association. The evidence on increases and declines in the percentage of blacks in the labor force is strong evidence that the social pressures of Jim Crow did not have the economic clout that has been so uniformly attributed to them by my numerous critics. After all, if these were successful, then what explains the initial black increase in market share, given that the attitudes did not shift markedly over the relevant periods? Social pressures did not shut down black institutions; government officials did when they closed five of the seven black medical schools. And when they did so they choked off the supply in a way that no set of social sanctions could possibly hope to achieve.

78. *Id.* at 90 (citations omitted).
83. *Id.* at 93 (citing Reuben A. Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROBS. 267, 270 (1970)).
84. *Id.*
The situation in the plumbing trade was little different. As with physicians, there is surely some public health justification for the regulation of plumbers, given the risks of infection spread through the water supply. But once again, a system of regulation introduced for good motives can easily be turned to bad. Almost like clockwork, the dominant “Plumbers’ and Steamfitters’ Union, affiliated with the American Federation of Labor (AFL), excluded blacks nationally through the \textit{Lochner} era.” And once again, the upshot was, after 1910, a decline in black labor in the markets — a result that cannot be squared with the fashionable view that social norms are sufficient to keep blacks out of certain key industries and trades. As late as the 1950s there was only very spotty black representation in the plumbing trades.

A similar pattern was found in the barbering trades, where once again the licensing laws were used (although with somewhat less success) to keep blacks out of the trade, or at least significant portions of it. The Southern supporters of Jim Crow had little need to regulate the terms of the employment relation if licensing laws can keep people out of the trade altogether. But by the same token, the white interest groups behind the passage of these statutes did not use their resources idly. They worked to achieve passage of the statute because they feared the competition from rival groups, notwithstanding the dominant social norms in their favor.

There are also many other statutes that reflect the restrictive impact of government action. In this regard, Professor Ayres has graciously brought to my attention an article by Professor William...

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  \item[85.] \textit{Id.} at 94 (citations omitted).
  \item[86.] \textit{Id.} at 96 (describing the Ohio experience) (citing \textsc{David A. Gerber, Black Ohio and the Color Line}, 1860-1915, at 303 (1976)); \textit{Id.} at 97 (describing Philadelphia and Chicago) (citations omitted).
  \item[87.] \textit{Id.} at 98 (two licensed black plumbers in Maryland, out of 3,200; first black plumber in Colorado licensed in 1950; one licensed black plumber in Charlotte as of 1968) (citations omitted).
  \item[88.] \textit{Id.} at 99-103.
  \item[89.] It is perhaps worthwhile noting a bit of history. Ayres published his highly critical review of \textit{Forbidden Grounds, Price and Prejudice}, \textit{supra} note 47. On June 28, 1992, he sent to me a brief letter with Cohen’s article which noted simply: “I may be wrong in asserting that Jim Crow largely ignored the employment relation.” Letter from Ian Ayres to Richard A. Epstein (June 28, 1992) (on file with author). He subsequently wrote a letter to \textit{The New Republic} noting the historical oversimplification, but maintaining the position taken in his review that social forces could have had a devastating effect on black success in the South: “Even in the South, boycotts by bigoted employers and consumers could massively restrict the profitability of integrated or all-black production.” Letter from Ian Ayres to Leon Wieseltier, Literary Editor, \textit{The New Republic} (Sept. 12, 1992) (copy on file with author). Ayres himself has graciously allowed the
\end{itemize}
Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*. Initially, Professor Cohen’s title reference to involuntary servitude hardly resonates with the claim that Southern labor markets were laissez-faire inventions. Professor Cohen therefore identifies other forms of general labor relations, such as enticement statutes, which made it a *criminal* offense to entice a worker “by offering higher wages in any other way whatsoever.” According to Professor Cohen these statutes had been once used in early England, had then been largely repealed, and had been reintroduced into the South between 1865 and 1867, where they operated as “the most common measures aimed at controlling the Negro labor force adopted in these years.” These statutes remained in active use until World War II, when presumably their effects were swamped by the large migration to the North. What is instructive about these statutes is that they are designed to prevent the departure of black labor from the South. If the sole goal of the Southerners had been simply not to associate with blacks, then the statutes would be largely perverse in their end: whites should be thrilled that others are prepared to pay for the one-way train tickets for blacks out of the South. But once the goal was to keep blacks in the South as a ready source of labor, then the picture becomes more ominous. Should we believe that the desire was to ensure that these workers received a competitive wage? Or, were other motives at work?

