

# THE RIGHT TO HAVE PROPERTY

by: Joseph William Singer\*

Laura Underkuffler has kindly commented on my progressive, social-relations approach to property and property law.<sup>1</sup> I feel humbled, honored, and seen. She notices the core moral commitments manifested in that work. She focuses on my scholarship on discrimination in public accommodations, the violent dispossession and persisting sovereignty of Native nations, and the obligations of the rich toward the poor. She emphasizes my willingness to take a moral stance. And she comments on the fact that I attempt to persuade readers about what the law should be, not just by interpreting authoritative texts, but by making normative arguments that are built on stories. She ponders the role of stories in the legal system. Well, here are some stories, and here are some moral stances.

## I. STORIES OF POSSESSION & DISPOSSESSION

In 1066, William the Conqueror invaded England with his Norman army, killed King Harold, and installed himself as King William I.<sup>2</sup> He displaced the English lords with his Norman chums and made himself both the owner and the ruler of all the land in the realm. He parceled out much of the land to a small number of lords who, in turn, gave land rights to vassals who gave rights to sub-vassals, all the way down to the peasants who lived on the land. Everyone had a place in the feudal hierarchy and a status as a lord or commoner—except perhaps the “villeins” at the bottom who did not enjoy English freedom.<sup>3</sup> Every person was in service to the lord above them. And the lords were the law on their manors: Their word was—literally—law. Their tenants only had as much security—and as many rights—as the lords were willing to give them. The only person who was truly free was the King—until you remember that the lords had men with weapons at

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1. Laura S. Underkuffler, *Ways of Knowing and the Law: A Tribute to Joseph William Singer*, 10 TEX. A&M L. REV. 697 (2023).

2. See JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 32–36 (2015) (detailing, in brief, the rise and fall of feudalism in England, which is discussed in the rest of the this paragraph); see also FRANK BARLOW, THE FEUDAL KINGDOM OF ENGLAND 1042–1216 (5th ed. 1999); DAVID CARPENTER, THE STRUGGLE FOR MASTERY: THE PENGUIN HISTORY OF BRITAIN 1066–1284 (Penguin Books 2004) (2003); RICHARD HUSCROFT, RULING ENGLAND 1042–1217 (Routledge 2d ed. 2016) (2005); EDMUND KING, MEDIEVAL ENGLAND: FROM HASTINGS TO BOSWORTH (The Hist. Press 2009) (1998).

3. See SINGER, *supra* note 2, at 33.

their disposal, and they could always rebel against the King and put one of their own in his place or force the King to sign a document limiting his prerogatives, as they did with King John and the Magna Carta.<sup>4</sup>

Over time, the lords did limit the powers of the Crown and increased and protected their powers—and property rights—over their own lands. But simultaneously, the Crown limited the powers of the lords over their vassals by creating royal common law courts that limited the jurisdiction of the manorial courts of the lords and eventually protected the property rights of the peasants from the whims of the lords.<sup>5</sup> A society of lords and commoners gradually evolved to limit the powers of both the lords and the Crown while increasing the powers and rights of the commoners, otherwise known as the people.

Similar stories happened in the United States. We rejected the English feudal model of property with its lords and commoners. Instead, we adopted the view that property is not something that belongs only to an aristocratic class paternalistically taking care of the peasants living on the land.<sup>6</sup> (Of course, plantation slavery was exactly that system—only much, much worse—and there was almost no attention paid to the “taking care of” part of the feudal arrangements.) The United States rejected “titles of nobility” and even said so in the Constitution.<sup>7</sup> The early settlers in New Jersey, for example, refused to pay feudal rents to the two lords appointed by King Charles II as the owners and rulers of New Jersey.<sup>8</sup> The settlers claimed that they held their property free of any obligations to a lord and backed up their conception of property with civil disobedience and even violent resistance.<sup>9</sup> After 100 years of conflict in New Jersey between the lords and the freeholders, the freeholders prevailed.<sup>10</sup> The capital of Monmouth County, New Jersey, where I grew up, is called Freehold. It is one of the places where the ideals of individual liberty, access to property for all, and local self-government were formed.

Why do I tell these stories? I tell them because they are true and because they are an antidote to another story—a false story. That mythical story imagines the New World as an empty land, slowly peopled by settlers from abroad fleeing oppression and poverty and seeking liberty and property earned by hard labor. That alternate story suggests that property rights in the United States originate in first pos-

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4. *See id.* at 34.

