

ARTICLES

NO RIGHT TO EXCLUDE: PUBLIC ACCOMMODATIONS AND PRIVATE PROPERTY

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"[I]f a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies." An attempt to apply this doctrine generally at the present day would be thought monstrous.¹

—Oliver Wendell Holmes, Jr. (1879)

Under a true interpretation of the common law all business is public, and the phrase "private business" is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profession and a public calling.²

—Edward A. Adler (1914)

I. THE PUZZLING GAP IN PUBLIC ACCOMMODATIONS LAW

A. *Why Retail Stores May Not Be Public Accommodations*

While Christmas shopping in New York City, Professor Patricia Williams passed a Benneton store. She saw a sweater in the window that she thought might be perfect for her mother. The door to the store was locked, however, and the clerk inside refused to press the buzzer to let her in, mouthing the words, "We're closed," in her direction. Professor Williams, an African-American, was left standing outside while several white customers conspicuously browsed inside the store. In print and in public appearances, she has more than once explained the "blizzard of rage" she felt at being subjected to this humiliating treatment.³

Upon hearing this story, people assume that retail stores have no right to exclude customers solely on the basis of race. This perception appears to have the strong support of both custom and law. In April 1993, for example, a Denny's Restaurant in Maryland failed to serve six African-American Secret Service agents while the white agents with them were served second and third helpings.⁴ On May 24, 1994, Denny's Restaurants agreed to pay more than \$54 million to settle lawsuits filed by these and other black customers who had either been refused service or otherwise treated improperly in its restaurants in violation of federal and state public accommodations laws.⁵

¹ Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 628-29 (1879), reprinted in OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 203 (Dover Publications, Inc., 1991) (1881) (quoting *Lane v. Cotton*, 88 Eng. Rep. 1458, 1464 (K.B. 1710)).

² Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 158 (1914).

³ Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

⁴ Ana Puga, *Denny's to Pay \$46m Damages in Discrimination Settlement*, BOSTON GLOBE, May 25, 1994, at 1, 12.

⁵ Stephen Labaton, *Denny's Restaurants to Pay \$54 Million in Race Bias Suits*, N.Y. TIMES, May 25, 1994, at A1. On December 12, 1995, it was reported that the 294,537 plaintiffs in the two class-action lawsuits against Denny's will begin receiving their share of the settlement, now reported to be \$46 million. Betsy Pisik, *Denny's Mails Checks to Suit's Black Diners*, WASH.

The Denny's case received substantial public attention. The conduct was outrageous and was universally condemned. The huge settlement appeared to vindicate widely shared values: discrimination on the basis of race in places of public accommodation has no place in a society committed to individual dignity and equal protection of the laws. At the same time, it was not surprising to most people that such conduct could and did happen. In another outrageous, widely publicized incident, two African-American teenagers, Alonzo Jackson and Rasheed Plummer, were detained at an Eddie Bauer outlet store in a mostly black middle-class suburb in Prince George's County, Maryland by two white police officers moonlighting as security guards. One officer questioned Jackson about his Eddie Bauer shirt, purchased at the same store the day before. When he could not prove that he had purchased the shirt, he was ordered to take off his shirt and leave it at the store until he could produce a receipt—even though a store employee remembered making the sale. After leaving the store in an undershirt and jacket, Jackson went home and miraculously located the receipt and retrieved the shirt from the store.⁶ These cases suggest both the continuing problem of racial discrimination in the marketplace and the strong sense that businesses open to the public have a duty to serve the public without regard to race. This strong intuition suggests that it would be unthinkable if the law did not pro-

TIMES, Dec. 12, 1995, at B10. It was further reported that more than 100 employees have been fired for discriminatory behavior. *Id.*

⁶ Courtland Milloy, *Teen Stripped of More Than Just a Shirt*, WASH. POST, Nov. 15, 1995, at D1; Cathy Young, *Indignity of "Rational" Discrimination*, DET. NEWS, Dec. 19, 1995, opinion section, at A9. Jackson has since filed an \$85 million anti-discrimination suit against Eddie Bauer. Judith Evans, *Eddie Bauer's Tarnished Local Image; As Its Fashions Become Popular with Urban Youth, Retailer Deals with Fallout of P.G. Incident*, WASH. POST, Dec. 30, 1995, at C1; see also PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG; ON THE PERSISTENCE OF PREJUDICE* (1995); Lena Williams, *When Blacks Shop, Bias Often Accompanies Sale*, N.Y. TIMES, Apr. 30, 1991, at A1; Monte Williams, *The Trials of a Member of a Special Club*, N.Y. TIMES, Oct. 4, 1995, at C1. As Professor Regina Austin notes:

Blacks are treated as if they were all potential shoplifters, thieves, or deadbeats. There can hardly be a black person in urban America who has not been denied entry to a store, closely watched, snubbed, questioned about her or his ability to pay for an item, or stopped and detained for shoplifting.

Regina Austin, "A Nation of Thieves": *Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 148 (footnotes omitted).

In another incident in a Boston suburb, a children's store contacted a police officer to stop two Asian-American women, Lily Lee and Judy Wong, after they left the store to search their bags because the clerks found several empty hangers after the women had spent some time browsing in the store. Eileen McNamara, *Shoppers Won't Buy Store's Bias*, BOSTON GLOBE, Nov. 25, 1995, at 13. The police officer stopped the women as they were getting into their car, demanding that they produce their shopping bags with receipts. The officer failed to question their friend, Joanne Walker, a white woman, who had been with them the entire time shopping in the store and was entering the same car, shouting at her to be quiet when she objected to his search of her friends. *Id.*

vide a remedy for a patron of a business open to the general public who has been excluded or treated unequally on the ground of race.⁷

In the case of restaurants, this intuition is supported by federal law. But in the case of retail stores, the law is not so simple. Did Professor Williams or Alonzo Jackson, for example, have a remedy under the federal public accommodations law of 1964? The answer is almost certainly no. Title II of the Civil Rights Act of 1964 regulates restaurants, innkeepers, gas stations, and places of entertainment. Retail stores are not covered.⁸ Most people are surprised, even shocked, to learn this. What accounts for the exclusion? Does it mean that retail stores are affirmatively entitled to exclude customers on the ground of race?

Perhaps a remedy exists under current interpretations of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981 and § 1982. Section 1981 grants “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens,”⁹ while Section 1982 grants “all citizens . . . the same right . . . as is enjoyed by white citizens . . . to purchase . . . personal property.”¹⁰ Virtually every law professor with whom I have casually spoken assumes that the Supreme Court would interpret the Civil Rights Act of 1866 to prohibit racially motivated refusals to serve customers on the basis of race in all businesses open to the public. Perhaps they are right. I hope they are. Yet a careful reading of the current case law interpreting sections 1981 and 1982 yields less than iron-clad assurance that the Supreme Court would so interpret these laws. The Supreme Court has held that Sections 1981 and 1982 govern private conduct of nongovernmental ac-

⁷ On the other hand, a widely discussed article by Richard Cohen in the *Washington Post Magazine* spoke sympathetically about the rationality of “jewelers” excluding certain patrons from their stores and cab drivers who refused to serve passengers on the ground of race. Richard Cohen, *Closing the Door on Crime*, WASH. POST, Sept. 7, 1986, Magazine, at 13. This article sparked an exchange in the *New Republic* that similarly contained statements by a number of authors sympathetic to this position with others critical of it. Symposium, *The Jeweler's Dilemma: How Would You Respond?*, NEW REPUBLIC, Nov. 10, 1986, at 18 (comments by Walter E. Williams, Ronald Hampton, J. Anthony Lukas, Rhonda Schoem, Roger Starr, Juan Williams, Michael Walzer, Jefferson Morley, Crocker Coulson, and the *New Republic* editors). Compare Walter E. Williams, *The Intelligent Bayesian*, NEW REPUBLIC, Nov. 10, 1986, at 18 (arguing that the store owner who is an intelligent user of statistics will rationally exclude “young black males”) with Clarence Page, *Black Youths: Buzz In or Buzz Off?* CHI. TRIB., Nov. 2, 1986, § 5 (Perspective), at 3 (suggesting what this principle might mean if it were taken to extremes).

⁸ One could make complicated arguments to interpret the statutory list as illustrative rather than exhaustive, but this line of reasoning is unlikely to be accepted by the Supreme Court given the text of the law and the cases adjudicating the question of whether a business does or does not fit into one of the listed categories. For an attempt to make the argument nonetheless, see *infra* text accompanying notes 592-623.

⁹ 42 U.S.C. § 1981 (1994).

¹⁰ Section 1982 states that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (1994).

tors.¹¹ However, the Supreme Court has never held that the Civil Rights Act of 1866 constitutes a general public accommodations law.

Although the matter is far from certain,¹² there is reason to believe that the Supreme Court, as currently constituted, might very well *not* interpret either Sections 1981 or 1982 as requiring a retail store to admit customers regardless of race.¹³ The most obvious problem with finding a remedy under Section 1981 is that this interpretation of the Civil Rights Act of 1866, as repassed in 1870, arguably renders the federal public accommodations law of 1875 entirely superfluous.¹⁴ Although the Supreme Court has interpreted the Civil Rights Act of 1866 as independent of, and supplementary to, the Civil Rights Acts of 1964 and 1968, it is quite another matter to find it duplicative of a statute passed only five years after its repassage in 1870—especially when that statute occasioned an enormous amount of controversy. If there is a way to distinguish the cases that have applied the Civil Rights Act of 1866 to private conduct from the conduct encompassed by the public accommodations law of 1875, there is reason to believe that the current Supreme Court might adopt such a distinction. One obvious distinction is that the duty to serve the public incumbent on public accommodations might be conceptualized, not as a right to enter into contracts or a right to purchase property, but as a right to enter real property possessed by another—a right not definitively included in either Sections 1981 or 1982. If we consider the Supreme Court's recent habit of adopting ungenerous interpretations of civil rights acts, we might well conclude that the assumption that the Supreme Court would necessarily interpret federal law to prohibit racial discrimination in access to retail stores constitutes wishful thinking.

¹¹ *Runyon v. McCrary*, 427 U.S. 160, 168-72 (1976); *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 417-37 (1968); see also Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199 (arguing that the Civil Rights Act of 1871, like the civil rights acts of 1866 and 1870, was intended to regulate the conduct of private persons as well as state actors).

¹² See *infra* text accompanying notes 623-62.

¹³ I believe the Court should interpret the prohibitions against racially motivated refusals to deal implicit in § 1981 and § 1982 as encompassing rights not to be excluded from businesses open to the public. However, I am not confident that this is how the Court would interpret these Reconstruction era statutes. My uncertainty on this score motivates this Article. In the absence of a federal remedy, the only remaining remedies must be found in state law. In those states without state public accommodations laws, the common law is the last bulwark that can protect equal access to public accommodations. For this reason, I will argue in this Article that we should stop characterizing the law as immunizing retail stores from the duty to serve the public.

¹⁴ See *infra* text accompanying notes 637-48. Of course, the Supreme Court did find a private remedy for housing discrimination under § 1982 in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), arguably rendering superfluous the recently enacted Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (1994). On the other hand, the Fair Housing Act did include remedies not available under § 1982.

Nor does the common law of New York provide a remedy for Professor Williams. Rather, the common law in New York is that, with the exception of innkeepers and common carriers, privately owned premises that serve the public may exclude individuals arbitrarily unless a statute specifically prohibits the discriminatory conduct.¹⁵ The presumption, in other words, is that businesses, as property owners, have the right to exclude non-owners unless that right is limited by statute. Businesses similarly have the right to refuse to contract with anyone with whom they do not wish to deal unless required to do so by express statutory command. This presumption appears to be the law in every jurisdiction in the United States except the State of New Jersey.¹⁶

The most likely remedy under New York law, therefore, comes from the New York public accommodations statute¹⁷ and from New York City ordinances.¹⁸ What does this mean for the seven states that do not have statutes prohibiting race discrimination in retail stores (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas)? It means that, in those seven jurisdictions, comprising more than twenty percent of the population of the United States (21.36% to be exact),¹⁹ it may well be that *no law prohibits retail stores from discriminating on the basis of race in their choice and treatment of customers*.²⁰ Consider further that at least eleven jurisdictions have no provision protecting the public from sex discrimination in public accommodations (Alabama, Arizona, Florida, Georgia, Kentucky, Mississippi, Nevada, North Carolina, Puerto Rico, South Carolina, and Texas). Again, in those jurisdictions, it is almost certainly the case

¹⁵ *Madden v. Queens County Jockey Club*, 72 N.E.2d 697, 698 (N.Y. 1947).

¹⁶ *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982). For a discussion of the law in New Jersey, see *infra* text accompanying notes 696-97.

¹⁷ N.Y. CIV. RIGHTS LAW § 40 (McKinney 1990).

¹⁸ N.Y., N.Y. ADMIN. CODE tit. 8, §§ 8-102(9), 8-107(4) (1991). Yet it remains to be seen whether stores that allow access only by a lock and buzzer system are sufficiently "open to the public" to be subject to the injunction not to discriminate on the basis of race. Moreover, it is not at all clear how easy it would be to prove that such exclusion was "on account of race," rather than on account of some legitimate nonracial factor.

¹⁹ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 22 (109th ed. 1989). The populations of the states that do not provide a right of access without regard to race to retail stores are Alabama (4,040,587), Florida (12,937,926), Georgia (6,478,216), Mississippi (2,573,216), North Carolina (6,628,637), South Carolina (3,486,703), Texas (16,986,510). With a total national population of 248,709,873, the combined populations of these states, 53,131,795, represents 21.36% of the United States population.

²⁰ Discrimination in public accommodations has historically been exercised most vigorously against African-Americans. No other group experienced the systematic forced exclusion and segregation imposed by the Jim Crow statutes and ordinances. At the same time, other groups, including Latinos and Jews, have faced substantial discrimination in public accommodations as well. BARRIERS; PATTERNS OF DISCRIMINATION AGAINST JEWS 26-42 (Nathan C. Belth ed., 1958); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 560-66 (1994).

that no law—state or federal—protects customers from such discrimination.²¹

B. *What is Surprising About the Common-Law Rule*

Therein lies a mystery. The possibility that no law—state or federal—may prohibit racial and sexual discrimination in retail stores in some states is shocking to most people, including many lawyers and law professors. Both public perception and fundamental legal principles today suggest that businesses open to the public have a duty to serve the public without unjust discrimination. Yet the formal law does not unequivocally reflect this principle. I will argue here that the formal law *should* reflect the settled social consensus behind this principle, and that, in order to do so, the common-law rule that grants most businesses the right to exclude customers at will must be changed. At the same time, I want to explore the historical origins of the odd disjunction between popular conceptions about the law and the current rules in force. The rules are less capacious than most citizens—and even lawyers—believe. There is a gap in the law. How did it get there?

One explanation is that the common law never provided a right of access to retail stores although it did provide a right of access to other public accommodations. If you ask a random law professor what the law is regarding the duty of businesses to serve the public, the typical answer will be that innkeepers and common carriers have duties to serve the public, subject to reasonable regulations they may impose to protect their legitimate business interests, but that other businesses have an absolute right to choose their customers and to exclude anyone from their businesses for any reason unless limited by a civil rights statute.²² Thus, the common law always treated retail stores differently from inns and carriers.²³ Some states required

²¹ No federal statute prohibits sex discrimination in public accommodations unless they receive federal funds.

²² See, e.g., Alfred Avins, *What Is a Place of "Public" Accommodation*, 52 MARQ. L. REV. 1, 2-7 (1968) (arguing that only innkeepers and common carriers had common-law duties to serve the public); Earl M. Maltz, *"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 RUTGERS L.J. 553, 553-54 (1986) (citing *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (Story, J.) ("Just as it is under current law, the position of common carriers in the antebellum era was quite unlike that of private businesses generally. While private parties were free to refuse to contract with whomever they pleased, a [common carrier] was 'bound to take [one wishing passage] as a passenger on board, if [the common carrier had suitable accommodations, and there was no reasonable objection to the character or conduct of the [passenger].'" *Garifine v. Monmouth Park Jockey Club*, 148 A.2d 1, 2-6 (N.Y. 1959), limited by *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982)).

²³ Steven Sutherland, Note, *Patron's Right of Access to Premises Generally Open to the Public*, 1983 U. ILL. L. REV. 533, 534-36.

places of entertainment to serve the public, although most did not.²⁴ The federal public accommodations law of 1964 simply ratified the common-law rule requiring public service by innkeepers and common carriers. In addition, Congress chose to accept the law of the states that had imposed a duty to serve on places of entertainment. In addition to these traditional categories, the statute listed gas stations (involved in travel like carriers and inns) and restaurants (a modern equivalent to inns and also needed for travel).²⁵

This view of the common law is the prevailing one among law professors. If you ask for policy justifications for the differential common-law treatment of those businesses with duties to serve and those that do not have such duties, you may hear a combination of the following arguments. First, innkeepers and common carriers were often local monopolies at the time the duty to serve was invented, and their special obligations were based on the lack of competition in the local market. Second, these businesses operated under licenses or franchises from the state and were closer to public entities than private businesses because their powers were delegated from the state, and because they exercised quasi-public functions. Third, these businesses implicate the right to travel and therefore involve a fundamental right. Finally, necessity required special obligations to protect travelers from hardship when they had no place to sleep at night and were vulnerable to bandits on the highways.

This view of the common law is not entirely wrong. The historical evidence indicates, however, that it is not entirely right either. It is not at all clear that the common law *always* limited the duty to serve the public to innkeepers and common carriers. Indeed, before the Civil War, the law probably required all businesses that held themselves out as open to the public to serve anyone who sought service. Further, the policy justifications for limiting the right of access to inns and carriers are the invention of a particular legal scholar named Bruce Wyman, who wrote a 1904 *Harvard Law Review* article articulating these justifications for the current common-law rule.²⁶ Although those policy justifications are widely rehearsed, they are supremely unconvincing as reasons to impose a duty to serve on inns and common carriers but not on other businesses. Businesses other

²⁴ Max W. Turner & Frank R. Kennedy, *Exclusion, Ejection, and Segregation of Theater Patrons*, 32 IOWA L. REV. 625, 626 (1947).

²⁵ The 1964 statute *did* contain a major modification of the common law: while the common law authorized segregation of customers by race as a "reasonable regulation of the business," the federal statute explicitly provided that segregation constituted a denial of equal access.

²⁶ Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904) [hereinafter *The Law of Public Callings*]; see also Bruce Wyman, *The Inherent Limitation of the Public Service Duty to Particular Classes*, 23 HARV. L. REV. 339 (1910) [hereinafter *Inherent Limitation*]; Avins, *What is a Place of Public Accommodation*, *supra* note 22, at 5 (accepting the Wyman thesis).

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

Law professors are not surprised that the common law limits the right of access to innkeepers and carriers, but they *should* be surprised by this. The explanation for the current gap in the law that assumes that the common law always entitled most businesses to choose their customers with impunity is wanting.²⁷ This creates another puzzle. If the common law once presumptively provided a right of access to all public places, how did this right get narrowed?

What is surprising to law professors is not that the common law imposes no duty to serve the public on retail stores but that the 1964 Civil Rights Act failed to remedy this situation. Virtually everyone with whom I have spoken assumes that federal law provides a remedy for racial discrimination or segregation in all businesses open to the public. At the very least, they assume that state statutes fill this gap. Why do they make this assumption? The answer is that the civil rights statutes passed in the 1960s had a revolutionary impact on public attitudes. In 1964, it was still plausible to argue that businesses had a right to exclude African-American customers simply because the businesses were property owners and because one of the rights associated with property was the right to exclude. Today in 1996, this argument is no longer acceptable; "because it is my property" is not a tenable argument for the right of retail stores to exclude on the basis of race. Rather, the prevailing social assumption now is that businesses open to the public have no right to exclude customers on the basis of race and that the law backs up this assumption.²⁸ Yet this new understanding of the obligations of property owners is contradicted by the common-law rule that is premised on the view that most owners—including most businesses open to the public—have an absolute right to exclude non-owners. The failure of the common law to impose a

²⁷ *Garifine*, 148 A.2d at 2 ("There was a time in English history when the common law recognized in many callings the duty to serve the public without discrimination. See [Norman F.] Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927); *cf.* [Charles K.] Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911); . . . Wyman, [*The Law of the Public Callings*, *supra* note 26, at 156]. With the passing of time and the changing of conditions, the common law confined this duty to exceptional callings where the needs of the public urgently called for its continuance.").

²⁸ See JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 79 (1959) (arguing that the "usage of lawyers shares the nonlegal connotation: simply that [a public] accommodation is 'open to the public'").

duty to serve on retail stores can be partly explained by the enormous success of the federal law in changing attitudes. Everyone assumes that some statute—state or federal—must prohibit race discrimination in retail stores and thus is content to state that the law provides no right of access to retail stores unless imposed by statute. If no statute provides such a right of access, however, we should formally change the common-law rule to make it cohere with current settled social values and understandings of the law. A court in Georgia, for example, would almost certainly not hold that the common law of Georgia entitles retail stores to refuse to serve African-American customers. If this is so, professors and treatise writers, as well as judges, should stop saying that the common law imposes no duty on most businesses to serve the public.

This Article has several purposes. The first is to argue that the assumption that the common law always limited the duty to serve to innkeepers and common carriers is almost certainly wrong. The scholars who shaped and justified the modern common law of public accommodations limiting the duty to serve to innkeepers and common carriers, such as Bruce Wyman and Joseph Beale, uniformly believed that the common law once imposed such obligations on many other businesses as well. How did the range of businesses with duties to serve the public become limited to inns and carriers? Justice Arthur Goldberg, in his concurrence in *Bell v. Maryland*,²⁹ and Justice Morris Pashman of the Supreme Court of New Jersey in his 1982 opinion in *Uston v. Resorts International Hotel, Inc.*,³⁰ issued opinions stating that the current common-law rule, which authorizes most businesses to choose whom they wish to serve, has its origins in the Jim Crow period and thus, in the words of Justice Pashman, “has less than dignified origins.”³¹ Although the story is not a simple one, Justices Goldberg and Pashman are substantially correct.

The narrow range of businesses with duties to serve the public under both current common law and the 1964 federal statute do not reflect the common law as it has existed from time immemorial. Before the Civil War, it was not at all clear that only innkeepers and common carriers had a duty to serve the public; the extent and character of the duty to serve the public was not fixed in stone. Although the law was ambiguous, there is a substantial argument that the duty to serve the public extended to all businesses that held themselves out as open to the public. Only around the time of the Civil War did this rule begin formally to narrow, and only after the Civil War, when civil rights were extended to African-Americans for the first time, did the courts clearly state for the first time that most businesses had no com-

²⁹ 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring).

³⁰ 445 A.2d 370 (N.J. 1982).

³¹ *Id.* at 374 n.4.

mon-law duties to serve the public. The rule achieved its present form only when the issue became enmeshed in the problem of race relations. This change in the law had the effect—and without doubt the purpose—of enabling businesses to continue to serve white customers while choosing to exclude black customers.

When that happened, the courts narrowly construed the duty to serve the public not to protect the tender rights of property owners from heavy-handed regulation but to *reformulate* property rights—abolishing the general right held by the public to have access to places open to the public and replacing it with a general right of businesses to control access to their property. The courts did not *decrease* regulation of property; they *redefined property rights by shifting entitlements from members of the public to businesses*. They took a property right belonging to the public—an easement of access to businesses open to the public with a concomitant duty on businesses to serve the public—and replaced it with a business right to exclude correlative with no right of access by members of the public, unless the business fit into a narrow range of public service companies. The courts did not do this in order to free property owners from government regulation; on the contrary, Jim Crow laws represented both an expansive and an expensive regulatory system.³² Rather, the replacement of a general right of access with a general right to exclude redistributed property rights in order to promote a racial caste system.³³

³² Derrick Bell notes the hypocrisy involved in the Jim Crow system by observing the inconsistency between the forced segregation authorized by *Plessy* and the extreme protection for “private property” recognized by *Lochner*. At the same time, Bell notes that “[b]oth decisions protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*).” Derrick Bell, *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 75, 80 (Richard Delgado ed., 1995) [hereinafter *CRITICAL RACE THEORY*] (originally published in 33 *VILL. L. REV.* 767 (1988)). Cheryl Harris explores a different connection between property and race; she argues that the “possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness” Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1736 (1993). Harris’s argument suggests that although Jim Crow laws constituted limitations on property rights of white business owners, they protected the “property right in whiteness” belonging to the majority of persons in the white community interested in arranging property so as to exclude African-Americans from access to certain types of private property open to the “public.” See also MORTON KELLER, *REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-33*, at 275-76 (1994) (noting the discrepancy between the *Lochner* ideology and the *Plessy* ideology).

³³ Property rules may be phrased in neutral terms, yet be connected to racial discrimination when they are intended to affect people differently based on race. I argue here that the replacement of a right of access with a right to exclude was, at least partially, intended to allow exclusion of African-Americans from public accommodations, even though it was phrased in race-neutral terms. See John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-To-The-Future Essay*, 71 *N.C. L. REV.* 1487 (1993); Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 *STAN. L. REV.* 1251 (1990) (both explaining how government policies were deliberately shaped to foster racial segregation).

The second purpose of this Article is to explain why a change in the common law is justified partly because it is less than clear that federal law currently prohibits race discrimination in retail stores. This lacuna in federal law is especially significant in the seven states that do not have state public accommodations laws to fill this gap. The public accommodations provisions of the Civil Rights Act of 1964 failed expressly to cover many businesses. There is doubt that the current Supreme Court can be relied upon to interpret the Civil Rights Act of 1866 as imposing such a duty. This gap in the law is significant. Consider the practices in stores in the South in the 1950s and 1960s of preventing black customers from trying on clothing and expecting black customers to allow white customers to cut in front of them in line.³⁴ Although these practices have gone by the wayside, other ra-

Property rules may also operate to structure unequal opportunities for people in a manner connected with race even if they are not consciously intended to deny opportunities to a racial group. See, e.g., Adeno Addis, "Hell Man, They Did Invest Us:" *The Mass Media, Law, and African Americans*, 41 *BUFF. L. REV.* 523 (1993); Adeno Addis, *Recycling in Hell*, 67 *TUL. L. REV.* 2253 (1993) (both exploring how seemingly neutral rules about ownership of the media allow the creation of images that devalue African-Americans); Regina Austin, "An Honest Living": *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 *YALE L.J.* 2119 (1994) (exploring the connection between street vendor regulation and access of African-Americans to the market). The connection between "color-blind" legal rules (and color-blind reform strategies or modes of analysis) and disparate racial impacts is well known. See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988); Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 *TUL. L. REV.* 1407 (1990); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *STAN. L. REV.* 1 (1991). Such cases may involve unconscious racism, see Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, in *CRITICAL RACE THEORY*, *supra* note 32, at 409, 413-14 (originally published at 77 *VA. L. REV.* 539 (1991)) (arguing that racial attitudes are crucial to understanding differing perceptions of whether a person has engaged in or experienced a threat); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987) (arguing that unexamined negative stereotypes shape perceptions and thus both law and public policy), or they may reflect indifference to disparate racial impacts of public policies, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699 (1993) (arguing that changes in aesthetic ideology led to gentrification and to its disparate racial impacts); Jerome M. Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 *RUTGERS L.J.* 597 (1994) (explaining how Justice Rehnquist ignores the interests of African-Americans and assumes that their circumstances are presumptively fair); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841 (1994); Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcations and Disorientation in the Postmodern Metropolis*, 9 *HARV. BLACKLETTER J.* 117 (1992) (describing the racial impacts of seemingly neutral rules of local government law); Harris, *supra* note 32 (describing both overt and hidden connections between race and property); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 *FORDHAM URB. L.J.* 431 (1994) (explaining the disparate racial impacts of environmental policy). The disparate racial impacts of neutral property rules are hard to see unless one is interested in looking for them. "Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture." *CRITICAL RACE THEORY*, *supra* note 32, at xiv.

³⁴ HENRY L. GATES, JR., *COLORED PEOPLE: A MEMOIR* 17 (1995).

cially discriminatory practices persist, as the recent Eddie Bauer and Denny's incidents attest. It is difficult for many African-Americans to obtain taxicabs in many cities. Exclusion and unequal treatment in the form of surveillance of African-American customers in stores abounds. Professor Williams's experience is just one example.³⁵ Even if racial discrimination were a thing of the past,³⁶ the continued failure of the law formally to prohibit such discrimination conveys a message of white supremacy. The absolute right to exclude, enshrined in the common law, is a relic of the Jim Crow era, and as such, authorizes the creation of racially discriminatory practices wholly incompatible with settled social values and the policies underlying civil rights law.

The Article's third purpose is to criticize both the policies that have traditionally justified the common-law rule immunizing most businesses from the duty to serve the public and the conception of private property that underlies those justifications. The policy justifications for protecting businesses from claims that they have wrongfully excluded patrons are unconvincing. Adopting a general doctrine that requires all businesses open to the public to serve the public unless they have good reason not to do so will not impose significant costs on businesses that they do not already bear. At the same time, adoption of this rule will fill the gap in the law by proclaiming that retail stores, like innkeepers, common carriers, restaurants, and places of entertainment, have no right to exclude members of the public on arbitrary bases such as race. If faced with the question, courts in any of the seven states that do not have public accommodations statutes prohibiting race discrimination would probably announce that retail stores have a common-law duty to serve the public without unjust discrimination, at least with regard to race. If this is a plausible assumption, we should stop describing the common-law duty to serve the public as limited to innkeepers and common carriers and acknowledge that, under current public policy as implemented in both federal and state statutes, all businesses that serve the public are "public accommodations" that cannot, without good reason, deny to members of the public a right of access to their businesses for the purpose of obtaining the services they provide. Both courts and law professors need to change our statement of the common-law rule, as well as our conceptions of property on which it is based.

³⁵ Juan Williams, *Closed Doors: Benign Racism in America*, NEW REPUBLIC, Nov. 10, 1986, at 22; Lena Williams, *supra* note 6, at A1.

³⁶ Professor Williams's experience and that of the African-American customers of Denny's Restaurants and the Eddie Bauer incident demonstrate that racial discrimination in public accommodations is not merely of historical interest.

C. Outline of the Argument

In Part II, I describe public accommodations law in the United States in the nineteenth century. I am particularly interested in discovering the historical origins and justifications of the current common-law rule, which limits the duty to serve the public to innkeepers and common carriers (and, in some states, places of entertainment). Before the Civil War, while it was clear that innkeepers and common carriers had duties to serve the public, it was not at all clear that other businesses open to the public had no such duties. The authoritative legal materials before the Civil War did not explicitly extend the duty to serve the public to businesses other than inns and common carriers. At the same time, the law also did not expressly immunize those businesses from the duty to serve the public. Legal authority affirming such a right to exclude is sparse to nonexistent.

If one carefully examines both the reasoning and the language in the cases and treatises that explored the duty to serve the public, the most plausible statement of the law is that all businesses open to the public had a duty to serve the public. The cases that explained *why* innkeepers and common carriers had a duty to serve the public focused on the fact that they held themselves out as ready to serve anyone and were therefore “common callings” with duties to do what they held themselves out as ready to do. Many businesses other than innkeepers and common carriers were thought to be involved in “common callings” or “public employment”—and were characterized by the adjective “common” in both judicial opinions and treatises in the late eighteenth and early nineteenth centuries—because they “held themselves out” as ready to serve the public. Only after the Civil War was the presumption created that private property entailed the right to be free from regulation. Before the Civil War, in the era of preclassical legal thought, the presumption was the reverse. Businesses that served the public were subject to a host of implied duties. If we take seriously the *reasons* given by judges and legal commentators for the duty to serve, as well as the preclassical conception of property rights, then it is at least arguable—and at most probable—that *all* businesses open to the public had the same legal obligations as inns and carriers to serve the public. I will argue that, despite the ambiguities in the law, this is the most plausible reading of antebellum law in the United States from 1800 to 1850.

The first cases to address the question of whether African-Americans also possessed a right of access to places of public accommodation were decided in the 1850s. Those cases uniformly held that the right of access did extend to every person without regard to race. At the same time, they authorized racial segregation as a “reasonable regulation of the business.” Moreover, they adopted for the first time an explicit exception to the principle that businesses open to the pub-

lic had a duty to serve the public. This dubious honor belongs to the Supreme Judicial Court of Massachusetts in an 1858 case that entitled the Howard Athenæum, a library and lecture hall, to exclude an African-American man from its public lectures. This case was the first that exempted places of entertainment from the duty to serve the public. I will argue that it was not an accident that the duty to serve was cut back to entitle a public place to exclude patrons on the basis of race.

In the confused era from the Civil War to the Jim Crow era, Massachusetts, New York, Pennsylvania, and all the Southern states, as well as the United States in 1875, initially passed public accommodations laws. These statutes all required places of public accommodation to serve the public without regard to race. At the same time, most of them—including the federal law—were interpreted by many courts to authorize “separate but equal” accommodations.³⁷ As Reconstruction ended, the Southern statutes were repealed and replaced by a legal regime that granted all businesses the power to choose their customers with impunity. A similar result followed when the federal law was struck down in the *Civil Rights Cases* of 1883. Thus from 1850 to 1880, the states experimented with a variety of legal regimes in public accommodations, at first requiring access without regard to race and finally abolishing this right in many states. Some of the states that did provide a right of access interpreted their state laws to prohibit racial segregation; others interpreted their laws to allow such segregation. Starting in the 1880s and gathering steam after *Plessy v. Ferguson* was decided in 1896, the Southern states passed laws that not only authorized exclusion and segregation of customers on the basis of race, but in fact *required* such discriminatory practices.

³⁷ Alfred Avins, a prolific writer on public accommodations laws, argued in 1968 that the federal public accommodations law of 1875 did more than extend common-law rights of access owned by white persons to African-Americans. If this were all the statute did, then African-Americans would have whatever rights white persons had; if a state chose to abolish a right of access to businesses open to the public for all persons (white as well as black), as some states such as Tennessee and Delaware did in 1875, this result would in no way violate the principle of equal protection of the laws. Avins believed states should have the ability to do this, even though the intent of such a change in the law might well be to authorize public accommodations to choose to exclude African-Americans, but not white persons, without any legal liability or remedy. Avins, *What is a Place of “Public” Accommodation*, *supra* note 22, at 16. By preventing the states from repealing the common-law right of access—for whites as well as for African-Americans—he believed that the 1875 federal public accommodations law wrongly gave “special privileges to Negroes not enjoyed by the rest of the population.” *Id.* at 59; *id.* at 69 (“the ‘civil rights’ laws, which started as a way of giving Negroes the same rights as everybody else, have culminated in a system giving them more rights than anybody else”). Avins also argued generally that public accommodations laws that applied to businesses that were not monopolies illegitimately cut back on the rights of free association, as well as the rights of property owners to control their property. *Id.* at 24 (“The right of the owner to . . . discriminate has been placed on theory that this is a property right incidental to his ownership of the business.”); *id.* at 72 (arguing that public accommodations laws interfere with freedom of association).

This history demonstrates that the current common-law rule immunizing most businesses from the duty to serve the public has its origins in the mid-nineteenth century when the right of access was explicitly extended for the first time to African-Americans. At first granting such access, and often with a right to integrated service, the law gradually changed to replace the public accommodations model with a model of private property that abolished the right of access to most businesses and replaced it with a right to exclude. The categories of businesses subject to the duty to serve the public narrowed only around the time of the Civil War and Reconstruction—when the country was fighting about the meaning and extent of the newly recognized racial equality ultimately enshrined in the Fourteenth Amendment. It was only after the Civil War that the rule that immunized most businesses from the duty to serve the public crystallized. It had the effect—and undoubtedly the purpose—of enabling businesses to continue to serve white customers, while choosing to exclude black customers. This change in the conceptualization of property rights preceded the full development of the classical system of property and free contract. Indeed, one can argue that it helped to bring about the change from the preclassical conception of property and contract (which included numerous implied obligations on market actors) to the classical *laissez-faire* conception. The baseline idea that most businesses have no duties to the public is a distinctly post-Civil War idea characteristic of the period of classical legal thought, a period that did not come into its own until the 1880s.³⁸

This process cannot be explained as a decrease in government regulation of property or by the *Lochner* era *laissez-faire* ideology. After all, the segregation statutes adopted in the *Lochner* era constituted substantial and expensive regulations of property. Rather, the change in the common-law doctrine was adopted, more or less consciously, to entitle businesses to exclude African-Americans. The common-law right to exclude, in other words, was adopted to establish a racial caste system in access to the market.

Part III reviews and criticizes the current policy arguments in favor of granting businesses other than innkeepers and common carriers absolute rights to exclude members of the public for good or bad reasons unless a civil rights statute limits that right. I will argue that the proper rule is the one announced by the Supreme Court of New Jersey in 1982 in *Uston*³⁹ to the effect that “when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasona-

³⁸ Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW & SOCIOLOGY 3 (1980) [hereinafter *Legal Consciousness*].

³⁹ 445 A.2d 370 (N.J. 1982).

bly.”⁴⁰ Such a rule will have no injurious effects on business and will be in accord with current settled values as expressed both in better social custom and legislation.

Part IV considers the lessons that public accommodations law offers for understanding private property. When asked to define private property, many judges, scholars, casebook authors, and law students focus on the right to exclude. This right is frequently characterized as “fundamental.” Both law scholars and judges routinely tell us that the “power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights”⁴¹—so much so that permanent deprivation of this right may constitute a *per se* violation of the takings clause.⁴² This assumption underlies the common-law rule that grants most businesses the absolute right to exclude unless limited by statute. It not only exerts substantial influence on the common law, but on the Supreme Court’s interpretation of both labor law and First Amendment law.⁴³ Only one state has been willing to announce that its common-law policy is that all places open to the public have an obligation to serve people who enter their establishments unless they have a good reason not to do so.⁴⁴ In other states, the assumption appears to be that owners have a right to exclude non-owners in the absence of a civil rights statute limiting that right to exclude, except for a narrow class of businesses involved in the travel business, *i.e.*, innkeepers and common carriers. Free speech law also has been interpreted narrowly; under both the United States Constitution and most state constitutions, private property rights of

⁴⁰ *Id.* at 375.

⁴¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

⁴² *Id.*; *see also* *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987) (noting that the Court has repeatedly held that the right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that it constitutes a taking of property to require a private marina to open itself to the general public). *But cf.* *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (holding that a rent control ordinance protecting tenants from eviction does not constitute an unconstitutional forced invasion of property); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-85 (1980) (requiring shopping centers to permit organizations to exercise state protected rights of free expression and holding that such required access does not violate the Takings Clause).

⁴³ *See* *Lechmere v. NLRB*, 502 U.S. 527 (1992) (limiting rights of access of labor organizers to an employer’s parking lot); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (adopting such a narrow interpretation of the Civil Rights Act of 1866 that Congress wound up amending § 1981 for the first time since its adoption in 1866 and repassage in 1870); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972) (declining to find a First Amendment right of access to businesses open to the public partly on the ground that the right to exclude was an essential component of property rights).

⁴⁴ *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

shopping center owners prevail over public rights to distribute leaflets and obtain signatures for petitions.⁴⁵

The refusal to place common-law duties to serve the public on retail stores is based, to a very large extent, on the notion that property owners, including businesses open to the public, have a right to manage their businesses without undue interference by the government.⁴⁶ Yet this view of private property is belied by the antidiscrimination laws. Those laws recognize that businesses open to the public are legitimately regulated in a manner that ensures a formal right of access without regard to race or other characteristics unrelated to the business owner's legitimate interests. The notion of a duty to serve without regard to race is as central to the core values that most people share in the United States today as is the notion of private property that would grant the owner full discretion to admit whom it pleases.

People are unpleasantly surprised when they learn that no law may prohibit racial discrimination in retail stores in some states. They assume that the law does provide a remedy of some kind. This represents an enormous shift in attitudes about private property. At the time the federal Civil Rights Act was passed in 1964, it was opposed by legislators who feared undue invasion of property rights, as well as rights of free association.⁴⁷ Moreover, the question of its constitutionality was sufficiently in question that it took a decision of the Supreme Court to lay to rest contentions that it unlawfully took property rights without just compensation.⁴⁸ Things have changed dramatically.

⁴⁵ *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551 (1972); *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984).

⁴⁶ Conceptions of property are socially constructed. Yet the assumptions underlying our conceptions of property are often unconscious and taken for granted. Because they are so deeply ingrained, they are often invisible to us. As Richard Delgado has argued:

My premise is that much of social reality is constructed. We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire. These patterns of perception become habitual, tempting us to believe that the way things are is inevitable, or the best that can be in an imperfect world. Alternative visions of reality are not explored, or if they are, rejected as extreme or implausible.

Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, in *CRITICAL RACE THEORY*, *supra* note 32, at 64, 65-66 (originally published in 87 *MICH. L. REV.* 2411 (1989)).

⁴⁷ For a discussion of property concepts and values underlying public accommodations law, see *infra* Part IV.

⁴⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-61 (1964); see also *Pickett v. Kuchan*, 153 N.E. 667 (Ill. 1926) (holding that Illinois's public accommodations law does not deprive owners of constitutionally protected property rights); *Greeneberg v. Western Turf Ass'n*, 73 P. 1050 (Cal. 1903) (holding that California's public accommodation law constituted a valid exercise of the police power); *People v. King*, 18 N.E. 245, 248-49 (N.Y. 1888) (holding that New York's 1873 public accommodations law did not constitute an unconstitutional deprivation of property rights or an invalid exercise of the police power).

Consider the long list of places subject to the public accommodations provisions of the Americans with Disabilities Act, passed in 1990.⁴⁹

Public accommodations laws represent a significant—even revolutionary—limit on the right to exclude. If the moral intuition behind public accommodations laws is apt, we may have to rethink our most fundamental conceptions of private property. I will argue that we should so rethink the meaning of property, shifting our focus from title and ownership to the ways in which property rules shape human relationships.⁵⁰ I also argue that a proper understanding of private property views it as a social system and that one of the central systemic features of a property system is the creation of rules that promote widespread dispersal of access to and ownership of property.

II. THE HIDDEN HISTORY OF THE DUTY TO SERVE

A. *The Antebellum Period and Preclassical Legal Thought*

1. *The Scope of Public Accommodations Law.*—

a. *The law of common callings.*—Assume you are a lawyer in 1820 in a small town in one of the Northern states. A client comes to see you with the following story. He is a farmer who goes to town to buy seed to plant his crops, and cotton and wool to enable his wife to spin thread and make clothes. These goods are available at the general store in town. In town meetings, your client has supported the idea of allowing free African-American children into the public school. Unfortunately, the owner of the store objects to your client's extreme views. Consequently, the store owner has refused to sell goods of any kind to your client anymore. There is another general store in the next town twenty miles away whose owner is willing to sell your client these goods. Your client would like, however, to buy in town. Does your client have any legal rights?

The antebellum lawyer would need to know whether general stores, like innkeepers and common carriers, have duties to serve the public without unjust discrimination. One of my purposes in this Article is to argue both that the answer to this question was not clear and that, despite the lack of clarity, the lawyer working in 1820 would be

⁴⁹ 42 U.S.C. § 12,181(7) (1994).

⁵⁰ For related arguments, see Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162 (1990); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUDIES/REVUE D'ÉTUDES CONSTITUTIONNELLES 1 (1993); Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409 (1994); Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L.J. 475 (1993) [hereinafter *Jobs and Justice*]; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter *Reliance Interest*]; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990) [hereinafter *On Property*].

likely to conclude that the duty to serve the public extended to all businesses open to the public, including general stores.

The answer is not clear because existing English and American legal materials in the antebellum period do not directly address the question of the obligations of owners of general stores. They neither explicitly place such a duty on general stores nor explicitly characterize such stores as “private” trades with the absolute right to choose their customers. The absence of explicit treatment might mean that no such obligations exist; after all, the common law recorded custom, and perhaps no such custom existed for trades other than innkeepers and common carriers.

On the other hand, in the eighteenth and early nineteenth centuries, the common law was also thought to represent human reason. In a famous English case of 1710 addressing the obligations of common carriers for loss of passengers’ goods, Justice Powell wrote: “[f]or nothing is law that is not reason.”⁵¹ If the justifications for imposing a duty to serve the public on innkeepers and common carriers apply equally to proprietors of general stores, perhaps courts would impose similar obligations on them. Moreover, in the first half of the nineteenth century, public policy was a substantial factor in justifying (if not shaping) the evolution of the common law in the United States. On the assumption that reason and policy have something to do with it, let us start by addressing the justifications for the duty to serve on innkeepers and common carriers offered in the antebellum period and then proceed to address more specifically the obligations of other employments.

b. Holding oneself out as open to the public as the primary basis of the duty to serve.—

(1) *English law.*—What reasons were given by judges and treatise writers for imposing a duty to serve the public on innkeepers and common carriers? Specifically, did the idea of monopoly or the idea of a government license have anything to do with it, as suggested by later scholars? Let us start with the law of England.⁵² An early English case from 1586, *White’s Case*,⁵³ held that innkeepers had a duty to admit guests if the inn was not full. The leading English case, cited over and over again in the nineteenth century in the United States, is *Lane v. Cotton*.⁵⁴ The question in that case was whether the postmaster was liable for the loss of a letter containing valuable ex-

⁵¹ *Coggs v. Bernard*, 92 Eng. Rep. 107, 109 (K.B. 1703).

⁵² English common law was adopted in large part by the states after the Revolution. Moreover, both lawyers and early treatise writers in the antebellum period cited extensively—and sometimes exclusively—from English cases in this period.

⁵³ 2 Dyer 343 (1586).

⁵⁴ 88 Eng. Rep. 1458 (K.B. 1701).

chequer bills. The court held that the postmaster was not so liable. In a dissenting opinion, Lord Holt argued that the postmaster should be liable because non-governmental employers who were in “public offices”—including captains of ships⁵⁵ and innkeepers⁵⁶—were generally strictly liable for loss of goods entrusted to them and it would be anomalous to immunize a public servant when the statute that created the office of postmaster was intended to protect the public.⁵⁷ The other judges refused to find the postmaster liable because he held a new office, founded by statute, and newly created public offices did not necessarily have the same legal obligations as “common-law offices.”⁵⁸ Yet none of the other judges disputed Lord Holt’s statement that such common-law “offices” had obligations to the public. As Lord Holt explained: “one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public.”⁵⁹ The other judges merely disagreed about whether such obligations should be implied in a newly created office designed by statute.

Thus, according to Lord Holt, the duty to serve the public was premised on the fact that the actor was engaged in a “public employment.” What is a public employment? In expressing his views, Lord Holt noted that the innkeeper “is bound to receive all manner of people into his house till it be full.”⁶⁰ He explained the common-law principle this way:

⁵⁵ *Id.* at 1462 (Holt, C.J., dissenting).

⁵⁶ *Id.* at 1463.

⁵⁷ *Id.* at 1461. Lord Holt explained that innkeepers and common carriers were liable for the loss of goods entrusted to them by their guests because of public policy reasons:

But no man shall by law justify to deny the duty of his office, for there is a perpetual obligation upon them to keep the things to them committed, till they have discharged their trust; and when they have done, and no sooner, are they discharged. This case is within the same reason of justice and equity of law upon which all actions of this nature are brought; and it has all the ingredients whereby one is made responsible in like cases for negligent keeping of goods; for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such opportunity as they have by the trust reposed in them to cheat all people, they would be so apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril.

Id. at 1463; *see also id.* at 1469 (“[T]he same reason holds to charge [the postmaster] as to charge carriers, inn-keepers, and such like, *videlicet*, the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would lie under to imbezil goods intrusted to them, without possibility of proving a particular neglect.”).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1465.

⁶⁰ *Id.* at 1464.

[W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under the pain of an action against him If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made a profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuses to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier⁶¹

In addition, Lord Holt noted that the existence of competition *does not immunize innkeepers from their common-law obligations*.

[F]or if there are several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper.⁶²

The existence of competition “shall not excuse the inn-keeper” because the innkeeper “has made a profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king’s subjects that will employ him in the way of his trade.”

The duty to serve was premised on the innkeeper’s having undertaken a “public employment” or a “trade which is for the public good”—an obligation that is not diminished in any way by the presence of competitors in the local market. Yet Lord Holt does not explain what a “public employment” is except to say that it involves taking on a “public trust” for the benefit of one’s fellow subjects or “a trade which is for the public good.”⁶³ What does this phrase mean?

The 1710 English case of *Gisbourn v. Hurst*,⁶⁴ decided nine years after *Lane v. Cotton*, defines a “public trade or employment” in the context of a claim that a carrier had violated the duty to serve the public. In *Gisbourn*, plaintiff delivered cheese to “one Richardson” to be carried from London to Birmingham. “When he returned home, he put his waggon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the

⁶¹ *Id.* at 1464-65.

⁶² *Id.* at 1468.

⁶³ This characterization of innkeepers as engaged in public employment is similarly stated by Henry Jeremy in an 1816 English treatise. HENRY JEREMY, *THE LAW OF CARRIERS, INN-KEEPERS, WAREHOUSEMEN AND OTHER DEPOSITORIES OF GOODS FOR HIRE* (1816). He described the duties of carriers, innkeepers, and other “depositories of goods for hire” as based on the fact that they are engaged in “a public employment.” *Id.* at 138. As to the innkeeper, Jeremy said, “for his occupation is for the public benefit, and not to be withheld at his caprice.” *Id.* at 145-46.

⁶⁴ 91 Eng. Rep. 220 (K.B. 1710).

cheese for rent due for the house”⁶⁵ The court held that “goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent”⁶⁶ In contrast, those engaged in a “private undertaking” had no such immunity. The only question was whether Richardson was or was not “exercising a public trade or employment.” The court held that although Richardson was not generally a “common carrier,” he had effectively become one since “for some small time last past [he] brought cheese to London, and in his return took such goods as he could get to carry back in his waggon in to the country for a reasonable price.”⁶⁷ The court explained that “any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier”⁶⁸ The determinant, in other words, of whether or not one was a “common” carrier, as opposed to an ordinary carrier, was whether one held oneself out as available to take on business from anyone in the public.⁶⁹ A common carrier was engaged in a public employment; “common” and “public” are synonyms. If one held oneself out as open to the public (the definition of a “common calling”), then one was necessarily engaged in a “public trade or employment.”

Thus, the Court in *Gisbourn* defined “public employment” as *equivalent* to one in which the owner has held himself out as ready to serve the public by exercising his trade. In other words, the category of “public employment” was not intended to differentiate among businesses that are open to the public by functionally distinguishing which benefit the public and which are merely private employments.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ In *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703), the court held that defendant was liable for negligent failure to carry goods safely and securely even though he was not a common carrier and received no compensation. All the judges assumed that a common carrier would be so liable. Justice Gould argued that defendant “undertook” “specially” to carry them safely and was liable because of the “particular trust reposed in [him].” *Id.* at 107-08. “But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.” *Id.* at 107. Similarly, Justice Powell argued that the case turned upon the “undertaking,” *i.e.*, what did defendant undertake to do? *Id.* at 108. If the defendant is not a common carrier, he must specially promise to transport the goods safely, and if he does, he is liable for “neglect,” with or without payment. *Id.* at 108-09. Like Justice Holt in *Lane v. Cotton*, Justice Powell argued from reason as well as precedent. “For nothing is law that is not reason.” *Id.* at 109. Justice Holt assumed, similarly, that a “common porter” would be liable and that the only question was whether liability could exist in the absence of consideration when the defendant specially undertakes to transport goods safely. *Id.* All the judges assumed that common carriers “undertake” to transport goods safely.

Rather, *all* trades “open to the public” constituted public employments.

A supporting justification for the duty to serve the public is a combination of necessity and reliance. The 1835 case of *Rex v. Ivens*⁷⁰ held that an innkeeper had a duty to admit a traveler at midnight on a Sunday and that the “lateness of the hour is no excuse to the defendant for refusing to receive” the traveler.⁷¹

Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn.⁷²

Travelers need access to inns and rely on those inns providing the services they have held themselves out as ready to provide to the public. Although important, the necessity rationale is subordinate to the holding out principle since it only justifies a duty to serve for property owners who have voluntarily become “public servants” by the act of holding themselves out as open to the public. A private owner had no such duty under English law to house members of the public even if they were in dire straits. Only common inns had a duty to provide the necessity of shelter to travelers because, by holding themselves out as open to the public, they voluntarily undertook such obligations and travelers relied on their providing the service the inns had impliedly promised to provide.

Sir William Blackstone addressed the topic of the duties of “common callings” in his *Commentaries on the Laws of England*, first published in 1765. He specifically addressed this topic in Book III under the heading of “Private Wrongs” in the section dealing with the general topic of “contracts implied by reason and construction of law.”⁷³ The section dealing with innkeepers and common carriers starts this way:

⁷⁰ 173 Eng. Rep. 94 (K.B. 1835).

⁷¹ *Id.* at 97.

⁷² *Id.*

⁷³ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Professional Books Ltd., 1982 reprint) (Edward Christian ed., 15th ed. 1809); see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 307-11 (1979) (explaining that “implied contracts” involve both voluntarily assumed duties and those imposed by law) [hereinafter *Blackstone's Commentaries*]; Duncan Kennedy, *The Rise and Fall of Classical Legal Thought: 1850-1940*, ch. IV (Oct. 1975) (unpublished manuscript, on file with the author) (discussing the preclassical conception of implied contracts) [hereinafter *Classical Legal Thought*]; see also Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 477-79 (1988) (explaining the preclassical conception of implied contract).

The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case.⁷⁴

Blackstone next describes the duties of an “officer of the public” such as a “sherriff or gaoler” who allows a debtor-prisoner to escape, an “advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial”⁷⁵ Then Blackstone explains:

There is also in law always an implied contract with a common inn-keeper, to secure his guest’s goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workman-like manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such *general* undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.⁷⁶

Blackstone rests the duty to serve, not on the notion that inns or common carriers constitute monopolies or that they fulfill a “public function” fundamentally different from that performed by other private or public actors. Rather, Blackstone rests the duty to serve when they “hang out a sign” and “open[] [their] house[s] for travelers,” they thereby impliedly “engage[] to entertain all persons who travel that way.”⁷⁷ Inns and carriers are engaged in public service not because of their function as part of the travel industry but simply because they are open to the public.⁷⁸ Being open to the public they

⁷⁴ 3 BLACKSTONE, *supra* note 73, at 165.

⁷⁵ 3 *id.*

⁷⁶ 3 *id.* at 165-66; see James B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888) (explaining the special duties of common callings as based on the doctrine of *assumpsit* or the idea that they had voluntarily “assumed” such obligations in a contractual or quasi-contractual sense by holding themselves out as open to the public).

⁷⁷ 3 BLACKSTONE, *supra* note 73, at 165.

⁷⁸ Blackstone further explains:

Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour. Thus too the hospitable laws of Norway punish in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price.

create a “universal *assumpsit*”—effectively, a promise to the world to accept and serve any traveler who seeks such service. They have a duty to do what they have represented they would do—provide shelter for any travelers who come to them, as long as they have room. This may rest on the fact that members of the public rely on their fulfilling their implied representations of availability, or it may rest on the inherent moral obligation that businesses have to do what they purport to do “with integrity, diligence, and skill.” In either case, the crucial act is the act of “hanging out a sign”—holding oneself out as having made a public invitation to come to one’s property for certain services.

Blackstone wrote in an era before a clear separation existed between contract and property and between contracts implied in fact (intended by the parties) and contracts implied in law (imposed regardless of the will of the parties). One might understand the *assumpsit* involved in hanging out a sign and being open to the public as a contractual obligation to the public, triggered by a member of the public seeking service, and breached by the failure to provide service. On the other hand, since no agreement between the parties exists, no consideration has been provided by the traveler for the promise to serve, and it is not clear that the traveler relied specifically on a promise of the inn to serve him,⁷⁹ one might better argue that the duty to serve the public is simply an incident of operating a particular form of property. In either case, the basis for the duty is (1) that one has “undertaken” a “trade” or “employment” and therefore impliedly promised to exercise the trade with “integrity” and “diligence” and (2) that one has “hung out a sign” and made himself “open for travelers” and that it would constitute a breach of the promise to operate the trade with integrity and skill to refuse to serve a member of the public. In effect, Blackstone treated the act of hanging out a sign as an invitation to come on the premises to do business of a certain kind, the act of stepping inside and offering money as an acceptance, and the refusal to do business as a breach of contract.⁸⁰

⁴ *id.* at 167-68.

Blackstone describes implied warranties through “the contract which the law implies, that every transaction is fair and honest.” 3 *id.* at 166. These warranties include rights to recover damages against “any one [who] cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another” and against those who sell “unwholesome goods or goods one does not own.” *Id.* Thus, the obligation to take all travelers is akin to the common duties of all businesspeople to act honestly. The material about implied warranties lists everyone covered and explains what the warranties are to customers. The sentence about innkeepers is in the very middle of this paragraph, treating the duty to serve as akin to the duty to serve honestly because of a previously implied promise to help all who come for service.

⁷⁹ Note that inns and carriers had no duty to serve someone if they were full.

⁸⁰ See also JAMES B. BIRD, *THE LAWS RESPECTING TRAVELLERS AND TRAVELLING; COMPRISING ALL THE CASES AND STATUTES RELATIVE TO THAT SUBJECT: INCLUDING THE USING OF HIRED HORSES, ROBBERY, ACCIDENTS, OBSTRUCTIONS, &C. UPON THE ROAD. AND LAND AND*

A later English treatise writer, Frederick Charles Moncreiff, similarly wrote in 1874, in his work on *The Liability of Innkeepers*,⁸¹ that innkeepers were obligated to serve the public because they held themselves out as open to the public.⁸² If the innkeeper “induce[s] people to think that he is a common innkeeper, he is bound as such to receive those who offer themselves.”⁸³ What would “induce people to think” that one is a common innkeeper? “He must receive or profess to receive guests and their goods, and entertain the former according to his ability.”⁸⁴ However, receiving or professing to receive guests is not enough. What makes an inn “common”? The answer is: the same thing that makes it public. “His house of entertainment must be in a certain sense *common* or *public*.”⁸⁵ “Common” and “public” are used here as synonyms. No duty arises “if a man claims to exercise an arbitrary selection of guests, and does not in any way advertise or outwardly profess to be a common innkeeper.”⁸⁶ However, if the innkeeper holds itself out as ready to serve the public, or “commits any outward act calculated to induce people to think that he is a common innkeeper, he is bound as such to receive those who offer themselves.”⁸⁷

WATER CARRIAGE IN GENERAL: AND ALSO, THE LAW RELATING TO INNKEEPERS, AS FAR AS RESPECTS THE RELATION SUBSISTING BETWEEN THEM AND THEIR GUESTS, &c., &c. 51 (1819) (noting that “if the host [of a common inn] refuse [sic] to entertain either man or horse, (unless he has no room,) he is liable to an action. And it is even said, that he may be compelled by the constable to receive such guests.”)

This rule accorded with the argument of the 1714 case of *Coggs v. Bernard*, 92 Eng. Rep. 107, 109 (K.B. 1703), in which the Justices of the Kings Bench had struggled to determine whether an *assumpsit* could be shown when a person was not a common carrier and had not received compensation for agreeing to transport goods. Holding that the special promise to take care of the goods was enough to create liability, the Justices assumed that such special promises were not required in the case of inns and carriers since the very fact that they were in the business of serving people “indifferently” for hire was sufficient to create liability for loss of goods.

⁸¹ FREDERICK CHARLES MONCREIFF, *THE LIABILITY OF INNKEEPERS* (1874).

⁸² In explaining why innkeepers were liable for the loss of a guest’s goods even if this did not occur because of the fault of the innkeeper, Moncreiff argued from the necessity principle:

The grounds of so stringent a law as that concerning the liability of innkeepers are clear. The wayfarer is compelled to lodge at the inn: he has no choice, and he is a stranger in the neighborhood. He has no knowledge of the innkeeper’s respectability, who for all he knows is in league with thieves. If his goods are stolen, the guest would probably find it impossible to detect the thief, and would be greatly and unfairly embarrassed by being compelled to do so.

Id. at 1. Note that this explanation works even if there is more than one inn in the neighborhood. The wayfarer has no choice, but to stay in some inn, and they cannot all refuse to serve travelers.

⁸³ *Id.* at 18.

⁸⁴ *Id.* at 17.

⁸⁵ *Id.*

⁸⁶ *Id.* at 18.

⁸⁷ *Id.*

(2) *American law.*—American commentators in the antebellum period agree that the basis of the duty of innkeepers and common carriers to serve the public rests on the fact that they hold themselves out as ready to serve anyone who seeks their services. Chancellor James Kent, in his *Commentaries on American Law*,⁸⁸ published between 1826 and 1830, defined common carriers as “those persons who undertake to carry goods generally, and for all people indifferently, for hire.”⁸⁹ This definition rests on holding oneself out as open to serve anyone in the public who seeks service. Kent noted, “They are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action.”⁹⁰

Justice Joseph Story presented one of the clearest statements of the holding out theory in his treatise, *Commentaries on the Law of Bailments*,⁹¹ published in 1832. According to Story, “[a]n innkeeper is bound . . . to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence.”⁹² Story defined innkeepers subject to this rule:

An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. It must be a common inn, or *diversorium*, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons, who are lodgers. But it is not necessary, that the party should put up a sign as keeper of an inn. It is sufficient, if in fact he keeps one.⁹³

Story similarly explained the duty of common carriers “to receive and carry all goods offered for transportation upon receiving a suitable hire.”⁹⁴ This duty, Story notes, “is the result of his public employment as a carrier, and by the custom of the realm”⁹⁵ He defined common carriers as those who hold themselves out as ready to serve the public:

It is not . . . every person, who undertakes to carry goods for hire, that is deemed a common carrier To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and *he must hold*

⁸⁸ JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826-1830) (photo reprint 1971).

⁸⁹ 2 *id.* at 464-65.

⁹⁰ 2 *id.* at 465.

⁹¹ JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (1832).

⁹² *Id.* § 476, at 311 (citing *Thompson v. Lacy*, 106 Eng. Rep. 667 (K.B. 1820)).

⁹³ *Id.* § 475, at 310.

⁹⁴ *Id.* § 508, at 328.

⁹⁵ *Id.*

himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation, *pro hac vice*. A common carrier has, therefore, been defined to be one, *who undertakes for hire or reward to transport the goods of such, as choose to employ him*, from place to place.⁹⁶

Story defined common carriers as engaged in a public employment not because they served the public good in a way in which other trades did not, but simply because they held themselves out as ready to serve the public. A “common carrier” is one who “exercise[s his trade] as a public employment,” meaning that he “undertake[s] to carry goods for persons generally.” The common carrier’s duty “to carry passengers whenever they offer themselves and are ready to pay for their transportation . . . results from their setting themselves up, like innkeepers, farriers, and other carriers, for common public employment.”⁹⁷ This latter phrase—“common public employment”—is redundant; you undertake a “public employment” when you hold yourself out as ready to serve whoever seeks to employ you.

Theophilus Parsons’s *Law of Contracts*,⁹⁸ published in 1853, recognized that innkeepers “cannot . . . refuse [to receive a guest], unless his house is full, and he is actually unable to receive him.”⁹⁹ He simi-

⁹⁶ *Id.* § 495, at 322 (italics added).

⁹⁷ *Id.* § 591, at 374-75. Story also mentions that innkeepers are generally licensed by the state: “[i]n many of the states of America, inns and taverns are governed by special statute regulations, and no persons are permitted to assume the business of keeping them, unless by a particular license from the public authorities.” *Id.* § 485, at 316. However, he does not rest the duty to serve the public on the fact that inns are delegated public, governmental powers. Rather, he argues that, despite the fact that inns and taverns are licensed by the state and regulated by governmental permit, “[t]he common law, respecting the duties and liabilities of innkeepers, is understood, however, to prevail in all the United States, except Louisiana, in which state the civil law constitutes the basis of its jurisprudence . . .” *Id.* Thus, Story rests the duty to serve the public, not on the license or franchise, but on the common-law duties of innkeepers. This interpretation accords with his holding out theory.

This interpretation is supported by the 1836 edition of William Jones’s *An Essay on the Law of Bailment*. WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENT (1836 edition) (first published 1781). Citing a number of older English cases, Jones notes that “[a]n innkeeper is bound to receive a guest, having room for him, and if he refuse [sic], without a reasonable ground for his refusal, or on a false pretence that his house is full, he will be liable to an action.” *Id.* at 94 n.50. The first edition of Jones’s *Essay on the Law of Bailment* explains the rule that makes innkeepers strictly liable for loss of goods brought into the inn by guests, but does not mention the duty to serve which supports the rule. See WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 95-96 (1781). In explaining that a carrier in the business of transporting goods similarly has a duty to carry whatever goods a passenger brings forward if the carrier has room for them, Jones noted that “[b]y the general custom of the realm, that is, by the common law, . . . a common carrier is bound to carry the goods of the subject for a reasonable reward . . .” JONES, (1836 ed.), *supra*, at 10. Thus, Jones expressly rested the obligation on the “general custom of the realm,” that is, the common law, not the fact that the carrier received a franchise or license from the government and not because it had a monopoly.

⁹⁸ THEOPHILUS PARSONS, *LAW OF CONTRACTS* (1853) (photo reprint 1980).

⁹⁹ 1 *id.* at 627.

larly reported the rule that common carriers are “bound to receive and carry all the goods [and people] offered for transportation, subject to all the responsibilities incident to his employment, . . .”¹⁰⁰ and that the common carrier, in the absence of “special agreement” must “treat all persons alike.”¹⁰¹ Like Story, Parsons expressly adopted the holding out rationale. “Common carriers” are those “obliged to carry for all”¹⁰² because they “undertake[], for hire, to transport the goods of such as choose to employ [them], from place to place.”¹⁰³ Similarly, he noted that “Proprietors of stage coaches are not common-carriers of goods necessarily; but are so if they carry goods other than those of their passengers, usually, and *hold themselves out* as carrying for all who choose to employ them.”¹⁰⁴ When the carrier holds itself out as open to serve the public, it presents an offer that is accepted the moment a passenger tenders the usual fare, and the contract is breached if the carrier refuses to serve the passenger. “A common-carrier may make what contract he will as to his compensation; but a tender of his *usual*, or of a reasonable compensation, obliges him to carry”¹⁰⁵

Francis Hilliard’s 1859 treatise on *The Law of Torts*¹⁰⁶ similarly expresses the holding out theory:

An innkeeper is said to be one who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms. A person who does not *hold himself out* as an innkeeper, but entertains travelers occasionally for pay, is not an innkeeper, nor liable as such; and he is responsible only for negligence in respect to property of travelers intrusted to his care.¹⁰⁷

Hilliard gives the same justification for the duties of common carriers. “To make a person a common carrier, he must exercise the business as a public employment for hire, not as a casual occupation, *pro hac vice*; he must undertake to carry goods for persons generally.”¹⁰⁸

Hilliard’s treatise is the first on the law of torts and justifies the liabilities of innkeepers and common carriers as based not on contract (or the voluntary assent of the parties), but on positive law, meaning that the duty is imposed by the state. “The obligation of a common

¹⁰⁰ 1 *id.* at 648.

¹⁰¹ 1 *id.* at 649.

¹⁰² 1 *id.* at 622.

¹⁰³ 1 *id.* at 639 (citing *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 53 (1822)).

¹⁰⁴ 1 *id.* at 643 (emphasis added).

¹⁰⁵ 1 *id.* at 649.

¹⁰⁶ FRANCIS HILLIARD, *THE LAW OF TORTS* (1859).

¹⁰⁷ 2 *id.* at 614 (emphasis added).

¹⁰⁸ 2 *id.* at 620; *see also* 2 *id.* at 625:

A common carrier is required by law to perform the duty which he assumes, and is liable for any damage resulting from a refusal to perform it. He has no general right to refuse to receive a parcel tendered to him for conveyance, unless informed of the nature of its contents. Thus a railway company, acting as common carriers, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods, which in practice affects one individual only.

carrier does not arise out of *contract*, in the usual sense of that expression, but it is declared by law, and his responsibilities are fixed by considerations of public policy.”¹⁰⁹ This change from the implied contract theory of Blackstone, Story, and Parsons does not undermine the holding out theory; it simply clarifies (from the standpoint of the emerging perspective of classical legal thought) that the obligations of common carriers and innkeepers that arise when they choose to enter the business are imposed by law for reasons of public policy and are nondisclaimable.

Most of the cases decided in the United States in the antebellum period similarly base the duty to serve on the holding out theory. A few, however, base the duty on the fact that the business in question has been granted a license or franchise from the government. One of the earliest cases, *Adams v. Freeman*, decided in 1815 in New York, recites the established rule that innkeepers had a duty to serve the public, noting that “[a]ny person professing to keep an inn, thereby gives general license to all persons to enter his house,”¹¹⁰ but gives no reasons for the duty.¹¹¹ The case of *Clute v. Wiggins*,¹¹² decided by the New York Supreme Court in 1817, considered whether an innkeeper was strictly liable for loss of a guest’s goods. In adopting the English rule that innkeepers are so liable, even if the innkeeper is not at fault, the court explained that “[t]he liability of an inn-keeper for such losses, arises from the nature of his employment.”¹¹³ What is the nature of his employment? The court emphasized two factors. First, the innkeeper “has privileges by special license.”¹¹⁴ Second, “He holds out a general invitation to all travelers to come to his house, and he receives a reward for his hospitality.”¹¹⁵ *Clute v. Wiggins* does not address the question of whether the innkeeper has a duty to serve the public, although this duty may be implied. The reasoning emphasizes both the fact that the innkeeper has a license from the state and that

¹⁰⁹ 2 *id.* at 634.

¹¹⁰ *Adams v. Freeman*, 12 Johns. 408 (N.Y. Sup. Ct. 1815); *see also* *Goodenow v. Travis*, 3 Johns. 427 (N.Y. Sup. Ct. 1808) (holding that the claim that plaintiff was a “person of bad character” was a sufficient “reason or justification for not entertaining him”).

¹¹¹ *See also* *Wallen v. McHenry*, 22 Tenn. (3 Hum.) 245 (1842) (holding a public ferry keeper liable for refusing to transport plaintiff across the river after receiving his fare); *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74 (1848) (“His [an innkeeper’s] duty extends chiefly to the entertaining and harboring of travellers, &c., and therefore, if one who keeps a common inn refuses to receive a traveller, or to find him in victuals, &c., for a reasonable price, (without good excuse, as that his house is full,) he is liable not only to a civil action, but to an indictment.”)

¹¹² 14 Johns. 175 (N.Y. Sup. Ct. 1817).

¹¹³ *Id.* at 176.

¹¹⁴ *Id.*

¹¹⁵ *Id.* The court then decided that, in return for the innkeeper’s “special license” and his “reward” for inviting travelers to come to his house, “the law, in return, imposes on him corresponding duties, one of which is, to protect the property of those whom he receives as guests.” *Id.*

the innkeeper holds itself out as open to the public. It is not clear from the case whether *both* these factors were viewed as necessary to the outcome or whether either one independently was sufficient to create the “nature of the employment” sufficient to ground the rule imposing strict liability on the innkeeper.

Other early cases suggest that the duty to serve is based *independently* on the holding out premise and the license premise. In other words, either fact alone would be sufficient to create a duty to serve the public. A number of cases suggest that the duty to serve is based on the fact that the innkeeper or carrier has held itself out as open to the public without making any reference to a license or a franchise from the state. For example, an 1822 Massachusetts case, *Dwight v. Brewster*,¹¹⁶ defines a common carrier as “one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.”¹¹⁷ This fact alone seems to be sufficient to create the duty.¹¹⁸ The earliest federal case similarly suggests that it is the fact of holding oneself out as open to the public that creates the duty to serve. In the oft-cited 1835 case of *Jencks v. Coleman*, Justice Joseph Story stated that “there is no doubt, that this steamboat is a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff.”¹¹⁹ The fact that triggers the obligation is not a license or a franchise but the fact that defendant operated as a “common” carrier, *i.e.*, that it held itself out as ready to serve anyone who comes to contract for service.

The earliest case that directly addresses the justification for the right of access is the leading case of *Markham v. Brown*,¹²⁰ decided by the New Hampshire Supreme Court in 1837. In that case, an innkeeper named Markham expelled a stagecoach driver named Brown

¹¹⁶ 18 Mass. (1 Pick.) 50 (1822).

¹¹⁷ *Id.* at 53; *see also* Mershon v. Hobensack, 22 N.J.L. 372 (Sup. Ct. 1850), *aff'd*, 23 N.J.L. 580 (1851) (holding that common carriers are those that “undertake[e] to carry, for a compensation, the goods of all persons indifferently”); Fish v. Chapman & Ross, 2 Ga. 349, 352-53 (1847) (a common carrier “is one who undertakes to transport from place to place for hire, the goods of such persons as think fit to employ him” and “the business of carrying must be *habitual* and not *casual*”).

¹¹⁸ *See also* Bennett v. Dutton, 10 N.H. 481, 486 (1839), holding:

And we are of opinion that the proprietors of a stage coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal.

See also Wintermute v. Clarke, 7 N.Y. Sup. Ct. 242, 247 (1851) (“In order to charge the defendant as an innkeeper . . . it was sufficient to prove that all who came were received as guests . . .”).

¹¹⁹ *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7,258).

¹²⁰ 8 N.H. 523 (1837).

who was soliciting business from Markham's guests in the common rooms of the inn. The innkeeper argued that only travelers had a common-law right to be served in inns, not drivers of stagecoaches or other persons. Moreover, he argued that "[i]f the custom of the plaintiff's house, and the general custom of such taverns gives a license, by implication, for all persons to enter, whether travelers or not, it is a license which may be revoked in a particular case."¹²¹ The defendant driver argued, on the contrary, that he

had a right to enter the plaintiff's inn, without his consent, and against his prohibition, and to go into the common rooms in the house where guests were put, who were likely to desire a passage in his coach, to solicit them to go with him, though not requested by such guests.¹²²

The Supreme Court of New Hampshire held that an inn that was generally open to and served the drivers of stagecoaches had to serve all and could not discriminatorily refuse to serve a particular driver. At the same time, the innkeeper could exclude the driver if his previous behavior at the inn had been violent or disruptive.¹²³

Justice Parker began the opinion this way:

An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he otherwise has over it. *Holding it out as a place of accommodation* for travelers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.¹²⁴

Thus, like the English cases and the English and American treatise writers, the first American court to address the issue justified the duty to serve on the fact that the owner held out its place of business as ready to serve the public. Later cases similarly appealed to the holding out rationale.¹²⁵

Although the duty to serve the public appears to be partly premised on conceptions of public policy that support protection for the interests of travelers,¹²⁶ the antebellum cases and treatise writers do not focus their justifications for the duty on the doctrine of necessity. Nor do they characterize travel as a unique area of social life that justifies regulation of common carriers and innkeepers but not other

¹²¹ *Id.* at 526.

¹²² *Id.* at 525.

¹²³ *Id.* at 530-31.

¹²⁴ *Id.* at 528 (emphasis added).

¹²⁵ See, e.g., *Buckland v. Adams Express Co.*, 97 Mass. 124, 129 (1867) ("We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them.").

¹²⁶ *Rex v. Ivens*, 173 Eng. Rep. 94 (Monmouth Assizes 1835).

businesses. Even postbellum cases such as *Pinkerton v. Woodward*,¹²⁷ which base the duty to serve the public on the “public policy” of providing “for the protection and security of travelers,” do not characterize the interests of travelers as inherently unique. Rather, the discussions suggest a conception of social relations that comprehends the act of holding oneself out to the public as the voluntary acceptance of a social role that creates obligations when others rely on one’s fulfilling that role.

Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper . . . and a traveler relying on such representations goes to the house to receive such entertainment as he has occasion for, . . . the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper.¹²⁸

Holding oneself out as open to the public, one simply should do what one has undertaken to do, especially when others rely on you to fulfill your role.

Several antebellum cases rest the duty to serve solely on the franchise. In the 1831 case of *Beekman v. Saratoga & Schenectady Railroad Co.*,¹²⁹ a railroad was empowered by the Massachusetts legislature to exercise eminent domain powers to take privately held land in exchange for compensation. The court upheld the constitutionality of the statute against claims by the plaintiff that it wrongfully authorized a taking of property for “private use” since the land would be owned by a private railroad and “the road, when made, will be private property: it will not be for public use, but for the private use and emolument of the company, to be used exclusively by its own carriages.”¹³⁰ Plaintiff further complained that the railroad, as a private actor, would have no duty to carry all members of the public. The Chancellor rejected both of these arguments, finding that operation of the railroad benefitted the public and, in particular finding that:

The objection that the corporation is under no legal obligation to transport produce or passengers upon this road, and at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained if they should refuse to transport an individual or his

¹²⁷ 33 Cal. 557, 597 (1867).

¹²⁸ *Id.*

¹²⁹ 3 Paige Ch. 44 (N.Y. Ch. 1831); *see also* *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 546-47 (1858) (basing a gas company’s duty to serve the public on its “exclusive privilege” to furnish gas in the area).

¹³⁰ *Beekman*, 3 Page Ch. at 47-48.

property, without any reasonable excuse, upon being paid the usual rate of fare.¹³¹

Public utility companies, such as gas companies, were similarly required to serve the public because of their "exclusive privileges."¹³²

It might be argued, as Bruce Wyman later argued,¹³³ that the common law created special duties to serve the public on innkeepers and common carriers *only* because they operated on the basis of a franchise from the state.¹³⁴ The franchise might support a duty to serve either because the recipient operated a monopoly or because the franchise delegated public functions to the franchisee. On the monopoly rationale, it is important to note that *none* of the antebellum cases bases the duty to serve on the fact of monopoly. Indeed, the presence of competition was never a reason for denying the duty to serve in the antebellum era. In many towns, there were several innkeepers and cities like Boston had dozens of innkeepers.¹³⁵ Yet, no

¹³¹ *Id.* at 74-75; see also *Hall v. State of Delaware*, 4 Del. (4 Harr.) 132, 141 (1844) ("In this State, to keep an inn without a license, is an indictable offence. When the innkeeper obtains his license, he takes upon himself a public employment, and he is bound to serve the public. The employment is for the benefit of the public and not for his own private gain. He is obliged to keep his house open on Sundays, as well as on all other days. He cannot refuse to receive, and furnish with food and liquor (unless liquor is excluded by his license), all persons who are willing to pay a price adequate to the sort of accommodation provided and who come in a situation in which they are fit to be received, and demean themselves with proper decorum. If he does refuse, without a reasonable excuse, or if he furnishes unwholesome food or liquor, an action lies against him.").

¹³² *Shepard*, 6 Wis. at 547 ("Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence.").

¹³³ See *infra* text accompanying notes 546-69.

¹³⁴ Chancellor James Kent, for example, argued that

[i]n this and other states, where inns and taverns are under statute regulations, their definition and character are contained in the statute. Inns and taverns in this state, are to be licensed by the commissioners of excise Those persons so licensed are the true and proper innkeepers within the contemplation of our statute law, and probably the only persons to whom the rights and responsibility of an innkeeper attaches.

2 KENT, *supra* note 88, at 462. This passage might suggest that innkeepers have special duties to the public only because they are licensed by the state. This interpretation is too facile. The statement occurs in the section of Kent's treatise dealing with bailment and the extraordinary strict liability of innkeepers to compensate guests for goods lost while at the inn. It is not at all clear that Kent intended to do more than limit the applicability of this strict liability to licensed inns. In addition, he suggests that the entire field of innkeeper law had been preempted by statute and that the duties of innkeepers were solely governed by the statute with no common-law regulation left. His argument therefore tells us little about the obligations of businesses that were not so regulated by statute.

¹³⁵ See DAVID W. CONROY, IN PUBLIC HOUSES: DRINK & THE REVOLUTION OF AUTHORITY IN COLONIAL MASSACHUSETTS (1995) (explaining the role of taverns as meeting places and the politics of license granting in colonial Massachusetts). "The terms 'tavern' and 'inn' described almost any public house where food and beverages could be consumed and lodgings were available." *Id.* at 37. These "public houses" were established to "accommodate approved gatherings

lawyer, judge, or treatise writer *ever* suggested that innkeepers in cities like Boston should be exempt from the duty to serve the public.

The franchise rationale does appear in the antebellum law. A “special license” or franchise grants the licensee a right to do something that is otherwise prohibited as inimical to the public good. If the license is granted, it must be exercised in the interests of the public to promote public functions, and excluding members of the public arbitrarily is not in the public interest.