Once again Professor Cohen’s research reveals other mechanisms. The Emigrant-Agent Laws imposed heavy taxes on those agents who sought to encourage black labor to leave the South for more gainful correspondence to be made public.


91. *Involuntary Servitude*, supra note 90, at 319. The quoted language is the text of the Georgia statute. According to Cohen all states except Virginia made enticement a criminal statute. *Id.*

92. *Id.* at 319-20.

93. There is evidence, however, that the migration did take place notwithstanding these statutes, for the Davis-Bacon Act was passed in 1931 in part to make it more difficult for itinerant black crews from the South to compete with local white Northern labor. See, e.g., David Bernstein, *The Supreme Court and “Civil Rights,” 1886-1908*, 100 Yale L.J. 725 (1990) [hereinafter *Civil Rights*]; see also *Employment of Labor on Federal Construction Work: Hearings on H.R. 7995 and H.R. 9232 Before the House Comm. on Labor, 71st Cong., 2d Sess. 17 (1930) (“A contractor from a Southern State secured a contract to build a Government marine hospital, as I remember it, on Long Island; that he brought with him an entire outfit of Negro laborers from the South . . . .”) (letter of Ethelbert Stewart, Commissioner of Labor Statistics for Secretary of Labor James J. Davis) quoted in David Bernstein, *The Davis-Bacon Act: Let’s Bring Jim Crow to an End* 11 n.7 (Cato Institute 1993).
employment elsewhere.\textsuperscript{94} 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,\textsuperscript{95} and contract-enforcement laws in Mississippi "required Negroes to enter into labor contracts by a specific day each January,"\textsuperscript{96} and laws in other Southern states required employers to grant discharge to their black laborers before they could be hired by other employers.\textsuperscript{97}

This set of laws (like licensing laws) hardly looks as though it was fashioned to promote open and competitive markets in the South. But the question is whether this group of laws together could account for the rigid patterns of segregation that were reported, for example, by Professor James Heckman and Brook Payner, in the South Carolina textile mills during the years between 1900 and 1964.\textsuperscript{98} Here the most notable feature of the South Carolina experience was the constant, but low, percentage of black men and women at work in the textile industry. The percentage of black men during the period hovers around the five percent mark, while that of black women is still lower at below one percent.\textsuperscript{99} The numbers remain remarkably constant over a period that includes two world wars, a boom, a depression, the desegregation decision in \textit{Brown v. Board of Education},\textsuperscript{100} and the countless other events large and small over that sixty-five year period. It is hard to believe that any unregulated market would show such constant proportions over so long a period of time, and then suddenly shift with a massive intervention of external — that is, federal — origin the moment that the civil rights laws were passed.

To be sure, one could argue that social pressures might account for the rigid separation of black and white workers during this time. But if free entry in any form were allowed, then at least one should expect to see an increase in the percentage of black workers engaged

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95. \textit{Id.} at 324.
96. \textit{Id.} at 322.
97. \textit{Id.}
99. \textit{Id.} at 142 (graph).
\end{flushleft}
in the textile *industry*, for these could have been hired by new firms with all black work forces without running afoul of any law. And in equilibrium there should be some tendency for black wages to equal white ones, given the equal productivity of the two classes of workers. Yet the percentage of black workers *in the market* remained constant, which is odd if free entry had indeed been possible; recall white resistance to working with black workers is no obstacle to the creation of separate plants.

So was entry free? Here there is, so to speak, entry and entry. One possible view of the subject is to assume that Southerners who sensed the opportunity to hire black labor might have set up plants that specialized in their employment. But it is said that social pressures could be too strong for isolated individuals, as if they had to worry only about ostracism and not about violence. But what about Northerners who might come down to the South to set up these plants? Clearly a single Northerner would find it difficult to buck the local prejudices. But if the gains were large enough, the entry could be orchestrated so that extensive capital could support the entry of large groups or entire communities dedicated to hiring available black labor. Yet the plants that closed down in the North and moved to the South may have been integrated after a fashion in the North, only to be totally segregated in the South. Surely something was going on there. But what?