5. *See id.* at 34–35.

6. *See, e.g.,* BRENDAN McCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY 1–2 (1999).

7. U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1.

8. *See* McCONVILLE, *supra* note 6; *see also* EDWIN P. TANNER, THE PROVINCE OF NEW JERSEY 1664–1738 (1908).

9. *See* McCONVILLE, *supra* note 6, at 1–2.

10. *Id.* at 2.

session of vacant lands, combined with labor on it that cemented those possessory rights. Government and law followed and protected the hard-earned natural property rights of the settlers. This alternate story is comforting, and it justifies—or appears to justify—the rights of current owners to keep what they have. They owe their property to the hard work of their ancestors.

The stories of William I and the lords of Jersey are true; they are not fake news, and they are not merely cautionary tales. They teach us something about how we got to where we are. They show us what is wrong with the hardy-settler story of property rights. They show that property ownership became widespread in the United States only by rejecting feudalism, in whole or in part. England stripped lords of some of their property rights and transferred those rights to peasants. The same is true of New Jersey and other states, like New York, that limited or eliminated the property rights of lords while recognizing the rights of freeholders.<sup>11</sup> Property rights became widely available in the United States *only because some property rights were abolished and transferred to others*. Property rights were not born in immaculate conception from the labor of farmers. They were seized from lords and *redistributed* to ordinary folk. A similar story could be told about slavery. We fought a bloody Civil War to adopt the Thirteenth Amendment that ended the property rights of enslavers in other human beings.<sup>12</sup> The freedoms that Black Americans enjoy—including the right to own property—required *abolition* of the property rights of enslavers and the repeal of laws that allowed them to monopolize control of land.

Of course, these egalitarian stories are not the entirety of our historical record. Some property rights have been taken from the vulnerable and transferred to the powerful—not a movement toward equality, but away from it. The New Jersey freeholders seized their rights, not just from two English lords, but from the Lenni Lenape inhabitants of the Jersey shore.<sup>13</sup> The origin of non-Native property rights in the United States is a massive *dispossession* of Native nations with a *redistribution* of that land to non-Native, mostly white, “settlers.” I use scare quotes here because a more accurate term would be “invaders.” It is not just landowners in England who owe their title to King William’s dispossession of prior lords of the land. The United States took land from Native nations and transferred it to (mostly) white owners. The nation did this because the white inhabitants needed the land; they thought the Native inhabitants had more than

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11. On the conflict over feudalism in New York, see CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865* (2001).

12. U.S. CONST. amend. XIII, § 1.

13. See MCCONVILLE, *supra* note 6, at 15.

they needed; and they thought they could use it better and more efficiently.<sup>14</sup>

Private property law reflects and serves public policy. Property rights are not natural but are a creature of law and politics. Property rights were redistributed from Native nations to the United States by government fiat at the point of a gun for reasons of public policy. And it was handed out to “settlers” at low prices (or for free if they improved it). That means that the origin of land titles in the United States is a gigantic welfare program designed to help both rich land speculators and poor white “settlers.” They got their titles from the federal government, but the federal government seized its title from Native nations. The lands were not empty, and they were not unowned.<sup>15</sup> They were owned and ruled by Native nations, taken by force by the federal government, and transferred to other people. The United States was founded on the idea that every (white) man should have the chance to become an owner. But the corollary of that idea is that Native people had no right to ownership. To enable white invaders access to property they could own, the United States expanded westward—to lands that were occupied and already owned by others.<sup>16</sup> That meant wars with the occupants of the lands the invaders coveted—invasion, dispossession, a cruel march west on the Trail of Tears, confinement to reservations, and limitations on tribal sovereignty, religion, and culture.

There was, of course, another massive inegalitarian dispossession in our history. I refer, of course, to the system of race-based slavery. The United States was founded on dispossession, not just of Native nations and English and American lords, but of the labor and liberty of Black persons forced to endure servitude, violence, degradation, and deprivation of family and personhood. Their unremunerated labor built, not just the South, but the North as well, and by extension, the entire nation. There have never, in all our history, been reparations for either the tortious enslavement of human beings or the expropriation of their labor.<sup>17</sup> And their freedom meant the destruction of the property rights of enslavers over those they claimed as their property. Slavery

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14. For longstanding justifications for conquest, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

15. See generally Joseph William Singer, *The Lands Were Not Empty*, 2 AM. J.L. & EQUAL. 285 (2022) (reviewing GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2021)).