Several problems exist with the franchise theory. First, it fails to account for the fact that the overwhelming majority of cases and treatise writers explained the duty to serve the public *solely* on the basis of the holding out rationale. Holding oneself out as ready to serve the public appears to be sufficient, by itself, to create a duty to serve. Can it be the case that the judges were thinking to themselves that only those who have a franchise *and* hold themselves out to the public have a duty to serve the public? This is not impossible, but we have enough evidence of both judges and treatise writers who mention the holding out principle without any mention of franchise to suggest that holding out was sufficient, by itself, to justify the duty.

Second, the sources that mention franchises suggest that those who receive franchises to engage in otherwise prohibited activity are given such privileges solely because they will benefit the public; it would contradict the reason for granting the franchise to allow the franchisee to refuse to serve the public by picking and choosing among potential customers. This does not, however, suggest that one who operates without a franchise has no duty to serve the public. Rather, the case law is absolutely consistent that those who voluntarily hold themselves out as open to the public voluntarily have a duty to serve the public.

Third, in the antebellum period, the franchise rationale cannot be explained by the idea that the franchisee has been delegated “public” functions, as those were understood at the end of the nineteenth century. Rather, the cases consistently state that a business that holds itself out as open to the public thereby becomes a “public servant.”¹³⁶ Antebellum law did not strictly define “public” actors as state officials and “private” actors as all others. For example, in the 1847 case of *Fish v. Chapman & Ross*,¹³⁷ the Georgia Supreme Court held that de-

and to shelter travelers.” *Id.* at 33. Tavernkeepers received travelers. *Id.* at 45-46. Taverns in Massachusetts in the early eighteenth century served not only travelers, but provided food and drink to local inhabitants. *Id.* at 88. Conroy describes the politics involved in deciding how many licenses to grant in both cities and the countryside. *Id.* at 157-240. In many cases, more than one tavern existed in the same town. Boston, of course, had dozens of taverns. *Id.* at 171.

¹³⁶ *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74 (1848) (“For having taken upon himself a public employment, [the innkeeper] must serve the public to the extent of that employment.”).

¹³⁷ 2 Ga. 349 (1847).

endant was not a common carrier because he had not “undertake[n] to transport from place to place for hire, the goods of such persons as think fit to employ him,”¹³⁸ and thus had not undertaken to carry in “general” and “for all people indifferently.”¹³⁹ One who undertakes to “carry the goods of any person offering to pay his hire”¹⁴⁰ is a common carrier. “He must thus assume to be the servant of the public, he must undertake for *all people*.”¹⁴¹ The common carrier is a servant of the public, not because he is engaged in the transportation business, but simply because he has held himself out as ready to provide services to anyone who will pay his fare. Thus, the idea of a public employment simply restates the holding out principle. Public servants are those who have a duty to serve the public. Those who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve.

c. Common callings other than innkeepers and common carriers.—We can now address the question of whether the duty to serve the public extended to employments other than innkeepers and common carriers before the Civil War.¹⁴² The only “employments” specifically mentioned in treatises or case law as having a duty to serve the public are innkeepers, common carriers, and “farriers” (blacksmiths who shod horses). Do other “common callings” have a similar duty to serve the public? Lord Holt’s opinion in *Lane v. Cotton*¹⁴³ clearly categorizes innkeepers and common carriers as engaged in “public offices” or “public employments,” *i.e.*, trades that were “for the public good.” This fact justified the duty to serve. However, this category is not limited to innkeepers and carriers. Lord Holt treated blacksmiths as in the same category.¹⁴⁴

¹³⁸ *Id.* at 352.

¹³⁹ *Id.* at 354.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Postbellum cases repeat the description of inns and carriers as being “public” in their character, although in accord with classical legal thought, they characterize them as “quasi-public” rather than wholly “public” because of their ownership by nongovernmental entities or persons. *See, e.g., DeWolf v. Ford*, 86 N.E. 527, 529 (N.Y. 1908) (“For centuries it has been settled in all jurisdictions where the common law prevails that the business of an innkeeper is of a quasi[-]public character, invested with many privileges, and burdened with correspondingly great responsibilities.”).

¹⁴² It may be helpful to note that even though Bruce Wyman’s 1904 article was intended to justify the distinction between public service corporations with duties to serve the public (innkeepers, common carriers, and “public utilities”) from and private corporations with no such duties, he concluded that the class of employments subject to the duty to serve was substantially broader before the Civil War than after. Wyman, *The Law of Public Callings*, *supra* note 26.

¹⁴³ 88 Eng. Rep. 1458 (K.B. 1701).

¹⁴⁴ *Id.* at 1464 (“If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse [sic] to do it, an action will lie against him, because he has made a profession of a trade which is for the public good . . .”).

One might argue that blacksmiths are analogous to carriers and inns. Perhaps the operative principle was that the duty to serve applied to anyone engaged in the travel industry; after all, blacksmiths allowed horses to travel from place to place. Yet the “travel” justification is nowhere offered in the antebellum legal materials as a limiting principle. Indeed, the nineteenth century case law generally requires inns to serve local customers as well as travelers. For example, the 1884 Delaware case of *Hall v. State of Delaware*¹⁴⁵ specifically rejected the argument that inns were bound only to serve travelers and not local people who came in for a drink. “[A]n innkeeper is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided.”¹⁴⁶

In addition, it is not plausible to argue that innkeepers and common carriers were viewed as uniquely involved in promoting the public good before the Civil War. Despite later narrowing of the meaning of “public service corporation” in the post-Civil War period, the antebellum conception of “public service” in no way served to differentiate innkeepers and carriers from private merchants. Consider that we do not today categorize inns as undertaking “public functions”; we consider them, instead, to be involved in the travel business. Moreover, the meaning of “public employment” in the case law in question equated this phrase with “holding oneself out as ready to serve people indifferently.” As explained above, in the 1710 English case of *Gisbourn v. Hurst* a carrier was defined as engaged in a “public trade or employment” simply because he had “undertak[en] for hire to carry the goods of all persons indifferently.”¹⁴⁷

Similarly, the justification Blackstone proposed for the duty to serve in no way differentiated carriers and innkeepers from other trades. The duty to serve the public was imposed on innkeepers because they had established a “general undertaking” to serve the public by “hang[ing] out a sign.”¹⁴⁸ One might argue that it was simply implicit in the nature of the business of innkeeping and of common car-

¹⁴⁵ 4 Del. (4 Harr.) 132 (1844).

¹⁴⁶ *Id.* at 143-44. *But see* Wyman, *Inherent Limitation*, *supra* note 26, at 340-42 (arguing that the common-law duty applied only to travelers).

¹⁴⁷ 91 Eng. Rep. 220 (K.B. 1710).

¹⁴⁸ 3 BLACKSTONE, *supra* note 73, at 165-66. Blackstone does state that “vendors” that have absolute property rights in personal property may sell them to whomever they please. “Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whom ever he pleases, at any time, and in any manner . . .” 2 *id.* at 447. However, this statement merely makes the general observation that holders of absolute rights in personal property need not answer to any other co-owner. It does not mean that *any* vendor, including one operating a shop open to the public, has no duty to do what one has impliedly promised to do, *i.e.*, serve the public. If the statement were taken at face value, it would entitle inns to refuse to serve food and drink to travelers; yet we know that cannot be what Blackstone meant to argue. I therefore do not take this statement as any indication about the rights or responsibilities of the owners of general stores.

rying that the public be served but that other trades had no such implicit obligations. I am persuaded, however, that this is not Blackstone's intent for several reasons.

First, the rationale Blackstone uses is applicable to other trades. The innkeeper who "hangs out a sign" has made a "general undertaking" to serve the public. Other trades that are similarly open to the public make the same "general undertaking."¹⁴⁹ Second, Blackstone

¹⁴⁹ A small number of cases in the United States decided before 1870 address the question of what businesses fit into the category of inns. For example, boarding houses that rented rooms on a more permanent basis than inns were excluded from the "innkeeper" category and were exempt from the duty to serve the public. See *Beall v. Beck*, 2 F. Cas. 1111, 1116 (C.C.D.C. 1829) (Case No. 1,161) (noting that "all travelers have a right to enter and demand accommodation" in an inn but that the owner of a boarding house "has a right to select his guests"); *Pinkerton v. Woodward*, 33 Cal. 557, 583 (1867) (noting that the "keeper of [a boarding house] is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travellers of good conduct and means of payment, everything which they have occasion for as such travellers, whilst on their way").

The exemption of boarding houses from the duty to serve the public might suggest that the categories of businesses serving the public that were subject to the duty to serve were limited. This assumption is unwarranted. Boarding houses were exempt from the duty to serve because they were not understood to be "open to the public." For example, a Pennsylvania judge explained in 1869 that boarding houses were simply "private housekeeper[s]" who take in boarders. *Commonwealth ex rel. Smith v. Cuncannon*, 3 Brewst. 344, 347 (C.P. Phila. 1869). A house remains private even if the "head of the family boards his son" and this conclusion does not change when he "receives a stranger as a lodger." *Id.* "The true distinction is perfectly well understood. The public house is for the entertainment of all who come lawfully and pay regularly. The boardinghouse is for the accommodation only of those who are accepted as guests by the proprietor." *Id.* This definition is somewhat circular, as it defines businesses by reference to whether they are open to the public and then determines whether they are open to the public by reference to whether they have complied with the duty. Such a circle would enable someone to evade the duty to serve by claiming to be a private boarding house while in fact operating as an inn; in other words, the owner could violate the duty to serve the public simply by declaring the establishment not to be open to the public and thus retaining the right to choose customers. For an example of an innkeeper who tried this means of escaping innkeepers' liabilities, see *Beall v. Beck*, *supra*.

Other cases distinguish restaurants from inns for the purpose of exempting them from the innkeeper's strict liability for loss of a guest's goods. See *Commonwealth ex rel. Smith v. Cuncannon*, *supra*; *Sheffer v. Willoughby*, 61 Ill. App. 263 (1895), *aff'd*, 163 Ill. 518 (1896); *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74 (1848) (exempting coffee houses and boarding houses from the strict liability imposed on innkeepers). These cases cannot be viewed as direct authority for the proposition that restaurants had no duty to serve the public. Moreover, case law distinguishing restaurants from inns is nonexistent before 1850 since, in fact, no distinction existed. Inns served food and places that served food and drink (taverns or public houses) also served travelers. See *Overseers of the Poor of Crown Point v. Warner*, 3 Hill 150 (N.Y. Sup. Ct. 1842) (holding that the terms "inn" and "tavern" were synonymous); *People v. Jones*, 54 Barb. 311 (N.Y. 1863) (same). Cf. *Alpaugh v. Wolverton*, 36 S.E.2d 906, 908 (Va. 1946) (holding that restaurants, unlike inns, can serve whomever they like); see also *CONROY*, *supra* note 135 (describing "public houses" in the seventeenth and eighteenth centuries). The Delaware Supreme Court wrote in 1844, in *Hall v. State of Delaware*, 4 Del. (4 Harr.) 132, 140-41 (1844):

Originally an inn, according to the definition of Webster, signified "a house for the lodging and entertainment of travellers;" and a tavern signified "a house licensed to sell liquors in small quantities, to be drank on the spot." When tavern-keepers began, besides

uses the word “common” in conjunction not only with innkeepers and carriers, but with “farriers” and “taylor” or “other workmen.”¹⁵⁰ It is true that the only example Blackstone gives about a duty to serve the public involves innkeepers. Nonetheless, there is no doubt this duty would apply also to common carriers under English law.¹⁵¹ Given the mention of “common taylor” and “other workmen,” it is more plausible that the duty to serve is based on a combination of custom and the act of “hanging out a sign,” which invites the public in to do business, and that other “common callings” have similar duties.¹⁵²

This is not to say that all common callings had exactly the same duties. Each calling had its own special rules. Yet the one feature they did share was that they were “common.” The very definition of this word is “open to the public.” There is no indication in either the English cases or in Blackstone’s commentary that the duty to serve the public was expressly limited to innkeepers or carriers. On the contrary, the fact that Blackstone acknowledged some “workmen” to be engaged in “common” callings suggests that anyone who did what inns do, such as hanging out a sign inviting the public to come do business, had a duty to make good on the invitation. This is what it meant to be a common calling.

Another legal treatise of the time, William Jones’s *An Essay on the Law of Bailments*, published in London in 1781, similarly speaks of “common traders” and “common builders.”¹⁵³ Additionally, Jones analyzes these common callings in the same way that Blackstone did, mentioning in passing their “implied duties.”¹⁵⁴

Although Justice Story mentions only inns, carriers, and farriers as examples of common callings, his reasoning suggests that one “sets oneself up” for “common public employment” when one undertakes to serve customers generally, holding oneself out as ready to engage in a particular business for hire.¹⁵⁵ Similarly, he emphasizes that com-

liquors, to furnish food and lodging to travellers, the term *tavern* came to be used as a word of the same sense and signification with the term *inn*.” Both terms it is apprehended are now synonymous in the United States; and have been so in England, so far back as the reign of Elizabeth. The principles of law therefore laid down in the books, in relation to inns and innkeepers, are equally applicable to taverns and tavern-keepers, hotels, and public houses of entertainment.

¹⁵⁰ 3 BLACKSTONE, *supra* note 73, at 165.

¹⁵¹ See *supra* text accompanying notes 64-69; *Gisbourn v. Hurst*, 91 Eng. Rep. 220 (K.B. 1710).

¹⁵² Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1249-50 (1967) (arguing businesses classified as “common callings” with duties to serve the public in English common law included blacksmiths, food sellers, veterinarians, and tailors, as well as common carriers and innkeepers).

¹⁵³ JONES, (1781 ed.), *supra* note 97, at 100-01.

¹⁵⁴ *Id.* Jones does not address the duties of builders and traders in detail since they were less likely to be engaged in bailment relationships.

¹⁵⁵ STORY, *supra* note 91, § 591, at 374-75. It might be objected that the purpose of Justice Story’s discussion is to determine when those engaged in common callings are strictly liable for

mon carriers “exercise . . . a public employment” when they “undertake to carry goods for persons generally” and when they “hold [themselves] out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation.”¹⁵⁶ If this reasoning is correct, the duty to serve would not be limited to common carriers and innkeepers.

The only antebellum American case I have found that might be read to suggest that stores have no duty to serve the public is *Watrous v. Steel*,¹⁵⁷ decided in Vermont in 1829. In that case, a patron of a “book-store” quarreled with one of the owners, became involved in a physical altercation with that owner, and was physically ejected from the store. The Vermont Supreme Court stated: “[i]t is a well settled principle, that the occupant of any house, store, or other building, has a legal right to control it, and to admit whom he pleases to enter and remain there; and that he has also a right to expel any one from the room or building who abuses the privilege which has been thus given him. . . .”¹⁵⁸ This language might suggest that stores that are open to the public had no duty to serve the public. However, I think this reading of the case is incorrect.

First and most importantly, the case concerned a patron who “abuse[d] the privilege which [had] been . . . given him” to enter the store.¹⁵⁹ Thus the general statement that store owners could refuse to serve customers at will was *dicta* and unnecessary to the outcome. The court that decided *Watrous* was not faced with a situation in which a store held itself out as open to the public and then refused to honor that commitment. Rather, the case decided that one who abuses the privilege of entry can be ejected. Second, the judge equated a “store” with a “house” or “other building.” Houses and buildings are not generally open to the public, but owners are free to grant licenses to others to come onto the property. Such licenses are revocable at will. It is not clear whether the “book-store” in *Watrous* was generally open to the public. It was a printing and book selling

loss of goods entrusted to them and that he only mentions carriers and innkeepers in connection with this obligation. This objection fails when one notes that the book within which this discussion appears is one restricted to the law of bailment. Inns and carriers, as well as tailors, are likely to be engaged in undertakings that involve bailment of a customer’s goods, while retail stores are not likely to be engaged in bailment of a customer’s goods. This does not mean, however, that businesses that hold themselves out as open to the public have no duties to serve the public; they may not be mentioned in Story’s discussion simply because they do not involve bailment of customers’ property.

¹⁵⁶ *Id.* § 495, at 322.

¹⁵⁷ 4 Vt. 629 (1829). This case is cited by Alfred Avins for the proposition that businesses other than innkeepers and common carriers have long had a right to choose their customers as they saw fit. Avins, *What is a Place of “Public” Accommodation*, *supra* note 22, at 7 n.59.

¹⁵⁸ *Watrous*, 4 Vt. at 631-32.

¹⁵⁹ *Id.* at 632.

business.¹⁶⁰ It was not characterized as a “common” store; nor did Justice Turner state that the owner held itself out as ready to serve anyone who entered.¹⁶¹ Rather, the case report notes that the owner of the store had given the plaintiff “liberty to call at the store, and read the newspapers: that a circulating library was kept there, and [plaintiff] was a subscriber to it.”¹⁶² The opinion similarly notes the “plaintiff entered the book-store with the permission or license of the legal owner,”¹⁶³ suggesting that such license was not extended to everyone in the public. One might argue the court intended to equate stores of any kind with “houses” rather than common callings. However, given the antebellum distinction between “common callings” and private trades, it is not possible to conclude from this case alone that stores that held themselves out as open to the public could choose their customers at will. In this case, there is no implication that this business did hold itself out as ready to serve the public. Indeed, the court described a contractual relationship between the plaintiff and the store owner in which the plaintiff had paid for the right to come to the store to read the newspaper. It is not at all clear that this printing business was open to the general public at all.¹⁶⁴ Third, even if the book store had the right to choose its customers at will, it is not clear that this same principle would apply if the store sold necessities such as salt, rather than books.

One might argue that businesses other than common carriers and innkeepers had no duty to serve the public because in the preclassical period each *particular* legal relationship had its own peculiar rules and obligations. Moreover, in the absence of a general theory of contract or property, one cannot extrapolate from the case of innkeepers and carriers to assert that the duties of these occupations would be ex-

¹⁶⁰ *Id.* at 630.

¹⁶¹ *Cf.* *Merritt v. Claghorn*, 23 Vt. 177, 181 (1851) (referring to a “common innkeeper”); *Shaw v. Berry*, 31 Me. 478, 480 (1850) (referring to a “common inn”); *Mason v. Thompson*, 26 Mass. (9 Pick.) 280 (1830) (referring to a “common inn”).

¹⁶² *Watrous v. Steel*, 4 Vt. 629, 630 (1829).

¹⁶³ *Id.* at 631.

¹⁶⁴ A similar argument can be made about *Woodman v. Howell*, 45 Ill. 367 (1867), a post-Civil War case holding that store owners have the right to revoke a license to come on the property. *Woodman* involved a plaintiff who sought access to the office of a grain elevator to inspect the grain and the books as to the character of the grain. *Id.* at 368. A scuffle ensued when the business owner asked him to leave the office. *Id.* at 369. The dispute appeared to revolve around the right of the plaintiff to enter the office, rather than merely to inspect the grain at the elevator. *Id.* The office was certainly not generally open to the public. The court noted that: “We are aware of no rule that authorizes one man to go into or upon the premises of another, even if it be his business office or mercantile house, workshop, factory, or other place of business, when the owner shall have forbidden him. The fact, that he has devoted it to such purposes, does not transfer the title to the public or give others the right to use and occupy it, or deprive him of his control over it.” *Id.* at 370. Again, the places described by the court do not include retail stores that hold themselves out as open to the general public.

tended to businesses not specifically mentioned in current or prior case law.¹⁶⁵ The opposite argument seems more persuasive to me for several reasons.

First, both cases and treatises consistently and repeatedly base the duty to serve on the notion that innkeepers and common carriers hold themselves out as open to the public and that they therefore are necessarily involved in a “public employment.” A later Vermont case, decided in 1858, confirms this approach. In *Harris v. Stevens*,¹⁶⁶ the Vermont Supreme Court held that a railroad station had to allow passengers to enter at reasonable times to wait for trains, as long as they complied with reasonable regulations.¹⁶⁷ In so ruling, the court explained that railroad “corporations, by erecting their station-houses and opening them to the public, impliedly license all to enter.”¹⁶⁸ None of the sources requires something other than “holding oneself out as open to the public” to justify the duty to serve. Specifically, the legal sources do not distinguish between “businesses affected with a public interest” and businesses that solely promote private interests. To the extent they do distinguish public and private, they do not do so functionally by focusing on the type of business involved but on the simple criterion of whether there is an implicit invitation to the public to come and be served. It is true that no general theory of obligation prevailed in the preclassical era; contracts were divided by type and were characterized by status-specific obligations. But it is also true that this is the era of a grand style of reasoning in the common-law tradition and the justifications for the duty to serve support extending the right of access to the general store.

Although it is true that the only actors explicitly required by law to serve the public were common carriers and innkeepers, it is far from clear that other actors were exempt from such obligations. In this period, many actors other than innkeepers and carriers were characterized as engaged in “common employments,” including surgeons, tailors, and traders.¹⁶⁹ No strict, categorical separation was ever made between common carriers and innkeepers versus other kinds of businesses. This is not to say that innkeepers and common carriers were not subject to special rules—they were. It is to say, however, that they

¹⁶⁵ Singer, *Legal Realism Now*, *supra* note 73, at 477-81 (describing preclassical legal thought); Kennedy, *Classical Legal Thought*, *supra* note 73, at ch. IV (same).

¹⁶⁶ 31 Vt. 79 (1858).

¹⁶⁷ *Id.* at 80-81.

¹⁶⁸ *Id.* at 92. The court then noted that such licenses were revocable from those who did not have “legitimate business there growing out of the road, or with the officers, or employees of the company.” *Id.* In other words, the station was open to train passengers and those meeting travelers, but not for other purposes, such as loitering.

¹⁶⁹ See Ames, *supra* note 76, at 4 (quoting English case law referring to a “common surgeon”); 3 BLACKSTONE, *supra* note 73, at 165 (referring to “common taylor” and “other workmen”).

were not the only businesses subject to special rules. Nor were they conceptualized as *fundamentally* different from other kinds of business subject to regulation in the public interest by custom and law. Although the legal sources repeatedly use them as examples of businesses with duties to serve the public, those same sources do not *exempt* other common callings from this duty.

Second, it is implausible to interpret the sources as premised substantially on the fact that both innkeepers and common carriers had licenses or franchises from the state. In the antebellum era, *most* trades operated under licenses from the state.¹⁷⁰ Historian William Novak notes that “[l]icensing was used throughout the antebellum era to regulate and control a myriad of economic activities, structures, trades, callings, and professions.”¹⁷¹ Licensing was a privilege to do something that “was otherwise illegal or against public policy. . . . So what were some of the activities that were considered special privileges in the antebellum era—illegal without public sanction[?]”¹⁷² Novak tells us that “[i]n some states, one was the basic economic act of *selling for profit*. Beginning in 1827, Maryland put together a series of statutes that established a ‘license to trade.’”¹⁷³ These statutes made it illegal for anyone other than the grower or maker of goods to set up a shop for wholesale or retail selling without a state license. Tennessee, Missouri, Pennsylvania, and California passed similar statutes.¹⁷⁴ New York courts upheld local laws that prohibited selling produce outside the public market.¹⁷⁵ As late as 1856, the Tennessee Supreme Court held that the occupation of merchant was a privilege sanctioned by the state and not a natural right of individuals.¹⁷⁶ Other licensed trades in the antebellum era included “butchers, bakers, grocers, lawyers, and doctors.”¹⁷⁷ Laws in New York required licensing for anyone engaged in carting people or goods.¹⁷⁸ Such laws were also upheld in Massachusetts in 1845 and in Pennsylvania in 1859.¹⁷⁹ Novak concludes that “licensing left little in the antebellum economy untouched.”¹⁸⁰ Nor can one dismiss these licensing practices because

¹⁷⁰ See William J. Novak, *Salus Populi: The Roots of Regulation in America*, at 346-47 (1992) (Brandeis University, unpublished Ph.D. History thesis, on file at Langdell Library of Harvard Law School).

¹⁷¹ *Id.* at 345.

¹⁷² *Id.* at 346.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 347.

¹⁷⁵ *Id.* at 375-76; *Village of Buffalo v. Webster*, 10 Wend. 99 (N.Y. 1833); *Bush v. Seabury*, 8 Johns. 418 (N.Y. 1811).

¹⁷⁶ Novak, *supra* note 170, at 347; *French v. Baker*, 36 Tenn. (4 Sneed) 193 (1856).

¹⁷⁷ Novak, *supra* note 170, at 354-55.

¹⁷⁸ *Id.* at 352.

¹⁷⁹ *Id.* at 374-75; *Wartman v. City of Philadelphia*, 33 Pa. 202, 209 (1859); *Commonwealth v. Rice*, 50 Mass. (9 Met.) 253 (1845).

¹⁸⁰ Novak, *supra*, note 170, at 355.

they did not involve franchises (monopolies). Remember that Boston had licensed dozens of inns in the antebellum period. If the franchise or permit from the government is the crucial fact, this does not differentiate common carriers and innkeepers from other actors in the United States.

Third, even if we ignore the expressed justifications of scholars and judges and presume that the duty to serve was based on the presence of monopoly, there still would be a duty to serve on the general store precisely, because in many towns there was likely to be only one general store. In fact, Bruce Wyman, the progenitor of the monopoly theory, believed that the legal sources demonstrated that many actors other than innkeepers and common carriers were conceptualized and characterized as “common callings” in the antebellum period—including barbers, tailors, victuallers, surgeons, and smiths—and that each had a duty to serve the public.¹⁸¹ Professor Joseph Beale similarly noted in 1897 that

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a “common” or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sherriffs, and gaolers. Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskillfulness or improper preparation for the business.¹⁸²

Law professors sometimes assert that the duty to serve was partly based on *necessity*: travelers excluded from carriers would have no means of transport to get home and if no inn would take them, they would be vulnerable to both the cold and bandits on the highway.¹⁸³ However, this justification proves too much. In the first half of the nineteenth century, most people in the United States lived in rural areas. Although many people produced much of what they needed to survive, they also were dependent on others for some of the necessities of life and both barter and shops filled these needs.¹⁸⁴ In the sparsely populated rural areas, complete denial of access to local shops for the necessities of life would have produced as much hardship as denial of entry to an inn at night.

It is also important to note that the necessity justification persists even in the presence of competition. Although monopoly may create a more urgent need for access—since no alternatives are available—it

¹⁸¹ Wyman, *The Law of Public Callings*, *supra* note 26, at 160.

¹⁸² Joseph H. Beale, Jr., *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158, 163 (1897).

¹⁸³ The cases do base the innkeeper's and common carrier's strict liability for loss of a guest's or passenger's goods on public policy and necessity. *See, e.g.*, *Lane v. Cotton*, 88 Eng. Rep. 1458, 1463 (K.B. 1701) (“grounded upon great equity and justice”).

¹⁸⁴ JACK LARKIN, *THE RESHAPING OF EVERYDAY LIFE: 1790-1840*, at 6-11, 36-39 (1988).

is a distinctly romantic notion that competition necessarily ensures that someone will provide the service. As the history of race discrimination in the United States demonstrates, it may be the case that no inn and no carrier in a particular area will serve someone because of that person's race. The market does not correct for racial discrimination, but rather, often responds to and embodies it. The goal of the local market may be precisely to prevent African-Americans from coming to town or passing through the town. The assumption that competition would inevitably result in service is unwarranted.

Finally, the treatise writers and judges characterize common carriers and innkeepers as involved in "public employment." By this, they mean both that these employments are involved in activity that *promotes the public good* and that they have voluntarily agreed to serve the public by *holding themselves out* as ready to do so. Yet as we have seen, this classification in no way distinguished innkeepers and common carriers from common surgeons, common blacksmiths, and common traders. Indeed, some of the cases define all corporations as a form of public servant. For example, in the 1857 case of *Galena & Chicago Union Railroad Co. v. Rae*,¹⁸⁵ although the court found the defendant justified in not transporting the plaintiff's goods because the train was full, the court stated that

[c]orporations for carrying are created for the public good, and powers and privileges are given them in consideration of the benefits they are expected to confer upon the public. Their obligations to the public require the use of their facilities fairly, and in such manner as is best calculated, in the prosecution of their business, to afford the largest public benefit.¹⁸⁶

The narrow conception of "public service corporations" as it was understood in the *Lochner* era at the end of the nineteenth century is quite different from the more expansive notion of public service commonly accepted in the preclassical era before the Civil War.¹⁸⁷ "Public

¹⁸⁵ 18 Ill. 488 (1857).

¹⁸⁶ *Id.* at 490.

¹⁸⁷ For example, in the 1908 case of *DeWolf v. Ford*, 86 N.E. 527 (N.Y. 1908), the court noted that "the business of the innkeeper is of a quasi public character," *id.* at 529, suggesting both that its character is anomalous and exceptional and that it is only "quasi" public, rather than a "public employment," as that term was used in preclassical legal thought. The "quasi public" designation is based on the premise that innkeepers are not state officials or "governmental" actors and thus not "truly public" as the classical system defined the public sphere. The court goes on to emphasize that the innkeeper's duties do not arise from "express contract," but rather from the innkeeper holding itself out as willing to receive guests and "the law implies whatever else is necessary to constitute the relation between them." *Id.* at 530. The holding out theory here triggers the implied duties, just as it did in the antebellum era. However, the reasoning is backwards. The antebellum cases *start* with the holding out principle and *derive* the innkeeper's duties from that fact. The classical cases, such as *DeWolf*, start by characterizing the innkeeper as an anomalous quasi public type of business with duties implied by law rather than voluntarily assumed by contract and thus use the act of holding oneself out as open to the public as a

employment” in the antebellum era was synonymous with “common calling” and “common” simply meant “open to the public.”¹⁸⁸ Under this reasoning, the duty to serve would have applied to a general store open to the public.

In conclusion, I believe it is not possible to demonstrate conclusively one way or the other whether businesses such as general stores had a duty to serve the public in the antebellum period. At the same time, the most plausible construction of antebellum legal materials would extend the right of access to all businesses that hold themselves out as ready to serve the public. Moreover, the formal law exempting businesses other than inns and common carriers from the duty to serve did not come into being until the late 1850's. In other words, the current common-law rule did not crystallize until around the Civil War. It is my contention that the timing of this crystallization was not an accident.

d. Race and the right of access.—So far, I have bracketed the problems of race discrimination. Was there a duty to serve the public without regard to race in the antebellum period? Several issues are presented. First, did the right of access extend to African-Americans? Second, did the exception for “disruptive” guests focus on misbehavior by the guest or could a guest be deemed “disruptive” if his or her presence was undesired by other guests? Third, even if there was a right of access—a right to be served—did separation of the races or segregation constitute a “reasonable regulation” that was compatible with the duty to serve? The answers to these questions are not clear; the legal and nonlegal materials are ambiguous.¹⁸⁹

No cases I have found decided before 1850 address the obligation of innkeepers and common carriers to provide services to African-Americans. No statutes required segregation in transportation until after the Civil War.¹⁹⁰ The first cases I have found that expressly address this question were decided in 1858 and 1859. These cases suggest that, in the North, innkeepers and common carriers had duties to serve free Negroes but that racial segregation in these facilities would constitute a “reasonable regulation” and thus not constitute a viola-

voluntary entry into this anomalous type of business. *See also* *Alpaugh v. Wolverton*, 36 S.E.2d 906, 908 (Va. 1946) (characterizing inns as “quasi public”).

¹⁸⁸ *McDuffee v. Portland & Rochester R.R.*, 52 N.H. 430, 448 (1873), explicitly equates the word “common” when associated with carriers to mean “public” and then defines “public” as a business that is open to and has a duty to serve the public.

¹⁸⁹ For essays on the antebellum legal treatment of African-Americans, see 2 *RACE, LAW, AND AMERICAN HISTORY, 1700-1990: THE AFRICAN AMERICAN EXPERIENCE, RACE AND LAW: BEFORE EMANCIPATION* (Paul Finkelman ed., 1992) [hereinafter *RACE AND LAW: BEFORE EMANCIPATION*].

¹⁹⁰ *FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO* 15 (1918).

tion of the duty to serve. At the same time, one of the cases takes the opportunity to hold that places of entertainment are *not* subject to the duty to serve and thus have the power to exclude individuals arbitrarily—including on the ground of race.

Given the absence of case law before 1850, it is necessary to address four sources of information about rights of access for African-Americans in the antebellum period: (1) the general common law before 1850; (2) statutes and constitutional provisions regarding free Negroes; (3) the earliest extant case law of 1858 and 1859; and (4) historical accounts of actual social practices in the antebellum era.

Before 1850, neither common law nor statutes said anything specifically about race in connection with public accommodations. At least formally, this would suggest all free persons had the same rights of access to common callings as was enjoyed by white men. Indeed, some of the cases explicitly speak of wrongful discrimination. For example, in the 1837 New Hampshire case of *Markham v. Brown*,¹⁹¹ Justice Parker held that a “common innkeeper” who allows drivers of stagecoaches that pass through the town to come into his inn cannot exclude the driver of a “rival line” from going into public rooms in the inn for the purpose of soliciting passengers for his line, as long as the driver acts properly.¹⁹² Justice Parker argued that “the landlord, if he give[s] a general license to some of those whose business is connected with his guests, in their characters as travelers, cannot lawfully exclude others, pursuing the same business, and who enter for a similar object.”¹⁹³ Why is this so?

There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests—the same lawful purpose—comes in a like suitable condition, and with as proper a demeanor; any more than he has the right to admit one traveler and exclude another, merely because it is his pleasure.¹⁹⁴

The argument is expressly premised on a requirement of equal treatment and lack of discrimination. “And we are of opinion, that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff, to enter the plaintiff’s inn for the purpose of tendering his coach for the use of travelers, and soliciting them to take passage with

¹⁹¹ 8 N.H. 523 (1837).

¹⁹² *Id.* at 523.

¹⁹³ *Id.* at 529.

¹⁹⁴ *Id.* at 529-30. The Court did hold that the driver could be excluded if he had caused “affrays or quarrels” or “if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house—interfered with its due regulation—intruded into the private rooms—remained longer than was necessary, after being requested to depart—or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him.” *Id.* at 531.

him.”¹⁹⁵ The court does allow inns to exclude thieves,¹⁹⁶ “brawlers,”¹⁹⁷ those in a “filthy condition,” or “drunkards and idle persons.”¹⁹⁸ These categories imply wrongdoing and do not include skin color.¹⁹⁹

The formal expression of the court would seem to allow exclusion only of individuals who were disruptive or otherwise wrongfully disturbing the owner or other guests. Other cases present a similar picture. Justice Story’s 1835 opinion in *Jencks v. Coleman*²⁰⁰ noted that common carriers were bound to take passengers on board as long as there was no “reasonable objection” to their “character or conduct.”²⁰¹ The plaintiff in *Jencks* sought to board the steamship Benjamin Franklin for the purpose of soliciting passengers for a line of stagecoaches traveling from Providence, Rhode Island, where the boat would dock, to Boston. The steamship owner had contracted with a different company to provide such transportation. In charging the jury, Justice Story stated that the steamship was

not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, a fortiori, whose characters are unequivocally bad.²⁰²

The court went on to state that the company was not “bound to admit passengers on board, whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.”²⁰³ Thus, it might be reasonable to exclude the plaintiff unless this unreasonably promoted “an oppressive monopoly.”²⁰⁴ This construction of the law justifies exclusion when the conduct of a passenger might interfere with the operation of the carrier’s business. It would not allow exclusion of someone simply because of their status or skin color, neither of which constitutes a wrongful interference in operation of the business—whatever the prejudices of the other passengers.

Doty v. Strong,²⁰⁵ decided by the Supreme Court of Wisconsin in 1843, restated the holding out test: “[a] common carrier is one who

¹⁹⁵ *Id.* at 530.

¹⁹⁶ *Id.* at 528-29.

¹⁹⁷ *Id.* at 529.

¹⁹⁸ *Id.*

¹⁹⁹ See also *Goodenow v. Travis*, 3 Johns. 427 (N.Y. 1808) (holding that the claim that the plaintiff was a “person of bad reputation” was a sufficient “reason or justification for not entertaining him”).

²⁰⁰ 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258).

²⁰¹ *Id.* at 443.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 444.

²⁰⁵ 1 Pin. 313 (Wis. 1843).

undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place."²⁰⁶ The court then went on to state: "[t]his is a general undertaking, and embraces every one in the community, and to make it particular, as an undertaking with a single individual, it is only necessary that he should apply with such goods as the common carrier has undertaken to transport."²⁰⁷ The undertaking "embraces every one in the community." This formulation does not seem to leave room for exclusion of particular persons on the ground of race. Formally, this structure of doctrine should require admittance of any person of any color who comports himself or herself properly.²⁰⁸

This interpretation is supported by the first legal materials that address the issue of race and public accommodations. The first source to mention anything about race in connection with the duty to serve is Edward Lillie Pierce's *A Treatise on American Railroad Law*,²⁰⁹ published in 1857. To my knowledge, Pierce's statement is the first in United States law to explicitly confirm that the right of access to places of public accommodation extended to African-Americans. The entire paragraph in Pierce's treatise is worth quoting in full:

DUTY OF THE COMPANY TO RECEIVE PASSENGERS AND TO CARRY THEM ACCORDING TO ITS PROFESSIONS.—The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse. It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language, or vulgar conduct—renders them an annoyance to other passengers. *But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account*

²⁰⁶ *Id.* at 326.

²⁰⁷ *Id.*

²⁰⁸ See also *Pearson v. Duane*, 71 U.S. (4 Wall.) 605, 615-16 (1866) (holding that the carrier could exclude "a drunken or insane man, or one whose character is bad," but that it could not exclude plaintiff even though it did so for the "humane reason" that his life had been threatened by an unlawful private group called the Vigilance Committee in San Francisco); *Hall v. State of Delaware*, 4 Harr. 132, 145 (Del. 1844) ("Upon the well settled principles of law, it follows, that all persons who come to an inn, or tavern, or public house of entertainment, in a situation fit to be received, who behave with propriety and decorum, and are willing to pay a price according to the accommodation provided, have a right under authority and license of law, to be received as guests. . . . If he behaves in a disorderly manner, the innkeeper, after first requesting him to depart, has a right to turn him out of his house.").

²⁰⁹ EDWARD LILLIE PIERCE, *A TREATISE ON AMERICAN RAILROAD LAW* (1857). Pierce was a Boston attorney with strong abolitionist sentiments. Patricia H. Minter, *The Codification of Jim Crow: The Origins of Segregated Railroad Transit in the South, 1865-1910*, at 18 (1994) (unpublished Ph.D. dissertation, University of Virginia).

*of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations.*²¹⁰

To support the italicized sentence, Pierce cites only Justice Story's 1835 opinion in *Jencks v. Coleman*²¹¹ and the 1839 New Hampshire decision of *Bennett v. Dutton*²¹²—neither of which mentions anything whatsoever about race.

This passage from Pierce is first cited and quoted two years after publication of Pierce's treatise, in an opinion by Judge Lowe of Ohio in the 1859 case of *State v. Kimber*.²¹³ In that case, a city passenger railroad company forcibly ejected a "mulatto" woman²¹⁴ from the train immediately after she had stepped on the platform to take her seat on the car. The state charged the conductor with criminal assault and battery, and the court convicted the defendant conductor and fined him ten dollars. Citing cases that did not involve race, Judge Lowe first reported the general rule to the effect that

I understand the duty of common carriers of passengers for hire to be to receive and convey all persons who apply for a passage, and who are ready and willing to pay their fare and who are not unfit persons by reason of their disorderly conduct, misbehavior, drunkenness, or disease, or who take passage for the purpose of interfering with the business of the carrier.²¹⁵

Judge Lowe then quoted from Pierce's treatise on railroad law from 1857 to the effect that a railroad "cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations."²¹⁶ The judge therefore concluded that Sarah Fawcett had been wrongfully ejected from the train.²¹⁷

²¹⁰ PIERCE, *supra* note 209, at 489 (emphasis added).

²¹¹ 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258).

²¹² 10 N.H. 481 (1839).

²¹³ 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859).

²¹⁴ The report of the case is confusing regarding the woman's name. It was either Sarah or Mary Fawcett. Both names are used. It does not appear from the report that the two women were involved although this is a possible interpretation from the presence of the two names in the reported case.

²¹⁵ 3 Ohio Dec. Reprint at 197 (citing Justice Story's opinion in *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258) and *Bennett v. Dutton*, 10 N.H. 481 (1839)).

²¹⁶ 3 Ohio Dec. Reprint at 197-98. Judge Lowe further maintained:

I am not aware of any decision in a court of last resort, that maintains a different doctrine from these authorities, and if there were any such decision I am satisfied the diligence of the counsel for defendant would have enabled them to produce it. I must take them therefore as the law applicable to this case.

Id. at 198.