The key to understanding the nature of the problem rests on the point that outsiders could not just enter the textile markets. They also had to physically enter entire communities, and forge a wide range of other connections both economic and social. Again, ostracism is surely one technique that is available, and one that does not amount to the use of force or fraud within the libertarian framework. It might amount to a collective refusal to deal of the sort that attracts the attention of the antitrust laws, but even here the noneconomic and diffuse operation of the sanctions in all likelihood would escape any legal response detection: no federal interest could have been perceived, and it is hard to believe that any Southern court would turn some local version of the antitrust laws against its own cultural norms.

But ostracism is a strategy with limits. It certainly cannot defeat mass migration by self-contained groups from outside the community. For the textile industry at least, which sells, not at retail, but to the trade, customer resistance to dealing with black workers is not really an issue. But other mechanisms could have that effect. One possibility is that other actions could well defeat the operation of a new textile mill in the Old South.\footnote{Zoning laws, water lines, sewer...}

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101. See *FORBIDDEN GROUNDS*, *supra* note 1, at 251.
hook-ups and plant inspections are all standard forms of health and safety regulation. They could be used in a deliberate manner to frustrate the operation of Southern mills that wished to defy the implicit but powerful local norm. And the moment that integration takes place, the water and power could be cut off.

I am not a social historian and hence cannot document whether these tactics were used, or how often. But reprehensible as they are, they surely have many attractive features for the supporters of Jim Crow. They are covert, which means that they do not generate the same amount of bad publicity associated as the publication of rigid segregation laws. Their administrative enforcement is far cheaper than adjudication to the achievement of the stated end. (Even today, under the ADA, the statutory requirements are largely enforced through the permit system; and affirmative action requirements are enforced through the Equal Employment Opportunity Commission or accreditation review.) Of course, it might be that Southern judges and administrative officials would not countenance these practices on the ground that they were in violation of explicit rules and practices. But even if legal formalism offered a sound normative theory of statutory construction, it is a very poor guide to a social history dominated by a desire to escape the limits of formal general rules. If everyone in control of the system was in cahoots, the dominant social mores would have received extensive amounts of coercive state support.

My argument thus far is designed to show that social norms could not possibly have the effect on black employment levels ascribed to them by my critics. There remains, however, one theoretical point that should be addressed. Both Evan Tsen Lee and Richard McAdams have noted an apparent inconsistency between what I see as the limited power of social norms under Jim Crow and their general effectiveness elsewhere. Anyone who has read my writings on employment contracts knows that one reason I defend the contract at will in labor markets is that I believe that informal and reputational sanctions go a long way to prevent abuse by either employers or employees.102 Thus, Lee asks why I find “informal private agreements to be such a strong force [in ordinary employment contracts], yet such a weak force when employers form cartels to exclude certain races from certain areas of endeavor?”103
It is a fair question to which it is possible to offer a fair reply. First, both employer and employee can monitor each other's behavior at reasonably low cost. In contrast, the cost of monitoring what fellow cartel members do on the side is very expensive since they conduct their own sales efforts outside each other's presence. Second, within the firm, both sides have an interest in the perpetuation of the agreement, given the positive costs of finding a new job for the employee or hiring a new worker for the employer. In the cartel, however, there are strong incentives to cheat, for cheating allows each member to garner a larger fraction of the business while earning more than the competitive rate of return. Customers who are aware of the instability of cartels will actively play one member off against another. And the fear that new entrants will come into the market further induces cheating in the short run while the allure of monopoly profits is still high. The nonenforcement of contracts, without more, usually leads to the breakup of these cartels. In contrast, there are no third-party pressures that destabilize ordinary employment relations, for, if anything, customers want to do business with firms that have good employment relationships in order to lower their own costs of doing business. The empirical evidence is in accord with the basic theory; for while contracts at will in employment often prove stable over years, cartels quickly disintegrate without legal backing. The traditional common law policy, which stressed the nonenforcement of specific cartel agreements, was sound, and so too was its willingness to respect the ordinary contract at will.