16. See generally *Indian Removal Act: Primary Documents in American History*, LIBR. CONG., <https://guides.loc.gov/indian-removal-act> (last visited June 3, 2023) (research guide containing resources related to the Indian Removal Act and its effects, including the Trail of Tears).

17. Rashawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, BROOKINGS INST. (Apr. 15, 2020), <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> [<https://perma.cc/G7N2-F4Y4>] (detailing a history of missed opportunities for reparations).

was itself a dispossession of the property of enslaved persons. Conversely, freedom only came about by another dispossession and redistribution of rights. That dispossession recognized, for the first time, the rights of formerly enslaved persons to acquire property.<sup>18</sup>

But the expropriation of the labor of Black persons did not actually stop with the Thirteenth Amendment. With the end of Reconstruction, the growth of Jim Crow segregation, the terror of lynching, the onset of racial zoning and racially restrictive real estate covenants, the exclusion of Black people from the benefits of New Deal minimum wage laws and low-cost financing for home ownership, and the continued discriminatory effects of zoning laws to this very day, we can see that the past is not past.<sup>19</sup> We have had laws in place over the last 200 years that have affirmatively perpetuated racial inequalities in access to property. While some of those laws have been repealed, their consequences endure. Other laws and practices—like zoning laws—are still on the books, and they continue to cause enormous inequalities of wealth on the basis of race.<sup>20</sup>

One might tell another episode of this story by focusing on the rights of women. It was not until the middle of the 19th century that married women were entitled to control their own property. The Married Women's Property Acts stripped husbands of the legal power to control the property of their wives.<sup>21</sup> That gave married women, for the first time, the legal right to control their own property. But it was not until the 20th century that management powers over property that was jointly owned by husbands and wives were taken from husbands and shared equally between the spouses.<sup>22</sup> And it was not until the mid-20th century that non-community property states required equitable distribution of property acquired during marriage upon death or divorce.<sup>23</sup> It is still the case that the labor in the home is (mostly) uncompensated, and since the work of taking care of the house, the children, the elderly, and relatives with disabilities is mostly done by

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18. See 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

19. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

20. See, e.g., Richard D. Kahlenberg, *Zoned Out in Texas: How One Mother Overcame Dallas's Discriminatory Housing Laws*, CENTURY FOUND. (Jan. 12, 2022), <https://tcf.org/content/report/zoned-texas-one-mother-overcame-dallass-discriminatory-housing-laws/> [<https://perma.cc/CTD8-6MZ5>].

21. JOSEPH WILLIAM SINGER & NESTOR M. DAVIDSON, *PROPERTY* § 8.2.3, at 363, § 9.2.2, at 399–401 (6th ed. 2022).

22. See *Kirchberg v. Feenstra*, 450 U.S. 455, 459–60 (1981) (holding that a state law that allowed husbands to control property jointly owned with their wives violates the Equal Protection Clause of the Fourteenth Amendment). *But see West v. First Agric. Bank*, 419 N.E.2d 262, 272 (Mass. 1981) (refusing to retroactively apply a change in tenancy by the entirety law granting women equal management powers over property).

23. SINGER & DAVIDSON, *supra* note 21, § 9.3.1, at 401–03.

women, that means that men acquire property from their labor while women do not.<sup>24</sup> Marital property law did become more equal, but we have a ways to go in that regard. Importantly, for women to have control of their own property—for married women who work in the home to have any property *at all*—the law stripped husbands of some of their property rights and transferred those property rights to their spouses. More equal access to property for women only happened because the state divested men of their management powers over the property of their wives and vested those rights in married women. And full equality has yet to be established given our persistent refusal to allocate property resources to those who provide free labor taking care of families in the home.

Why tell these stories? Why listen to them? They teach us that property rights come from legal structures that allocate ownership. They teach us that property rights have been abolished and/or redistributed over time. They teach us that some of our property rights originate in acts of dispossession of other owners. They teach us that some of those dispossessions and redistributions moved us in a democratic or an egalitarian direction, promoting widespread access to property and the freedom to use it in ways that make life pleasant and meaningful, while other dispossessions and redistributions moved us in an inegalitarian and oppressive direction. The moral of these stories is that *our property rights are not ours alone*. Property rights originate, and are based on, laws that made it both possible—and impossible—to become an owner. We owe our rights—and our lack of rights—to laws. Those laws need to be identified and evaluated to see how we got here and to understand how they promote freedom and equality—and how they deny it.