²¹⁷ *Id.* An 1889 case interpreting the Nebraska public accommodations statute of 1885 similarly interpreted the holding out principle to encompass black patrons. *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) ("A barber, by opening a shop, and putting out a sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during

The judge buttressed his decision by noting that the victim was not disorderly and that there was no "objection to her whatever but her complexion."²¹⁸ As to the latter, Judge Lowe added: "[a]s she appears upon the stand she seems to be about as much of the white as African race—in fact a mulatto, and apparently [sic] one of the better portion of her class."²¹⁹ This sentence is intended to emphasize that defendant's objections to her were unreasonable since she was partly white in appearance and because of her supposed class background, being of the "better portion" of the "mulatto class." Does this suggest that if she were not part white, or if she were clearly "lower class," that the court might have viewed the objections as reasonable? Perhaps. The judge notes that "[i]t is not pretended that the passenger was in any way disorderly, . . . [or] that any of the passengers objected to her being received"²²⁰ If the other passengers had objected, would the result have been different? Maybe. Yet the legal rule announced in the case, based on the citation of Pierce's treatise, appeared to be that race alone could *not* constitute a legitimate reason for total exclusion. Perhaps the court would accept race as a legitimate reason for segregation.

Although the formal law of public accommodations made no distinctions based on race, other laws *did* make distinctions based on race. A number of states in the former Northwest Territory, as well as states in the South, passed laws completely prohibiting immigration of free Negroes to the state. Such statutes constitute the most virulent form of law entitling places of public accommodation to refrain from serving African-American customers; they do so by attempting to exclude free African-Americans from the state or locality entirely.²²¹ In addition, various laws were passed during this period disenfranchising free Negroes, prohibiting their testimony in court, and disallowing them to exercise various trades.²²² One might argue that the presence of laws that authorized discrimination against African-Americans suggested that rights accorded to white citizens did not extend to African-Americans—a presumption accepted by the United States Supreme Court in the *Dred Scott* decision.²²³ The opposite conclusion appears

business hours. The statute will not permit him to say to one 'You are a slave, or a son of a slave; therefore I will not shave you.'").

²¹⁸ *Messenger*, 41 N.W. at 639.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 26 (1988); JoAnn Manfra, *Northern Exclusionary Measures and the Privileges and Immunities of Free Blacks, 1778-1857: An Unexamined Theme in Antislavery Constitutionalism 1-8* (1979) (unpublished LL.M. Thesis, on file at Langdell Library at Harvard Law School).

²²² JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 148-67* (7th ed. 1994).

²²³ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

more plausible. Laws *did* exist in the antebellum period that expressly restricted the rights of free Negroes.²²⁴ The *absence* of laws depriving African-Americans of the right to be served in places of public accommodation may therefore constitute evidence that the duty to serve the public did extend to all customers regardless of race.²²⁵

Although the common law appeared to speak in universal terms, it always allowed the innkeeper to implement “reasonable regulations . . . for the due accommodation of passengers and for the due arrangements of their business,” as Justice Story wrote in *Jencks v. Coleman* in 1835.²²⁶ This doctrine allowed for the complete exclusion of guests who were disruptive and was often interpreted after 1858 to allow racial segregation, even if reasonable regulations might not include a right to refuse absolutely to serve African-Americans.

One might argue that the right to exclude disruptive guests could be premised not only on misconduct by the guest, but on the feelings of other guests. Some judges went so far as to argue that “accommodation of passengers” required exclusion, rather than mere segregation. Cases decided after 1850 expressly rely on the preferences of the majority of the customers of a business as a reasonable basis for justifying racial segregation. For example, the Michigan Supreme Court ruled in 1858 in the case of *Day v. Owen*²²⁷ that, although a steamboat owner had a duty to transport passengers regardless of race,²²⁸ it could exclude an African-American man from the cabin area to “accommodat[e] the mass of persons who have a right, and are in a habit of traveling on his boat.”²²⁹ In so doing, the court rejected plaintiff’s argument that the steamboat could only exclude persons of “bad character.” Plaintiff had tried to convince the court that

the mere *fact*, that a given class of persons and another given class do not associate together, or that individuals of the former class would be ‘offensive’ to individuals of the latter, provided they should chance to meet on the same conveyance, [does not] constitute any *legal* ground of refusal on the part of the carrier to carry”

²²⁴ JOHNSON, *supra* note 190 (containing a detailed review of numerous state laws restricting the rights of free Negroes).

²²⁵ This argument, however, must be balanced by the recognition of widespread *customary* exclusion of Negroes in the North in this period. See *infra* text accompanying notes 239-44.

²²⁶ 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258); see also *State of Iowa v. Chovin*, 7 Iowa 204, 207 (1858) (common carriers have a “clear duty . . . to receive all passengers who offer themselves as such,” but also have the “power to make reasonable regulations, to guide and govern [their] agents in the discharge of their duties, and for the conduct of passengers while in [their] trains”); *Stephen v. Smith*, 29 Vt. 160, 163 (1857) (railroad may impose reasonable regulations); *Galena & Chicago Union R.R. v. Yarwood*, 15 Ill. 468, 472 (1854) (same); *Commonwealth v. Power*, 48 Mass. (7 Met.) 596 (1844) (same).

²²⁷ 5 Mich. 520 (1858).

²²⁸ *Id.* at 523.

²²⁹ *Id.* at 527.

Thus “a common carrier can not refuse to carry any person of legal conduct and intention *upon the ground of any physical or personal quality or defect, or to suit the preference or antipathies of other passengers.*”²³⁰ The court held that it might very well constitute a reasonable regulation to segregate passengers by race. This question was a mixed one of law and fact for the jury. The court justified this conclusion as follows:

The right to be carried is one thing—the privileges of a passenger on board of the boat, what part of it may be occupied by him, or he have the right to use, is another thing. The two rights are very different. The latter, and not the former right, is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by them.²³¹

All rules and regulations must be reasonable; and to be so, they should have for their object the accommodation of passengers. Under this head we include everything calculated to render the transportation most comfortable and least annoying to passengers generally

[T]he reasonableness of a rule or regulation[] is a mixed question of law and fact[] to be found by the jury on the trial²³²

The reasonableness of the rule [confining colored persons to the deck and excluding them from the cabin area], if it be reasonable, [depends] on the accommodation of the mass of persons who have a right, and are in the habit of traveling on his boat. As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. He may do so if he chooses, but the law does not impose it on him as a duty. It does not require a carrier to make any rules whatever, but if he deems it for his interest to do so, looking to an increase of passengers from the superior accommodations he holds out to the public, to deny him the right would be an interference with a carrier’s control over his own property in his own way, not necessary to the performance of his duty to the public as a carrier.²³³

This discussion strongly suggests that, although it would be unlawful to refuse absolutely to provide service to someone because of that person’s race, it would be reasonable to exclude African-Americans from a portion of the steamboat to “accommodate” the “mass of

²³⁰ *Id.* at 523 (emphasis added).

²³¹ *Id.* at 526.

²³² *Id.* at 527.

²³³ *Id.* at 526-27; *see also* Fitchburg R.R. v. Gage, 78 Mass. (12 Gray) 393, 399 (1859) (holding that the common carrier’s duty to provide “equal justice to all” does not require equal rates for all passengers but rather only that each passenger be charged a “reasonable compensation”); Benjamin M. Kline, *The Origin of the Rule Against Unjust Discrimination*, 66 U. P.A. L. REV. 123 (1918) (discussing the evolution of the doctrine that common carriers and utilities must provide services without unjust discrimination in rates or services, rather than merely having the right to provide service for a reasonable compensation).

persons who have a right, and are in the habit of traveling on [the] boat." Protection of the "community at large" might require special burdens on a minority, including segregation. If the right of access is one belonging to "the community at large" and not "particular individuals," business owners might have the right to accommodate the majority by segregating the "offensive minority."

Although Massachusetts was arguably the most hospitable state to abolitionists and abolitionist sentiment, its Supreme Judicial Court upheld racial segregation in the schools in the famous case of *Roberts v. Commonwealth* in 1849.²³⁴ Although *Roberts* was effectively overturned by legislation passed in 1855 outlawing segregated schools,²³⁵ the first Massachusetts Supreme Judicial Court decision to address race in connection with public accommodations upheld the right of the owner to exclude a patron solely on the basis of race. In the 1858 case of *McCrea v. Marsh*,²³⁶ the Massachusetts Supreme Judicial Court allowed a well-known lecture hall, the Howard Athenæum, to refuse to admit black patrons. The plaintiff in that case had actually purchased a ticket but the doorkeeper refused to seat him when he went inside. The court held that the ticket created only a revocable license, and that plaintiff's only remedy was to sue for breach of contract, presumably with damages amounting to little or nothing.²³⁷ This ruling would not require other lecture halls to grant tickets. Indeed, it was premised on the viability of *Wood v. Leadbitter*,²³⁸ the famous English case that held that places of entertainment, unlike innkeepers and common carriers, had no duty to serve the public. This decision therefore would deprive *both* white and black patrons of rights of access to places of entertainment. On the other hand, it was far more likely that the lecture hall's right to exclude would be exercised differently depending on the race of the person seeking admission. This adoption of the rule exempting places of entertainment from the duty to serve the public otherwise applicable to innkeepers and common carriers therefore had the immediate effect—and perhaps the pur-

²³⁴ *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850); LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 148 (1961).

²³⁵ LITWACK, *supra* note 234, at 149.

²³⁶ 78 Mass. (12 Gray) 211 (1858).

²³⁷ *Id.* at 213; *see also* *Burton v. Scherpf*, 83 Mass. (1 Allen) 133 (1861) (similar holding, involving a "colored man" who was ejected from a theater after buying a ticket and taking his seat). This rule remains in effect in many states in the United States and is routinely taught in law schools as the law of the land. The only remedy for refusing to seat someone who purchased a ticket is to sue for damages; the complainant has no right to be seated unless the refusal violates a civil rights statute. Few people are aware that this rule operated to support the rule that places of entertainment had no duty to serve the public, with the consequent effect of allowing places of entertainment to exclude African-Americans.

²³⁸ 153 Eng. Rep. 351 (Ex. 1845). *Wood v. Leadbitter* was itself overruled thereafter in *Hurst v. Picture Theatres Ltd.*, 1 K.B. 1 (1914).

pose—of allowing theater owners to practice racial segregation and exclusion under cover of law.

McCrea v. Marsh was the first American case to adopt explicitly the English rule exempting places of entertainment from the duty to serve the public. It was also the first case to adopt the rule that ticket holders have no right to enter the theater and that tickets merely confer licenses revocable at will, subject to the payment of only nominal damages. *McCrea* and *Kimber* are the first cases to address the rights of African-Americans to have access to public accommodations. It is telling that the first courts to address expressly the rights of African-Americans in public accommodations split on this question. *It is also telling that the first case to hold that a business open to the public—a lecture hall—had no duty to serve the public was a case in which the plaintiff was an African-American male.* It is my view that the identity of the plaintiff in *McCrea v. Marsh* was not incidental to the outcome. The effect of the ruling in *McCrea* was to place an express limit, for the first time in United States legal history, on the rights of the public to obtain access to businesses open to the public. After *McCrea*, neither white nor black persons had a right of access to places of entertainment in Massachusetts. Although neutral in coverage, this new rule of law was not neutral in application, as *McCrea* itself demonstrates.

Actual social practice in the North supported segregation or exclusion of free Negroes from many aspects of social life, including public accommodations. Segregation was not lawfully imposed in the North before the Civil War, but was nonetheless widespread as a matter of custom. This included both total exclusion and segregation. Historian Leon Litwack notes:

Racial segregation or exclusion . . . haunted the northern Negro in his attempts to use public conveyances, to attend schools, or to sit in theaters, churches, and lecture halls. But even the more subtle forms of twentieth-century racial discrimination had their antecedents in the antebellum North: residential restrictions, exclusion from resorts and certain restaurants, confinement to menial employments, and restricted cemeteries. The justification for such discrimination in the North differed little from that used to defend slavery in the South: Negroes, it was held, constituted a depraved and inferior race which must be kept in its proper place in a white man's society.²³⁹

Litwack explains that “extralegal codes—enforced by public opinion” or custom, rather than statute or common law—“relegated [Negroes] to a position of social inferiority”:²⁴⁰

²³⁹ LITWACK, *supra* note 234, at viii; *see also id.* at 65 (“Segregation confronted [Negroes] in public places, including churches and cemeteries.”); JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 54-56 (1976).

²⁴⁰ LITWACK, *supra* note 234, at 97; FONER, *supra* note 221, at 25-26.

In virtually every phase of existence, Negroes found themselves systematically separated from whites. They were either excluded from railway cars, omnibuses, stage coaches, and steamboats or assigned to special "Jim Crow" sections; they sat, when permitted, in secluded and remote corners of theaters and lecture halls; they could not enter most hotels, restaurants, and resorts, except as servants; they prayed in "Negro pews" in the white churches, and if partaking of the sacrament of the Lord's Supper, they waited until the whites had been served the bread and wine. Moreover, they were often educated in segregated schools, punished in segregated prisons, nursed in segregated hospitals, and buried in segregated cemeteries.²⁴¹

Racial segregation was the norm throughout the antebellum period.²⁴² Even Massachusetts showed a similar pattern of customary segregation on common carriers, including stagecoaches, railroads, and steamboats.²⁴³ By 1841, separate Negro cars were known as "Jim Crow cars."²⁴⁴

²⁴¹ *Id.*; see also Richard C. Wade, *Urban Segregation During Slavery*, in *THE ORIGINS OF SEGREGATION* 81 (Joel Williamson ed., 1968) ("Taverns, restaurants, and hotels were always off-limits to Negroes.") [hereinafter *ORIGINS OF SEGREGATION*]; *id.* at 83 ("Cultural and recreational enterprises were also segregated when they did not exclude Negroes entirely. Theaters provided special galleries for colored persons which were often approached through special entrances."). For other descriptions of African-American life in the North in the antebellum period, see *SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION* (Ira Berlin & Ronald Hoffman eds., Illini Books 1986); LEONARD P. CURRY, *THE FREE BLACK IN URBAN AMERICA, 1800-1850: THE SHADOW OF THE DREAM* (1981); KATHRYN GROVER, *MAKE A WAY SOMEHOW: AFRICAN-AMERICAN LIFE IN A NORTHERN COMMUNITY, 1790-1965* (1994); GARY B. NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720-1840* (1988). Eric Foner notes that prejudice against mixing of whites and Negroes in the North was so virulent in New York that "[e]ven Lincoln's funeral illustrated the problem, for when his body reached New York, the city's municipal authorities sought to bar blacks from marching in the procession, only to be overruled by the War Department." FONER, *supra* note 221, at 75.

²⁴² Robert Ernst, *The Economic Status of New York City Negroes, 1850-1863*, in 1 *THE MAKING OF BLACK AMERICA: ESSAYS IN NEGRO LIFE AND HISTORY* 250, 251 (August Meier & Elliot T. Rudwick eds., 1969) ("Racial prejudice and custom had erected an almost impenetrable barrier between whites and Negroes As early as 1833 an English traveler [to New York had] noted that Negroes could not sit in any public assembly, court or church, except in a special section 'generally in the most remote or worst situation.' In 1843 the New York Zoological Institute announced that 'people of color [were] not permitted to enter, except when in attendance upon children and families.' During the fifties, Negroes were refused passage on omnibuses and street railroads, and attempts to eject colored persons from the cars sometimes resulted in violence.").

²⁴³ Louis Ruchames, *Jim Crow Railroads in Massachusetts*, in *RACE AND LAW: BEFORE EMANCIPATION*, *supra* note 189, at 433 (originally published in 8 *AM. Q.* 61 (1956)).

²⁴⁴ *Id.* at 434 ("The name was taken from a song and dance routine popularized during the 1830's by Thomas D. Rice, 'the father of American Minstrelsy.' The routine was called 'jumping Jim Crow' and was an imitation, by a white, of a Negro referred to as Jim Crow, doing a song and dance. Reflecting prevailing white prejudices, it caricatured the Negro as an inferior and ignorant creature. Thus, the application of 'Jim Crow' to the cars for Negroes on the railroads of Massachusetts was a natural development, and Massachusetts has come to have the dubious distinction of first using the term with reference to a segregated Negro car.").

Beginning in the 1840s, an increasing number of people began to challenge exclusion or segregation from public accommodations, eventually resulting in successful desegregation in Massachusetts.²⁴⁵ Thus, newspaper accounts of the era “frequently reported cases of Negroes’ being forcibly removed from railroad cars for refusing to sit in the Jim Crow sections.”²⁴⁶ These cases often involved well-known abolitionists, such as David Ruggles and Frederick Douglass. Historian Louis Ruchames reports that on July 6, 1841 David Ruggles, an abolitionist from New York who had helped more than five hundred people escape to the North through the Underground Railway, was “dragged out” of a first class car traveling from New Bedford to Boston, Massachusetts, “his clothing torn in the process, and thrown off the train.”²⁴⁷ The trial judge ruled that the train was the private property of the railroad and that it therefore had the right to promulgate reasonable regulations requiring passengers to take such seats as may be assigned them by the conductor, thus “ensuring the welfare and comfort of its passengers as were not forbidden by the existing law of the state.”²⁴⁸ A few weeks later, on September 8, 1841, Frederick Douglass, the well-known abolitionist, was forcibly removed from a first class car in a train in the North and carried by four or five men into the Jim Crow car, tearing his clothing and injuring his companion, J.A. Collins, a white member of the Massachusetts Anti-Slavery Society.²⁴⁹ Numerous other incidents occurred in 1841, as well.²⁵⁰

²⁴⁵ For a discussion of the struggle against racial discrimination in antebellum Massachusetts, see J. Morgan Kousser, *The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 Nw. U. L. REV. 941 (1988).

²⁴⁶ LITWACK, *supra* note 234, at 107.

²⁴⁷ Ruchames, *supra* note 243, at 435.

²⁴⁸ *Id.* at 435.

²⁴⁹ *Id.* at 435-36. About three weeks later, Douglass and Collins were again forcibly attacked and Douglass removed from a railroad car because Douglass refused to move to the Jim Crow car and because Collins refused to move to let a gang of men get at Douglass. *Id.* at 436-37.

²⁵⁰ Ruchames reports:

One morning, at the end of September [1841], Mrs. Mary Newhall Green, the secretary of the Lynn Anti-Slavery Society, a light complexioned Negro, who had previously without incident used the Eastern Railroad for trips from Lynn to Boston, was dragged out of the white car, with a baby in her arms. In the process, the baby was injured, and Mrs. Green’s husband, who had sought to defend her, was badly beaten.

On the evening of that day, some three or four white men, who had boarded the train of the Eastern Railroad in East Boston, were dragged out of their car, together with a Negro whose ejection they had protested. One of the whites, Dr. Daniel Mann, a dentist of Boston, brought charges of assault and battery against George Harrington, the conductor, who had led the assault.

Id. at 437. Justice Simmons decided the conductor’s actions were reasonable and justified by the “disorderly and unlawful conduct of Dr. Mann and his friends.” *Id.* at 438. Exclusion of Negroes sometimes excluded white persons as well. When Charles Lenox Remond, a “Negro abolitionist” who was one of the American delegates to the World Anti-Slavery Convention held in London in June 1840, returned to Boston, he boarded a train in Boston to visit his parents in Salem. The conductor ordered him to the “Jim Crow” car. His white companions who had just

In addition to resistance by African-Americans, white abolitionists in some states began to press for abolition of the practice of segregation on conveyances and in public places, noting that slaves traveling with their masters were allowed in cars otherwise reserved for white persons.²⁵¹ In 1842, a joint legislative committee in Massachusetts proposed a law prohibiting railroads from segregating by race, claiming that such practices violated the rights of African-Americans under the state constitution, particularly because railroad corporations were chartered by the state. Although the legislature refused to pass the bill, changing public opinion and abolitionist pressure led to the abandonment of separate railroad accommodations by 1849.²⁵² Schools were desegregated by 1845 in Salem, New Bedford, Nantucket, Worcester, and Lowell.²⁵³ At the same time, school segregation in the Boston schools was upheld in the famous case of *Roberts v. Commonwealth*²⁵⁴ in 1849. Nonetheless, *Roberts* was overturned by legislation in 1855 outlawing segregated schools.²⁵⁵ By 1859, some theaters and lecture halls in Boston admitted African-Americans without segregation, although others either excluded or segregated African-Americans.²⁵⁶ As late as 1860, most restaurants, hotels, and theaters continued to exclude African-Americans, although African-Americans were free to ride public conveyances.²⁵⁷

Elsewhere in the North, segregation was generally the practice until the Civil War.²⁵⁸ In an 1855 New York case, in which an African-American woman was expelled from a segregated car, the judge instructed the jury that "if sober, well behaved, and free from disease," African-Americans could not be excluded from public conveyances.²⁵⁹ The jury found the railroad liable for negligence and ordered damages paid for the harm done in expelling plaintiff.²⁶⁰ However, one year later, a jury refused to punish a railroad for ejecting an African-American

welcomed him in Boston moved with him to the Jim Crow car to discuss his trip to Europe. When they did so, "they were ordered by the conductor to leave immediately or be dragged out." *Id.*

²⁵¹ *Id.* at 106-07. Ruchames, *supra* note 243, at 442 (The abolitionists who campaigned for a public accommodations law "emphasized . . . that the railroads which forcefully prevented whites and Negroes from sitting together were most solicitous in permitting Southern slaveholders to keep their Negro slaves by their side when travelling in those very same cars. It was only the free Negro who was segregated, not the slave.").

²⁵² LITWACK, *supra* note 234, at 107-08; *see also* Ruchames, *supra* note 243, at 444-47.

²⁵³ LITWACK, *supra* note 234, at 143.

²⁵⁴ *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850); LITWACK, *supra* note 234, at 148.

²⁵⁵ LITWACK, *supra* note 234, at 149.

²⁵⁶ *Id.* at 110.

²⁵⁷ *Id.* at 110-11.

²⁵⁸ *Id.* at 111.

²⁵⁹ *Id.* (citing N.Y. DAILY TIMES, May 29, 1855).

²⁶⁰ *Id.*

ican patron.²⁶¹ In that case, the judge instructed the jury that railroads could make reasonable regulations and were not obligated to carry people when this would be adverse to the railroad's interests and that the jury could determine "the probable effect upon the capital, business and interests of admitting blacks into their cars indiscriminately with the whites."²⁶² Moreover, the same principle applied to hotels, buses, and restaurants.²⁶³ Similarly, African-Americans were segregated on trains in Philadelphia until legislation forbade this in 1867.²⁶⁴

Did the common-law right of access to inns and common carriers extend to African-Americans in the antebellum period? The answer to this question depends on what we mean by "law." The formal law appeared to require service regardless of race; the first cases to address this question in 1858 and 1859 adopted this statement of the law. Yet, we know that this was not always the custom. Many establishments in the North that were otherwise open to the public excluded African-Americans. However, the custom was not universal. Many public accommodations *did* provide access. Those that did, nonetheless, were almost certain to segregate or otherwise treat African-Americans differently from white persons.²⁶⁵ When forced to address the issue, the courts appeared to adopt the position that the longstanding custom of racial segregation constituted a "reasonable regulation" of property to protect the interests of the majority of patrons, while acknowledging a duty to serve customers of all races.

Despite this ambivalent situation, two things are clear. First, no court ruling before the Civil War states that African-Americans are not entitled to be served in places of public accommodation. Second, legal authority for the proposition that businesses other than common carriers and innkeepers have a right to serve whomever they wish is sparse to nonexistent. Rather, all the scholarly and judicial learning suggested that the duty to serve applied to businesses that held themselves out as ready to serve the public. The formal narrowing of public accommodations law began when *McCrea v. Marsh* adopted the rule that authorized places of entertainment to choose their customers at will. Adoption of this rule in the United States, whatever its justification in England, had a disparate racial impact and was undoubtedly intended to have such an impact. Only after the Civil War did the law in the United States clearly authorize *most businesses* to choose their

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 111-12 (citing N.Y. DAILY TIMES, Dec. 18 & 20, 1856).

²⁶⁴ *Id.* at 112.

²⁶⁵ Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, in 3 RACE, LAW, AND AMERICAN HISTORY, 1700-1990: THE AFRICAN-AMERICAN EXPERIENCE, EMANCIPATION AND RECONSTRUCTION 167, 169 (Paul Finkelman ed., 1992) (originally published in 17 RUTGERS L.J. 415 (1986)).

customers at will. This occurred only after African-Americans were granted civil rights. Reversing the presumption of access and substituting a right to exclude served to limit these newfound civil rights. Only after the issue of public access became thoroughly enmeshed in the issue of racial segregation did the current common-law rule obtain its present form.

2. *Preclassical Legal Thought and Public Accommodations.*— Legal thought in the United States from 1789 to roughly 1880 had certain important characteristics relevant to understanding public accommodations law in the period. First, Duncan Kennedy has persuasively demonstrated that both treatise writers and judges in this period increasingly relied on the notion of implied contract to rationalize the legal system.²⁶⁶ Issues that had previously been conceptualized as property issues were recast in the form of contract. This progression is evidenced in the change from the property focus of Blackstone's *Commentaries on the Laws of England* (1765) to the implied contract focus of Parsons's *Law of Contracts* (1853). In Parsons's system, almost all private relationships included implicit obligations that were mandatorily imposed by law and enforceable by the state. In the preclassical period during the first half of the nineteenth century, almost all of law was incorporated into the contractual model. But freedom of contract was a dim dream; rather, the market was heavily regulated by custom and law. All private relationships included implicit obligations that were enforceable by the state. These obligations varied depending on the kind of relationship involved. Almost everyone appeared to occupy a status most of the time, as master or servant, as attorney or client, as bailor or bailee, as husband or wife, as landlord or tenant, or as public accommodation or patron. One could voluntarily enter one of the regulated relationships, but once one entered the relationship, the terms and obligations accompanying it were substantially predefined by the state through the common law. The parties had little or no power to alter the terms of the relationship by contract. In this sense, no aspect of life was conceptualized as entirely free from state control.²⁶⁷ This conception rested on assumptions that were anathema to the classical legal thought that emerged after 1880, including (1) an interweaving of public and private institutions and public and private law and (2) a failure to distinguish between state imposed duties (tort and quasicontract or contracts implied in law) and voluntarily assumed duties (contracts implied in fact).

Common callings fit into this schema very well. Individuals could choose whether to establish a common calling, but once they did so,

²⁶⁶ Kennedy, *Blackstone's Commentaries*, *supra* note 73, at 307-11; Kennedy, *Classical Legal Thought*, *supra* note 73, at ch. IV; see also Singer, *Legal Realism Now*, *supra* note 73, at 477-79.

²⁶⁷ This paragraph is taken from Singer, *Legal Realism Now*, *supra* note 73, at 477.

they voluntarily assumed obligations that were coercively imposed by the state—primarily, the duty to serve the public without unjust discrimination and the duty to use diligence and skill in undertaking the usual duties of the common calling. This relationship fits into the paradigm of implied contract. However, it does not fit into the classical models of contract or property. It does not fit into the classical model of contract because opening up an inn to the public would not be considered a promise to serve particular individuals that is sufficiently definite so as to constitute a legally binding obligation. In addition, the promise to serve the public is not supported by consideration and is not bargained-for; it therefore cannot establish an obligation to serve a particular individual who comes seeking service. Nor does the duty to serve fit comfortably in the classical theory of private property under which owners are generally free to use their property as they see fit. Hence, Oliver Wendell Holmes's classical assertion, first published in 1879: "if a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies. . . . An attempt to apply this doctrine generally at the present day would be thought monstrous."²⁶⁸ Holmes's critique of the common calling idea is quintessentially classical. It is also the earliest statement by a legal theorist supporting the marginalization of the duty to serve. Holmes's views therefore helped to shape the classical system, as well as the modern common-law rule that immunizes most businesses from a duty to serve the public. The innkeeper and common carrier duty to serve had to be both marginalized and rationalized in the classical system as belonging to a limited sphere of businesses "affected with a public interest." In contrast, in the preclassical mode of thought, it was natural to understand businesses as imbued with implicit duties based on morality, custom, and public policy.

In addition to failing to separate rigidly the public and private spheres of life, legal reasoning in the preclassical period represented a hodge-podge of arguments and jurisprudential theories that were later seen as contradictory. Law was understood as simultaneously based on commands of the sovereign (positivism), on natural rights, and on immemorial custom. The method of reasoning in treatises and cases was alternatively formalistic and policy-oriented (based on custom, morality, and reason). The duty to serve was simultaneously based on (1) immemorial custom (it had long been the custom to require and expect a right of access); (2) the inherent nature of the employment (both a formalistic assertion and a moral claim about the duties of a person in that kind of trade to ply the trade with skill and diligence); (3) public policy (preventing businesses from denying necessities to persons in dire need of them who have no alternative way to protect

²⁶⁸ Holmes, *Common Carriers and the Common Law*, *supra* note 1, at 628-29, reprinted in HOLMES, *THE COMMON LAW*, *supra* note 1, at 203.

their lives and well-being); and (4) morality (arguing that it would be wrong to fail to exercise one's trade appropriately and to leave travelers to the dangers of the open road at night).

During the antebellum era, one can discern two countervailing trends. The first, described in detail by Morton Horwitz in *The Transformation of American Law, 1780-1860*,²⁶⁹ is the invention of the elements of classical legal thought based on a particular conception of property and contract. On the property side, the courts and treatise writers increasingly supported granting freedom to property owners to use their property without regard to the harms such uses might cause their neighbors or others in the community.²⁷⁰ On the contract side, the courts and scholars began the process of developing the ideology of freedom of contract based on the assumption that the terms of contractual relationships would be left to the free will of the parties rather than dictated by the state.²⁷¹

The second trend, described by Duncan Kennedy and William Novak, is the persistent and crucial importance of a distinctly preclassical insistence on substantial regulation of both property use (especially businesses) and contractual relationships. Duncan Kennedy has described in detail the features of preclassical legal thought noted above—the mixing of public and private spheres, the use of multiple sources of reasoning based on custom, morality, policy, and sovereign commands, and the triumph of the idea of implied intent in established status relationships.²⁷² William Novak has convincingly demonstrated that the antebellum economy was pervaded by regulation in the form of licensing requirements and regulation of trades, including requirements about the quality of goods and services and limits on access to the trades themselves. Novak has also documented the central importance of political and legal theorists, such as Supreme Court Justice James Wilson, who developed the concept of *salus populi* (the good of the people) to justify a substantial amount of regulation of private conduct to ensure that it promoted the public good.²⁷³

It is crucial to note that, although Horwitz is correct in identifying the increasing use of elements of reasoning that were to blossom into the classical conception of private property and freedom of contract, the antebellum period saw a sustained and unchallenged acceptance of the idea that common carriers and innkeepers had duties to serve the public. Nor did the cases ever state that the duty was limited to innkeepers or common carriers. Rather, they asserted, over and over

²⁶⁹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) [hereinafter *TRANSFORMATION OF AMERICAN LAW—1780-1860*].

²⁷⁰ *Id.* at 31-62, 109-39.

²⁷¹ *Id.* at 160-210.

²⁷² Kennedy, *Classical Legal Thought*, *supra* note 73, at chs. III-IV.

²⁷³ Novak, *supra* note 170, at 13.

again, that the duty was based primarily on the fact that these businesses voluntarily made themselves servants of the public by holding themselves out as ready to provide important services to whomever sought them and secondarily on the fact that they exercised important privileges delegated by the state and therefore had a duty to use those privileges in a nondiscriminatory fashion for the public good. With the exception of places of entertainment, from 1800 until 1865 and beyond, we see no diminishment of any kind in scholarly or judicial support for the duty to serve despite the beginnings of the classical conceptions of property and contract that would later attempt to marginalize the duty to serve.

What should we make of the fact that antebellum law clearly imposed duties to serve on innkeepers and common carriers but neither clearly imposed these duties on other businesses nor expressly exempted those businesses from such duties? The answer depends on what baseline we adopt. The classical baseline, characteristic of legal thought from 1880 to 1940, was freedom from "regulation." The classical perspective sought to marginalize legal doctrines that regulated private relationships by making those doctrines appear to be exceptional. The baseline in the classical system is free use and control of property without government regulation, unless one fits into a narrow set of unusual circumstances. Accepting this baseline would lead one to conclude that businesses were not subject to duties to serve the public unless case law explicitly imposed that obligation on them. Under this view, common callings other than inns and carriers would have no public duties. In contrast, the preclassical paradigm assumed that individuals who entered into particular activities, particularly business activities, had substantial implied obligations. If we take this paradigm as the context for understanding antebellum law, it is far more plausible to conclude that the duty to serve the public inhered in every business that held itself out as open to serve the public indifferently.

B. From Reconstruction to Jim Crow and Classical Legal Thought

I. Alternative Solutions to the Public Accommodations Problem.—After the Civil War, the nation faced the enormous problem of reintegrating both the Southern states and the newly freed slaves into the national fabric of the United States. This process required enormous changes in law, custom, and conceptions of morality and social relations, both in the North and the South. In some ways, public accommodations law constitutes a minor aspect of this complicated story. Yet it did play a crucial role. Starting in the 1840s, and continuing through the 1870s and 1880s, through *Plessy v. Ferguson* in 1896 and beyond, the law of public accommodations formed a central battleground in the fight to create a new nation after the Civil War. A

major aspect of this arena of struggle was the constant challenge to exclusionary practices in railroads and streetcars, lecture halls, restaurants, and inns by African-Americans. Many newspaper accounts and judicial opinions recount challenges to exclusionary practices by African-Americans who sought to buy tickets to enter theaters, who stood at the “white” part of the platform or in the first class car reserved by custom to white persons, and who sat in cars reserved for “ladies”—meaning white women and their servants or male escorts. Remarkably, many of these challenges were successful. In the period from 1865 to 1900, many states passed public accommodation statutes and many courts issued rulings affirming the right of access to places of public accommodation.

These successful challenges took place, however, against a backdrop of extensive customary segregation in the North. This custom, along with prevailing social mores, imposed substantial pressure on courts to interpret the newly codified rights of access in a manner that preserved the option of segregation—a practice that, after all, had been declared by at least two Northern courts before 1865 to constitute a “reasonable regulation” of property consistent with a right to be served in an equal manner. What is remarkable is that sometimes, in both law and in social practice, this custom of segregation was successfully challenged. Some state courts interpreted their state public accommodations laws to require, not only a right of access by African-Americans, but a right to be served on the same terms as white persons without segregation or different treatment of any kind.

What options were available to lawmakers in 1865? Eight major options existed.

(a) *Right of access for white persons but not black persons.* First, lawmakers could have held that the newly discovered principles of equality before the law applied only to political rights, such as the right to vote, to testify in court, to serve on a jury, and to sue and be sued in court. These new rights could even extend to civil rights such as rights to make and enforce contracts and to own property. These rights should merely affirm the capacity to make such contracts and own such property without a right to force white persons to deal with African-Americans.

This solution explicitly refuses to grant equality in what were often called “social rights,” meaning rules enabling African-Americans to “associate” with white persons or organizations on equal terms. The distinction between political and civil rights, on the one hand, and social rights, on the other hand, was well-established in 1865. Thus, the legislatures and the courts could have passed laws to the effect that the common-law duty of public accommodations to serve the public simply did not extend to African-Americans since this would constitute forced association and establish social equality.

Under this conception, African-Americans would have the power to work and to create businesses of their own, and white persons would have the right to serve African-Americans if they so wished. What is excluded from this solution is the right of African-Americans to compel white businesses to deal with them.

This solution characterized the Black Codes adopted in most Southern states after the Civil War. Yet they could not last. Why not? Part of the answer is that this solution did not have the appearance of equality behind it. It rests on an affirmation of the right of *white people* to be served in public accommodations while denying the same right to black persons. At the time the Black Codes were passed, they were understood by everyone as attempts to deny freedom and equality rather than to promote them.

(b) *Abolishing the right of access for everyone, white and black.* The second possible solution was to abolish the right of access for everyone, white and black. Effectively, the courts and legislatures could have simply reversed the common-law rule that places of public accommodation had duties to serve the public, affirming instead a right of businesses to choose their customers on any terms they wished. This solution *was* adopted in a number of states. Moreover, it remains on the books in Mississippi today for most places of public accommodation.²⁷⁴ This solution preserves the appearance of equality because the formal rights of white and black persons are identical. The right of access is taken away from *both* races. Of course, this formal equality may be belied in practice. Social custom may allow or encourage—or even require—stores to choose to serve white customers but not black customers.

(c) *Equal rights of access without segregation or discrimination.* A third solution regulates all businesses open to the public by requiring places of public accommodation to serve everyone without discrimination and in an integrated setting. This approach was adopted by a number of states in the North and, perhaps surprisingly, in a few cases in the South as well. It is the solution imposed by the federal public accommodations law of 1964.

(d) *Rights of access but with an option of providing service in a segregated manner.* The fourth solution preserves the right of access—the duty to serve without regard to race—but allows the business to separate the races. This solution also was adopted in a large number of cases in the nation after the Civil War, as well as before. As noted above, the first cases decided in 1858 and 1859 affirmed a right to be served, but justified racial segregation as a reasonable regulation under the common law. A significant number of courts interpreted their public accommodations laws to require service but to allow seg-

²⁷⁴ MISS. CODE ANN. § 97-23-17 (1973).

regation. In addition, the federal public accommodations law of 1875 was interpreted by some lower federal courts to enact this solution. This solution attempts to preserve the appearance of equality by denying that separate treatment is unequal treatment and was explicitly adopted as the ruling theory in *Plessy v. Ferguson* in 1896.

(e) *Rights of access but segregation is required.* This is part of the Jim Crow solution. Service was required by many Jim Crow statutes in railroads and streetcars (as well as schools), but separate facilities or segregated seating were also required. This solution again can be premised on the idea that separate is equal.

(f) *Right of access only to businesses that serve your race.* This option requires businesses to choose which race they will serve and then to serve everyone of that race without discrimination. This option formed a part of the Jim Crow statutes that allowed or required particular businesses, such as restaurants and inns, to choose to exclude everyone of a particular race. It can be premised on the notion that separate is equal and that because anyone is free to establish businesses to serve either race, no systematic exclusion from the ability to purchase goods or service—or to travel—will result.

(g) *No right of access but a right to integration if access is provided.* This solution was never adopted by any jurisdiction since it has the peculiar quality of allowing a business to refuse absolutely to provide service to any person for any reason (including race), but requires that business to provide service in an integrated manner if the patron is admitted to the business. It is an odd solution because it adopts two extreme positions, *i.e.*, the absolute right to choose customers on the basis of race with an absolute right to equal treatment once access is provided.

(h) *Rights of access to some businesses affected with a public interest but not private businesses.* An eighth and final solution is to identify particular types of businesses that must serve the public (in either an integrated or a segregated manner) and then to identify others that are free to choose their customers with impunity. This is the common-law rule that developed by the end of the Jim Crow period.

2. *The Confused Period Between 1865 and 1896.—*

a. *From access to exclusion to segregation.—*The legal treatment of public accommodations is ambiguous, changing, and confused from after the Civil War until the start of the Jim Crow era in the 1880s. In the South, as well as the North, the period between 1865 and 1896 saw conflicting laws and customs as to both access and integration. Although African-Americans were routinely denied access to most hotels other than those that served only African-Americans, they did enjoy access to some places of entertainment and restaurants

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	owner no duty to serve patron no right of access	owner duty to serve patron right of access
<i>owner privilege to integrate or segregate</i>	Solution (b) <i>Tenn. & Del. statutes (1875); Fla. (1943); Miss. (1956); Ark. (1959)</i> no public accommodation law; owner's choice whether to serve and how	Solution (d) <i>lower federal court interpretation of federal public accommodations law of 1875; Pa. statute (1887)</i> public accommodation law requiring service but allowing owner to segregate
<i>owner duty to segregate</i>	Solution (f) <i>Jim Crow laws (inns)</i> owner must serve only one race; no duty and no privilege to serve the other races	Solution (e) <i>Jim Crow laws (railroads)</i> requiring service but mandating segregation (separate accommodations)
<i>owner duty to integrate</i>	Solution (g) owner power to choose whether to serve but must do so in an integrated manner	Solution (c) <i>Federal public accommodations law of 1964; Mass. statute of 1865; current statutes in 43 states, D.C. & P.R.</i> public accommodation law mandating access without segregation
<i>mixed solutions</i>	Solution (h) (<i>racially neutral</i>) no duty to serve and no right to integration in <i>retail stores</i> Solution (a) (<i>not racially neutral</i>) <i>Black Codes</i> African Americans have no right to be served	Solution (h) (<i>racially neutral</i>) duty to serve in an integrated fashion in <i>innkeepers, common carriers, places of entertainment, etc.</i> Solution (a) (<i>not racially neutral</i>) <i>Black Codes</i> white persons have a right to be served

and even sat in some integrated railroad cars. Both law and custom varied wildly from state to state, and even from locality to locality.