Richard McAdams takes up the same cry, attacking both my use of the study of Japanese automobile litigation by J. Mark Ramseyer and Minoru Nakazato, and invoking the work of Robert Ellickson on the role of informal norms in settling disputes among neighbors. (For the record, I should note that I edited both the Ramseyer & Nakazato article and the Ellickson article for the Journal of Legal Studies.) In his view the Ramseyer & Nakazato article is largely irrelevant to the inquiry because it deals with traffic accidents, and concerns a culture far removed from our own. The passages in the article to which I cited, however, were contained in a

104. As Richard Posner explains: "It might seem that nonenforcement [of cartel agreements] would be a patently inadequate remedy since even without legal sanctions for breach of contract people would ordinarily be led by considerations of reciprocal advantage to adhere to their contracts. But a price-fixing agreement is less stable than most contracts." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 285 (4th ed. 1992) (citations omitted). Posner draws the same opposition here that I do in the text.


general section entitled *The Fragility of Communal Norms*\textsuperscript{107} and their analysis (complete with references to Lake Wobegon) was not confined to Japanese society, but rather covered the situation where marginal people "in most societies" could effectively play the endgame, namely, engage in litigation for their own ends.\textsuperscript{108} To be sure, the willingness to play this endgame increases when there are no ongoing social relations between parties, which is often the case in traffic litigation, and Ramseyer and Nakazato are careful to note that strategies may differ where there are ongoing relationships between parties where reputation is a constraint and wealth is only an imperfect proxy for utility.\textsuperscript{109} In both cases their general discussion is explicitly and overtly cross-cultural, and an attack on the idea that in Japanese study "culture" should be understood as "king."\textsuperscript{110}

Their model is in perfect correspondence with the position taken in *Forbidden Grounds*. There is no question that to the extent that outsiders moved to the South in order to take advantage of the existing cultural and social structure, they would have been subject to the dominant social pressures and would have to learn, if only for survival, to play by those rules. The ease of monitoring their behavior, and the reputational losses that they would have suffered from deviation, would have usually been enough to keep them in line. It was exactly that position that I took to explain why informal sanctions keep promises alive in cooperative endeavors.\textsuperscript{111} But new entrants are not seeking to cooperate with the established parties. They wish to enter into competition with them. My responses to Lee's point thus carry over to this context as well. If one cannot rely on informal sanctions to keep a cartel alive, so too one cannot rely on informal sanctions to keep competitors in line when their interest is to hire from the very pool of labor that the established parties wish to keep down in their places.

McAdams thinks that I fall into deep contradiction by appealing to informal norms in ordinary contracts while doubting their efficacy between strangers.\textsuperscript{112} But he totally misstates the meaning of Ramseyer & Nakazato when he writes: "First, Ramseyer & Nakazato

\textsuperscript{107} Ramseyer & Nakazato, *supra* note 105, at 286-87.

\textsuperscript{108} *Id.* at 287. The full sentence read: "Nevertheless, most societies contain marginal people who effectively play the endgame." *Id.*

\textsuperscript{109} *Id.* at 265-66.

\textsuperscript{110} *Id.* at 263.

\textsuperscript{111} *Forbidden Grounds, supra* note 1, at 69-70.

\textsuperscript{112} McAdams, *supra* note 11, at 259-61.
studied the effect of social norms on disputes between strangers; although Epstein does not mention it, they expressly qualify their results as apply only to such disputes, expressly contrasting the work of Ellickson"113 — who by implication does not.

It's just sloppy scholarship. The relevant passage in Ramseyer & Nakazato reads in full: “First, this article deals only with disputes between strangers. Although we believe that the same narrow, short-term self-interest often drives the bargaining process between Japanese who deal with each other on a repeated basis, we postpone the more complex issue to another paper.”114 In a footnote, the authors then amplified this theme: “Many scholars have suggested, for example, that where people deal with each other on an ongoing basis, they may not structure their relations according to legal rules.”115 It was a proposition that they did not investigate, but which they certainly did not accept.