## II. EVERYONE SHOULD HAVE SOME

Robert Hargrove Montgomery taught economics at the University of Texas from 1922 until 1963.<sup>25</sup> He was a liberal Democrat who served in the Franklin Delano Roosevelt administration. Because he was an outspoken proponent of government regulation of business, he was accused of teaching communism and was condemned in the 1940s by conservatives in the Texas legislature and the University Board of Regents. In 1948, he was haled before the legislature to defend himself. The legislative committee asked him if he belonged to any radical organizations. He answered “that he belonged to the two most radical organizations in existence, ‘the Methodist Church and the Democratic

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24. Megan Brenan, *Women Still Handle Main Household Tasks in U.S.*, GALLUP (Jan. 29, 2020), <https://news.gallup.com/poll/283979/women-handle-main-household-tasks.aspx> [<https://perma.cc/M4P7-2L8S>].

25. Robert J. Robertson, *Montgomery, Robert Hargrove (1893–1978)*, TEX. STATE HIST. ASS’N (Feb. 6, 2009), <https://www.tshaonline.org/handbook/entries/montgomery-robert-hargrove> [<https://perma.cc/S26D-CJ5Z>].

Party.’”<sup>26</sup> And when they asked him if he believed in private property, he said, “I do, sir, and I believe in it so strongly that I want everyone in Texas to have some.”<sup>27</sup>

This story is evocative for me. I value the institution of private property because it gives us the means to live comfortably and in dignity. It gives us a place in the world where we can have privacy and security and freedom, where we can cultivate friendships, be with our families, worship, have fun, cook pancakes, watch the news, and display signs supporting a candidate for the local school board.

Does the right to enjoy property belong to the few or the many? In a feudal society or a slave society or an aristocracy, property rights belong to the few. They belong to lords, not commoners; enslavers, not enslaved persons; the rich, not the poor. But in a free and democratic society that aspires to treat each person with equal concern and respect, property rights belong to the many. Property rights belong to *everyone*. They are not the province of a lordly class, a superior racial caste, people of the male persuasion, or members of an established religion.

Why do democracies seek to ensure access to property for every person? They do so because property is essential to liberty. If all people are “created equal,” then every human being is entitled to liberty. If that is so, it follows that every person is entitled to have and enjoy property. What type of property? How much? If we are serious about the equal status of every person—every grown-up, every child, every Native, every immigrant—then this means that our system of property laws must make it *realistically possible for each person* to obtain the resources needed to live our lives fully and joyfully.

For that to be true, property law must not prevent us from acquiring the property we need to live comfortably, and it must affirmatively provide a legal, political, social, and economic infrastructure that will ensure that we—*all of us*—can acquire property—not just in theory, but in fact. Property law is not just meant for owners—those who already own property. It is meant for those who need—but do not have—property. It is meant for homeless persons. It is meant for caretakers who protect and support children, the elderly, and those with disabilities, and who do so without a salary. It is meant for workers trying to earn enough to afford an apartment and food and medical care and a night out on the town, even though the law allows payment of wages too low to pay for basic necessities.<sup>28</sup>

The democratic ideal of property for all is real, but it is not a reality. Because we are a democracy that values liberty and equality, we have a *right to have property*. And that means we have a right to get prop-

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26. *Id.*

27. JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* 87 n.3 (1983).

28. See Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 MINN. L. REV. 605, 609 (2022).

erty if we do not have it. But our property law system fails to live up to its own ideals. For example, Jeremy Waldron has written about the potential for arrest of homeless persons who sleep on public lands in violation of the law.<sup>29</sup> He noted that the freedom to sleep requires a place where we are free to lie down.<sup>30</sup> But if every private owner has the right to exclude us and if they exercise that right and if the city makes it illegal to sleep on sidewalks and in public parks, then without saying so directly, we have adopted a property law system that has made it illegal for a certain class of human beings to sleep. But human beings cannot live without sleeping, and that means we have turned a class of people into outlaws who have no right to exist. When homeless people violate the law by sleeping on public or private property of others, police may come and tell them to “move along.” But some people have begun responding: “Move along to where?”<sup>31</sup> The lack of property means there is no place they can move to without violating the law. If property is valuable because it gives us a basis to live and to exercise liberty, and if democracies support the notion of equality of persons before the law, then it must be the case that our property law system, as a whole, must make it realistically possible for people to acquire property, to become owners. We must not make it illegal for human beings to lie down and rest.