After the initial spate of Black Codes in the South attempted to recreate slavery to the greatest extent possible, public accommodations laws or constitutional provisions were passed in a few Northern states, including Massachusetts and Pennsylvania, and many states in the South. These laws were interpreted to require the places covered by them to serve African-Americans as well as white persons, and some were judicially interpreted to require not only service but integration. All these laws were interpreted by courts to require integration where the business in question had not provided "separate but equal" accommodations, although judges were not uniform in their willingness to find separate accommodations to be equal in fact.

Some of the judges who disallowed segregation when separate accommodations were either unavailable or unequal clearly believed that separate but equal treatment would in no way violate the norm of equality underlying public accommodations statutes. However, other judges seem to have assumed or hoped that providing separate but equal facilities would be so financially burdensome that the business in question would have no choice but to allow access in an integrated fashion. This was particularly true in the case of railroad companies that would need to add new cars and which, for that reason, opposed the Jim Crow laws of the 1880s and 1890s that required separation of the races.²⁷⁵ Even the federal public accommodations act of 1875 was interpreted by lower federal courts as authorizing segregation as a reasonable regulation of the business.²⁷⁶

From 1865 to 1880 or so, most of the legal challenges to racial exclusion or segregation were brought by African-American women challenging their exclusion from a "ladies' car." In many places, especially in the South, railroads provided only two cars—the smoking car and the ladies' car. The ladies' car was reserved for women traveling alone or with children and women traveling with men. Men traveling alone were generally—but not always—excluded from the ladies' car. The ladies' car, in effect, constituted first-class accommodations. The smoking car, in contrast, was reserved for men traveling alone or those who purchased second-class tickets. The smoking car had decidedly worse physical accommodations than the ladies' car. It was not only smoky but dirty from the use of spitting tobacco, with stains from spitting on the seats, floor, and walls, and was closer to the engine with a greater chance of sparks flying in. Tradition allowed white men traveling alone and African-American men only in the smoking car. White women traveled in the ladies' car unless they were excluded from it because they were not "ladies"—for example, known prostitutes were often excluded from the ladies' car. African-American women, especially those who were wealthier or more highly educated, began to demand admittance to the ladies' car after the Civil War. Some railroads accommodated them, while others excluded them, in effect claiming that African-American women were not "ladies" by definition. Many of these plaintiffs won their lawsuits in this period; others lost, and after 1880, the losses became more and more numerous. Historian Barbara Welke has argued that the numerous lawsuits brought by African-American women demanding admission to the ladies' car in this period, and the paucity of suits brought by African-American men, can be explained by the traditional gendered division

²⁷⁵ Minter, *supra* note 209, at 76-77, 148-50, 205-06.

²⁷⁶ *United States v. Dodge*, 25 F. Cas. 882 (C.C.W.D. Tex. 1877) (No. 14,976).

of space on the trains, as well as the customary division of passengers by social class.²⁷⁷

The initial public accommodations statutes were passed during the initial phase of Reconstruction. In the second phase starting in 1875, the new public accommodations statutes began to be repealed in a number of Southern states, effectively abrogating the right of access. This abrogation arguably applied to both white and black patrons, thus reversing the common-law presumption of a right to be served and substituting a right to exclude and deny service. Indeed, in some states, such as Tennessee and Delaware, the repealing statute expressly granted owners of businesses absolute liberty to choose their customers at will.²⁷⁸ As a result, railroads were no longer required to provide first-class services for African-Americans who purchased first-class tickets. From 1875 to 1883, these statutes were deprived of much of their force because of the federal public accommodations law of 1875 requiring service; at the same time, the federal law was often interpreted to authorize racial segregation.

The third phase started with Tennessee's law in 1881 and gathered steam after the *Civil Rights Cases* struck down the federal public accommodations law in 1883 and *Plessy v. Ferguson* approved the "separate but equal" doctrine in 1896. Southern states passed Jim Crow laws requiring, rather than merely allowing, exclusion of African-Americans from hotels and restaurants and mandating segregation in transportation. The first of the laws (the 1881 Tennessee statute) merely required that separate first-class accommodations be provided for African-American passengers who purchased first-class tickets, leaving second-class accommodations integrated. Only later did strict separation by race become the norm.

The effect of these laws was complicated. On the one hand, most African-Americans strongly opposed them because they constituted a legal statement of inferiority—indeed, a "badge or incident of slavery."²⁷⁹ On the other hand, the Jim Crow laws, as applied to railroads, formally required service by carriers (although segregated service) and required that separate services be equal in quality to what was afforded to white passengers. Although the promise of equal quality was never enforced, it did provide a basis for legal challenges to segregated facilities on the ground that the facilities reserved for African-American passengers were not of the same quality as those reserved for white passengers. In addition, the laws required railroads to provide first-class accommodations to African-Americans who bought first-class tickets, prohibiting the widespread practice of selling

²⁷⁷ Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 *LAW & HIST. REV.* 261, 277 (1995).

²⁷⁸ 1875 *DEL. LAWS*, ch. 194, § 1 (1875); 1875 *TENN. PUB. ACTS*, ch. 130, § 1 (1875).

²⁷⁹ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

such tickets to African-American passengers (both men and women) and then directing them to the smoking car and away from the ladies' car. For these reasons, some African-American legislators abstained or voted in favor of Jim Crow laws on the ground that they required first-class services to African-Americans who paid full fare. Some of these legislators may have been more interested in preserving the right to obtain first-class accommodations than they were in achieving racial integration.²⁸⁰

Tennessee and South Carolina are prime examples of the changes that occurred in this period. South Carolina passed a "Negro Code" in November 1865.²⁸¹ By January 1866, the commanding general of the department in which South Carolina was located nullified it with a military fiat that "all laws [be made] applicable alike to all inhabitants."²⁸² In 1868, the Constitutional Convention adopted a provision in the South Carolina bill of rights to the effect that "[d]istinction on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges."²⁸³ Over the course of the next two years, in 1869 and 1870, South Carolina passed public accommodations laws that applied to any person engaged in a business for which a license was required by the state, including common carriers.²⁸⁴ These laws not only required service to African-Americans, but were intended to prohibit segregation.²⁸⁵ At the same time, voluntary segregation of whites and African-Americans in railroad cars was typical in practice with almost all white persons riding in first-class cars and almost all African-Americans riding in second-class cars.²⁸⁶ These statutes were repealed in 1889, leaving businesses the choice of whether or not to serve African-Americans and whether or not to segregate passengers by race.²⁸⁷ Finally, in 1898 the South Carolina legislature passed a Jim Crow law requiring segregation on railroads in first-class compartments.²⁸⁸

After abolishing its version of the Black Codes,²⁸⁹ the legislature in Tennessee passed a public accommodations statute in 1867 similar

²⁸⁰ *Id.* at 55, 67-68, 71-72, 76-77, 107-08, 115, 131-32, 190, 216.

²⁸¹ JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877*, at 74 (1990).

²⁸² *Id.* at 77.

²⁸³ *Id.* at 279.

²⁸⁴ *Id.* at 283.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 284.

²⁸⁷ George B. Tindall, *The Color Line*, in WILLIAMSON, *supra* note 281, at 13, reprinted from GEORGE B. TINDALL, *SOUTH CAROLINA NEGROES, 1877-1900* (1952).

²⁸⁸ *Id.*

²⁸⁹ JOSEPH H. CARTWRIGHT, *THE TRIUMPH OF JIM CROW: TENNESSEE RACE RELATIONS IN THE 1880s*, at 8 (1976).

to that in South Carolina. It prohibited racial discrimination by railroads and other common carriers.²⁹⁰ However, in reaction to the federal public accommodations act of 1875, Tennessee passed an anti-public accommodations act in 1875.²⁹¹ The 1875 Tennessee law nullified the 1867 state statute and effectively abrogated the duty to serve the public for innkeepers, common carriers, and places of entertainment. These businesses were now released from “any obligation to entertain, carry or admit, any person, whom he shall for any reason whatever, choose not to entertain, carry or admit.”²⁹² These businesses were affirmatively granted the power to “control the access and admission or exclusion of persons” in a manner as “perfect and complete” as that of the owners “of any private house, carriage, or private theater, or places of amusement for his family.”²⁹³ In 1881, Tennessee passed what is generally regarded as the first Jim Crow law mandating separate first-class accommodations in railroad cars for black and white passengers.²⁹⁴

In terms of social practice, the period from 1870 to 1900 was one of experimentation and diversity both among states and among localities. Charles E. Wynes notes that

From 1870-1900, there was no generally accepted code of racial mores. It is perhaps true that in a majority of the cases where a Negro presumed to demand equal treatment—in hotels, restaurants, theaters, and bars, and even on the railroads—he was more likely to meet rejection than acceptance. But uncertainty led many Negroes to keep trying for acceptance, just as it led at least some whites to accept them. Acceptance by the whites of racial intermingling on the railroads was encouraged by the propensity of the Federal courts to award damages to Negroes who charged unequal treatment.²⁹⁵

From 1867 to 1877, the vast majority of states appears to have adopted the view that places of public accommodation had a legal duty to serve African-Americans. At the same time, many states authorized segregation either by adopting the common-law rule of “reasonable regulation” or by interpreting their new public accommodations laws

²⁹⁰ Stanley J. Folmsbee, *Notes and Documents: The Origin of the First “Jim Crow” Law*, in 4 RACE, LAW, AND AMERICAN HISTORY, 1700-1990: THE AFRICAN-AMERICAN EXPERIENCE: THE AGE OF JIM CROW: SEGREGATION FROM THE END OF RECONSTRUCTION TO THE GREAT DEPRESSION 147-48 (Paul Finkelman ed., 1992) [hereinafter AGE OF JIM CROW] (originally published in 15 J.S. HIST. 235-37 (1949)).

²⁹¹ Act of Mar. 24, 1875, ch. 130, § 1, 1875 TENN. PUB. ACTS 216-17; Folmsbee, *supra* note 290, at 148-49.

²⁹² Folmsbee, *supra* note 290, at 148-49 (citing Act of Mar. 24, 1875, ch. 130, § 1, 1875 TENN. PUB. ACTS 216-17).

²⁹³ *Id.* at 149.

²⁹⁴ *Id.* at 151-52.

²⁹⁵ Charles E. Wynes, *Social Acceptance and Unacceptance*, in ORIGINS OF SEGREGATION, *supra* note 241, at 20-21, reprinted from CHARLES E. WYNES, RACE RELATIONS IN VIRGINIA, 1870-1902 (1961).

in a manner that defined separate accommodations as equal. This was sufficient to comply with the statutory mandate of equal service. Custom and actual social practice both diverged from formal law. Practice included both widespread exclusion of African-Americans from various public accommodations and extensive integration in certain facilities in certain localities. These historical changes in both law and custom are important to understanding the origins of the current common-law rule that limits duties of access to innkeepers and common carriers.

b. Common-law decisions.—

(1) *Common-law decisions extending the right of access to African-Americans.*—The year 1865 marked an enormous turning point in the history of public accommodations law. At the same time the Black Codes were passed in the South, successful court challenges to exclusionary practices became more common in the North. After invalidation of the Black Codes, plaintiffs often prevailed with such claims in the South as well. More cases were decided affirming the holding of the 1859 Ohio case of *State v. Kimber*,²⁹⁶ and the dicta of the 1858 Michigan Supreme Court case of *Day v. Owen*,²⁹⁷ to the effect that common carriers could not entirely refuse to serve African-Americans. The case law that emerged after 1865 is absolutely consistent in affirming a common-law right of access to places of public accommodation without regard to race until the time of the Jim Crow laws of the 1890s. This right of access is premised not only on the traditional duties of places of public accommodation, but also on newly emerging conceptions of racial equality.

At the same time, the case law is fairly consistent in authorizing “separate but equal” accommodations, as well as in beginning to identify the businesses subject to the duty to serve by category—rather than by reference to the act of holding oneself out as open to the public—and imposing that duty only on innkeepers and common carriers (and, in some states, places of entertainment) while immunizing other businesses from the duty. These limitations on the right of access were justified *both* by reference to the absence of a right to “social equality” between the races and by reference to the property rights of businesses that wished to exclude unwanted customers or to segregate them.²⁹⁸

²⁹⁶ 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859).

²⁹⁷ 5 Mich. 520 (1858).

²⁹⁸ Maltz, *supra* note 22, at 558; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 983-84 (1995) (both arguing that the authorities agreed in the 1860s that common carriers had a duty to serve African-Americans, but that they disagreed about the legality of segregation). The resulting structure of law may be analogized to the emerging negligence principle, based on the principle of no liability without fault, which then

The increasing number of cases affirming a right of access to places of public accommodation regardless of race did mark a substantial change in the law, which was reflected in significant changes in social practice. One might argue that no change in the law occurred, on the ground that the antebellum law had clearly required common callings to serve the public and that no exception was ever made with regard to race. The first cases to address the question simply ratified this long-standing principle. On the other hand, the extensive practice of excluding African-Americans from various public accommodations in the North, not to mention the South, was challenged for the first time by court rulings affirming the illegality of this conduct. It thus seems more accurate to characterize the case law that emerged after 1858 as a deliberate attempt to alter social custom by affirming that places of public accommodation had no right to exclude African-Americans. At the same time, the law changed in the opposite direction by beginning the process of *limiting* the categories of places subject to the duty to serve.

In the 1865 case of *Derry v. Lowry*²⁹⁹ an African-American woman was forcibly removed from a local train in Philadelphia and assaulted by the conductor solely because of her race. She sued the conductor for assault and battery and won. Judge Allison first noted that the plaintiff, "Mrs. Derry," was a "very respectable woman, almost white" and that she had boarded the streetcar to go home from church "where, with others of her race, she had been engaged in providing comforts for the wounded soldiers."³⁰⁰ After she had ridden a few minutes, the conductor asked her to get out because "no niggers were allowed to ride on that line."³⁰¹ The conductor took hold of her with the aid of two of his friends standing on a street corner and struck and kicked her and finally ejected her from the car "with great violence, tearing her clothes and inflicting some personal injuries."³⁰²

defined fault in objective terms as the conduct to be expected from a reasonable person—a standard that might have the effect in a particular case in imposing liability on a person who was not capable of complying with the standard of care required of a reasonable person and thus not morally at fault. Similarly, the emerging will theory of contract was limited by the objective theory of consent, which relied on the formal manifestations of intent rather than subjective will and which therefore sometimes resulted in enforcing contracts that clearly did not accord with the will of the parties when their formal agreement diverged from their subjective understanding. See HORWITZ, *TRANSFORMATION OF AMERICAN LAW—1780-1860*, *supra* note 269, at 262-64; MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 11-16 (1992) [hereinafter *TRANSFORMATION OF AMERICAN LAW—1870-1960*]; Kennedy, *Classical Legal Thought*, *supra* note 73, ch. IV.

²⁹⁹ 6 Phila. 30 (C.P. 1865).

³⁰⁰ *Id.* at 30. It is disturbing, but probably not surprising, how many of the plaintiffs in these cases are described by the courts as partially white in order to make them seem more sympathetic and deserving of a right to be served.

³⁰¹ *Id.*

³⁰² *Id.*

The court held that “city passenger railway companies . . . are chartered for the accommodation of the community generally” and their rights to use public roads cannot deprive citizens of the “common right of passage upon and over the streets of the city[.]” a common right that “belongs equally to the rich and to the poor, to the black man as much as to the white man.”³⁰³ The judge instructed the jury that the train “as a common carrier, [was] bound to carry every individual who, paying the amount of fare charged to others, desires to travel on the road, and as against whom no reasonable or well-founded objection can be made on personal grounds.”³⁰⁴ The judge eloquently argued that “the act of defendant was a clear violation of the rights of the plaintiff when he put her out of the car, because her skin was a few shades darker than his own.”³⁰⁵

The true principle is that a corporation created for the carriage of passengers has no right to exclude any class of persons, as a class, from the benefits of its mode of transportation; it may *for cause* either by or without a regulation exclude individuals. A corporation of this description might as well undertake to make nationality or religion a ground of exclusion, as color; it would not be difficult to determine in advance the legal force of a by-law excluding all Germans, or Frenchmen, or Irishmen, or Protestants or Catholics, Jews or Greeks, as such, from the passenger cars of the city; such an exclusion would not be tolerated by any intelligent tribunal; and yet in this, the day of our comparative enlightenment and freedom from a prejudice, to which we were so long in bondage, a question can be seriously made before a court and jury and practically enforced at the bar of public opinion, as to the right of an individual conductor, or a company, to turn persons out of the passenger cars of the city with force and violence because of their complexion. Than this, nothing can be more unreasonable; nothing, in my opinion, is a clearer or grosser violation of the plainest principles of the law and of the rights of individuals.³⁰⁶

The judge further argued that “the mere prejudice of one class against another cannot be allowed to subvert or overthrow the cardinal doctrine of the equality of all before the law, in the maintenance of the sacred rights of person and of citizenship.”³⁰⁷ He argued against “distinction of age or sex, or nationality or color[.]”³⁰⁸ and concluded by stating:

The argument which is used as a justification for the exclusion of people of color from the cars, would shut them out from and bar against them our courts of justice, forbid to them the use of public ferries, bridges and highways, and rests not upon any principle of legal or moral

³⁰³ *Id.* at 31.

³⁰⁴ *Id.* at 32.

³⁰⁵ *Id.* at 31-32.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 31.

right, but upon bald, naked prejudice alone. It is our duty, gentlemen, in the discharge of our duties, you in your sphere and I in mine, to cast aside all prejudice, that the law may vindicate its just claim to strict and impartial justice. . . . The logic of events of the past four years has in many respects cleared our vision and corrected our judgment; and no proposition has been more clearly wrought out by them than that the men who have been deemed worthy, to become the defenders of the country, to wear the uniforms of the soldier of the United States, should not be denied the rights common to humanity, and this not only without law, but against law and the plainest principles of right and justice.³⁰⁹

The charge to the jury included an admonition that “the jury, for a wrong like that complained of by the plaintiff, may go beyond mere compensatory damages, and may give vindictive damages, by way of punishment.”³¹⁰

Derry v. Lowry is more eloquent in its language, but representative in its holding of both state and federal cases decided in the period. Beginning in 1858, many courts interpreted the common-law duty to serve as encompassing a duty to serve African-Americans. The trend to recognize a duty to serve after 1865 is strong.³¹¹ No case in this period that I have found affirms a common-law right of businesses open to the public to exclude completely on the ground of race, although a significant number justify various forms of segregation.³¹² At the same time, the cases do support the theory that class and gender were both operative in motivating social custom and legal change. African-American women who were light skinned or the “better class,” or both, had a greater chance of winning lawsuits challenging exclusionary practices. Nonetheless, the rules promulgated by these cases affirm rights of access to businesses open to the public, and none

³⁰⁹ *Id.* at 33.

³¹⁰ *Id.*

³¹¹ CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* 3 (1983). In addition to *Derry v. Lowry*, see *Gray v. Cincinnati S. R.R.*, 11 F. 683, 686 (C.C.S.D. Ohio 1882) (railroads, as “common carriers” are “under obligations to carry the traveling public from point to point” without excluding passengers because of race); *Charge to Grand Jury—The Civil Rights Act*, 30 F. Cas. 999 (W.D.N.C. 1875) (No. 18,258) (holding that the common law prohibited common carriers from excluding entirely black passengers); *Donnell v. State*, 48 Miss. 661 (1873) (holding that a state statute requiring theater owners to sell tickets to black persons did not constitute an unconstitutional taking of property rights); *Chicago & Northwestern Ry. v. Williams*, 55 Ill. 185 (1870) (holding that a railroad could not exclude a “colored” woman from the ladies’ car, at least where “separate but equal” accommodations were not provided); *Pleasants v. North Beach and Mission R.R.*, 34 Cal. 586 (1868) (holding that a streetcar could not refuse to serve a black woman but allowing her to be awarded only nominal damages).

³¹² The right to be served (although perhaps in a segregated manner) is also uniformly enforced as the basic right created by state and federal public accommodations laws. See, e.g., *Charge to Grand Jury—The Civil Rights Act*, 30 F. Cas. 999 (W.D.N.C. 1875) (No. 18,258) (affirming a right to be served under state common law and statute and under the 1875 federal public accommodations law).

authorizes complete racial exclusion, outside of the cases and statutes which abrogate rights of access for white and black persons alike.

In 1880 and 1881 Judge Eli Shelby Hammond of the federal Circuit Court for the Western District of Tennessee wrote a remarkable series of opinions in the case of *Brown v. Memphis & Charleston Railroad Co.*³¹³ These opinions are interesting because they address not only the right to exclude on account of race, but also the construction of gender involved in the practice of providing separate “ladies’ cars” for the accommodation of women and their male companions. In addition to affirming a right to be served, Judge Hammond affirmed the right of African-American women to be treated as “ladies” and thus to have access to the ladies’ car on the same terms as white women—at least in the absence of equal first-class accommodations provided in a Negro ladies’ car.³¹⁴

In *Brown*, plaintiff Jane Brown, a “colored woman,” sued the defendant railroad for wrongfully ejecting her from the ladies’ car set apart for “persons of good character, and genteel and modest deportment.”³¹⁵ Defendant railroad first claimed both that African-Americans were not allowed in the ladies’ car and that plaintiff had been excluded because she had a reputation for being a prostitute.³¹⁶ Plaintiff Brown not only won the lawsuit but was awarded the monumental sum of three thousand dollars in damages, a sum that included puni-

³¹³ 4 F. 37 (C.C.W.D. Tenn. 1880); 5 F. 499 (C.C.W.D. Tenn. 1880); 7 F. 51 (C.C.W.D. Tenn. 1881). Judge Hammond’s opinions in the *Brown* decisions were even more remarkable given his privately expressed racist views. In a long essay written to aid his son in writing a paper on slave life on the plantation while the son was a student at Harvard in 1893, Judge Hammond characterized the slaves on his father’s plantation as stupid and devoid of any ambition or love of freedom. At the same time, in a complete contradiction of these observations, he noted that his own servant, with whom he had grown up, and whom he took with him when he went into the Confederate army, escaped as soon as they got close to Yankee lines. He characterized the escape as evidence of disloyalty rather than as evidence of ambition and love of liberty. He further voiced great fears of miscegenation and support for forcibly shipping all African-Americans out of the United States, a utopian idea, in his view, which nonetheless could be accomplished if white people would only get together and make it happen. Eli Shelby Hammond, *Slave Life on the Plantation* (manuscript, 1893) (in possession of Langdell Library, Harvard Law School and the Houghton Library) (permission to quote for publication given by Leslie Morris at Houghton Library).

³¹⁴ Judge Hammond would probably have approved separate seating by race if a Negro ladies’ car had been provided which had “equal” accommodations. See *Logwood v. Memphis & Charleston R.R.*, 23 F. 318 (C.C.W.D. Tenn. 1885). There is substantial doubt that he would have ruled the same way if the plaintiff were a black man rather than a black woman. It is Judge Hammond’s privately expressed fears of miscegenation that lead me to wonder whether he would have reached the same result in the *Brown* decision if the plaintiff were a black man rather than a black woman. See *supra* note 313.

³¹⁵ *Brown*, 4 F. at 38.

³¹⁶ *Brown*, 5 F. at 500.

tive damages for the purpose of deterring this kind of conduct.³¹⁷ The case required three separate full opinions by Judge Hammond. Apparently, the railroad could not believe that it had lost the case and would have to pay such a huge award and kept coming up with new arguments to escape from the verdict.³¹⁸

At the time of the decision in 1880 and 1881, Judge Hammond had a variety of conflicting sources of law to interpret. First, the federal public accommodations law of 1875 prohibited discrimination on common carriers, but nonetheless could be interpreted to allow segregation by race on the ground that separate service was equal service.³¹⁹ He could have ruled that it was appropriate not only to segregate men and women but to segregate by race, keeping African-American women off the car reserved for white women. To rule in this manner, he need only have concluded that the smoking car accommodations were equal to those in the ladies' car. This approach was in fact adopted by the Tennessee Supreme Court in a similar case involving Ida B. Wells in 1887.³²⁰ The possibility of separate but equal accommodations for white and black passengers was accepted by Judge Hammond in a later case, *Logwood v. Memphis & Charleston Railroad Co.*,³²¹ in 1885. A second possibility would be to interpret the federal law as requiring integration as well as service. The third possibility would be to hold the federal statute unconstitutional, as did the United States Supreme Court in the *Civil Rights Cases* in 1883, and to apply the 1875 Tennessee statute passed in protest of the federal statute. The 1875 Tennessee statute abrogated the duty to serve the public. If it applied, it would have given the railroad *carte blanche* to determine whom to serve and in what manner. A fourth approach would be to hold the 1875 Tennessee statute unconstitutional under the dormant commerce clause as an attempt to regulate interstate commerce, a subject vested in the federal government alone. If both the 1875 federal statute and the 1875 Tennessee statute were unconstitutional, the fifth possibility would be to apply the common-law rule

³¹⁷ *Id.* at 503; *Brown*, 7 F. at 63, 67-68. A similar case, that awarded \$2500 in damages, including \$2000 in exemplary damages, is *Houck v. Southern Pac. Ry.*, 38 F. 226 (C.C.W.D. Tex. 1888).

³¹⁸ Judge Hammond also decided *Robinson v. Memphis & Charleston R.R.*, one of the five cases applying the federal public accommodations law of 1875 that were overturned in the *Civil Rights Cases* of 1883, 109 U.S. 3 (1883). No opinion was published in the *Robinson* case. However, the charge to the jury is significant. Unlike Judge Hammond's ruling in *Brown*, he instructed the jury that the federal public accommodations law was violated only if race was the *sole* motive for exclusion. If defendant wrongfully excluded plaintiff partly because of a mistaken belief that she was a prostitute, no federal statutory violation would be shown, although he noted that she might have a common-law remedy of the type granted to Jane Brown. *Charge to the Jury in Robinson v. Memphis & Charleston R.R.* (manuscript, in possession of Langdell Library, Harvard Law School) [hereinafter *Charge to the Jury in Robinson*].

³¹⁹ *United States v. Dodge*, 25 F. Cas. 882, 882-83 (W.D. Tex. 1877) (No. 14,976).

³²⁰ *Chesapeake, Ohio & Southwestern R.R. v. Wells*, 85 Tenn. 613 (1887).

³²¹ 23 F. 318 (C.C.W.D. Tenn. 1885).

requiring service. This approach would either answer the question of whether racial segregation constituted a “reasonable regulation” of the business—one way or the other—or leave that question to the jury to determine as a mixed question of law and fact.

Judge Hammond first dismissed the railroad’s claim to have the right to “exclud[e] persons of color from the ladies’ car [and provide] equal accommodations in another car” because the railroad “as a matter of fact made no such distinction as to color on its cars.”³²² Since defendant did not show that it had a formal policy to segregate by race and since it had not consistently implemented such a policy, “the court refused to entertain the question of color, and excluded it altogether from the jury, and charged that the case was to be tried precisely as if the plaintiff were a white woman excluded under similar circumstances.”³²³ This approach suggested that Judge Hammond might have approved a formal color line separating the races, and he did, in fact, approve such a policy in 1885.³²⁴ At the same time, if consistently followed, this formulation of the law would have had revolutionary consequences; consistent application of a rigid color line would have prevented the railroad from making exceptions for black servants, for example. If this were accepted as the law, it would force white persons to travel without servants or do without their assistance during the trip while the servants traveled in a separate car reserved for African-Americans.³²⁵ The only alternative to such a result would be for the railroad to give up on its policy of racial segregation entirely. It is doubtful that Judge Hammond intended such a result; yet his verbal formulation seems to require it. His formulation allows segregation by gender, race, and class but requires consistency.³²⁶ Afri-

³²² *Brown v. Memphis & Charleston R.R.*, 5 F. 499, 500 (C.C.W.D. Tenn. 1880).

³²³ *Id.* Judge Hammond noted that plaintiff withdrew her complaint that defendant segregated on the basis of race because “this company has no such regulation, people of all colors being admitted to their cars without classification or distinction on account of color.” *Brown v. Memphis & Charleston R.R.*, 4 F. 37, 38 (C.C.W.D. Tenn. 1880). One can speculate that the conductor who excluded the plaintiff did not give race as the expressed reason for her exclusion and that, in fact, the railroad did allow black and white passengers to enter the ladies’ car. Thus, plaintiff could not make out a race discrimination claim either as a matter of general practice or in her specific case. She could have argued that the proffered reason for her exclusion—her reputation for unchastity—was a pretext for racial discrimination but such a theory would have been hard to sustain at the time, especially if the railroad’s practice were not to exclude African-Americans completely from the first-class cars.

³²⁴ *Logwood v. Memphis & Charleston R.R.*, 23 F. 318 (C.C.W.D. Tenn. 1885).

³²⁵ Minter, *supra* note 209, at 7-8, 23, 87, 93, 147 (railroads typically allowed black servants or nurses to travel in the ladies’ car and the later Jim Crow laws often exempted such servants from prohibitions against riding in cars reserved for white passengers).

³²⁶ This way of stating the law avoided application of the federal public accommodations law of 1875 while giving Brown a possible remedy. Judge Hammond believed that violation of the federal law required that race be the sole motive. In this case, since part of the motive was the belief that Jane Brown was a prostitute, no federal statutory violation could be shown. See *Charge to the Jury in Robinson*, *supra* note 318.

can-American women who pay first-class fares are entitled to first-class accommodations and the right to be treated as ladies. In the absence of a first-class ladies' car for Negro women, Jane Brown was entitled to access to the ladies' car.

In response to his first opinion, the railroad must have argued that it was entitled to exclude Brown from the ladies' car because of the 1875 Tennessee statute that abrogated the common-law right of access to common carriers. Judge Hammond answered this contention in his second opinion.³²⁷ He noted that the 1875 statute provided that all innkeepers, common carriers, and places of amusement had a right "to control the access and admission or exclusion of persons" from their places of business.³²⁸ Citing *Hall v. DeCuir*,³²⁹ an 1877 United States Supreme Court case that had declared unconstitutional a state public accommodations statute that purported to regulate common carriers involved in interstate commerce, Judge Hammond declared the 1875 Tennessee statute void as an unconstitutional interference with interstate commerce.³³⁰ The analogy to *Hall* was not perfect. *Hall* struck down a public accommodations law that regulated trains to require equal access and integration. The Supreme Court found the state public accommodations law in that case to impose a "direct burden upon inter-state commerce" and to "interfere directly with its freedom."³³¹ The Tennessee statute at issue in *Brown* was arguably *de-regulatory*. It gave railroads *freedom* to serve whomever they wished and this could be interpreted as posing no burden whatsoever on interstate commerce. Yet, Judge Hammond nonetheless struck it down as an attempt to regulate interstate commerce.³³² He could also have held the statute to be preempted by the federal statute, which required access to common carriers without regard to race.

³²⁷ *Brown*, 5 F. 499.

³²⁸ *Id.* at 501 (citing Act of Mar. 24, 1875, ch. 1, § 1, 1875 TENN. PUB. ACTS 216-17).

³²⁹ 95 U.S. 485 (1877).

³³⁰ 5 F. at 501. The 1875 Tennessee statute stated:

The rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel or public house, or carrier of passengers for hire, or conductors, drivers, or employes of such carrier or keeper, shall be bound or under any obligation to entertain, carry, or admit any person whom he shall for any reason whatever choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement; nor shall any right exist in favor of any such persons so refused admission; but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement, and their employes, to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private carriage or private theater or place of amusement for his family.

Id. at 500-01. Judge Hammond could also have found the statute preempted by the federal public accommodations act of 1875. Perhaps he did not do so because of doubts about the constitutionality of that statute.

³³¹ *Hall*, 95 U.S. at 488.

³³² *Brown*, 5 F. at 501.

However, he avoided this ruling, probably because no federal statutory violation could be shown, given his belief that race must be the sole motive for such a violation to exist. Holding the state law unconstitutional under the dormant commerce clause preserved a common-law remedy even when no federal statutory remedy was available.

Defendant also justified its exclusion of plaintiff Brown from the ladies' car on the grounds that she was "a notorious courtesan, addicted to lascivious and profane conversation and immodest deportment in public places, and well known to the defendant's conductor as such"³³³ and that defendant had equal accommodations for her in another car.³³⁴ Judge Hammond addressed the question of whether the railroad could set apart a separate car for persons of good character and "genteel and modest deportment" without reference to their "demeanor at the time they take passage in the car."³³⁵ He answered this question in several different ways.

In his first opinion of 1880, Judge Hammond held that this was a mixed question of law and fact for the jury to decide.³³⁶ In his second opinion, Judge Hammond effectively reversed his earlier decision that the jury must decide the reasonableness of an exclusion by holding that common carriers had no common-law right to exclude "unchaste women" at all. Such women, he held, "had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such such [sic] places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded."³³⁷ In effect, he ruled that prostitutes had a fundamental right to travel and could not be excluded under any circumstances from transportation facilities.

The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible

³³³ *Brown v. Memphis & Charleston R.R.*, 4 F. 37, 38 (C.C.W.D. Tenn. 1880).

³³⁴ *Id.*

³³⁵ *Id.* at 39.

³³⁶ *Id.* at 40.

³³⁷ *Brown*, 5 F. at 501. Judge Hammond further argued that "the social penalties of exclusion of unchaste women from hotels, theatres, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people must expect to meet them in such such [sic] places . . ." *Id.*

and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.³³⁸

This solution to the problem contained two quite different arguments. First, he suggested that everyone, good or bad, had a fundamental right to travel. Second, he suggested that, even if “unchaste” or immoral people could be lawfully excluded from common carriers, their exclusion would hurt good people who might fear being wrongly labeled immoral and thus hesitate to travel by common carrier. Hence, immoral persons could not be excluded in order to protect the rights of good people.

In his third opinion, after the aggrieved railroad moved for a new trial, Judge Hammond again ruled that common carriers could not exclude passengers based solely on their reputation or moral character, but could exclude people solely on the basis of “character, habits, and conduct that are injurious to the other passengers in the sense that it subjects them to loss at the hands of the thief or gambler, to discomfort by reason of personal trespass and insult, or to annoyance by the exhibition of gross and vulgar habits.”³³⁹ A common carrier, he ruled, is not a “censor of individual morals,” but “must carry all who come properly dressed, and who behave genteelly.”³⁴⁰ The excluded person must be guilty of conduct affecting others by “her habits and conduct in public places”³⁴¹ because “any other rule would prohibit them from traveling altogether”³⁴² This ruling clarified that a passenger could not be excluded simply because her presence made other passengers uncomfortable. The source of the discomfort had to be reasonable.³⁴³

Judge Hammond further concluded that, if the railroad intended to exclude prostitutes from the ladies’ car, they had to do so consistently. The defense would not be valid unless there was a showing that it was the defendant’s custom to exclude prostitutes from the ladies’

³³⁸ *Id.* at 501-02.

³³⁹ *Brown v. Memphis & Charleston R.R.*, 7 F. 51, 56-57 (C.C.W.D. Tenn. 1881).

³⁴⁰ *Id.*

³⁴¹ *Id.* at 60.

³⁴² *Id.*

³⁴³ Hammond interprets Story’s opinion in *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7258), who commented on the right to exclude passengers of bad character. He noted that Story meant “character, habits, and conduct that are injurious to the other passengers in the sense that it subjects them to loss at the hands of the thief or gambler, to discomfort by reason of personal trespass and insult, or to conveyance by the exhibition of gross and vulgar habits.” *Brown*, 7 F. at 57; *see also* *Brown v. Memphis & Charleston R.R.*, 5 F. 499, 502 (C.C.W.D. Tenn. 1880) (holding that the railroad could remove anyone “whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, then he can so grade the men.”).

car.³⁴⁴ He found, however, that the railroad had no such policy in this case.³⁴⁵ Moreover, he went so far as to argue that if defendant railroad was going to exclude plaintiff on the ground that she was a prostitute, it would also have to exclude men who associated with prostitutes. "Nor do I see why [the policy] should not be applied to men as well as women, so as to exclude whoremongers, not only from the 'ladies' car, but from that in which 'gentlemen' ride. But the experience of every man who travels demonstrates that, as a fact, no such classification is attempted."³⁴⁶

Judge Eli Shelby Hammond's opinions in the *Brown* case are not premised on the idea that race is irrelevant in access to public accommodations. They are compatible with a belief in the "separate but equal doctrine"—a doctrine he accepted several years later in *Logwood*. At the same time, he bravely struck down Tennessee's attempt to abolish the common-law right of access, at least as applied to interstate commerce. He also seems to have challenged the railroads' attempts to allow some African-Americans on the ladies' car (such as servants and nurses) while excluding others. Taken together, his rulings would have forced railroads to add first-class ladies' cars for African-American women—an expensive proposition that the railroads fought. He recognized a right of white women to board trains without having their virtue questioned and he extended this right to African-American women. While affirming race, class, and gender hierarchies, his rulings cut across these categories. They affirmed the right of African-American women who could afford to purchase first-class tickets to be accorded first-class accommodations—a right, in effect, to be treated like ladies.³⁴⁷ In the absence of substantial investment by railroads in first-class accommodations for African-American women, this meant the right to such treatment in the company of white women and on the same terms. Perhaps nothing demonstrates the force of Hammond's rulings better than the fact that he authorized and found appropriate an award that included punitive damages and totalled \$3000, an enormous sum that was the largest reported award I have found in this period.

(2) *Common-law decisions affirming the separate but equal doctrine.*—Judge Hammond's decisions in *Brown* voiced no opinion on the question of whether the railroad could lawfully separate black and white passengers if it provided "equal" accommodations—in effect, being required to add an African-American ladies' car. He also voiced no opinion about the proper rule to apply to a black man seek-

³⁴⁴ *Brown*, 7 F. at 57-59.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 58.

³⁴⁷ See Welke, *supra* note 277, at 290.

ing service on the ladies' car.³⁴⁸ His views on these matters were somewhat clarified four years later in *Logwood v. Memphis & Charleston Railroad Co.*,³⁴⁹ in which Hammond stated that “[e]qual accommodations do not mean identical accommodations. Races and nationalities, under some circumstances, . . . may be reasonably separated . . .”³⁵⁰ Nonetheless, his opinion suggested that he would apply strictly the rule that “in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to each class.”³⁵¹ If this were done, however, “[c]olored people and white people may be so separated . . .”³⁵²

At the same time the courts were moving to embrace the notion that places of public accommodation had a duty to serve the public without regard to race, they applied the common-law rule authorizing businesses to make “reasonable regulations” for the control of their property and used this approach to encompass racial segregation. The much-cited 1867 decision of the Pennsylvania Supreme Court in *West Chester & Philadelphia Railroad Co. v. Miles*,³⁵³ resulted in an opinion by Justice Agnew that constituted a strong endorsement of racial separation as a “reasonable regulation.” Unlike the progressive attitudes publicly presented by the Judges Lowe, Allison, and Hammond, Justice Agnew based his decision explicitly on expressions of disgust at racial mixing, especially fears of miscegenation. *Miles* involved a “colored woman” named Mary E. Miles who sat in the middle of a railroad car. The Pennsylvania Supreme Court noted that “[a] rule of the road required the conductor to make colored persons sit at one end of the car.”³⁵⁴ But she refused to move when asked to do so. “She declined positively and persistently to do it[.]” and the conductor

³⁴⁸ It is questionable whether Judge Hammond would have approved the presence of a black man on the ladies' car even if the black man argued that he could not tolerate the smoke in the smoking car. I say this because of Judge Hammond's privately expressed fears about miscegenation. See *supra* note 313. Compare the Tennessee Supreme Court's solicitude for a white man who sought a seat in the ladies' car in *Memphis & Charleston Railroad Co. v. Benson*, 85 Tenn. 627 (1887). At the same time, his theory would clearly allow a black man to enter the ladies' car if a white man were allowed to do so unless equal accommodations were provided in another car.

³⁴⁹ 23 F. 318 (C.C.W.D. Tenn. 1885).

³⁵⁰ *Id.* at 319.