Ramseyer then conducted that second study,116 where he indeed concluded that the legal norms play a much more important place in structuring banking relationships than the traditional culture-bound accounts of Japanese law suggest. “In short, for all the good will and Confucianism, and for all the reputational capital and repeated deals, firms enter the Japanese banking world at their peril. In this community, self-interest generally reigns; legal rules often shape the arrangements that firms strike; and noncooperative strategies remain feared threats.”117

At this point it is fairly straightforward to understand why Ellickson's work on informal norms does little violence to the basic thesis of Forbidden Grounds. Ellickson's study deals with a variety of harms caused by cattle: cattle damage to nearby property, building boundary fences, and litigation arising out of collisions between livestock and automobiles on the public highway. The first two involve repeat interactions within a small community, and usually the amounts of damages are relatively small, at least in comparison to major personal injury suits. Where there are repeat players who operate in environments where parties are uncertain whether they will be future plaintiffs or future defendants, there is a strong tendency for the emergence of efficient customary norms — a point that I have stressed in my own writings on the importance of custom in

113. Id. at 259-60.
114. Ramseyer & Nakazato, supra note 105, at 265.
115. Id. at 265 n.6 (citations omitted).
117. Id. at 93.
setting tort standards of care.\textsuperscript{118} The cattle interactions that Ellickson describes fit nicely into that model, except perhaps for highway accidents which are less likely to involve local citizens. In addition, the norms that he observes — chiefly a strict liability for cattle trespass in both open and close-ranges\textsuperscript{119} — mimic those of the tort law, and do not require any subtle cooperative behavior between the parties. The cultural norms, therefore, are not seeking to accomplish a very ambitious task (e.g., telling farmers how to raise and tend to their own cattle), and there is little incentive for anyone to deviate from the collective solutions once they are in place. And it surely helps that these persons cooperate in many other activities as well.

All this is a far cry from what happens with a new entrant into a community who wants to keep the established culture and society at a distance and open up new entrepreneurial opportunities. These entrants are quite happy to defy the local norms, and do not even have to go through the trouble of litigation to make their point. So long as the new entrant is able to keep the competitors at a distance, and pick his trading partners, he does not have to worry about the dominant local folkways if these are expressed only in the form of social and cultural sanctions. He can establish his own ways of doing business and prosper because of the opportunities left open by the business strategies taken by the dominant group. This difference in context must have been apparent to the dominant forces in the South, for why should they invest in extensive legal structures if informal cultural norms are sufficient to discipline outsiders who want to go their separate ways?

The patterns of behavior in the Old South, however, did not rest simply on a mix of social sanctions and formal legal barriers to entry. They also rested on another approach that was often less subtle and more effective: private violence, which everyone acknowledges had a powerful role to play in the South. If you wanted to open up a textile plant that hires black workers, and thus reduce their availability for other jobs, then you had to take with it the risk that your tires would be slashed, and your wife and children would be molested on the street, in the schools, and at the movie theater. The responsive system of local justice would simply turn a blind eye on the complaint, so that no redress could be had through the courts under its race neutral tort and criminal law statutes. Any outsider,

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\textsuperscript{119} Of Coase and Cattle, supra note 106, at 672-74.
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any carpetbagger, who came into the South had to run that risk, given that entry into the market also meant physical entry into the local community. In the face of these pressures, how could one argue that the system of social customs and mores was sufficient to the task? Surely, the Southerners did not think so, for if they did, then why should they engage in coercive practices, both legal and off the books, in order to control the migration and employment of black labor? The image that one has of Southern labor markets at the time when the civil rights laws were passed is one of markets that were dominated by coercion and restraint. Would the case for federal intervention have been as compelling if laissez-faire had been the order of the day?

Over and over again the critics of markets generally insist that markets operate within the framework of broader social structures that protect private property and make voluntary exchange possible: effective markets require stable social institutions. How many times have we been told that there are no pre-political legal rights or pre-political institutions not by Thomas Jefferson, but by modern critics of natural law? But the proposition works in reverse: corrupt state institutions can sharply curtail the effectiveness of voluntary markets. When personal liberty is not protected, when property rights may be violated at will, when contracts are subject to the whimsical interpretation of local officials, when the sheriff is in cahoots with local thugs, people will cower and markets will behave accordingly. With these pervasive and corrupt background conditions, it becomes highly improbable that local customs and norms were sufficient to maintain white dominance, segregation, and the wholesale exclusion of blacks from certain trades, without a healthy assist from both public and private force. Why would Southerners resort to all these grisly tactics if the cultural sanctions were sufficient under the day? The emphasis in the study of Southern institutions should be to identify the coercive mechanisms of social control; it should not be to insist that none was used. And lest one pine away for the nonexistent Civil Rights Act of 1910, ask whether it could have been passed when it was most needed.