We cannot have it both ways. Either every person is a part of “We the People” or they are not. A property system in a free and democratic society rejects titles of nobility; instead, it ensures that *every* person can have property in sufficient amounts so they can live in dignity. That will happen only if we structure the law to make access to property physically, factually, and legally possible. It will *not* be possible if we define the rights of “owners” so broadly that they amass the power to prevent other people from enjoying the benefits of ownership. If we can define ownership to deny equal access to property, we can also define it to promote equal access. Property law is built on underlying values, and if we focus on those values, we can figure out what duties we must place on owners to ensure that they are not the only ones who enjoy the benefits of ownership. Property law protects the rights of owners, but to be true to its underlying values, it must also ensure that non-owners also can *have property*. Equality and property are not enemies, unless we make them so—unless we structure our property laws to defy our democratic ideal that each person is

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29. See Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 311–15 (1991) (discussing laws and ordinances designed to curtail and prohibit certain activities, such as sleeping, in public places).

30. *Id.* at 310–11.

31. Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy (A Tribute to André van der Walt)*, in TRANSFORMATIVE PROPERTY LAW: Festschrift in Honour of AJ van der Walt 1, 1 (Gustav Muller et al. eds., 2018) (emphasis omitted).



of infinite value, equal before the law, and entitled to pursue happiness.

### III. A WELCOME TERRAIN OR ONE FILLED WITH DREAD?

Human beings understand the moral implications of human relationships partly by reference to values, norms, principles, and rules, and partly by reference to moral intuitions that arise when we hear what happened. This is a fixed feature of moral reasoning and of both United States law and law school education. Consider the fact that every judicial opinion starts with a story. We tactfully call it “the facts,” but it is a story, nevertheless. We read those facts in judicial opinions; we discuss the facts when we teach law in our law schools. When we do this, we learn what happened. We learn who did what to whom. We learn what the problem is, who made a complaint, who has a defense or a counterclaim. We learn *what is at stake*. And most stories are not neutral. They may identify a victim and a villain. They may show why we feel pulled in opposite directions, why the case is hard. “The facts” tell us whose story it is—who is the main character and who are the supporting characters. They tell us what we should be worried about, what the problem is, and who caused it.

This year the Supreme Court heard and decided the case of *303 Creative LLC v. Elenis*.<sup>32</sup> The story of the case, according to petitioner Lorie Smith, is that she started a commercial design studio so she could use her artistic abilities to craft websites “so she could promote causes close to her heart.”<sup>33</sup> She wants to start designing wedding websites “to celebrate weddings and express what she believes is the beauty of God’s design for marriage.”<sup>34</sup> But, she says, “Colorado denies her that right.”<sup>35</sup> Colorado law defines providers of website services as “public accommodations” like restaurants and retail stores;<sup>36</sup> that is because the Internet is where commerce happens today and where it will happen in the future. Colorado law prohibits sexual orientation discrimination in public accommodations,<sup>37</sup> so Smith is correct that it requires her to provide wedding websites to same-sex couples if she offers those services on the open market to male-female couples. Otherwise, she is discriminating on the basis of both sex and sexual orientation in violation of Colorado law. But, Smith argues, she cannot do that because it would violate her religious beliefs and force

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32. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *rev’d*, 143 S. Ct. 2298 (2023).

33. Brief for the Petitioners at 2, *303 Creative LLC*, 142 S. Ct. 1106 (filed May 26, 2022) (No. 21-476).

34. *Id.*

35. *Id.*

36. *See id.* at 7; *see also* COLO. REV. STAT. § 24-34-601(1)–(2)(a) (2021).

37. COLO. REV. STAT. § 24-34-601(2)(a) (2021).

her to “celebrate” unions that are not “marriages” in the eyes of God.<sup>38</sup>

Smith just wants to be left alone to express her religious beliefs, to provide services she believes in. She is asking the state to get out of the way so she can live her life according to God’s plan. She doesn’t mean to hurt anyone. They are free to live as they choose; they just can’t force her to participate in a practice that goes against her religious commitments, and they cannot force her to write words of praise for something she condemns. Why should the government force her to celebrate a religious rite that violates her own religious commitments? How can it put words in her mouth? It is as if a Jewish child were being forced to recite a Christian prayer in order to attend a public school. Nor do her actions hurt anyone else; there are lots of websites where you can go to set up your own wedding website, and many of them even let you do it for free. Go live your life and let me live mine.