³⁵¹ *Id.*

³⁵² *Id.*; See *Younger v. Judah*, 111 Mo. 303, 311-12 (1892) (upholding segregated seating in a theater as a reasonable regulation).

³⁵³ 55 Pa. 209 (1867); see *Chicago & Northwestern Ry. v. Williams*, 55 Ill. 185, 189 (1870) (suggesting that *Miles* was correctly decided and that public carriers might be able to segregate passengers by race, as they could do by sex, as long as they furnish “separate seats equal in comfort and safety”); see also *Bowie v. Birmingham Ry. & Elec.*, 125 Ala. 397, 406-08 (1899) (relying on *Miles*); *Memphis & Charleston R.R. v. Benson*, 85 Tenn. 627, 631 (1887) (upholding separate cars for “persons of color” and for “ladies, or gentleman accompanied by ladies”).

³⁵⁴ *Miles*, 55 Pa. at 210.

“put her out” of the car.³⁵⁵ The trial court found for plaintiff, granting her a verdict of \$5. The Supreme Court of Pennsylvania reversed, with a ringing endorsement of the separate but equal doctrine.

Justice Agnew began by affirming the duty to serve. “It is admitted no one can be excluded from carriage by a public carrier on account of color, religious belief, political relations or prejudice.”³⁵⁶ Moreover, he conceded the right of black and white passengers to be treated equally. “But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a free-man—that would be to draw the illogical sequence of inferiority from difference only.”³⁵⁷ “The question,” he argued “is one of difference, not of superiority or inferiority.”³⁵⁸

The sole question was whether separation of the races constituted a reasonable regulation of the railroad’s business.³⁵⁹ Justice Agnew, for the court, had no trouble in concluding that it did. To begin the argument, Agnew supported the idea that businesses could implement reasonable regulations based both on the owner’s “right of private property in the means of conveyance, and the public interest.”³⁶⁰ To support the finding that racial segregation was reasonable, the court first attempted to analogize separation of the races to separation of men and women in the form of the ladies’ car, a separation the court felt had an unquestionable foundation.³⁶¹ Further, the court noted, during the War, white and black soldiers had been separated from civilians on trains “and the separation of soldiers from citizens implied no want of equality, but a sound regulation of the right of transit.”³⁶² No rights are violated by separation, given that the separation does not deny the equality of the races and no one is entitled to a particular seat on the train. Just as “a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel,” passengers on trains have no right to choose their seat.³⁶³ The carrier has the right to manage its business to make such deci-

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 211.

³⁵⁷ *Id.* at 213.

³⁵⁸ *Id.*

Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar.

Id.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 212.

³⁶¹ *Id.* at 211.

³⁶² *Id.*

³⁶³ *Id.* at 212.

sions. "If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths?"³⁶⁴

The court then justified racial separation as based on a combination of natural law, custom, and policy. "It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting."³⁶⁵ Both natural law and custom support separation of the races, while separation also serves the goal of preserving the "public peace" by "repress[ing] tumults."³⁶⁶ "It is much easier to prevent difficulties among passengers by regulations for their proper separation, than it is to quell them."³⁶⁷ According to the court, the feeling against integration was both natural and understandable, whether or not it could be viewed as reasonable.

The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro take[s] his seat beside a white man or his wife or daughter, the law cannot repress the anger, or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterward the breach of the peace it may have caused.³⁶⁸

It is telling that the revulsion Justice Agnew describes is the revulsion of a white man sitting next to—or worse yet, having his wife or daughter sit next to—a black man. This fear of the possibility of black men being close to white women features prominently throughout the opinion. Justice Agnew goes so far as to equate sitting next to someone with being in the same bed. "Who would maintain that it is a reasonable regulation, either of an inn or a vessel, to *compel* the passengers, black and white, to room and bed together?"³⁶⁹

Justice Agnew based the custom of separation on what he saw as this natural revulsion, as well as divine will. The question is "whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation."³⁷⁰ It is reasonable because "the Creator made one black and the other white," creating "distinct" and "dissimilar" races, "each producing its own kind, and following the peculiar

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 212-13.

³⁶⁹ *Id.* at 212 (emphasis in original).

³⁷⁰ *Id.* at 213.

law of its constitution.”³⁷¹ Natural and divine law create the feelings that lead to the custom of separation.

Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.³⁷²

Oddly, however, Justice Agnew immediately contradicts himself. After arguing that it was natural for human beings to feel revulsion at social contact with people of another race, he argues that social contact is especially dangerous because it leads inevitably to sexual contact and the intermingling of the races.

The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.³⁷³

Amazingly, despite the “natural” revulsion of the races for each other, contact proves so appealing that it leads to “illicit intercourse” and even to marriage. The natural separation of the races seems not merely to be a fact but, is also a goal to be assiduously attained, and the attainment of that goal requires laws that support and affirm separation:

[F]ollowing the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.³⁷⁴

Natural law finds its counterpart in custom:

We find the same difference in the institutions and customs of the state. Never has there been an intermixture of the two races, socially, religiously, civilly or politically. By uninterrupted usage the blacks live apart,

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 213-14.

visit and entertain among themselves, occupy separate places of public worship and amusement, and fill no civil or political stations, not even sitting to decide their own causes. In fact, there is not an institution of the state in which they have mingled indiscriminately with the whites. Even the common school law provides for separate schools when their numbers are adequate. In the military service, also, they were not intermixed with the white soldiers, but were separated into companies and regiments of color, and this not by way of disparagement, but from motives of wisdom and prudence, to avoid the antagonisms of variant and immiscible races. Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away.³⁷⁵

In an extremely odd ending, Justice Agnew acknowledges that the legislature had just passed a public accommodations law after the events in this case, changing the common law.³⁷⁶ He implies that the statute would require integration, and that it must be understood to have changed the previous common-law rule, which would recognize racial segregation as a reasonable regulation. But if this is so, his argument about the naturalness of the distinctions between the races and the impossibility of the law affecting behavior, conduct, or attitudes; is undermined.³⁷⁷

The common-law decisions of this period are consistent in one respect and inconsistent in another. They uniformly recognize a right of access to places of public accommodation without regard to race. When they cut back on the right of access, as when the Massachusetts Supreme Judicial Court announced in 1858 that no right of access existed for service in places of entertainment, the new restriction on the right of access *formally* applied to both black and white patrons.³⁷⁸ The decisions also overwhelmingly adopt the separate but equal doctrine, finding separate service to be both consistent with the general duty to serve and with norms of equality.

On the other hand, the cases appear inconsistent. Some cases affirm a right of access, such as *State v. Kimber* and *Derry v. Lowry*, and contain stirring rhetoric about equality and support the enormous changes in race relations effectuated by the events surrounding the

³⁷⁵ *Id.* at 214-15.

³⁷⁶ *Id.* at 215. ("It only remains to add that this cause arose before the passage of the Act of 22d March 1867, declaring it an offence for railroad companies to make any distinction between passengers on account of race or color, and our decision pronounces the law only as it stood when the case arose, leaving the act to operate upon such cases as shall fall within its provisions. Indeed the act itself is an indication of the legislative understanding of the law as it stood before the passage of the act.")

³⁷⁷ A case holding that racial segregation is reasonable as a matter of federal maritime law is *Green v. City of Bridgeton*, 10 F. Cas. 1090 (C.C.S.D. Ga. 1879) (No. 5754). Other cases suggesting that separate accommodations were allowable under the common law include *Chicago & Northwestern Ry. v. Williams*, 55 Ill. 185, 189 (1870).

³⁷⁸ Of course, affirming an absolute right to exclude authorized lecture halls and other places of entertainment to exclude black patrons only, if they so wished.

Civil War. Other cases both affirm the wisdom, naturalness, and beneficence of segregation and affirm the inferiority of African-Americans, as well as the need to continue pre-Civil War policies of protecting white Americans from forced association with African-Americans. The very same arguments that would justify a right of access without regard to race would justify racial integration, while the arguments that justify segregation would also justify abolishing the right of access. A second inconsistency is that a vested right of access to places of public accommodation is not understood as an illegitimate interference with property rights while forced integration *is* understood to interfere with protected property rights. In addition, over the course of the next twenty years (from 1865 to 1885) the emerging rhetoric of private property has the effect of switching the baseline from a duty to serve applicable to businesses, which hold themselves out as open to the public, to a baseline property right to exclude unless a business fits within a narrow set of activities involved in travel (inns and carriers) or public utilities (gas and electric lines, for example).

c. State and federal statutes.—

(1) *Black codes.*—Immediately after the Civil War and the abolition of slavery, Southern legislatures attempted to reinstate, to the extent possible, the incidents of slavery by promulgating “Black Codes” that severely restricted the rights of all African-Americans. These laws were partly intended to establish “systems of peonage or apprenticeship resembling slavery.”³⁷⁹

In conjunction with the Black Codes, three Southern states adopted laws in 1865 and 1866 that permitted or required railroads to engage in various forms of racial segregation. Mississippi passed a statute forbidding any black person from riding in a first-class car reserved for white persons. However, the statute did not prohibit integration in second-class cars and did not require the railroad to set aside a particular car for African-Americans.³⁸⁰ Florida, in 1865, forbade white persons to use cars set aside for African-Americans, but did not require the railroads to provide cars for either race; nor did it prohibit integration in smoking cars.³⁸¹ Texas passed a law in 1866 requiring all trains to establish a separate car for “the special accommodation of freedmen.”³⁸²

³⁷⁹ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 22 (3d ed. 1974); see also FONER, *supra* note 221, at 199; John H. Franklin, *History of Racial Segregation in the United States*, in 2 *THE MAKING OF BLACK AMERICA* 3, 5 (August Meier & Elliott T. Rudwick eds., 1969).

³⁸⁰ WOODWARD, *supra* note 379, at 23.

³⁸¹ *Id.* at 23-24.

³⁸² *Id.* at 24.

These laws and others like them engendered active resistance by African-Americans in various parts of the South. For example, in New Orleans, African-Americans protested segregation "by boarding streetcars reserved for whites and gathering on the tracks to block the carriers in the spring of 1867."³⁸³ Similarly, African-Americans in Charleston started entering the city's new streetcars from which the company sought to exclude them. Demonstrations in both cities caused the federal military commanders to intervene and order that the discriminatory exclusion be ended. The Black Codes as a whole were nullified by military commanders and by the Reconstruction Act of 1867. Nevertheless, the social practice of denying African-Americans the right to ride in first-class cars continued on many railroads throughout Reconstruction, in both the South and the North.³⁸⁴

(2) *State and federal public accommodation laws.*—

(a) *Rights of access.*—Massachusetts passed the first public accommodations law in 1865; Pennsylvania followed with a similar statute in 1867.³⁸⁵ After nullification of the Black Codes, Southern states passed similar statutes, as well as constitutional provisions promoting equality. Statutes were passed in South Carolina (1869 and 1870),³⁸⁶ Tennessee (1867),³⁸⁷ and between 1868 and 1873 in Georgia, Florida, Mississippi, Louisiana, Texas, and Arkansas.³⁸⁸ New York passed a Civil Rights Act in 1873.³⁸⁹ The federal government passed its own public accommodations law in 1875. After the *Civil Rights Cases* invalidated the federal public accommodations law of 1875, statutes were passed in Iowa (1884), New Jersey (1884), Ohio (1884), Colorado (1885), Indiana (1885), Michigan (1885), Minnesota (1885), Nebraska (1885), Rhode Island (1885), Washington (1889-1890), California (1893), Wisconsin (1895), and Connecticut (1905).³⁹⁰

Those state statutes and the cases interpreting them affirmed the rights of African-Americans to be served in places of public accommodation. For example, the 1876 case of *United States v. Newcomer*³⁹¹ interpreted the new federal statute to allow conviction of a hotel clerk for refusing to provide a room in a hotel to a black man.³⁹² The most

³⁸³ BARNES, *supra* note 311, at 3.

³⁸⁴ *Id.*; see also FONER, *supra* note 221, at 371 (describing integration in streetcars and resorts in New Orleans).

³⁸⁵ 1865 Mass. Acts, ch. 277; JOHNSON, *supra* note 190, at 28, 124, 172.

³⁸⁶ JOHNSON, *supra* note 190, at 176; Tindall, *The Color Line*, *supra* note 287, at 6.

³⁸⁷ Folmsbee, *supra* note 290, at 147-49.

³⁸⁸ BARNES, *supra* note 311, at 3.

³⁸⁹ JOHNSON, *supra* note 190, at 29, 150.

³⁹⁰ *Id.* at 30, 74-75, 76, 80, 101, 104, 127, 129, 139, 143, 165, 175, 202, 207.

³⁹¹ 27 F. Cas. 127 (E.D. Pa. 1876) (No. 15,868).

³⁹² *Id.* at 128; see also Fruchey v. Eagleson, 43 N.E. 146 (Ind. 1896) (holding that a hotel violated the 1894 Indiana Civil Rights Act by refusing to allow a "Negro boy" to stay at the

interesting case is *Donnell v. State*,³⁹³ decided by the Mississippi Supreme Court in 1873. In that case, George Donnell was arrested by the sheriff of Hinds County, Mississippi and held under a judgment of a justice of the peace who imposed on him a \$100 fine for failing to sell theater tickets in the city of Jackson to H.C. Carter and D. Webster as required by the 1873 “civil rights bill.” The defendant claimed that the state law constituted an unconstitutional deprivation of the theater’s property rights. The Mississippi Supreme Court rejected the argument, stating that

the most absolute and unqualified title to private property is held upon the condition that the owner will so use it as not to encroach upon the rights of others; and the state may rightfully interfere with the owner, so far as to control the use as that it shall not be seriously detrimental to others.³⁹⁴

In addition, the court noted that the common law had always included “rules which have a special application to those who sustain a *quasi* public relation to the community,”³⁹⁵ which placed a duty to serve on innkeepers, common carriers, and places of entertainment. Thus the statute did not change the common law in this regard, but merely extended those rights to African-Americans.³⁹⁶ In addition, the court asserted the pre-*Lochner* view that regulations of property use “in no sense appropriate[] the private property of the lessee, owner or manager, to the public use.”³⁹⁷ The court thus concluded, in the most emphatic terms, that restrictions on the right to exclude in the form of laws extending the right of access to places of public accommodation to African-Americans did not unlawfully interfere with any protected property rights.³⁹⁸

(b) *Decisions affirming integration.*—Some states interpreted their state public accommodations laws to require integration. For example, the 1865 Massachusetts statute was clearly intended to, and had the effect of, prohibiting separate Negro cars.³⁹⁹ Similarly, the 1889 Illinois Supreme Court case of *Baylies v. Curry*⁴⁰⁰ held that the Illinois public accommodations law passed in 1885 prohibited ra-

hotel); *People v. King*, 18 N.E. 245 (N.Y. 1888) (skating rink violated state public accommodations law by refusing to admit “three colored men”).

³⁹³ 48 Miss. 661 (1873).

³⁹⁴ *Id.* at 678-79.

³⁹⁵ *Id.* at 680 (emphasis in original).

³⁹⁶ Several courts similarly interpreted the federal statute of 1875. See *infra* text accompanying notes 442-52.

³⁹⁷ *Donnell*, 48 Miss. at 682.

³⁹⁸ For a similar holding, see *People v. King*, 18 N.E. 245, 247-48 (N.Y. 1888).

³⁹⁹ JOHNSON, *supra* note 190, at 28.

⁴⁰⁰ 21 N.E. 595 (Ill. 1889); see also *Fruchey v. Eagleson*, 43 N.E. 146, 150 (Ind. 1896) (interpreting the 1894 Indiana Civil Rights Act to prohibit exclusion or segregation on account of race in hotels); *Joyner v. Moore-Wiggins Co.*, 136 N.Y.S. 578, 581 (App. Div. 1912) (interpreting the

cial segregation in theaters. The theater in question had refused to seat and then ejected a black couple after they attempted to sit in an area reserved for white persons. The Illinois state law provided that “[a]ll persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of . . . theaters, . . . subject only to the conditions and limitations established by law, and applicable alike to all citizens.”⁴⁰¹ Although the federal courts interpreted nearly identical language in the federal public accommodations law of 1875 to authorize racial segregation,⁴⁰² the Illinois Supreme Court rejected this interpretation, concluding that “[i]t would be difficult to employ more comprehensive and sweeping language to abolish all distinctions in accommodations, facilities, privileges or advantages in theaters on account of race or color, than that thus employed.”⁴⁰³ The court held that plaintiffs had a right of access to the theater and to “the first balcony” and this balcony could not be reserved for white persons only.

The high point of the United States Supreme Court’s attachment to the integration view of public accommodations statutes came in *Washington A.G. Railroad Co. v. Brown*,⁴⁰⁴ decided in 1873. That case construed a congressional statute authorizing the Alexandria and Washington Railroad Company to change the direction of its line inside the District of Columbia and providing that “no person shall be excluded from the cars on account of color.” Plaintiff, Catharine Brown, was a black woman who was excluded from a car set aside “for white ladies, and gentlemen accompanying them.”⁴⁰⁵ Justice Davis scoffed at the assertion that the railroad had “never excluded this class of persons from the cars, but on the contrary, has always provided [separate] accommodations for them.”⁴⁰⁶ “This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense.”⁴⁰⁷ Justice Davis concluded:

It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told

New York Civil Rights Law in effect at the time to prohibit racial segregation in a theater), *aff’d*, 105 N.E. 1088 (N.Y. 1914).

⁴⁰¹ *Baylies*, 21 N.E. at 596.

⁴⁰² See *infra* text accompanying notes 455-66.

⁴⁰³ *Baylies*, 21 N.E. at 596.

⁴⁰⁴ 84 U.S. 445 (1873).

⁴⁰⁵ *Id.* at 447.

⁴⁰⁶ *Id.* at 452.

⁴⁰⁷ *Id.*

this company, in substance, that it could extend its road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it.⁴⁰⁸

This remarkable decision interpreted the “full and equal enjoyment” to mean a right not to be excluded *from any part of the train* and thus a right to be free from forced racial segregation.

Integration was thus achieved in certain instances by interpreting state and federal statutes to require, not only service, but integrated service. Integration was also achieved by a second strategy. Many cases that purported to adopt the “separate but equal” doctrine nonetheless went a long way to promote integration by strictly construing the requirement that “separate” facilities be “equal” ones.⁴⁰⁹ For example, a federal judge in Ohio explained in 1882 in the case of *Gray v. Cincinnati Southern Railroad Co.* that the “company was bound to provide for this colored woman precisely such accommodations, in every respect, as were provided upon their train for white women.”⁴¹⁰ To provide “precisely” the same accommodations would be expensive indeed. Similarly, a Tennessee judge held in *Murphy v. Western and Atlantic Railroad* in 1885 that, although railroads could segregate passengers by race, they “must furnish, substantially, like and equal accommodations. The money of one has the same value as that of the other”⁴¹¹ The *Murphy* decision had the effect of requiring the railroad to allow a black man to ride in the ladies’ car, one of the few cases decided in the South in this period that involved a black man as the plaintiff, rather than a black woman. A similar result obtained in *Houck v. Southern Railroad Pacific Railway Co.*,⁴¹² in which a pregnant black woman was forced to stand outside on the platform of a train for many miles during rainy weather and subsequently became sick and suffered a miscarriage. The court had no trouble in concluding that the accommodations in the smoking car were not equal to those in the ladies’ car and awarded her a total of \$2500 in damages.⁴¹³

A strict requirement of equal accommodations might very well have had the effect of establishing integration if the railroad could not afford to create a separate first-class car for African-Americans. In many Southern states at the time, train lines could not financially support more than two cars and the custom was to have a smoking car and a ladies’ car. To provide “separate but equal” accommodations

⁴⁰⁸ *Id.* at 452-53.

⁴⁰⁹ *See, e.g., The Sue*, 22 F. 843 (D. Md. 1885).

⁴¹⁰ *Gray v. Cincinnati S. Ry.*, 11 F. 683, 686 (C.C.S.D. Ohio 1882).

⁴¹¹ 23 F. 637, 639 (E.D. Tenn. 1885).

⁴¹² 38 F. 226 (C.C.W.D. Tex. 1888).

⁴¹³ *Id.* at 228-30.

would require at least three cars on each train, adding a Negro "ladies' car." To separate the races entirely would require *both* a Negro ladies' car and a Negro smoking car. For this reason, the Jim Crow statutes were often opposed by railroads.⁴¹⁴

Some judges clearly understood that a strict enforcement of the "separate but equal" doctrine would have the effect of requiring integration. For example, in *The Sue*,⁴¹⁵ an 1885 case decided by a federal court in Maryland, Chief Judge Morris rejected the defendant steamboat owner's argument that it would be "expensive and difficult" to provide equal first-class accommodations for African-American passengers. Judge Morris concluded that this was irrelevant *even if the result were forced integration*.

The right of the first-class colored passenger was to have first-class accommodation according to the standard of the [first class] cabin on the same boat, and this, no matter what might be the difficulties. . . . *If it is beyond the power of the owner of the boat to afford this, then they have no right to make the separation.* On many vehicles for transportation, the separation cannot be lawfully made, and the right of steamboat owners to make it depends on their ability to make it without discrimination as to comfort, convenience, or safety.⁴¹⁶

While accepting the separate but equal doctrine as established law, Judge Morris clearly understood that a strict application of the "equality" prong of the doctrine would effectuate substantial integration in particular instances.

One case decided in Iowa in 1873, prior to the passage of the federal public accommodations law of 1875, interpreted the federal Civil Rights Act of 1866 to require a steamboat to allow a black woman to eat at a first-class table with white passengers when she had a first-class ticket and no separate but equal first-class eating accommodations were provided for black passengers. In *Coger v. North Western Union Packet Co.*,⁴¹⁷ the Supreme Court of Iowa ruled that both state law and the 1866 federal Civil Rights Act prohibited the steamboat from excluding black passengers from any areas of the boat to which white passengers were entitled to go, including the meal areas. This ruling "rest[ed] upon the equality of all before the law . . ."⁴¹⁸ Segregation, according to Chief Justice Beck, would mean that "[h]is contract . . . would not secure him the same privileges and the same rights that a like contract, made with the same party by his white fel-

⁴¹⁴ Minter, *supra* note 209, at 40-41 (railroads were concerned about the "added expense if they were forced to provide Jim Crow cars").

⁴¹⁵ 22 F. 843 (D. Md. 1885).

⁴¹⁶ *Id.* at 848 (emphasis added).

⁴¹⁷ 37 Iowa 145 (1873).

⁴¹⁸ *Id.* at 153.

low citizen, would bestow upon the latter.”⁴¹⁹ The court applied the Civil Rights Act of 1866, which provided that “citizens of every race and color . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens.”⁴²⁰ The court argued that the “language [in the statute] is comprehensive and includes the right to property and all rights growing out of contracts. It includes within its broad terms every right arising in the affairs of life.”⁴²¹ What is remarkable about this interpretation is that, if accepted, it would have made the federal public accommodations law of 1875 unnecessary and superfluous. At the same time, the case involved a woman who had purchased a ticket, and then had been clearly denied equal accommodations. The case does not definitively answer the question of whether separate but equal accommodations would have been sufficient and does not address the question of whether the steamboat had a duty to sell her the ticket in the first place.⁴²²

Did the new public accommodations laws result in a significant amount of racial integration in common carriers, inns, and places of

⁴¹⁹ *Id.* at 153-54. At the same time, it is important to note that the steamboat failed to provide separate “but equal” services, and the case may have turned on that fact. *See id.* at 154 (“[T]he rule contended for . . . says to the negro, you may have inferior accommodations at a reduced price, but no others.”).

⁴²⁰ *Id.* at 156.

⁴²¹ *Id.* The court then rejected the idea that integration constituted an attempt to create a “social right.”

Without doubting that social rights and privileges are not within the protection of the laws and constitutional provision in question, we are satisfied that the rights and privileges which were denied plaintiff are not within that class. . . . Certainly no one will claim that the passengers in the cabin of a steamboat are there in the character of members of what is called society. Their companionship as travelers is not esteemed by any class of our people to create social relations. Neither are these created by the seat at a common table. Those of high pretensions in society — the good and virtuous, may mingle as passengers in the cabin, and sit at the same table with the lowly and vicious without a thought that the social barriers erected by the haughty assumptions of pride and wealth, or the just requirements of moral and good manners are broken down, and the high and low, good and bad, are thus brought to a common level of conventional society. The plaintiff could not have attained any social standing by being permitted to share the treatment awarded to other passengers; she claimed no social privilege, but substantial privileges pertaining to her property and the protection of her person.

Id. at 157-58.

⁴²² The United States Supreme Court interpreted the 1866 Civil Rights Act to prohibit a racially motivated refusal to deal in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and in *Runyon v. McCrary*, 427 U.S. 160 (1976). These decisions were criticized because they would make most of the civil rights laws of the 1960s superfluous in some sense. Interpreting the 1866 act to require the steamboat to sell plaintiff a ticket in *Coger* would also have made the 1875 public accommodations law superfluous. It might be that the judge in *Coger* meant to interpret the 1866 act to require a carrier to provide equal accommodations if it chose to sell a first-class ticket to a black woman, but that it would have no duty to sell such a ticket until passage of the 1875 public accommodations act.

entertainment? Historians have been debating this for many years.⁴²³ Because of the numerous challenges to segregation in public transit in the North waged by both blacks and white abolitionists in the form of refusals to comply with orders to leave cars assigned to white persons, petitions and legislative lobbying, boycotts, and lawsuits, segregation in transportation had been significantly undermined in the North by 1865. Catharine Barnes goes as far as to argue that “[a]lthough the practice was not completely eliminated for some years, Jim Crow travel never again posed a major problem for Northern blacks. From Reconstruction on, segregated carriers and the controversy over them were centered in the South.”⁴²⁴ This conclusion, however, appears to be an overstatement, if not actually wrong. There did continue to be segregation in Northern states in public transit after 1865 and it was sometimes even upheld by the courts.⁴²⁵ In addition, exclusion from restaurants, inns, and places of entertainment continued to be common in the North.

The extent of segregation in the South in the twenty years after the Civil War has been a subject of ever greater controversy among historians. Some historians, beginning with C. Vann Woodward in his famous book, *The Strange Career of Jim Crow*, first published in 1955,⁴²⁶ argued that the period from 1865 to 1885 was one of substantial fluidity and experimentation in race relations with a substantial amount of racial mixing in places of public accommodations. Scholars who support Woodward’s view include George Tindall,⁴²⁷ Charles Wynes,⁴²⁸ and John Blassingame.⁴²⁹ Wynes argues, for example, that in the 1870s in Virginia, although some railroads employed Jim Crow cars, “large numbers of white Virginians, at least in some parts of the state, gradually became accustomed to African-Americans riding in whatever cars and seats they chose.”⁴³⁰ Wynes concludes that by the end of the nineteenth century “it was customary for the races to ride together on most of the railroads of Virginia without confinement to either a Jim Crow car or the smoking car.”⁴³¹ He notes that there were exceptions to this practice, but they “became fewer and

⁴²³ Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the “Separate but Equal” Doctrine, 1865-1896*, 28 AM. J. LEG. HIST. 17 (1984), reprinted in BLACK SOUTHERNERS AND THE LAW, 1865-1900, at 349 (Donald G. Nieman ed., 1994).

⁴²⁴ BARNES, *supra* note 311, at 2.

⁴²⁵ *West Chester & Philadelphia R.R. v. Miles*, 55 Pa. 209 (1867).

⁴²⁶ WOODWARD, *supra* note 379.

⁴²⁷ TINDALL, *SOUTH CAROLINA NEGROES*, *supra* note 287.

⁴²⁸ WYNES, *RACE RELATIONS IN VIRGINIA*, *supra* note 295.

⁴²⁹ JOHN W. BLASSINGAME, *BLACK NEW ORLEANS, 1860-1880* (1973).

⁴³⁰ WYNES, *Social Acceptance and Unacceptance*, *supra* note 295, at 22.

⁴³¹ *Id.* at 25.

fewer.”⁴³² Catharine Barnes similarly argues that “the Reconstruction South developed a mixed and inconsistent pattern in public transportation. Although many carriers segregated blacks, others accepted integration as the norm.”⁴³³

Other scholars, such as Vernon Wharton,⁴³⁴ Joel Williamson,⁴³⁵ and Howard Rabinowitz,⁴³⁶ argue that, regardless of what the laws said, “voluntary” racial segregation was the general practice in the South from the Civil War to the beginning of the formal Jim Crow system in the late 1880s and 1890s. For example, Joel Williamson argues that in South Carolina, from 1865 to 1877, segregation remained the norm in practice on railroad lines.⁴³⁷ Most African-Americans chose to ride on the second-class cars on railroads, while almost all whites—especially white women—rode in first-class cars.⁴³⁸ Thus, Williamson concludes that “from 1868 until 1889, when the [South Carolina] antidiscrimination law was repealed, [African-Americans] in South Carolina could legally use all public facilities which were open

⁴³² *Id.* According to Wynes, after 1870, African-Americans won more and more cases. In 1871, an African-American named Kate Cummings was awarded \$1100 damages by a federal court in Virginia because she had been forcibly removed from a first-class car and sent to ride in the smoking car. *Id.* at 21-22 (citing *Richmond Daily Dispatch*, Jan. 28, 1871 & Apr. 8, 1870). Similarly, J.J. Wright, a Negro judge of the Supreme Court of South Carolina, bought a first-class ticket and rode in first-class cars in both South and North Carolina. But when he reached Virginia, the president of the line, Colonel Algernon S. Buford, personally ordered him to leave the first-class car. Wright sued the railroad for \$5000 damages, but settled out of court for \$1250. *Id.* at 22 (citing *Harrisonburg Old Commonwealth*, Feb. 1, 1871 & Apr. 19, 1871). Also in 1871, an African-American named James Sims was awarded \$1800 in damages against the Richmond, Fredericksburg, and Potomac Railroad and the Potomac Steamboat Company for being forced to leave the main saloon of the steamer Keyport on a trip in 1869 even though he held a first-class ticket. Sims was a member of the Georgia legislature at the time and was traveling from Washington, D.C. to Savannah, Georgia. *Id.* at 22 (citing *Richmond Daily Dispatch*, May 18-19, 1871). In 1876, a watchman at the Chesapeake and Ohio depot in Staunton, Virginia was sent to prison for four months for putting a Negro woman out of the passengers’ waiting room. *Id.* at 22. Similarly, because of Negro opposition, segregation on streetcars declined between 1870 and roughly 1900 in Savannah, Georgia. August Meier & Elliott T. Rudwick, *A Strange Chapter in the Career of “Jim Crow,”* in 2 *THE MAKING OF BLACK AMERICA*, *supra* note 379, at 14-15.

⁴³³ BARNES, *supra* note 311, at 2.

⁴³⁴ VERNON L. WHARTON, *THE NEGRO IN MISSISSIPPI, 1865-1890* (1947).

⁴³⁵ WILLIAMSON, *AFTER SLAVERY*, *supra* note 281.

⁴³⁶ HOWARD RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890* (1978).

⁴³⁷ Joel Williamson, *The Separation of the Races*, in *ORIGINS OF SEPARATION*, *supra* note 241, at 31.

⁴³⁸ *Id.* at 38. Williamson notes:

Most Negroes apparently deliberately chose to ride in the more economical second-class accommodations, and virtually all of the whites—particularly white women—took passage on the first-class cars. The separation thus achieved was so nearly complete that the first-class car was often referred to as the “ladies’ car.” It is highly relevant that the first Jim Crow legislation affecting railroads in South Carolina provided for the separation of the races only in the first-class cars, because, of course, this was the only place on the railroads where there was any possibility of a significant degree of mixing.

Id.

to whites. However, in actual practice, they seldom chose to do so."⁴³⁹ Similarly, although emphasizing that "Negroes frequently were admitted to places of public accommodation"⁴⁴⁰ in South Carolina during Reconstruction, George Tindall concedes that African-Americans and whites did not sit together. In Columbia, South Carolina, African-Americans were "freely admitted to theaters, exhibitions, and lectures, although they were usually given a wide berth by the whites if the hall were not crowded."⁴⁴¹ Segregation remained the practice in much of the South in restaurants, inns, places of entertainment, and schools.⁴⁴² In Virginia, from 1870 to 1900, only inns that catered solely to an African-American clientele would admit them.⁴⁴³ African-Americans were invariably excluded from hotels in South Carolina reserved for white travelers.⁴⁴⁴ Separate hotel facilities were maintained for African-American travelers.⁴⁴⁵ Catherine Barnes notes that state public accommodations laws passed in the South between 1868 and 1873 were not always obeyed and were often ignored in certain areas.⁴⁴⁶ Because civil rights laws were often not vigorously enforced, "transit companies could discriminate against blacks, if they wished, with impunity. Railroads in Texas and Mississippi, for example, allowed blacks only in second class coaches."⁴⁴⁷

What is important for our purposes here is the fact that the postbellum laws clearly enshrined a right of access to places of public accommodation and that, in many Northern states and some Southern states, this declaration of law had the effect of promoting both access and integration at least some of the time. At the same time, this fact generated a backlash. Other courts reacted to the newly asserted

⁴³⁹ *Id.* at 40.

⁴⁴⁰ George B. Tindall, *The Color Line*, in *ORIGINS OF SEPARATION*, *supra* note 241, at 8.

⁴⁴¹ *Id.*

⁴⁴² Wynes, *Social Acceptance and Unacceptance*, *supra* note 295, at 26 (concerning the situation in Virginia).

Much less successful than the Negro's search for equality of treatment on the state's railroads was his search for equal preferment in restaurants, hotels, bars, and theatres. Only in isolated cases did he meet with acceptance. Insistence upon these rights in nearly all instances met with cold rejection or physical eviction. However, it must be recognized that, unlike the situation of the railroads, there were very few public hostels or places of amusement from which Negroes sought service. In those years, anyone who journeyed more than a few miles from home almost always traveled by train, including poor whites and Negroes. But the Negroes, poor, ignorant, and often unaware of such luxuries, generally did not seek admittance to public establishments providing personal services or amusements. It was easy to rebuff the few who did. Besides, the majority of those seeking these things were travelers or visitors from outside the state, who were not prone to make an issue of discrimination they met only in passing.

Id.

⁴⁴³ *Id.*

⁴⁴⁴ Tindall, *supra* note 440, at 9.

⁴⁴⁵ *Id.*

⁴⁴⁶ BARNES, *supra* note 311, at 3-4.

⁴⁴⁷ *Id.* at 4.

rights of access by rejecting the idea that access implied integration and by strictly limiting the categories of businesses subject to the duty to serve.

(c) *Decisions affirming the separate but equal doctrine.*—

Although most judges in the North interpreted their new public accommodations laws to mandate integration,⁴⁴⁸ some interpreted their statutes to authorize segregation by preserving the antebellum idea that segregation constituted a reasonable regulation of the business rather than a failure to comply with the duty to serve.⁴⁴⁹ For example, in *Central Railroad of New Jersey v. Green*,⁴⁵⁰ decided by the Pennsylvania Supreme Court in 1878, the court held that the state public accommodations law passed in 1867 prohibited the railroad from excluding Mr. and Mrs. Green from the rear car of the train on account of their color. However, a concurring opinion by Justice Paxson argued that Mrs. Green had no ground of complaint if the railroad offered a seat in another car that was “equal in every respect of the car from which she was excluded.”⁴⁵¹

Most judges in the South interpreted their new public accommodations laws as authorizing segregation. For example, despite a state public accommodations law passed in 1873 in Georgia and the federal public accommodations law passed in 1875, a federal judge in Georgia had no trouble in concluding in 1879 that the common-law rule that recognized racial segregation as a “reasonable regulation” remained in effect in Georgia. In *Green v. City of Bridgeton*,⁴⁵² Judge Erskine first recognized the duty to serve based on the holding out principle. “The City of Bridgeton was held out to the world as a common carrier of passengers, for hire, consequently free to all proper persons who sought transportation”⁴⁵³ At the same time, although the “owner” of the vessel could not exclude passengers because of race, it could manage its boat by segregating the passengers by race.

But the vessel being thus open to passengers did not strip the owners or master of the right to make such suitable regulations as would promote

⁴⁴⁸ See, e.g., *Joyner v. Moore-Wiggins Co.*, 136 N.Y.S. 578, 581 (App. Div. 1912) (interpreting the New York Civil Rights Law in effect at the time to prohibit racial segregation in a theater), *aff'd*, 105 N.E. 1088 (N.Y. 1914); *Furchey v. Eagleson*, 43 N.E. 146, 150 (Ind. 1896) (interpreting the 1894 Indiana Civil Rights Act to prohibit exclusion or segregation on account of race in hotels).

⁴⁴⁹ For an excellent summary of the law, see Riegel, *supra* note 423.

⁴⁵⁰ 86 Pa. 421, 427 (1878).

⁴⁵¹ *Id.* at 426; see also *Commonwealth v. George*, 61 Pa. Super. 412 (1915) (interpreting Pennsylvania’s 1887 public accommodation law requiring theater owners to “accommodate, convey or admit” patrons without regard to race as authorizing “separate but equal” seating and making it a jury question whether the balcony seats reserved for black patrons were equal to the orchestra seats on the ground floor).

⁴⁵² 10 F. Cas. 1090 (C.C.S.D. Ga. 1879) (No. 5754).

⁴⁵³ *Id.* at 1092.

the interests of the owners, and preserve order and decorum. Nor, on the other hand, could the proprietors, or master, be required to put passengers in the same cabin or stateroom, who would be repulsive or disagreeable to each other.⁴⁵⁴

Professor Michael McConnell argues that debates surrounding passage of the Civil Rights Act of 1875 clearly demonstrate that it was understood by both proponents and opponents to require desegregation of the covered institutions.⁴⁵⁵ Nonetheless, perhaps surprisingly, every reported federal court opinion I have found that addressed the question concluded that the federal public accommodations act of 1875 authorized “separate but equal” accommodations, despite the fact that the statute provided for “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement”⁴⁵⁶ For example, in *United States v. Dodge*,⁴⁵⁷ decided in 1877, the court ruled that a black woman, Milly Anderson, had been wrongfully excluded from the ladies’ car because “she was a person of African descent.”⁴⁵⁸ However, the court stated that the railroad could segregate by race if it provided equal accommodations. The court noted that common carriers “owe to the public at large a general duty, independent of any contract in the particular case.”⁴⁵⁹ This duty included the duty to serve the public, but always allowed the carrier to impose reasonable regulations. This duty to serve the public “is recognized and exists by the common law of the land, and it is only to protect this right, and enforce this duty, that congress passed the provision of law which I read to you.”⁴⁶⁰ The sole purpose of the federal statute was to prevent states from abolishing the common-law right of access for white or black persons. At the same time, the court concluded that the statute codified that the common law’s “reasonable

⁴⁵⁴ *Id.*

⁴⁵⁵ McConnell, *supra* note 298, at 1061, 1073.

⁴⁵⁶ Law of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 336 (1875). Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 875 (1966) [hereinafter *The Civil Rights Act of 1875*]; John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, in RACE AND HISTORY: SELECTED ESSAYS, 1938-1988, at 116, 127 (1989) (noting that the 1875 act can be interpreted to allow “separate but equal” accommodations).

⁴⁵⁷ 25 F. Cas. 882 (C.C.W.D. Tex. 1877) (No. 14,976).

⁴⁵⁸ *Id.* at 882.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*; see also Alfred Avins, *Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 18 CASE W. RES. L. REV. 1251, 1266-67 (1967) [hereinafter *Racial Segregation*] (noting that Congressman William Lawrence argued at the time the 1875 statute was debated that it did no more than provide a new remedy for violation of the common law).

regulation” doctrine allowed segregation if equal accommodations were furnished.⁴⁶¹

Other lower federal courts similarly interpreted the 1875 federal act to authorize segregation. One case decided shortly after passage of the federal law flatly asserted that it was not “intended to convey any rights or privileges of social equality among men.”⁴⁶² The statute “only requires innkeepers, common carriers, etc., to furnish accommodations to colored men, equal to those provided for white men, when the same price is paid.”⁴⁶³ Equal accommodations may be separate.⁴⁶⁴ “Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious.”⁴⁶⁵ Integration is the equivalent of “social equality,” which “is a wild dream of fanaticism, which can never be realized.”⁴⁶⁶

Courts differed in their willingness to challenge carriers’ assertions that separate accommodations for African-American passengers were in fact equal. Some judges strictly interpreted the requirement. In the *Brown* case of 1880-1881, federal Judge Hammond questioned the railroad’s contentions that the accommodations offered to plaintiff were “equal” to those in the ladies’ car, an assumption behind the “separate but equal” doctrine of *Plessy v. Ferguson*. Although the company claimed that the smoking car had equivalent accommodations, Judge Hammond voiced skepticism about that claim, since the smoking car was

at the time crowded with passengers, mostly emigrants, traveling on cheap rates, with many women and children. . . . [Plaintiff] could not be excluded [from the ladies’ car], nor was she compelled to accept a seat in the other car, if, because of the smoking or bad ventilation or other causes, it was disagreeable to her, there being room for her in the ladies’ car.⁴⁶⁷

⁴⁶¹ This interpretation was similarly adopted in the case of *Gray v. Cincinnati S. R.R.*, decided in Ohio in 1882, by a judge who suggested that racial segregation would be consistent with current law at the time if accommodations really were equal. 11 F. 683 (C.C.S.D. Ohio 1882); see also *Avins*, *supra* note 460, at 1282-83 (arguing that the Congress that passed the 1875 public accommodations law did not intend it to prohibit segregation).