120. See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconciling the Regulatory State 19 (1990) ("Seeing the common law status quo as prelegal and neutral, judges (and many others) did not recognize its principles as part of a regulatory system at all, but regarded them instead as the state of nature."). I know of no nineteenth century judge who took this position. There were many nineteenth century judges who regarded the common law rules as just, and legislative interference as occasionally tyrannical, as Justice Peckham himself did in Lochner v. New York, 198 U.S. 45 (1905). If more judges had taken his position, then we might have been spared the mischief of Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954), which of course sustained extensive legislative interference with market behavior under an exaggerated account of the police power. See Forbidden Grounds, supra note 1, at 98-108.
But what about the North? Here there is no question that substantial amounts of racial hostility existed as well. But again it would be a mistake to suggest that there were no other pressures that constrained the operation of labor markets. Private violence is always an option. And while it probably was not practiced in the same thoroughgoing manner as in the South, it surely reared its head in the North. There were common instances of violence against other recent immigrants, such as Jews and Italians. It certainly was directed against blacks, especially those blacks who threatened to take jobs away from whites. In addition, there were doubtless other legal constraints at work, both direct and indirect. Bernstein’s article repeatedly notes that the licensing laws were used to exclude black labor in the North as well as the South. 121 It seems clear that the Davis-Bacon Act 122 passed in 1931 was designed to protect white construction workers against wage competition supplied by itinerant black crews coming up from the South. 123 And the existence of white-only (or grandfather clauses) in unions protected by state monopoly power under the National Labor Relations Act 124 gave an opportunity to vent discriminatory impulses as well. Finally, it is perhaps possible that other land use, sewer, water, and similar forms of regulation could be used in some communities to keep in line firms that sought to hire black labor. The political sentiment and political power in the North was less unified than in the South, so that these forces were weaker, and the extensive out-migration from the South in the face of legal obstacles, showed that many blacks from the Old South voted with their feet.

Even if public regulation and private violence could be completely curbed, there is nothing that says that competitive markets would eliminate all vestiges of discrimination in labor markets. But one has to be very careful to measure the nature and extent of the discrimination that does remain. I cannot pretend to have made any exhaustive study of the day-to-day practices of discrimination in the North, to see whether the dominant patterns were consistent with the basic positions that I took in Forbidden Grounds. But it is instructive in this regard to look at one case that was regarded as a counter-example to my basic proposition that competition erodes the impact of

121. Bernstein, supra note 77.
123. See, e.g., Civil Rights, supra note 93.
private discrimination in unregulated markets. At the Conference Professor Michael Gottesman mentioned that I had not even discussed particular instances of discrimination in the North, and offered United States v. Bethlehem Steel Corporation\(^{125}\) to show the pervasive nature of private discrimination in the North, in this instance in Bethlehem’s huge Lackawanna facility. Bethlehem Steel was a case that he should have known well because he represented the three locals of the United Steelworkers of America (Locals 2601, 2602, and 2603) who were joined as codefendants in the case for their part in the perpetuation of the practices of discrimination found in the Bethlehem Plant and who were aware of the local discriminatory practices.\(^{126}\)

A simple look at the caption on the case shows therefore that this is not a case of discrimination in an unregulated market. For this reason alone the case oddly confirms my basic thesis that discrimination is the source of massive difficulties where entry is not free. Indeed, in this case it is not quite clear exactly how much of the discrimination is attributable to the firm, and how much to the various locals who maintained separate seniority lists for the protection of their individual members, doubtless in part for reasons unrelated to discrimination. To be sure, it is easy to find statements that could easily be taken as crude excuses for racial bigotry: thus the Bethlehem supervisor who announced that blacks were assigned to work the coke ovens because “Negroes could better stand heat than whites.”\(^{127}\) But the sentiments of a single employee, however deplorable, cannot account for the complex web of employment practices that spans well over twenty years, and which involves a seniority system in widespread use at steel plants throughout the country on the strength of general custom and usage.\(^{128}\) Here it appears that the plant was unionized from the early 1950s, and perhaps as early as 1944.\(^{129}\) The three rival unions created a more complex bargaining setting than the usual single-union monopoly type situation. The

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\(^{126}\) Id. at 980. The opinion states that the Union was aware of the discrimination from at least 1961, which was sufficient to fasten onto it any liability under the 1964 Act. Id. But the Union had to have known of the practices from the first day. It is also unclear as to how much it supported them. There is no such thing as “the” union interest, and doubtless there were all sorts of fights over the extent to which the discrimination should be fostered or discouraged inside the plant.