It’s a powerful story, and if it were the only way to understand the situation, then Lorie Smith would be a victim of an oppressive state that is compelling her to speak, to profess beliefs she does not share, and to celebrate a religious event that violates her commitment to live according to God’s will. She is a member of an oppressed minority who is seeking an exemption from a law that would force her to speak words of praise for something she condemns.

Is there another way to understand the story? What might the customers say if the law protects her right to deny them service? Oddly, at this point in the litigation, that story is missing. That is because Smith has not yet opened her wedding website design business.<sup>39</sup> She has no customers, and no one has been refused service. She sued for a declaratory judgment that the state cannot punish her for refusing to sell her services to same-sex couples.<sup>40</sup> The people she wants to turn away have no names, no faces.

We have no stories about the people she has turned away because they have not appeared on her doorstep yet. We have no stories of the people who have had to look elsewhere, who have been told their marriages are not real, that their marriages are abhorrent, that they are violating God’s plan. We have not seen the wording of the notice on her website that conveys the message that “gay people not welcome.” What will those words be? How politely will she let people know that her services are not for them? We have not heard from the customers who—if she wins—will have to consult the gay equivalent of *The Negro Motorist Green-Book*, which informed Black people of the restaurants and hotels and private homes that would serve them as

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38. Brief for the Petitioners, *supra* note 33, at 3.

39. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021), *rev’d*, 143 S. Ct. 2298 (2023).

40. *See id.*

they traveled through hostile terrain in the South.<sup>41</sup> We have not heard the stories of those who will have to call ahead to see if they are welcome. To understand what Lorie Smith is asking for, we need to write the story on the other side. It might go something like this.

My colleague Randall Kennedy recounts the trips his family took when he was a child traveling from his home in Washington, D.C., to his birthplace in South Carolina. It was the early 1960s, and his parents “packed coolers filled with sodas, deviled eggs, chicken wings, sandwiches of all varieties, cookies, and candy.”<sup>42</sup> At the time, he thought they just wanted to keep the kids occupied and happy during a long eight-hour trip.<sup>43</sup> “Only later,” he says, did he “learn that their preparations stemmed from fear”<sup>44</sup>:

Having fled the Jim Crow South in the Fifties, my parents were seeking to limit our contact with filling stations, restaurants, motels, and other public accommodations along the way, where their children might be snarled at by white cashiers and attendants. As I matured, I saw that once we crossed the Potomac River and ventured into Virginia, we encountered a terrain that filled my parents with dread.<sup>45</sup>

The car was filled with food because they were not welcome at most restaurants.<sup>46</sup> The trip was long because it was hard to find a place to stay for the night.<sup>47</sup> The terrain was filled with dread because it was a country replete with racial terror—terror that came from lynching, abuse, disdain, dispossession, oppression, and segregation.<sup>48</sup> It was not until the passage of the 1964 Civil Rights Act that restaurants, hotels, places of entertainment, and gas stations had an obligation under federal law to serve customers without regard to race.<sup>49</sup> More than the duty to serve, that law imposed a duty to offer “full and equal enjoyment” to all customers, no matter the color of their skin.<sup>50</sup>

Private property owners are generally free to exclude non-owners from their property, but since the civil rights laws of the 1960s, businesses open to the public cannot refuse service to customers because of their race. People cannot become owners if no one will sell to them. And we cannot have a democratic system of freehold property if businesses have the power to deny service to a historically oppressed racial group. Property law gives owners the right to exclude, but it also

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41. VICTOR H. GREEN, *THE NEGRO MOTORIST GREEN-BOOK* (1941 ed.).

42. Randall Kennedy, Essay, *The Civil Rights Act's Unsung Victory: And How It Changed the South*, *HARPER'S MAG.*, June 2014, at 35, 35.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See id.* at 35–37.

47. *See id.*

48. *See id.*

49. 42 U.S.C. § 2000a(a)–(b).

50. *Id.* § 2000a(a).

protects the *right to acquire property*. That is why the Civil Rights Act of 1866 says that all “citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . real and personal property.”<sup>51</sup> You cannot *have* property if you cannot acquire it. You cannot acquire it if no one will sell it to you. That means you cannot be stopped at the door of a retail establishment and denied entry because of your race. Our civil rights laws mean that no one can deny you housing, employment, or the right to enter a store and demand service if they are doing so because of your race.