⁴⁶² *Charge to the Jury—The Civil Rights Act*, 30 F. Cas. 999, 1000 (C.C.W.D. N.C. 1875) (No. 18,258).

⁴⁶³ *Id.* at 1001.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 1000-01.

⁴⁶⁷ *Brown v. Memphis & Charleston R. Co.*, 5 F. 499, 502-03 (C.C.W.D. Tenn. 1880). Compare, for example, the Tennessee Supreme Court’s treatment of the same issue six years later in the *Ida B. Wells* case where the court (1) assumed without proof that the accommodations were equal and (2) refused to leave to the rider’s discretion whether the accommodations were equal. *Chesapeake, Ohio & Southwestern R.R. v. Wells*, 85 Tenn. 613 (1887).

In contrast, the Tennessee Supreme Court ruled in the 1887 case of *Chesapeake, Ohio & Southwestern Railroad Co. v. Wells*⁴⁶⁸ that Ida B. Wells, the famous anti-lynching activist, had no ground for her objection to being excluded from the ladies' car on the ground of race. The court cavalierly dismissed her complaint as based on "an idea without the slightest reason," and assumed without question that the accommodations in the smoking car were "equal in all respects in comfort and convenience" to the ladies' car from which she had been forcibly removed.⁴⁶⁹ Although the court assumed without question in *Wells* that the smoking car accommodations were equal to those in the ladies' car, it abandoned this assumption when the complainant was a white man. In another case decided in the very same year as the *Wells* decision, *Memphis & Charleston Railroad Co. v. Benson*,⁴⁷⁰ the Tennessee Supreme Court acknowledged that a white man would have a right to sit in the ladies' car if there were room there for him because "the foul air of [the smoking] car was likely to make him ill."⁴⁷¹

(3) *State statutes abolishing the right of access and creating a right to exclude.*—After the initial spate of public accommodations laws, several states began slowly to repeal them. Tennessee and Delaware responded to the federal public accommodations act of 1875 by passing state laws affirming the power of places of public accommodation to choose their customers as they wished.⁴⁷² South Carolina repealed its public accommodations laws in 1889, effectively leaving businesses the power to choose their customers.

The Tennessee statute passed in 1875 repealed the public accommodations law passed by the legislature in 1867, which had prohibited discrimination on common carriers. The 1875 law not only nullified the 1867 law but abrogated the common-law rights of access of *white patrons* to inns, common carriers, and places of public entertainment.⁴⁷³ Under the 1875 statute, such businesses were released from "any obligation to entertain, carry or admit, any person, whom [they] shall for any reason whatever, choose not to entertain, carry or admit"⁴⁷⁴ The statute further provided that the right of businesses to "control the access and admission or exclusion of persons to or from" their premises should be as "perfect and complete" as that of the owner "of any private house, carriage, or private theater, or places of amusement for his family."⁴⁷⁵

⁴⁶⁸ 85 Tenn. 613 (1887).

⁴⁶⁹ *Id.* at 615.

⁴⁷⁰ 85 Tenn. 627 (1887).

⁴⁷¹ *Id.* at 630.

⁴⁷² 15 Del. Laws, ch. 194, § 1 (1875); 1875 Tenn. Pub. Acts, ch. 130, § 1.

⁴⁷³ Folmsbee, *supra* note 290, at 148-49.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 149.

In 1881, one of the four African-American legislators in the state of Tennessee introduced a bill to repeal the 1875 statute. The bill was defeated.⁴⁷⁶ Instead of repealing the 1875 statute, the legislature passed a Jim Crow statute providing that every person (1) had a right to be served in a common carrier and (2) had a right to first-class service upon purchasing a first-class ticket. The catch was that carriers were now required to provide separate first-class services for white and African-American passengers.⁴⁷⁷ This was the first state law since the Black Codes requiring racial segregation in transportation.⁴⁷⁸ The railroads ignored the law, for the most part, refusing to undertake the expense of providing "separate but equal" first-class cars for the few African-American passengers who sought them.⁴⁷⁹

It was in the wake of this statute and the invalidation of the federal public accommodations law of 1875 that the Tennessee Supreme Court ruled in the 1887 case of *Chesapeake, Ohio & Southwestern Railroad Co. v. Wells*.⁴⁸⁰ The trial court had ruled in favor of Ida B. Wells and against the railroad company. The Tennessee Supreme Court reversed, finding Wells's claim both outrageous and incomprehensible. Dispensing of her argument in a short opinion, the court explained:

We know of no rule that requires railroad companies to yield to the disposition of passengers to arbitrarily determine as to the coach in which they take passage. The conduct of the plaintiff below was upon an idea without the slightest reason. Having offered, as the statute provides, "accommodations equal in all respects in comfort and convenience to the first-class cars on the train, and subject to the rules governing other first-class cars," the company had done all that could rightfully be demanded.

We think it is evident that the purpose of the defendant in error [plaintiff] was to harass with a view to this suit, and that her persistence was not in good faith to obtain a comfortable seat for the short ride.⁴⁸¹

South Carolina followed a similar path. In 1889, South Carolina repealed its public accommodations laws passed in 1869 and 1870. But it did not replace them with Jim Crow statutes until several years after *Plessy v. Ferguson* was decided in 1896. Not until 1898 did South Carolina adopt laws requiring racial segregation, and even then the law required segregation only in first-class train coaches. In the interim period, from 1889 to 1898, the law granted proprietors of places of public accommodation the option of determining how to treat their customers. Effectively, the legislature took away the right of access to

⁴⁷⁶ CARTWRIGHT, *supra* note 289, at 103.

⁴⁷⁷ Minter, *supra* note 209, at 71-74; CARTWRIGHT, *supra* note 289, at 104.

⁴⁷⁸ JOHNSON, *supra* note 190, at 16.

⁴⁷⁹ CARTWRIGHT, *supra* note 289, at 107.

⁴⁸⁰ 85 Tenn. 613 (1887).

⁴⁸¹ *Id.* at 615.

places of public accommodation from white persons as well as black persons, presumably because white persons would continue to be served as a matter of custom rather than law, while black customers could be turned away.

(4) *Jim Crow: forced segregation.*—In 1881, Tennessee passed what is often called the first Jim Crow law. It required separate, first-class accommodations for white and African-American passengers.⁴⁸² The law required first-class services to be provided to African-Americans who purchased first-class tickets and would prevent railroads from placing black women in smoking cars with drunken men, some smoking and others chewing tobacco and spitting tobacco juice on the floor and seats and walls.⁴⁸³ The federal act of 1875 was then struck down as unconstitutional in the *Civil Rights Cases* of 1883. Thereafter, other Southern states began to adopt such laws, and by 1900 every state in the former Confederacy, as well as Kentucky, had adopted new statutes instituting the Jim Crow policy of forced racial segregation in public accommodations, validated by *Plessy v. Ferguson* in 1896.⁴⁸⁴ Jim Crow laws requiring segregation in railroad transportation were passed in Tennessee (1881), Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama (1891), Arkansas (1891), Georgia (1891), Kentucky (1891), South Carolina (1898), North Carolina (1899), and Virginia (1899).⁴⁸⁵ In 1902, Louisiana passed the first statute requiring separation of the races in street cars; it was followed by similar statutes in nine other states.⁴⁸⁶ The first quarter of the twentieth century saw more and more forms of segregation instituted into law. The Jim Crow system not only instituted racial segregation as a general practice in the South; it authorized the wholesale exclusion of African-Americans from such traditional places of public accommodation as restaurants, inns, and theaters, as well as barber shops.⁴⁸⁷

⁴⁸² Franklin, *History of Racial Segregation in the United States*, *supra* note 379, at 10; Minter, *supra* note 209, at 240-41.

⁴⁸³ Minter, *supra* note 209, at 3, 71-74.

⁴⁸⁴ 163 U.S. 537 (1896); Minter, *supra* note 209, at v; *see also* AGE OF JIM CROW, *supra* note 290.

⁴⁸⁵ BARNES, *supra* note 311, at 10; Minter, *supra* note 209, at xi, 240-41; Gilbert T. Stephenson, *The Separation of the Races in Public Conveyances*, 3 AM. POL. SCI. REV. 180, 190-91 (1909); Tindall, *supra* note 287, at 13; Wynes, *Social Acceptance and Unacceptance*, *supra* note 295, at 25.

⁴⁸⁶ Georgia (1891); Arkansas (1903); Mississippi (1904); Florida (1905); South Carolina (1905); Tennessee (1905); Virginia (1906); North Carolina (1907). BARNES, *supra* note 311, at 10-11; Minter, *supra* note 209, at 240-41.

⁴⁸⁷ FRANKLIN & MOSS, FROM SLAVERY TO FREEDOM, *supra* note 222, at 262; *see also* State v. Steele, 11 S.E. 478, 484 (N.C. 1890) (innkeepers may exclude persons who are "so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house"); 1908 La. Acts 176 (forbidding proprietors

The Jim Crow laws were passed in the same period when the courts were beginning to strike down labor and other legislation as infringements of property rights or invalid exercises of the police power.⁴⁸⁸ How were the Jim Crow laws compatible with property rights? If maximum-hours laws violated property rights,⁴⁸⁹ why did not the intrusive regulatory system known as Jim Crow similarly unconstitutionally interfere with the right to control one's property? There was in fact a deep contradiction between the *Lochner* philosophy and Jim Crow.⁴⁹⁰ Jim Crow laws *required* businesses to segregate and, in the case of trains, to provide expensive duplicative services. Perhaps Jim Crow laws could be understood as merely *supporting* the right of businesses to serve customers in a segregated manner. This interpretation needs to suppress the fact that Jim Crow laws not only *forced* businesses to segregate, but imposed substantial costs on businesses that could not easily afford to provide two entirely separate—and equal—services. Perhaps instead, the Jim Crow laws were understood to *enhance* property rights by protecting the rights of white *customers* to eat and sleep in an all-white environment. Yet to understand Jim Crow laws in this way, one must turn the baseline on its head, defining the basic property right in question as belonging to the white customer desiring access rather than to the business seeking to control access to its premises.

We are left with a profound contradiction between the *Lochner* philosophy and the Jim Crow philosophy. Why was this not perceived to be a contradiction at the time? The answer has something to do with the association between property rights and race. Not only was it assumed that African-Americans did not have the same rights as white citizens to enter the marketplace—to contract and to purchase personal and real property—but white businesses were also reluctant to challenge regulatory laws requiring segregation because they saw it as in their interests to promote segregation. Whether or not such statutes maximized the profits of white businesses is beside the point; there were severe disincentives to challenging such statutes. As Derrick Bell has argued, white Americans were willing to suffer intrusions

to sell liquor to both black and white customers in the same building); *State ex rel. Tax Collector v. Falkenheiner*, 49 So. 214 (La. 1909) (enforcing the statute). For a vivid description of the Jim Crow system, see STETSON KENNEDY, *JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NON-WHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS* (1959).

⁴⁸⁸ See ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1976).

⁴⁸⁹ *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a maximum-hours statute).

⁴⁹⁰ DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* § 1.13 at 43 (3d ed. 1992) (“Though eager to countermand state regulation in the economic realm, the justices were satisfied to leave state regulation of race relations untrammelled during these years.”).

on property rights in order to maintain white supremacy.⁴⁹¹ The conflict between *Lochner* and Jim Crow dramatically illustrates the link between property and race relations in United States history.

3. *How the Conception of Public Accommodations Was Narrowed.*—

a. *Racial cases as occasions for cutting back on the obligations of common callings.*—Antebellum law imposed a duty to serve the public on common inns and on common carriers. Yet it also characterized other businesses as “common callings,” and based the duty to serve the public on the fact that a business had held itself out as open to the public. The common-law rule, as we currently know it—placing a duty on innkeepers and common carriers but not on other businesses—did not crystallize into that form until the post-Civil War period. The narrowing of the duty to serve the public first occurred in the context of claims of a right of access by African-American plaintiffs. The current rule clearly has its origins in a desire to avoid extending common-law rights of access to African-Americans.

First, before the Civil War, the rule that common callings—at least innkeepers and common carriers—had a duty to serve the public was universal; no state of which I am aware refused to adopt it. After the extension of rights of access to African-Americans following the Civil War, several states abolished their public accommodations laws, explicitly allowing all common callings, *including innkeepers and common carriers*, to serve whomever they wished.⁴⁹² Mississippi has such a statute to this day.⁴⁹³

Second, it was in this period, for the first time, that many states crystallized the rule that the right of access did not apply to places of entertainment. A number of them did so in the context of claims by black patrons to have a right to enter the theater.⁴⁹⁴ The Massachusetts Supreme Judicial Court took the occasion of a claim by a black man that he had been wrongfully excluded from a lecture hall to announce that it was adopting the English rule of *Wood v. Leadbitter*,⁴⁹⁵ to the effect that places of entertainment, unlike innkeepers and common carriers, had no duty to serve the public. This rule formally deprived *both* white and black patrons of rights of access to places of entertainment. However, it was far more likely that the lecture hall’s

⁴⁹¹ DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note 490, at 44-50.

⁴⁹² Two such states were Tennessee and Delaware.

⁴⁹³ MISS. CODE ANN. § 97-23-17 (1972).

⁴⁹⁴ *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858).

⁴⁹⁵ 153 Eng. Rep. 351 (Ex. 1845). *Wood v. Leadbitter* was itself overruled thereafter in *Hurst v. Picture Theatres Ltd.*, 1 K.B. 1 (1914).

right to exclude would be exercised differently depending on the race of the person seeking admission. This adoption of the rule exempting places of entertainment from the duty to serve the public otherwise applicable to innkeepers and common carriers therefore had the immediate effect—and perhaps the purpose—of allowing theater owners to practice racial segregation and exclusion under cover of law.

Similarly, in 1885, two years after the *Civil Rights Cases* invalidated the federal law that had prohibited discrimination in places of entertainment, the Supreme Court of Iowa ruled in *Bowlin v. Lyon*⁴⁹⁶ that places of entertainment had no duty to serve the public. Thus, it, too, used the occasion of a claim by a black plaintiff to announce that the duty to serve was limited in its application. The court asserted that its ruling constituted no denial of equality.

[W]e deem it proper to say that the question whether plaintiff had the right to demand admission to the place is in no manner affected by the fact that he is a colored man. His legal right in the premises is not different from that of white men whose character and conduct are not different from his own.⁴⁹⁷

Whether or not a right of access exists will not depend on race, according to the court. Both black and white persons will be treated alike. Of course, affirming a right of access will entitle black customers to skate at the skating rink, while affirming a right to exclude will entitle the skating rink to choose to exclude only black customers without violating any law. This appearance of neutrality—belied in practice in general and in the specific facts of this case—was supported by the notion of the right of the owner to use its property as it saw fit.

It may be said, as a general rule, that the law does not undertake to govern or regulate the citizen in the conduct of his private business. In all matters of mere private concern he is left free to deal with whom he pleases, and to make such bargains as he is able to make with those with whom he does deal. There are, however, classes of business in the conduct and management of which, notwithstanding they may be conducted by private parties for their own emolument, the general public has such interest as that they are properly the subject of regulation by law, and those engaged in them are subject to restrictions and limitations which do not apply to persons engaged in other kinds of business. Innkeepers and carriers of passengers are of this class. All members of the general public are entitled to demand accommodations from them, and they are bound to afford such accommodations if they are able to do so. If the innkeeper has room in his house he is bound to receive and entertain any traveler or wayfaring person who applies for accommodation, and is able and willing to pay a reasonable consideration therefor, and whose character and conduct are unobjectionable; and the carrier is also bound

⁴⁹⁶ 25 N.W. 766 (Iowa 1885).

⁴⁹⁷ *Id.* at 767.

to receive all members of the public who apply for accommodation, and whom he is able to accommodate.⁴⁹⁸

Thus, the court both affirms a rule of equality—denying both white and black persons a right of access to places of entertainment—and affirms the property rights of the owner that justify limiting governmental regulation of most businesses, of which innkeepers and common carriers form a narrow exception.

Third, some cases used the public accommodations cases to announce the doctrine that the obligations of innkeepers and common carriers rested not on the fact that they held themselves out as ready to serve the public, but on the fact that they held franchises from the state, thus exercising both public functions and monopoly powers. For example, although Massachusetts had the first public accommodations statute, passed in 1865, the Massachusetts Supreme Judicial Court gave the statute a narrow reading the very next year, in its decision in *Commonwealth v. Sylvester*.⁴⁹⁹ The statute stated that “[n]o distinction, discrimination or restriction on account of color or race shall be lawful in any licensed inn, in any public place of amusement, public conveyance or public meeting in this commonwealth.”⁵⁰⁰ The court held that the statute applied only to “licensed” places of public amusement, even though the word “licensed” did not appear as a qualifying term and the words “in any” were repeated (“in any licensed inn, in any public place of amusement”), suggesting that the first word “licensed” was not meant to modify the later phrase “place of public amusement.”

Similarly, the Mississippi Supreme Court’s conclusion in *Donnell v. State*⁵⁰¹ in 1873 that the state public accommodations law did not effect a taking of property without just compensation was rendered in the face of the argument by the defendant that theaters should be distinguished from common carriers and innkeepers.

The hall is shown to be a piece of private property. It is a concert hall, leased out indiscriminately to white and black. What is contended for is, that a lessee of the hall for any lawful and legitimate business has a constitutional right to admit or refuse whom he pleases, just as his judgment will indicate the same to be most for his pecuniary interest; and we have high authority for this in the case of the Lord of the Vineyard, mentioned in the Scripture; there the Lord gave to those who had worked but one hour, the same pecuniary compensation which he extended to those who had worked eleven, upon the broad principle which we at once recognize, to wit: that a man has a right to do as he pleases with his

⁴⁹⁸ *Id.* at 767-68.

⁴⁹⁹ 95 Mass. (13 Allen) 247 (1866).

⁵⁰⁰ *Id.* at 274 n.*; 1865 Mass. Acts, ch. 252.

⁵⁰¹ 48 Miss. 661 (1873).

own; to give to whom he pleases, and to refuse whom he pleases, without question.⁵⁰²

This argument distinguished inns and common carriers on the ground that those actors “deriv[ed] a charter and special branches of franchise from the state.”⁵⁰³ The defendant further argued that no necessity existed since entertainment was “an article, not of necessity, but simply of luxury”⁵⁰⁴ Although the court rejected this argument, the case demonstrates the beginnings of the attempt to narrow the meaning of public accommodation.

The franchise argument was also made in the brief for the United States in three of the *Civil Rights Cases* (*United States v. Stanley*, *United States v. Ryan*, and *United States v. Nichols*), submitted by Attorney General Charles Devens in support of the constitutionality of the federal public accommodations law challenged in those cases.⁵⁰⁵ The Attorney General argued that:

The relation of innkeepers to the State differs from that of a man engaged in the more common avocations of life. The former is required to furnish the accommodations of his inn to all well-behaved comers who are prepared to pay the customary regular price.

This business and that of conducting a theater are carried on under a license from the State, through the intermediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State. This is because the business to be carried on is quasi public in its nature, and for the general accommodation of the people.

For this reason Congress has the right to prohibit any discrimination against persons applying for admission to an inn or theater based upon race, color, or previous condition of servitude.⁵⁰⁶

The Attorney General attempted to rest the legitimacy of federal power to regulate inns and theaters on the franchise and the delegation of public power, thereby distinguishing other businesses.

The Iowa Supreme Court accepted this argument in 1885 in *Bowlin v. Lyon*, discussed above, decided two years after the *Civil Rights Cases* struck down the federal public accommodations law. The court specifically noted that the skating rink had no “license or privilege granted by the state” and suggested that the result might have been different in such a case. After noting the duty to serve imposed on innkeepers and common carriers, the *Bowlin* court stated:

It may be that the manager of a place of public amusement, who carries on his business under a license granted him by the state, or a municipal

⁵⁰² *Id.* at 662-63.

⁵⁰³ *Id.* at 663.

⁵⁰⁴ *Id.*

⁵⁰⁵ PHILIP B. KURLAND & GERHARD CASPER, 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 305 (1975).

⁵⁰⁶ *Id.* at 314.

corporation organized under the laws of the state, would be subject to the same restrictions. We incline to think that he would; for, as he carries on the business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike.⁵⁰⁷

The lack of a franchise meant that the business had a presumptive right, as a property owner, to be free from any duty to serve.

It seems to us, however, that the business conducted by the defendants was not of this character. The public has assumed no control of it, and it does not appear that it is a business in which the public have a concern. . . . It seems to us that it is essentially a private business, and that it will remain so until the public assumes some control of it. Defendants were using their own property in conducting the business, and were carrying it on according to their own notions. When members of the public entered the building, they did so by permission of defendants, or under a contract with them. When they invited the members of the public to go to the place, they offered simply to extend to them permission to enter or to contract with them for that permission. We see no reason why they might not have limited their invitation to certain individuals or classes. As the place belonged to them, and was under their exclusive control, and the business was a private business, it cannot be said, we think, that any person had the right to demand admission to it. They had the right, at any time, to withdraw the invitation, either as to the general public, or as to particular individuals.⁵⁰⁸

Fourth, state courts began to interpret their state public accommodations laws narrowly. If a place was not expressly listed in a civil rights statute, it was not uncommon for state courts to rule that the legislature had intended to allow racial discrimination in that establishment. For example, in a distinction that would have made no sense in the antebellum era, and in the face of two dissents, the Supreme Court of Minnesota ruled in 1898 that a statute prohibiting racial discrimination in inns, taverns, restaurants, places of entertainment, and places of "refreshment," did not prohibit a saloon (a place where liquor was sold) from excluding a "negro" who wanted a beer.⁵⁰⁹ Similarly, in a 1909 Iowa case, *Brown v. J.H. Bell Co.*,⁵¹⁰ a coffee merchant who rented space in a food show and gave away free samples of his coffee was entitled to refuse to serve black customers despite a state civil rights act prohibiting racial discrimination in "restaurants, chop houses, eating houses, lunch counters *and all other*

⁵⁰⁷ *Bowlin v. Lyon*, 25 N.W. 766, 768 (Iowa 1885).

⁵⁰⁸ *Id.*

⁵⁰⁹ *Rhone v. Loomis*, 77 N.W. 31 (Minn. 1898); *see also Kellar v. Koerber*, 55 N.E. 1002 (Ohio 1899) (holding that a public accommodations statute regulating "inns, restaurants[, and] eating houses" did not regulate saloons that could exclude customers on account of race).

⁵¹⁰ 123 N.W. 231 (Iowa 1909).

places where refreshments are served . . ."⁵¹¹ The court noted that the statute only intended to regulate places that had always been considered "quasi public"⁵¹² while "[i]t is the right of a trader whose business is purely of private character to trade with whom he will, and he may discriminate as he pleases."⁵¹³ The court noted that barber shops, regulated by the state statute, had never previously been considered either "public" or "quasi public," but concluded that the list in the statute was intended to authorize discrimination in places not expressly listed. This case, as well as any, illustrates the connection between the narrowing of the common-law right of access and claims to access by African-American plaintiffs pursuant to either common law or civil rights statutes.⁵¹⁴

Finally, and most important, the post-Civil War era was the period when *laissez-faire* ideology and classical legal thought emerged, with their expansive protections for freedom of contract and private property rights. One might conclude that the obligation to serve the public narrowed during this period partly because of the *Lochner* philosophy of immunizing private property from regulation. However, the first case explicitly to cut back on this common-law right of access to "common callings" was the pre-Civil War case of *McCrea v. Marsh*,⁵¹⁵ ruling that places of entertainment had no duties to serve customers of any color; it was not an accident that this rule was adopted in the case of a plaintiff who was an African-American man seeking to attend a public lecture. Further, the post-Civil War era, which saw increasing protections for property rights as well as a narrowing of the duty to serve, was also the Jim Crow era when the courts found valid substantial *regulations* of property designed to promote racial segregation. Although the narrowing of public accommodations law appears, on the surface, to cohere with emerging protections for property owners, the inconsistency between property rights as conceived in this period and Jim Crow statutes suggests that changes in public accommodations law are far more tied to racial politics than to *laissez-faire* philosophy or the protection of property from government regulation.

b. The Supreme Court's contribution to the narrowing of public accommodations law.—The Supreme Court contributed might-

⁵¹¹ *Id.* at 233 (emphasis added).

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 235 (explaining that in "private" business, individuals are "free to deal with whom" they please) (quoting *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885)); see also *Darius v. Apostolos*, 190 P. 510 (Colo. 1920) (holding that a public accommodations law that regulated inns, carriers, barber shops, restaurants, theatres, "and all other places of public accommodation and amusement" did not prohibit discrimination by a bootblacking establishment).

⁵¹⁵ 78 Mass. (12 Gray) 211 (1858).

ily not only to the “separate but equal” doctrine but to the general narrowing of public accommodations law also.⁵¹⁶ After an early decision in 1873, interpreting a statute preventing “exclusion” from a railroad as preventing segregation within it, the Court began its long descent to *Plessy v. Ferguson* and the separate but equal doctrine. First, it struck down Louisiana’s 1869 public accommodations law as an unconstitutional burden on interstate commerce in 1877 in *Hall v. DeCuir*.⁵¹⁷ That law was interpreted by the Louisiana Supreme Court to grant all persons “equal rights and privileges in all parts of the vessel, without distinction on account of race or color,”⁵¹⁸ effectively prohibiting the railroad from establishing separate cars or seats for black and white passengers. Chief Justice Waite conceded that the statute “purports only to control the carrier when engaged within the State,”⁵¹⁹ but argued that “it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.”⁵²⁰ Why was this so? “A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.”⁵²¹ What would be wrong with this? The only insurmountable problem would be one in which one state’s law required integration and another state’s law required segregation. As Chief Justice Waite noted: “No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate.”⁵²² The Louisiana law involved here did provide that “both white and colored, must be permitted to occupy the same cabin,” but did the law of others states require that white and black passengers “be kept separate”? The answer is no. At the time the Supreme Court decided *Hall v. DeCuir* in 1877—two years after the federal public accommodations law of 1875—no state had a Jim Crow law requiring racial segregation in common carriers. Thus, the only conflict the railroad faced was that one state, Louisiana, required the railroad to allow integration, while the law of other states may have permitted, but not required, the railroad to segregate passengers. If state lines are taken as the dividing point, the Louisiana law does not force the railroad to engage in ac-

⁵¹⁶ For an analysis of some of the Supreme Court’s contributions to racism, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

⁵¹⁷ 95 U.S. 485 (1877).

⁵¹⁸ *Id.* at 485.

⁵¹⁹ *Id.* at 489.

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

tion prohibited by the laws of other states. The only embarrassment to the railroad from this scheme is that when the train comes within Louisiana, black passengers would be able to move to available seats in the "white cars." The converse is not true. If a black passenger boards inside Louisiana and sits in a car with white passengers, crossing the border would not force the railroad to eject the passenger from the "white" car. In the absence of a Jim Crow law, the railroad could allow the passenger to remain. At the same time, the railroad could force its black passengers at that point to change seats.

This shows that the Court in 1877, two years after the federal public accommodations law, was *already anticipating the legality, not only of the "separate but equal" doctrine, but also of the Jim Crow doctrine of forced segregation.* As the Court explained, "On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments."⁵²³ Again, this complaint makes sense only if one assumes that one state commands integration and the other commands segregation. If all states allow integration, then a state that mandates it is in no way interfering with practices that are lawful elsewhere along the carrier's path.

The result of *Hall v. DeCuir* was to strike down state public accommodations laws as applied to carriers involved in interstate commerce, leaving regulation to the federal government. Of course, only six years after *Hall v. DeCuir*, the Supreme Court struck down the federal public accommodations law in the *Civil Rights Cases*⁵²⁴ of 1883. Justice Bradley's infamous opinion expressed the view that the statute exceeded the scope of Congress's power under both the Thirteenth and Fourteenth Amendments. It exceeded the scope of Congress's Fourteenth Amendment power because it purported to regulate, not state action, but private conduct.⁵²⁵ It exceeded the scope of the Thirteenth Amendment—which did allow regulation of private conduct—because refusing accommodation in an inn, carrier, or place of amusement could not "justly [be] regarded as imposing any badge of slavery."⁵²⁶ Justice Bradley argued:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjec-

⁵²³ *Id.*

⁵²⁴ 109 U.S. 3 (1883).

⁵²⁵ *Id.* at 13.

⁵²⁶ *Id.* at 24.

tionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it.⁵²⁷

The disingenuousness of this passage is shocking. First, in striking down the federal statute, the Court explicitly assumes that state common law provided a remedy for black persons denied service in public accommodations.⁵²⁸ Yet, at the time Justice Bradley wrote his decision, he knew, or should have known, that Tennessee and Delaware had passed statutes in 1875 abrogating the duty of places of public accommodation to serve the public. Indeed, one of the *Civil Rights Cases* was on appeal from the state of Tennessee. Perhaps this passage could be read to suggest that such statutes might themselves constitute unconstitutional state laws depriving citizens of equal protection of the laws. Yet this is impossible to credit. After all, these statutes abrogated the right to be served *for both black and white passengers*, thereby establishing “equal treatment” under the law, despite the fact that their purpose was to allow exclusion of, or segregation of, black patrons and passengers at the discretion of the business.

Second, Justice Bradley ignored various state common-law decisions that denied rights of access to places of entertainment—places covered by the federal law he was striking down. It was disingenuous to suggest that state laws protected African-Americans from discrimination in access to such places.

Finally, and most ironically, Justice Bradley ignored the fact that the Supreme Court itself had struck down state public accommodations laws that applied to carriers engaged in interstate commerce. The resulting situation after *Hall v. DeCuir* and the *Civil Rights Cases* was that no federal law regulated the “private conduct” of interstate carriers and the states were prohibited from imposing integration on interstate carriers. In this situation, interstate railroads and steamboats were therefore free to integrate or segregate.

Can anything be said for Justice Bradley’s opinion?⁵²⁹ First, one might argue that the opinion merely held that the Thirteenth and Fourteenth Amendments could not serve as a source of federal power to regulate public accommodations. It did not, however, hold that Congress had no power under the Commerce Clause to pass the public accommodations law. Indeed, the Court’s decision in *Hall v. DeCuir* holding that the states could not regulate trains involved in interstate commerce suggested that Congress was the only body that did have the power to regulate such facilities. Congress could there-

⁵²⁷ *Id.* at 24-25.

⁵²⁸ *Id.* at 25.

⁵²⁹ To answer this question, Frank Michelman suggested two arguments to me that are discussed in the text following this footnote.

fore have repassed the 1875 bill under its commerce power and had it upheld. The 1964 public accommodations law was passed in exactly this form and was upheld by the Supreme Court as a valid exercise of the commerce power in *Heart of Atlanta Motel Inc. v. United States*.⁵³⁰

Second, Justice Bradley's opinion focused on the statute's failure to regulate "state action." If Congress had rewritten the statute to invalidate state statutes or state-enforced customs that required segregation, perhaps the Supreme Court would have upheld it.⁵³¹ Indeed, in 1970, in *Adickes v. S.H. Kress & Co.*,⁵³² the Supreme Court interpreted Section 1983 to allow a damages action against a public accommodation for excluding a white woman in the company of African-Americans when this action was supported by a state-enforced custom of using police officers to require such businesses to engage in racial segregation.

When viewed in historical context, however, it is clear that neither of these ways of rewriting the statute was in the cards, and Justice Bradley knew it. Congress was not about to rewrite and reenact a public accommodations law in 1883. Moreover, nothing in the language of the *Civil Rights Cases* suggests that this is what Justice Bradley had in mind. Rather, the opinion suggests substantial limits on federal power to regulate private conduct to promote equality. In fact, the actual political effect of the *Civil Rights Cases* was to help open the floodgates to state segregation statutes, especially after the Supreme Court came close to overruling *Hall v. DeCuir*.

This coup de grâce came in a decision in 1890, seven years after the *Civil Rights Cases*, when the Court upheld state statutes that had the effect of promoting segregation in interstate commerce. This decision contradicted *Hall v. DeCuir* and the premise of the *Civil Rights Cases* that state law could and would provide a remedy for discrimination in public accommodations. In *Louisville, New Orleans & Texas Railway Co. v. Mississippi*,⁵³³ the Supreme Court held that a Jim Crow law requiring segregation did *not* unconstitutionally burden interstate commerce and thus was enforceable. Justice Brewer distinguished *Hall v. DeCuir* on the ground that the Louisiana statute in that case "required [interstate carriers], when they came within the limits of the state, to receive colored passengers into the cabin set apart for white persons."⁵³⁴ Justice Brewer distinguished the Mississippi statute at issue in *Louisville, New Orleans, & Texas Railway* on the wholly specious ground that the "Supreme Court of Mississippi held that the

⁵³⁰ 379 U.S. 241 (1964).

⁵³¹ McConnell, *supra* note 298, at 1031, 1090-91.

⁵³² 398 U.S. 144 (1970).

⁵³³ 133 U.S. 587 (1890).

⁵³⁴ *Id.* at 589.

statute applied solely to commerce within the state.”⁵³⁵ The Court reached this conclusion despite the fact that the law effectively required “trains within the state [to attach] a separate car for colored passengers.”⁵³⁶ This requirement, according to Justice Brewer, did not interfere with interstate commerce. “This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state.”⁵³⁷ The Court did not explain why it did *not* interfere with interstate commerce to require an interstate carrier to add a new car either before it reached the border or at the moment it reached the border to accommodate separate facilities, but it *would* interfere with interstate commerce to be required to allow a black person to walk into and sit in a car reserved for white people.

As Justice Harlan pointed out in dissent, the defendant railroad “owns and operates a continuous line of railroad from Memphis to New Orleans. If one of its passenger trains—starting, for instance, from Memphis to go to New Orleans—enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the company and the conductor of such train are liable to be fined”⁵³⁸ Harlan concluded:

In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment [in *Hall v. DeCuir*] forbade the separation of the white and black races while such vessels were within the limits of that state. The Mississippi statute [here], in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that state. I am unable to perceive how the former is a regulation of interstate commerce, and the other is not. It is difficult to understand how a state enactment requiring the separation of the white and black races on interstate carriers of passengers is a regulation of commerce among the states, while a similar enactment forbidding such separation is not a regulation of that character.⁵³⁹

The final blow came in 1896 with *Plessy v. Ferguson*,⁵⁴⁰ which affirmed the constitutionality of the separate but equal doctrine as implemented in an 1890 Louisiana statute requiring separate railway carriages for white and black passengers. The Court affirmed the statute’s constitutionality on the ground that any inequality was in the

⁵³⁵ *Id.* at 591.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.* at 592-93.

⁵³⁹ *Id.* at 594.

⁵⁴⁰ 163 U.S. 537 (1896).

eye of the beholder⁵⁴¹—again in the face of a dissenting opinion by Justice Harlan.

In addition to endorsing the “separate but equal” doctrine developed by the state and lower federal courts, the Court’s construction of classical *laissez faire* doctrine supported the notion that the category of “businesses affected with a public interest”—and therefore able to be regulated by the state—was a narrow one and that most business should be left unregulated. This theory supported the distinction that we have come to accept in the common law between those few businesses with a duty to serve (inns and carriers and public utilities) and those without such duties (all others).

Moreover, the Court’s act of striking down the federal public accommodations law of 1875, disingenuously premised on the notion that the common law already imposed duties on businesses open to the public to serve without discrimination, opened the way for *changes in state law* to abolish or limit the duty to serve and replace it with a rule giving businesses freedom to choose their customers. This new rule assumed that market pressures would be sufficient to cause profit-maximizing businesses to serve the public and not exclude unreasonably. Yet this assumption is belied by the presence of prejudice. Stores may make *more* money today, for example, by excluding an unpopular minority—such as homeless persons—than by admitting them. Thus, the Court opened the way for state law changes that narrowed the duty to serve and simultaneously made it extremely difficult to find a clear constitutional basis to allow the federal government to come in and fill the gap.

The Court’s invalidation of the 1875 federal statute had a long-term effect: it helped to narrow the scope of the 1964 Civil Rights Act to businesses that appeared to be heavily involved in interstate commerce, *i.e.*, inns, common carriers, and gas stations (with places of entertainment as a possibly anomalous category). This was done in order to ground federal power on the Commerce Clause, given that the Supreme Court had refused to allow Congress to ground federal public accommodations law on the more natural Equal Protection Clause.

c. The classical theory of the public service company.—In the antebellum, preclassical era, much of law was conceptualized as assimilated to the notion of implied contract. One voluntarily entered a particular social relationship and accepted the obligations applicable to that relation imposed by law. One of the relevant, regulated rela-

⁵⁴¹ *Id.* at 544; *see id.* at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

tionships was that of common calling to customers. Individuals could choose whether to establish a common calling, but once they did so, they voluntarily assumed obligations that were coercively imposed by the state—primarily, the duty to serve the public without unjust discrimination and to use diligence and skill in undertaking the usual duties of the common calling.

This relationship fits into the paradigm of implied contract because it sits right in between the classical models of contract and property. It does not fit into the classical model of contract because opening up an inn to the public would not be considered a sufficiently definite promise to serve particular individuals that would constitute an enforceable promise. In addition, the promise to serve the public is not supported by consideration and is not bargained-for; it therefore cannot establish an obligation to serve a particular individual who comes seeking service. Nor does the duty to serve fit comfortably in the classical theory of private property under which owners are generally free to use their property as they see fit. Hence, Oliver Wendell Holmes's asserted that "if a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies' An attempt to apply this doctrine generally at the present day would be thought monstrous."⁵⁴² The innkeeper and common carrier duty to serve has to be rationalized in the classical system as belonging to a limited sphere of businesses "affected with a public interest."

The end result of this long process of struggle and legal change was that the common-law right of access was unalterably changed. It became commonplace, after Reconstruction, *for the first time*, for courts and legal commentators to state categorically that businesses other than innkeepers and common carriers had no duty to serve the public unless a statute limited their discretion in this regard. For example, the Supreme Court of Iowa explained in 1909 that public conveyances, restaurants, and places of amusement were "quasi public" in character and thus were subject to legislative regulation to require service to the public, but that it "is the right of a trader whose business is purely of private character to trade with whom he will, and he may discriminate as he pleases."⁵⁴³ The trader "may exclude all working men, all colored people, all Irishmen, all Jews, or all Adventists for reasons which seem to him sufficient. These reasons may be based

⁵⁴² HOLMES, *THE COMMON LAW*, *supra* note 1, at 629 (quoting Lord Holt in *Lane v. Cotton*, 12 Mod. 484 (K.B. 1721)).

⁵⁴³ *Brown v. J.H. Bell Co.*, 123 N.W. 231, 233 (Iowa 1909). See *id.* at 235 (citing *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885)), for the proposition that most businesses have property rights to admit or exclude whomever they please).

upon either race or religious prejudice, and yet the court would not be justified in saying that any right had been invaded.”⁵⁴⁴

Munn v. Illinois,⁵⁴⁵ decided in 1873, justified legislative regulation of businesses “affected with a public interest.” At the time the case was decided, it was not clear whether this category would be broad or narrow. Over the course of the next thirty years, as the freedom of contract-private property ideology gained sway, culminating in the *Lochner* decision in 1905, the category became increasingly narrow. Yet one set of businesses that fit within the category were innkeepers and common carriers who were thought either to obtain their powers from state licenses or to operate as virtual monopolies.