\(^{127}\) Id. at 979.

\(^{128}\) There were 285 lines of progression in the Plant. Id. at 982. The general establishment of lines of progression preceded the formation of the union, operating as a matter of custom and usage between the company and the employees. When the union came on the scene, it accepted the existing structure. Every functionally integrated steel plant in the United States has a multiple-unit system.

\(^{129}\) Note that there was an industry-wide agreement between union and all firms on job classification that was approved by the National War Labor Board in November,
steering of black workers to inferior jobs could well have been a response to pressure from union membership as well as a response to employer preference. As befits the general complexity of the situation, it seems as though sentiment inside the union was divided on the question of whether the discriminatory practices should have been maintained within the framework of the preexisting seniority system. There were union efforts to ease the barriers to transfer across divisions that were, it appears, opposed by the industry on a general basis in the decade before the passage of the Civil Rights Act of 1964. The reasons why each side took the position it did are not clear. But as these negotiations were undertaken at a national level, it is hard to infer any direct connection between the overall practices in the firm and the level of discrimination within a particular plant.

In addition, Bethlehem Steel failed to provide any data on wage levels in the various divisions. There is some hint that some workers in the least attractive divisions earned higher wages than workers in the more preferred division, because there was some reluctance to transfer out of these divisions owing to a short-term cut in pay. To be sure, this differential was in part attributable to the accrual of seniority on a unit by unit basis, and reflected the disparity of wages on the different pay scales. Yet, by the same token, the size of these differentials was not stated explicitly in the opinion; nor was there any effort to correct the data to take into account other factors that might influence the wage equation: the judge after all was more intent on establishing a violation of Title VII than in vindicating my theories about the incidence and effect of discrimination. But with all this said, no one could deny the persistence of discrimination, which will have its proportionate influence in any market setting, just as the claims for diversity do today. But the critical question is, how long would those patterns have persisted if the firm and the workers had been confronted with competitive pressures in an open environment? And on that question Bethlehem Steel provides us with no answers at all.

1944. Id. at 983.
130. Id. at 984. Note that there were no divisions in the Lackawanna plant with all blacks and no whites; and there was no evidence of a racial disparity in wages within divisions. The basic charge here was one of racial steering at the entry level.
VII. WHERE DO WE GO FROM HERE

It is, perhaps, a mistake to dwell today on difficult cases that arise out of the transition from the pre- to the post-civil rights environment. It is, however, instructive to ask what good the civil rights acts have done for their intended beneficiaries? The civil rights acts have now been in effect for over thirty years, and they have produced two different types of reaction. The first is the impassioned call for their continued and vigorous enforcement, at least as regards the various protected classes. Yet at the same time there is a deep disillusionment over the possible benefits of any such enforcement. If one were to look for tangible economic signs of the overall benefits of the Civil Rights Act, it would be difficult for one to find them. Without question there is more race-consciousness today than there was, say, twenty years ago; but the levels of distrust in racial relations, in some quarters at least, have become higher, not lower. On the economic front the relative strong growth rates between 1946 and 1964 slowed considerably after 1964 — due in large part, no doubt, to the heavy level of regulation and taxation of the employment relation. The Civil Rights Act is one component in that system of regulation, even though it would be foolhardy to regard it as the sole, or even the dominant, source of economic dislocation of the past thirty years. Minimum wage laws, licensing requirements, and high taxes are all worthy rivals to the civil rights laws in the creation of deadweight social losses.

But what is more apparent is that the current policies seem to leave little hope to exit from the situation. The critical problems with black labor take place before those young people make it into the labor force. There is no substitute for a good education (itself correlated with stable family structure), especially as more and more jobs require an ability to obtain some technical skills and ability before entering the work force. No civil rights law will protect those who cannot enter the labor market at the entry level owing to high regulatory and tax barriers, then they will be shut out of the critical on-the-job training that will allow them to take the next step forward in labor markets, and the massive resentment and political instability of our inner cities will surely increase. It is not a pretty set of prospects. Yet the thought that any vigorous enforcement of the civil rights acts in the next decade will generate any gains, either for blacks or the economy as a whole, is sheer illusion.