Nor does it matter if the reason they want to deny you service is their religious beliefs or commitments. We value religious liberty, but the liberty we protect is the liberty *of the customer*, not the store owner. The same 1964 statute that prohibited race discrimination in public accommodations prohibited discrimination because of religion.<sup>52</sup> That means that you cannot be denied service in a hotel or restaurant because you are Jewish or Catholic or Muslim or Baptist. Civil rights laws protect religious liberty, but the liberty they protect is that of the tenant, not the landlord; the employee, not the employer; the customer, not the store owner.

It was not until quite recently that about half the states added “sexual orientation” to their public accommodation statutes.<sup>53</sup> That means, of course, that half the states have no protection for gay people when they enter the marketplace. When then-Governor Mike Pence signed a bill in Indiana that appeared to give business owners the freedom to refuse service to gay customers if it would violate the owner’s religious beliefs, singer Audra McDonald tweeted: “Some in my band are gay & we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all?”<sup>54</sup> And that, in a nutshell, is the customer’s story.

The customer’s story in *303 Creative* is the story of a customer who cannot shop for services online the way other people can. They cannot search for wedding website designers. Instead, they have to “call ahead.” They have to *first* check whether the business takes *people like them*. They have to search for “gay-friendly businesses.” *Before* they shop, they need to hope that a friendly person has compiled a website listing the places where they are welcome as customers. They need to be ready to discover that no one will serve them. Or they have to steel themselves when they enter a store or open a website lest the business have a public notice that they are not part of the public, that

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51. *Id.* § 1982.

52. *Id.* § 2000a(a).

53. See generally Paul Vincent Courtney, Comment, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497, 1500–01 (2015).

54. Brian Wise, *Audra McDonald Takes to Twitter to Criticize Indiana “Religious Freedom” Law*, N.Y. PUB. RADIO (May 27, 2015), <https://www.wqxr.org/story/audra-mcdonald-takes-twitter-criticize-indianas-law/> [<https://perma.cc/KJ63-LPUM>].

they are not the right sort of people. Or perhaps they will face a public confrontation where they are told, in front of other people, that they are not welcome in the store.<sup>55</sup>

Elizabeth Sepper explains that people expect to be able to walk into a public accommodation and receive service.<sup>56</sup> The “provision of service requires no reason giving,” and the “fact that a business sells an item to someone does not imply its endorsement.”<sup>57</sup> It is *only* when people are *denied* service that they hear a clear message—that they do “not merit status as a consumer.”<sup>58</sup> And in a *public* accommodation, that message is given publicly and in front of other customers.

If a person cannot assume that businesses will sell their services to people like them, they have to worry before they go anywhere. They have to plan. The world becomes a checkerboard of friendly and hostile terrain. This store lets us in and that one doesn't. They no longer face a marketplace, but *segregated* marketplaces: one where they are welcome and treated as members of the public and one where they are unwelcome. The customer's story is the story of people who may feel compelled to stop holding hands before they enter the restaurant. It is the story of people who will be confronted with the sexual orientation equivalent of “Whites only” signs as they shop for goods and services. It is the story of people booking a hotel for a wedding ceremony or reception or the bridal suite who have to ask, “Do you serve people like me?”

Lorie Smith wants to be left alone to celebrate marriage as she sees it, but nothing stops her from creating as many websites as she wants to celebrate the beauties of “a biblical view of marriage.”<sup>59</sup> But that is not what she is doing. Rather than expressing herself and her beliefs, she is offering services in the marketplace for a fee to any customer who walks through her virtual door. She is selling property—access to a virtual place where information about your wedding can be viewed by your loved ones. She is entering the world of the marketplace—a world the legal system in Colorado has opened to all people, regardless of their sexual orientation. She is offering to convey the messages of her customers about their upcoming wedding with her design assistance.<sup>60</sup> She is selling space and services to the general public, just not everyone in the public. She is happy to serve customers of any religion and any sex, just not couples of the same sex. In her preferred world,

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55. See Elizabeth Sepper, *Free Speech and the “Unique Evils” of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 283.

56. *Id.* at 276.

57. *Id.* at 290.

58. *Id.* at 291–92.

59. Brief for the Petitioners, *supra* note 33, at 19–20.

60. See James M. Oleske Jr., *The ‘Mere Civility’ of Equality Law and Compelled-Speech Quandaries*, 9 OXFORD J.L. & RELIGION 288, 301–02 (2020), <https://doi.org/10.1093/ojlr/rwaa009> (explaining that an objective observer would not attribute the speech on a birthday cake to the baker rather than the person who bought the cake).

the legislature in Colorado actually has no power to ensure equal access to the marketplace without regard to sexual orientation. Instead, she has the right to operate a business that is closed to gay people.

But if marriage is an inherently religious matter, then the customers *also* have a right to practice their religion. Their marriage may violate Lorie Smith's convictions and religious beliefs, but the First Amendment gives her no right to impose her religion on others. The Colorado Anti-Discrimination Act prohibits stores and service providers from denying service because of the *customer's religion*.<sup>61</sup> But that's not what I'm doing, she might say. It's not you; it's me. Go get married; just don't involve me. Don't force me to participate. But the restaurant owners in the South *also* thought that it was against God's plan for people of different races to eat together or share beds in a hotel. They also thought that forced service "'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'"<sup>62</sup> The Supreme Court dismissed that claim by a restaurant owner in a footnote and said it was "patently frivolous."<sup>63</sup>

If Smith would refuse to sell the exact same website design and message to a same-sex couple that she would sell to a male-female couple—on the ground that their "marriage" is not a "marriage in God's eyes"—doesn't that mean that what matters to her is not the content of her speech, but the sex and religion of the customers? Nothing stops her from designing Christian wedding websites and selling the use of those websites to anyone who wants to use them. Colorado law does not stop her from limiting the nature of the product she sells; it does not, for example, prevent anyone from creating a bookstore that sells only books about Judaism or only books about Christianity. But she cannot offer wedding websites to people of all religions and then refuse to serve a couple because the spouse is of the wrong sex. Smith complains that state law requires her to send a "message[ ] of approval or endorsement" if it requires her to serve same-sex couples, but "[w]hat really seems to be going on . . . is that [she] want[s] to send a distinct message of disapproval by withholding services that [she would otherwise] provide as a matter of course."<sup>64</sup>

But, of course, the Supreme Court of 2023 is not the Supreme Court of 1968. Perhaps religion is an insufficient reason to deny goods and services because of race, but a sufficient reason to deny goods and services because of sexual orientation. Perhaps there is no constitutional free speech right to post a "Whites only" sign or a sign that says, "Catholics need not apply," but there is a First Amendment right to say "we serve couples of all faiths unless they are of the same sex." Perhaps reasons can be given why the marketplace should be open to

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61. COLO. REV. STAT. § 24-34-601(2)(a) (2021).

62. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968).

63. *Id.*

64. Oleske, *supra* note 60, at 304.

mixed-race married couples but not same-sex ones.<sup>65</sup> Perhaps religious reasons to deny service are legitimate in one context but not the other. Perhaps the Supreme Court will explain this to us someday—perhaps even this year.

#### IV. STORIES, VALUES, AND PROPERTY LAW

Stories do not tell us what to do. Lorie Smith has free speech claims that ultimately prevailed in the Supreme Court.<sup>66</sup> But we cannot understand the implications of such a win unless we know what the world will be like in that case. We cannot decide what to do without thinking about the implications of the legal rules we adopt and enforce. Stories do not tell us the answer, but they help us think about those consequences. And perhaps more importantly, they help us understand *what our actions mean*. They tell us about the world we are creating by our choice of legal rules. They show the law from the first-person perspective. The fact that a person has told us their experience does not mean they get to win. But stories about social relationships help us to see the moral and personal impact of legal rules—the experience of being subject to law. They help us to specify what our values mean in concrete cases. We start from values we share—norms such as liberty, equality, and democracy—but we have competing interpretations of what those values mean in practice. How can we tell which interpretations are the right ones? Stories help us do this. We cannot fully comprehend what a rule choice means in human terms unless we know the stories we will enable and those we will crush.

We cannot enjoy liberty if we have no property. If each of us is equal before the law, then property law in a free and democratic society must be structured so that each and every person has a realistic ability to acquire the resources they need to live in dignity and comfort. We need to sleep at night, and that means we need to have a place to do so. We need access to the marketplace to obtain the things we need to live, and that is why the market should be open to all. When we go shopping, we should face a welcome terrain, not one filled with dread. We should not have to wonder where we can lie down to rest at night, and when we enter the market to buy goods and services, we should not have to call ahead to see if they serve “our kind.”<sup>67</sup>

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65. See generally James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 123–25 (2015).

66. As this article was going to print, the Supreme Court ruled in favor of Lorie Smith, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

67. See Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 930 (2015).