Worse still, there are other forms of regulation that can make matters worse. Part of my opposition to the ADEA and the ADA is that both make it harder for employers to create jobs for young
workers of limited skills. If old positions only open up slowly and if firms are forced to pay enormous sums to hire and train disabled workers, some portion of this cost, perhaps a disproportionate share of this cost, will be paid by marginal workers whom these same employers will have to let go, or at least reduce their wages or benefits. If (or perhaps as) the total burden of regulation on the employment relationship becomes too great, there will be a shift (such as the one that is already taking place) away from large firms that are easily regulated into smaller firms and solo entrepreneurs who do business in spot markets as independent contractors, one step further removed from the civil rights laws.

What can be proposed to handle this situation? The Civil Rights Act of 1991, with its beefed up remedies, may create some lucky winners in the litigation lottery, but it will do nothing to undo the systematic weaknesses in the current system of labor law. So the question is whether one can devise any clever system that will undo the worst effects of the statute. One has been proposed in a number of different places: Professor Derrick Bell has written bitterly of The Racial Preference Licensing Act; my colleague David Strauss has made much the same proposal; and its most systematic economic elaboration came from Robert Cooter in his Article for the Symposium. Some sense of the merits of the arguments come from the analogies that are used to render it more plausible. Total prohibition of the drug trade is frightfully expensive; so it might be useful to permit its use and to tax the gains from sale. Pollution is a clear wrong, but it too cannot be prohibited entirely in a productive economy. First set the level of pollution that is to be tolerated and then allow trading of the pollution rights: if the external harms are kept constant, then the trades should increase social welfare by allowing a larger output for any given level of pollution. Treat discrimination on the grounds of race (or indeed any other) as of equal social status with pollution, and it may well be that the intermediate position of taxation or tradable quotas is desirable.

134. Cooter, supra note 59.
135. The differences between the tax and the quota system largely arise from imperfect knowledge. In principle any quota (X percent of Y workers for a given class of firms), should allow firms to buy and sell rights, so that the protected workers are hired
Yet the difficulties with this system are so great that it will die of its own weight. First, the political resistance to a conscious scheme of quotas or taxes would be unbearable: no one wants to have a public declaration that it is possible to monetize the level of disadvantage within the market. And within the firm the symbolic effects are likely to be disastrous, for white workers (or whoever is not protected under the quota) will ask time and again why there should not be equal pay for equal work. Needless to say, moreover, the system will not work evenly on the regulated firms. It may well be that a high-tech computer firm will find it far harder to reach its quota, or to avoid these taxes, than will a construction firm. And the locational variations in population for any national system will clearly require major adjustments as well, for it is hard to see how the targets that are realistic for a firm in Atlanta or New York are sensible for one in Salt Lake City or Minneapolis. Nor will internal management or promotion be easy under the preference system: if two workers are taken in, one with the preference and the other without, what is to be done to bonuses, perquisites, and a thousand other tactics to create differential wages to offset some of the imbalance wrought by the preference in the first place? Does the preference created on the ground floor continue as workers progress through the ranks, or can the state requirement be met solely by hiring the "right" number of each kind of worker?

The objections to a state-imposed system of quotas are too strong even in the current environment, and they are only marginally softened by making the obligation transferable or dischargeable with tax revenues. That is how it should be unless someone can show ways in which a state-mandated system of quotas, taxes or other preferences outperforms a plain old ordinary market. The basic choice echoes John F. Kennedy's famous expression: A rising tide raises all boats. That is open competition. But the correlative proposition is that a falling tide leaves many boats grounded. That is the modern civil rights laws.

at the end in the firms in which they cause the least dislocation. A system of quotas sets the target that each firm should reach and then allows a market to determine the value of the tradable rights. With a tax and subsidy system the government does not allow a private market to set the price for each slot. It sets the price itself and then observes the number of firms that prefer to pay the tax to hiring the workers protected under the law. In most schemes of this sort the proceeds from the tax are then distributed by way of subsidy to those firms who are prepared to hire protected workers in excess of the quotas. In principle it should be possible to set a tax to induce any level of hiring. In a frictionless world, therefore, it should not make a difference whether the tax is used to induce the quota, or the quota is used to set the appropriate transfer price. In a world with friction both systems are likely to go astray in unpredictable ways.