In his article *The Law of the Public Callings as a Solution of the Trust Problem*, Bruce Wyman sought to explain the “distinction between the private callings—the rule—and the public callings—the exception”⁵⁴⁶ Private businesses, he argued, were allowed to “sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous,” while public businesses “must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations.”⁵⁴⁷

Although Wyman’s argument suggests that a “private business” has no duty to serve, he did not write his article with the purpose of justifying the absence of such a duty. On the contrary, his purpose was to *justify regulation of trusts* by showing that such regulation had long been accepted in the common law.⁵⁴⁸ After noting that in private businesses, “one may sell or not as one pleases,” he argues that “[i]t is because the trusts are carrying on a predatory competition under the cover of this law that we have the trust problem.”⁵⁴⁹ He intended to use the historical *common-law* regulation of public accommodations

⁵⁴⁴ *Id.* at 236; see *State v. Edwards*, 29 A. 947 (Me. 1893) (distinguishing between public businesses, such as common carriers and mills, whose prices can be legislatively controlled and stores that are “private” and immune from such regulation).

⁵⁴⁵ 94 U.S. 113 (1876).

⁵⁴⁶ Wyman, *The Law of Public Callings*, *supra* note 26, at 156.

⁵⁴⁷ *Id.*

⁵⁴⁸ Wyman wrote:

The positive law of the public calling is the only protection that the public [has] in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief.

Id. at 172.

⁵⁴⁹ *Id.* at 156.

to justify *legislative* regulation of trusts. "In this time of peril to our industrial organization faith in our common law may show the way out. It cannot be that this law has guided our destinies from age to age through the countless dangers of society, only to fail us now."⁵⁵⁰ Wyman could have justified regulation of trusts by justifying the regulation of business generally—a tactic taken by other Progressive legal scholars of the time such as Charles Burdick and Edward Adler.⁵⁵¹ Instead, Wyman attempted to rationalize the *Lochnerian* view that public service companies were exceptional and legitimately subject to much more extensive legislative regulation than were other business corporations. Thus, he rested his justification of regulation of trusts on a particular description of the common law to the effect that "with regard to private businesses [the common-law courts] were saying that it lay in the election of the tradesman whether he would supply a customer or not, but with regard to the public callings that one was compelled to serve any one that tendered him ready payment."⁵⁵²

Wyman argued that the common law of England placed duties to serve the public only on businesses with local monopolies. He recognized that this principle applied not only to innkeepers and common carriers, but to other trades as well, such as surgeons.

[I]n the common case only one surgeon would be at hand in any one district, so that if he should refuse to bleed the patient, all might be lost. Such being the situation, it is easy to understand why the law was so stern in the case of the common doctor who undertook to cure all who came, requiring him to act with care although he promised none, and giving the patient an action although he had submitted himself to the operation, if the doctor was negligent. It was the unusual situation which produced this extraordinary law.⁵⁵³

Similarly, Wyman argued that blacksmiths and innkeepers had duties to serve the public but that carpenters and retail stores did not because competition existed in the case of the latter but not the former. In addition, he supplemented the monopoly argument with the argument that *necessity* required public access to the service provided by smiths, innkeepers, and common carriers.⁵⁵⁴

Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different. So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the

⁵⁵⁰ *Id.*

⁵⁵¹ Adler, *supra* note 2, at 135; Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911).

⁵⁵² Wyman, *The Law of Public Callings*, *supra* note 26, at 156.

⁵⁵³ *Id.* at 157-58.

⁵⁵⁴ *Id.* at 158. The necessity argument is implied, but not directly stated in Wyman's discussion of the duties of surgeons. Presumably, the consequences of not obtaining medical care are potentially severe, and lack of access to them could create significant hardship. *See id.* at 157.

carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There were builders enough to make the situation in that business virtual competition, so that there was no hardship; but the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for want of a shoe if the wayside smith should take it into his head to refuse to serve.⁵⁵⁵

In the case of inns, Wyman similarly presented both *monopoly* and *necessity* as explanations for the duty to serve.

The innkeeper is in a common calling under severe penalty if he do not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded. The surrounding circumstances must again explain the origin of this unusual law. When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. Truly a special law is required to meet this situation, for the traveller is so in the hands of the innkeeper that only an affirmative law can protect him. But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose. If he is charged an exorbitant price by one shopkeeper, all that he need do is to leave that shop and go to the next. No special law is required to meet this situation because, since the seller knows that the buyer may always do this, he in fact will almost never repulse him; rather he will by a low price induce him to purchase. The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn.⁵⁵⁶

Wyman explained the duties of common carriers in a similar manner.

Again the explanation [of the duty of common carriers to serve the public] must be sought in the history of the times. In merry England the population lived in communities apart from each other, so that small attention was paid to the roads, which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals, and so many were the bands of outlaws in the greenwood that no man might with safety traverse these paths alone, so that the transportation of goods was given over to the carrier, who traveled with oftentimes trains of pack animals and a considerable company. It was also the fact that one carrier or few would thus pass over the same roads between the same towns, because the traffic was still comparatively small, as England had not yet changed from a local economy where each community was sufficient to itself, into a national economy which would involve interchanges of goods between distant markets. The conditions surrounding transportation were therefore those of virtual monopoly. The

⁵⁵⁵ *Id.* at 158.

⁵⁵⁶ *Id.* at 159.

merchant had therefore the protection of law, a protection without which he stood no chance against oppression by the carrier.⁵⁵⁷

Wyman noted that common callings with duties to serve the public in the fifteenth century included barbers, tailors, and victuallers, as well as carriers, surgeons, smiths, and innkeepers.⁵⁵⁸

Wyman concluded that monopoly was the unifying factor in determining over time which businesses had duties to serve the public. "Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly."⁵⁵⁹ This justification similarly explained changes over time in the categories of business subject to the duty to serve. "Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualler, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it."⁵⁶⁰

In discussing modern cases that imposed duties to serve, Wyman emphasized that many involved public utilities that had received *franchises* from the state. In such cases, the businesses in question were almost uniformly local *monopolies* of the service they were licensed to provide. Moreover, these utility companies were understood at the time Wyman was writing to be in charge of *public functions* that could legitimately and adequately be provided only by state-sanctioned monopolies.⁵⁶¹ He quotes Justice Bradley's opinion in *California v. Central Pacific Railroad Co.*⁵⁶² to the effect that a franchise is

a right, privilege, or power of a public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security.⁵⁶³

⁵⁵⁷ *Id.* at 160.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.* at 161.

⁵⁶⁰ *Id.* at 160.

⁵⁶¹ Wyman noted:

Indeed it is now recognized by many advanced thinkers that it is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions [markets which can only be conducted with advantage upon the basis of exclusive franchise], the state should proceed to establish a legal monopoly, and then apply to that situation such strict regulation as the exigency demands.

Id. at 163.

⁵⁶² 127 U.S. 1 (1888).

⁵⁶³ Wyman, *The Law of Public Callings*, *supra* note 26, at 163 (quoting *California v. Central Pac. R.R.*, 127 U.S. 1, 40 (1888)).

Wyman cites an 1858 Wisconsin case that held that a gas works company could not refuse to supply a particular customer. The Wisconsin Supreme Court explained in *Shepard v. Milwaukee Gas Light Co.*:⁵⁶⁴ “It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that hence the only means of supply available to citizens was through the agency of the company.”⁵⁶⁵ Wyman argues that “Whenever . . . such an exclusive franchise appears, the courts are prompt to put the company into the class of public servants, requiring it to serve the public in exchange for the privilege granted it by the people.”⁵⁶⁶ In his view, the fact of monopoly differentiates public from private callings.

When the first works were constructed to furnish gas through mains laid in the public streets to various householders in the community at large, new conditions in the supply of illumination were created. Before that time illuminants had been commodities, bought and sold in packages, purchasable at various shops scattered over every city. The keepers of these shops had never been compelled to sell to all that required of them; why then, it was asked, must gas companies be compelled to do so?⁵⁶⁷

Retail shops had no such obligations because there were ordinarily “various shops scattered over every city.”⁵⁶⁸ This differentiated “the vending of candles from the purveying of gas.”⁵⁶⁹

Wyman’s proposed rationalization of the law fits perfectly with the legal theory of the *Lochner* era, when scholars and judges were attempting to justify limitations on government regulation of the market and expanding protection for a particular conception of property

⁵⁶⁴ 6 Wis. 539 (1858).

⁵⁶⁵ *Id.* at 545.

⁵⁶⁶ Wyman, *The Law of Public Callings*, *supra* note 26, at 165; *see also* *Snell v. Clinton Elec. Light, Heat & Power Co.*, 63 N.E. 1082 (Ill. 1902); *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 24 N.E. 818 (Ind. 1893) (holding that gas company could not refuse to provide gas to an applicant); *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29 (1880) (holding that company with exclusive license to drive logs on the Penobscot River could not refuse to provide service to all customers); *Haugen v. Albina Light & Water Co.*, 28 P. 244 (Or. 1891) (holding that water company could not refuse to supply water to a particular part of town); *State v. Citizens’ Tel. Co.*, 39 S.E. 257 (S.C. 1903) (holding that telephone company has duties to serve the public).

⁵⁶⁷ Wyman, *The Law of Public Callings*, *supra* note 26, at 168. Many cases hold that public utilities who hold state-granted monopolies of a particular business needed by the public must serve everyone without discrimination. *See, e.g., Snell*, 63 N.E. at 1082; *Portland Natural Gas*, 24 N.E. at 818; *Weymouth*, 71 Me. at 29; *Haugen*, 28 P. at 244.

⁵⁶⁸ Wyman, *The Law of Public Callings*, *supra* note 26, at 168. Wyman also argued that public utilities used public property, placing lines and pipes over the public streets. This use also justified duties to serve the public. Quoting an Indiana case, Wyman noted that “[Gas companies’] use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public” have obligations to the public. *Id.* at 168 (quoting *Portland Natural Gas*, 24 N.E. at 818). This explanation does not apply to innkeepers, although it does generally apply to common carriers.

⁵⁶⁹ *Id.* at 169.

rights. In so doing, they had to justify the remaining kinds of regulation in the face of the *laissez-faire* ideology.

Although it is the generally prevailing view, there are deep flaws in Wyman's argument.

(1) *The monopoly justification.*—First, Wyman provides no historical evidence of any kind that smiths and surgeons were more likely to be local monopolists than were carpenters or local stores, especially outside of urban areas. Small towns are likely to have a lack of competition in a variety of areas. Nor does he explain why innkeepers and common carriers retain duties to serve the public even when competition exists.

(2) *The franchise theory.*—Second, Wyman does not take cognizance of the fact that in the antebellum era, *most* trades operated under license from the state. If the franchise or permit from the government is the crucial fact, this does not differentiate common carriers and innkeepers from other actors in either Britain or the United States. Many different actors were required to obtain permits from the state in both countries.⁵⁷⁰ Moreover, it is not historically accurate to say that licenses created a duty to serve when they granted franchises or monopolies. Inns had a duty to serve even though Boston, for example, had dozens of inns. The franchise theory therefore cannot differentiate common callings from private business.

(3) *The public function theory.*—Third, the notion of the public sphere and what businesses operated in the public interest was quite different in the antebellum era than in the classical era. Wyman read back into history the views of the public-private distinction prevalent in his time, therefore misreading the older law. Businesses other than innkeepers and common carriers were conceptualized as engaged in public functions in the antebellum period.

(4) *The necessity theory.*—Fourth, many stores that do not fit into the classical category of "public service companies" provide necessities. Yet even if they were local monopolies, they were exempt from the duty to serve under Wyman's theory and under prevailing law at the time he wrote.⁵⁷¹

⁵⁷⁰ See Novak, *supra* note 170, at 346-47.

⁵⁷¹ Wyman might answer these criticisms by noting that, although competition may exist in some markets for inns or transportation, the majority of such markets lack adequate competition. Conversely, while some shops may constitute virtual monopolies in local markets, the barriers to entry of competitors are low and in most markets, competition exists. These generalizations might justify rigid rules placing duties to serve on specific classes of businesses while exempting other classes. It was typical of legal rules in the classical period to attempt to eschew case-by-case rulings and to deduce predictable rules from abstract principles. Thus, objective

Wyman's theory is the prevailing view today. It is generally propounded by courts and scholars as legitimately distinguishing those few businesses with duties to serve the public from those that have no such obligation. Several things are striking about the generally prevailing view. First, we can observe nearly universal ignorance of both an earlier, preclassical conception of the duty to serve and a progressive, legal realist critique of the classical conception. This ignorance has important consequences. It obscures the historically contingent origins and context within which the current common-law rule was born and therefore hides from our consciousness an alternative conception about the obligations of owners of property open to the public. It serves a mystifying function not only by making it more difficult for us to imagine a different legal regime but by hiding the fact that the general right of owners other than innkeepers and common carriers to exclude members of the public arbitrarily was born in an era whose preconceptions about property rights have otherwise been substantially abandoned since the advent of legal realism. In other words, obscuring the connection between the current rules and the *laissez-faire* ideology of the *Lochner* era helps to legitimate a rule that otherwise contradicts widespread current perceptions about the legitimate obligations of businesses open to the public.

Second, ignorance of the preclassical conception and the legal realist critique suggests both longstanding and universal acceptance of the current structure of the rules and serves to deflect criticism of those rules. Knowledge of other conceptions of the obligations of property owners naturally leads us to question whether the justifications for the special obligations of common carriers and innkeepers make sense. Do they in fact differentiate those businesses with general duties to serve the public from those without such duties? Are they historically accurate? Are they normatively acceptable today, given public values, general custom, and existing federal and state statutes?

Third, the monopoly theory is wanting because it gives no weight at all to the *expressed reasons* stated by judges and commentators for the duty to serve the public—namely, the dual justifications of necessity and holding out. Necessity can exist equally as to foodstuffs and clothing. Moreover, the holding out rationale accords with preclassical conceptions of contract, in which many relationships created duties implied in law. The act of holding oneself out as open to the public constituted an offer to serve that was accepted by a customer agreeing to pay for the service. This theory was propounded as late as 1889. In the case of *Messenger v. State*,⁵⁷² the Nebraska Supreme Court ex-

theories of both negligence in tort law and the will of the parties in contract law might contradict the facts of a particular case, but nonetheless provide predictable rules for actors to follow.

⁵⁷² 41 N.W. 638 (Neb. 1889).

plained why barber shops were listed in the state's public accommodations law:

A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter this shop during business hours. The statute will not permit him to say to one "You are a slave, or a son of a slave; therefore I will not shave you." Such prejudices are unworthy of our better manhood, and are clearly prohibited by the statute.⁵⁷³

This holding out theory did not accord with the freedom of contract ideology of Wyman's time, and he therefore had to come up with a different justification for placing a duty to serve on public utilities.

Fourth, the generally prevailing view fails to recognize the crucial role that racism and racial politics played in the construction of current law and theory. Limiting the number and type of businesses with duties to serve the public not only accorded with developing conceptions of *laissez-faire* and absolute property rights in the classical era, but also accorded with the emerging Jim Crow system. Relieving most businesses of a duty to serve the public allowed those businesses to exclude customers on the ground of race. The historical fact may help to explain why the state Jim Crow statutes were never interpreted to constitute takings of property, even though they otherwise would have appeared to constitute unjustified intrusions on property rights under emerging classical views.

However, there is a deep contradiction between Jim Crow laws and the *Lochner* system. Jim Crow laws pervaded social relations and applied to businesses that did not, by any stretch of the imagination, fit within the "public service corporation" category. A major example is restaurants, which did not operate on the basis of licenses from the state and were not likely to constitute monopolies. Nor did they supply public functions. Yet they were clearly covered by the Jim Crow laws. As far as I know, no one ever challenged a Jim Crow statute as a taking of property without just compensation. Given the expansive definitions of property and free contract rights recognized in this period, this is, in one sense, surprising. In another sense, it is not surprising at all; business owners did not object to Jim Crow laws because they accorded with white social prejudices of the time. The inconsistency did not rise to consciousness since the Jim Crow laws were understood as an enhancement, rather than a restriction, on property rights. Oddly, this comparison further supports the notion that cut-backs on the duty to serve in the postbellum period are as much or more attributable to the emerging Jim Crow system as they are to the new expansive conception of private property and freedom of contract.

⁵⁷³ *Id.* at 639.

d. *The legal realist critique.*—In 1911, Charles Burdick published an article on *The Origin of the Peculiar Duties of Public Service Corporations*.⁵⁷⁴ It was followed in 1914 by a similar article, entitled *Business Jurisprudence*, by Edward Adler.⁵⁷⁵ Both Burdick and Adler criticized the Wyman thesis that the duty to serve the public was premised on the need to respond to the problem of monopoly. Burdick argued that the duty of common callings to serve the public was premised on the fact that “a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who should apply, and to serve them with care”⁵⁷⁶ He concluded:

So it seems safe to believe that originally anyone who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this *assumpsit* was held to obligate himself to serve all who should apply and to serve with care.⁵⁷⁷

Similarly, Edward Adler argued that innkeepers and common carriers were not unique in their duties to serve the public but that such duties extended to all common callings.⁵⁷⁸ Adler noted that many businesses were described as “common” callings including surgeons, bakers, brewhouses, mills, distillers, cooks, and builders.⁵⁷⁹ He concluded: “What, then, did ‘common’ mean? Simply ‘business,’—business carrier, business tailor, business barber.”⁵⁸⁰ He explained:

It is scarcely open to dispute, therefore, that all trades mentioned in the books were on occasion called “common,” that the private was distinguished from the public exercise of a trade, and it is difficult to see how “common,” in the earliest uses as applied to all trades, can have any significance other than the one at the present time limited to a few trades,—that is, profession to serve all. As applied to innkeepers and carriers, the sense is uniformly the same even back to the earliest cases. . . . He is in a common employment who is in it as a business; the word defines his *profession*, his undertaking.⁵⁸¹

Adler concluded with a critique of the classical presumption that business had no obligations to the public.

Under a true interpretation of the common law all business is public, and the phrase “private business” is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profes-

⁵⁷⁴ Burdick, *supra* note 551, at 514; *see also* CHARLES K. BURDICK, CASES ON THE LAW OF PUBLIC SERVICE, INCLUDING THE LAW PECULIAR TO COMMON CARRIERS AND INNKEEPERS (1924).

⁵⁷⁵ Adler, *supra* note 2, at 135.

⁵⁷⁶ Burdick, *supra* note 551, at 515-16.

⁵⁷⁷ *Id.* at 522.

⁵⁷⁸ Adler, *supra* note 2, at 146-47.

⁵⁷⁹ *Id.* at 149-52.

⁵⁸⁰ *Id.* at 152.

⁵⁸¹ *Id.* at 152, 154.

sion and a public calling. The parties to business are the merchants on the one hand and the public on the other. The merchant or trader opens his doors into the public street and invites all who pass to enter. By public advertisement and circularizing he solicits patronage from all who read. He extends an invitation or makes a continuing offer to all indifferently. He seeks credit, employs the machinery of credit, and by so doing involves the fortunes of the community at large. He floats his securities in the public market. His good-will, always a principal asset, consists entirely of the likelihood that the people in general will avail themselves of the inducements which he has offered. Reason and authority alike show the soundness of this view.⁵⁸²

Adler's and Burdick's critiques of the classical conception of public service companies were intended to challenge the presumption that business should be conceptualized as wholly "private" and therefore generally immune from regulation in the public interest. Although they, and other legal realists, fought against *laissez-faire* ideology and succeeded, for a time, in creating a new attitude toward public regulation of business, the common law nevertheless permanently retained the new baseline right to exclude. No court until the New Jersey Supreme Court in 1982 has acknowledged a general right of access to property open to the public. It is time to correct the situation. That is the subject of the next Part.

III. REVIVING THE PUBLIC RIGHT OF ACCESS

A. Current Law

1. Federal Statutes.—

a. *The Public Accommodations Act of 1964.*—Title II of the Civil Rights Act of 1964 prohibits "discrimination or segregation" in "any place of public accommodation, as defined in this section."⁵⁸³ Covered establishments include inns (Section 2000a(b)(1)), restaurants (Section 2000a(b)(2)), gas stations (Section 2000a(b)(2)), and places of entertainment (Section 2000a(b)(3)). Conspicuously not listed as covered establishments are common carriers and other businesses, such as retail stores. Common carriers involved in interstate commerce are prohibited from discriminating on the basis of race under the terms of the Interstate Commerce Commission Act.⁵⁸⁴ The

⁵⁸² *Id.* at 158; see also Gustavus H. Robinson, *The Public Utility Concept in American Law*, 41 HARV. L. REV. 277, 303 (1928) ("[T]he phrase 'devoted to the public' . . . means doing business or offering to do business with the public: only those who do so offer may have imposed on them the utility status. This has long been pointed out as ancient.").

⁵⁸³ 42 U.S.C. § 2000a (1994).

⁵⁸⁴ 49 U.S.C. § 10741(b) (1994) ("A common carrier providing transportation or service subject to the jurisdiction of the [Interstate Commerce] Commission under chapter 105 of this title may not subject a person . . . to unreasonable discrimination."); 49 U.S.C. § 11101(a) (1988) ("A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service

first big question is whether the list in the 1964 Act is intended to be exhaustive or illustrative. Second, if the list is intended to be exhaustive, does this mean that the list is also intended to be *exclusive*, such that the 1964 statute intended to *repeal* any federal remedies that might have been implied under prior federal statutes (such as the Civil Rights Act of 1866), or is the list not intended to preempt the field, leaving open the possibility that other federal laws could provide a remedy?⁵⁸⁵

To better understand the issue, let us return to the problem of the exclusion of Professor Patricia Williams from a Benneton store. Did she have any remedy under the 1964 federal public accommodations law? If we are predicting how most federal courts would answer this question, the answer is almost certainly not, although an argument can be constructed to interpret the statute otherwise. Courts are unlikely to interpret the 1964 public accommodations law as covering retail stores. Why is this so? Let us start with the relevant text of the statute.

2000a. Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for

on reasonable request.”); *see also* *Mitchell v. United States*, 313 U.S. 80 (1941) (interpreting 49 U.S.C. § 3 (predecessor to 49 U.S.C. § 10741) to prohibit racial discrimination by interstate common carriers in terms of service to passengers).

⁵⁸⁵ For a summary of the arguments of the proponents and opponents of the 1964 public accommodations law, see LESLIE A. CAROTHERS, *THE PUBLIC ACCOMMODATIONS LAW OF 1964: ARGUMENTS, ISSUES AND ATTITUDES IN A LEGAL DEBATE* (1968).

consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

The statute prohibits “discrimination or segregation in places of public accommodation, as defined in this section.” This much is stated in the title to Section 2000a. The first operative paragraph (a) (Section 2000a(a)) states the law affirmatively, providing that “[a]ll persons shall be entitled to the full and equal enjoyment of the . . . services . . . of any place of public accommodation, as defined in this section.”⁵⁸⁶ The second paragraph (b) (Section 2000a(b)) then arguably functions as a definitional section, providing that “[e]ach of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter”⁵⁸⁷ A short list is provided. If one is a textualist in statutory interpretation, it is an obvious conclusion that the list in paragraph (b) defines which businesses constitute “places of public accommodation” regulated by paragraph (a), especially since the operative provisions in paragraph (a) are limited to places of public accommodation “as defined in this section.”

This interpretation can be bolstered by a host of canons of statutory interpretation. First, “[a] statute cannot go beyond its text.”⁵⁸⁸ If the meaning of the statute is plain, there is no room for interpretation.⁵⁸⁹ As Judge Robert Keeton says, “if the statute addressed the issue at hand and answered it, apply the mandate of the statute”⁵⁹⁰ The statute prohibits discrimination in “places of public accommodation, *as defined in this section*” and recites that “[e]ach of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter.”⁵⁹¹ There is no ambiguity whatsoever. The statute regulates a type of place that is

⁵⁸⁶ 42 U.S.C. § 2000a(a) (1994).

⁵⁸⁷ 42 U.S.C. § 2000a(b) (1994).

⁵⁸⁸ Karl Llewellyn, *Remarks on the Theory of Appellate Decisions & The Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (citing *First Nat'l Bank v. DeBerriz*, 105 S.E. 900 (W. Va. 1921)), reprinted in Karl Llewellyn, *Canons on Statutes*, in *THE COMMON LAW TRADITION: DECIDING APPEALS* 522 (1960); JABEZ G. SUTHERLAND, *STATUTORY CONSTRUCTION* § 388 (2d ed. 1904).

⁵⁸⁹ Llewellyn, *Canons on Statutes*, *supra* note 588, at 524 (citing *Newhall v. Sanger*, 92 U.S. 761 (1875)).

⁵⁹⁰ ROBERT E. KEETON, *JUDGING* 151 (1990).

⁵⁹¹ 42 U.S.C. § 2000a(a)-(b) (1994) (emphasis added).

defined in the statute as encompassing a short list of places. If Congress had intended the statute to apply to all businesses open to the public, it could and would have said so, rather than defining so carefully the few businesses subject to the statute.

It is helpful in this regard to compare the broader language of some state public accommodations laws and the Americans with Disabilities Act.⁵⁹² One way to draft a broad statute is simply to provide a broad functional definition rather than a list. For example, the Minnesota public accommodations law defines a “place of public accommodation” as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.”⁵⁹³ No list is provided that would narrow the scope of the statute to exempt such places as retail stores. Congress chose not to word the 1964 statute in this way. Similarly, the 1990 Americans with Disabilities Act lists many more places than are listed in the 1964 statute.⁵⁹⁴ Thus, Congress could either have chosen a broad standard without a list at all or a longer list if it intended to cover retail stores. Congress knows how to write a statute that applies to retail stores if it wants to do so. The fact that it specifically listed a small number of establishments strongly suggests that it did not intend to regulate the conduct of other businesses.⁵⁹⁵

This reading of the law is supported by several other canons. The second canon is that “expression of one thing excludes the other”—*expressio unius est exclusio alterius*.⁵⁹⁶ A term not included in a list was intended to be excluded. Third, terms that are defined in a statute have technical meanings that are intended to differ from their ordinary meaning. If a term is specifically defined in a statute, the court should use the technical, not the ordinary, meaning of the word.⁵⁹⁷ “Each of the following is . . .” is a typical way to introduce a definition

⁵⁹² 42 U.S.C. §§ 12181-12213 (1994).

⁵⁹³ MINN. STAT. ANN. §§ 363.01, Subd. 33 (West 1991).

⁵⁹⁴ 42 U.S.C. §§ 12181-12213 (1994).

⁵⁹⁵ Lisa G. Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 222 (1978) (noting that many establishments, including retail stores, are not covered by the 1964 public accommodations law).

⁵⁹⁶ WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 641 (1988) (citing *Tate v. Ogg*, 195 S.E. 496 (Va. 1938)); Llewellyn, *Canons on Statutes*, *supra* note 588, at 526 (citing *Detroit v. Redford Township*, 235 N.W. 217 (Mich. 1931)); SUTHERLAND, *supra* note 588, §§ 491-494.

⁵⁹⁷ ESKRIDGE & FRICKEY, *supra* note 596, at 642 (citing *Nix v. Hedden*, 149 U.S. 304 (1893)); Llewellyn, *Canons on Statutes*, *supra* note 588, at 525 (citing *Robinson v. Varnell*, 16 Tex. 382 (1856)); SUTHERLAND, *supra* note 588, § 395.

section. Fourth, “[e]very word and clause must be given effect.”⁵⁹⁸ If the list of covered establishments is not exhaustive, there was no reason to put them in the statute. The drafters could simply have described businesses that serve the public and be done with it. Illustration was not necessary, and if it were, the drafters could have stated that “places of public accommodation include, but are not limited to” The existence of a short list must therefore be intended to exclude places that are not included in the list.

Fifth, “[s]tatutes are to be read in the light of the common law and a statute affirming a common-law rule is to be construed in accordance with the common law.”⁵⁹⁹ The common-law rule understood in 1964 to be the universal rule was that innkeepers and common carriers (and in some states, places of entertainment) had duties to serve the public without unjust discrimination, while other businesses did not. The only purpose of the 1964 Civil Rights Act was arguably to implement that aspect of the common-law rule while overturning the pieces of the common-law rule that held that segregation was a “reasonable regulation” of private property open to the public and that “separate” facilities were “equal.”⁶⁰⁰

In addition to these techniques of textual interpretation, the legislative history supports the notion that the list was intended to be exhaustive.⁶⁰¹ The House Report accompanying the bill that eventually became Title II of the Civil Rights Act of 1964 specifically states that the bill “prohibits discrimination in *enumerated* public establishments.”⁶⁰² The Report also refers to “*specified* places of public accommodation,” and notes that paragraph (b) “*defines certain establishments to be places of public accommodation.*”⁶⁰³ “*Enumerated establishments,*” “*specified places,*” and “*defining certain establishments*” clearly suggest an intent to cover only such establishments as are listed in paragraph (b). Nevertheless, the *Additional Majority Views of Hon. Robert W. Kastenmeier* criticizes Title II as “deficient in

⁵⁹⁸ Llewellyn, *Canons on Statutes*, *supra* note 588, at 525 (citing *In re Terry's Estate*, 112 N.E. 931 (N.Y. 1916)); SUTHERLAND, *supra* note 588, § 380.

⁵⁹⁹ Llewellyn, *Canons on Statutes*, *supra* note 588, at 522 (citing *Bandfield v. Bandfield*, 75 N.W. 287 (Mich. 1898)).

⁶⁰⁰ This interpretation is supported by the Senate Report that justifies regulation of the covered establishments by reference to the common law of England, including the famous *Rex v. Ivens*, 173 Eng. Rep. 94 (K.B. 1835), suggesting that it classified innkeepers as public servants. S. REP. NO. 872, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2364.

⁶⁰¹ See BUREAU OF NATIONAL AFFAIRS, *THE CIVIL RIGHTS ACT OF 1964: WHAT IT MEANS TO . . . EMPLOYERS, BUSINESSMEN, UNIONS, EMPLOYEES, MINORITY GROUPS: TEXT, ANALYSIS, LEGISLATIVE HISTORY* (1964); CAROTHERS, *supra* note 585.

⁶⁰² H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391 (emphasis added).

⁶⁰³ *Id.* at 2395.

that it guarantees equal access to only some public accommodations, as if racial equality were somehow divisible."⁶⁰⁴ He states:

[T]he bill would allow discrimination to continue in barber shops, beauty parlors, many other service establishments, retail stores, bowling alleys, and other places of recreation and participation sports, unless such places serve food. It is hard to follow a morality which allows one bowling alley to remain segregated, while another bowling alley down the street which serves sandwiches must allow Negroes to bowl.⁶⁰⁵

The distinction between the listed establishments and places that are not covered must be justified by some minimal rational distinction in order to comport with the Equal Protection Clause. Why would a rational legislature distinguish hotels, restaurants, gas stations, and places of entertainment from other businesses open to the public? What possible reasons could exist for distinguishing the covered establishments from those that are excluded? Several answers come to mind. A first answer is that almost all legislation effectuates a compromise between competing interests. In this case, the competing interests are interests in not being discriminatorily excluded from access to the marketplace on the basis of race, religion, or national origin and interests of property owners in controlling access to their property. There was strong opposition to the 1964 Civil Rights Act and many of the objections rested on the supposed rights of private property owners.⁶⁰⁶ Limiting the applicability of Title II to only certain kinds of businesses probably was necessary to get the bill passed. If this is so, the court should not interfere with the careful balance of interests worked out by elected officials simply because the judges disagree with the balance reached.

Second, legislatures are not obligated to solve all problems at once; they often address *particular* problems that are brought to their

⁶⁰⁴ *Id.* at 2410.

⁶⁰⁵ *Id.* at 2410-11.

⁶⁰⁶ HOUSE COMM. ON JUDICIARY, MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.A.N. 2391, 2441. The Minority Report states:

Places of "public accommodation" do not cater by custom to one race in preference to another solely from proprietary preference. People are in business to make money and in certain areas they have learned, or have reason to believe, it is more profitable to serve only one race or another. In other areas, proprietors have learned it is more profitable to serve all races, indiscriminately. A host follows the customs of his community else he suffers, economically. To force him to abandon his practice, to run counter to prevailing opinion, is to injure his business and his property. He does not, and he cannot, set custom. He follows it or suffers.

Under the provisions of this bill, the proprietor's right to decide whom he will or will not serve, as that decision pertains to race, color, religion, or national origin, is stripped from him (Title II). Moreover, if a customer proves objectionable, the owner can have him removed from his premises only at peril of being in violation of the race laws. For, under this act, the proprietor, if challenged, must prove he did not remove the objectionable customer because of his race, but because of some other reason. This is a perversion of the basic principles of our law.

attention and for which they are convinced that reasonable answers exist. There is no obligation on a legislature to address a problem fully or not at all; it is empowered to address specific aspects of a problem that are brought to its attention and for which a reasonable compromise or consensus can be reached among the legislators. It may be the case that the social problem the 1964 Act was intended to address was the existence of widespread discrimination, especially in the South, which existed in particular types of establishments. The places covered were the places where substantial discrimination in the form of exclusion or segregation occurred. Congress was attempting to regulate those types of business establishments that had been engaging in segregationist and discriminatory practices. There was arguably no need for federal legislation regulating other businesses, which did not engage (at all? as widely?) in such practices. Even if one disagrees with this factual interpretation, a rational Congress *could* have believed that the covered establishments posed the greatest problem and therefore merited special legislation and this is all that is required under the low level rational scrutiny test.

Third, of the four categories of covered establishments (inns, restaurants, gas stations, and places of entertainment), three concern the right to travel. The combined statement of a number of representatives quotes the testimony of Roger Wilkins to the effect that the legislation was needed to allow African-Americans to travel.⁶⁰⁷ Their statement notes:

An official of the National Association for the Advancement of Colored People [Roger Wilkins], testified before the Senate Commerce Subcommittee as follows:

For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Tex. How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white? . . . Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town

⁶⁰⁷ Additional views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles Mathias, Hon. James E. Bromwell are found at 1964 U.S.C.C.A.N. at 2487, 2494.

where you know somebody or they know somebody who knows somebody who can take care of you. This is the way you plan it. Some of them don't go.

The statement then continues with the comments of the representatives.

Daily we permit citizens of our Nation to be humiliated and subjected to hardship and abuse solely because of their color. Equally unendurable is the knowledge that this treatment is not limited to travelers. Inhabitants in local communities—citizens who are long-time residents, taxpayers, leaders in their locales—are similarly denied access to restaurants, hotels, gasoline stations, theaters, and similar establishments. Their money is gladly taken at the supermarket, variety shop, or department store. But, to buy a meal, cold drink, or a bit of entertainment and the cold hand of rejection stares them in the face. On moral grounds, and from the standpoint of upholding human dignity, the U.S. Congress cannot tolerate such practices.⁶⁰⁸

One problem with this argument is that it fails to describe places of public entertainment. Yet, this category may be taken care of under the observation that discrimination was widespread in such places and they were in need of federal regulation, while segregation and discriminatory treatment may have been thought to be less of a problem for retail stores, so there was no need (or less need) for federal intervention in state property and civil rights law.

The argument for interpreting the 1964 public accommodations law to exclude coverage of retail stores and other nonlisted facilities is very strong and likely to be accepted by the current United States Supreme Court. What, if anything can be said on the other side?

First, one can focus on the broad remedial purposes of the statute and attempt to demonstrate that the statute is at least ambiguous on the question of whether retail stores are covered, and, therefore, should be interpreted broadly. How can the statute be rendered ambiguous? It is ambiguous because it is not clear as a policy matter why race discrimination is invidious in restaurants, inns, and places of entertainment, but permissible in retail stores. This lack of an immediately obvious policy reason for the distinction suggests that we should look for textual clarity about the distinction. Yet the text does not *expressly* limit its applicability.

Paragraph (a) imposes a duty to serve the public on "places of public accommodation, as defined in this section." This language re-

⁶⁰⁸ *Id.* The statement further recites:

If we consider the matter solely in commercial and economic terms, we can also substantiate the need for title II. As was so aptly stated, "Some of them don't go." The strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep, or the fear of finding oneself on a lonely road at night with car trouble and no place to turn for assistance has forced innumerable families and individuals to stay at home.

Id. at 2495.

fers to the entirety of Section 2000a (especially paragraphs (b) through (e)) to define the places of public accommodation covered by the act. This might be taken to suggest that the list in paragraph (b) is exhaustive. However, it might not mean this at all. Paragraph (b) states that “Each of the following *establishments which serves the public* is a place of public accommodation.” Paragraph (e) exempts “private clubs or establishments” that are “not in fact open to the public.” The phrase “as defined in this section” may simply mean that “places of public accommodation” are establishments “which serve the public”—whether or not they are privately owned—and that are not “private clubs.” Furthermore, the wording in paragraph (b) does not say that “only” the following types of establishment are places of public accommodation; it merely states that “each” of the following establishments “is” a “place of public accommodation” and is intended to be covered. In other words, the list of covered establishments in Section 2000a(b) can be interpreted as *illustrative* rather than *exhaustive*.⁶⁰⁹

Why would the statute describe the listed places if the list was not intended to be exhaustive? One can flip the argument presented on the other side to the effect that Congress can choose to address one problem at a time. The listed places were ones where a great deal of discriminatory conduct occurred. Congress listed them to make sure that everyone understood that the statute was intended to regulate them. They were listed, not because they were the only places to be covered, but to *ensure* that the statute was interpreted to cover them. If they were the places where discrimination was rampant before passage of the Act, Congress may simply have intended to make sure the world understood that such places also were intended to be covered. Congress might have done this because of the long history of courts narrowly interpreting civil rights statutes to exempt places that were not listed.⁶¹⁰

Further, the operative section of the statute is Section 2000a(a), which states that all persons shall be entitled to the full and equal enjoyment of the services of “*any* place of public accommodation, as

⁶⁰⁹ See *In re Cox*, 474 P.2d 992, 995 (Cal. 1970) (In Bank) (holding the identification of “particular kinds of discrimination—color, race, religion, ancestry, and national origin—[to be] illustrative rather than restrictive . . .”); *Sellers v. Philip’s Barber Shop*, 217 A.2d 121, 123 (N.J. 1966) (holding that specification of business, occupational, recreational, and educational enterprises within the law against discrimination, and providing that place of public accommodation that shall include such enterprises is not a limitation, but simply a general illustration, of the type of enterprise intended to be within boundaries of the law).

⁶¹⁰ Of course, Congress might also have understood the failure to list other establishments as a trigger for courts to exclude other establishments from the scope of the law. Nonetheless, an ambiguity arguably exists and the ambiguity may be deliberate. Congress sometimes refuses to answer an important question of interpretation in a statute when no agreement exists either way and all sides are more interested in passing a statute than in settling issues of detail.

defined in this section.” The wording “any” may indicate an intent to establish a broad definition, while the phrase “as defined in this section” may refer to “any” establishment (Section 2000a(a)) “which serves the public” (Section 2000a(b)). Nor does paragraph (b) state that it intended to provide a *definition* of the terms “place of public accommodation” governed by paragraph (a).

This interpretation may be supported by various canons of interpretation. First, remedial statutes should be liberally interpreted to effectuate their purposes.⁶¹¹ Second, “language may fairly comprehend many different cases where some only are expressly mentioned by way of example.”⁶¹² Third, statutes should not be interpreted literally where this will defeat the manifest purposes underlying the statute.⁶¹³

The purpose of the 1964 statute is to afford equal access to businesses that serve the general public. The statute should be interpreted broadly to effectuate that purpose. If the court interprets the statute in a narrow fashion, it will defeat the purposes underlying the legislation and therefore contravene the legislative intent; such an interpretation will therefore constitute an illegitimate interference with the system of democratic governance by contravening democratically enacted public policies. It is true that the statute explicitly mentions only certain types of establishments; this may be because those were the areas that posed the greatest problem at the time the statute was passed and where discrimination was the greatest. The Congress wanted to make crystal clear that discrimination was not to be tolerated in those businesses. This does not mean, however, that Congress intended to encourage or allow discrimination in other businesses that serve the public; such a result would violate the policy underlying the entire regulatory scheme.

Moreover, there is no conceivable rational distinction between the listed facilities and those that are not covered that would justify allowing discrimination in the one but not the other. The covered establishments do not involve only the right to travel since places of entertainment are included. If the statute is ambiguous, it should be interpreted to effectuate its purposes and not to establish an irrational distinction that could not have been intended by Congress. The basic purpose is to establish equal access to businesses open to the public. The only unifying policy underlying the covered establishments is this underlying principle of equality. No reason can be given consistent

⁶¹¹ Llewellyn, *Canons on Statutes*, *supra* note 588, at 522 (citing *Becker v. Brown*, 1 N.W. 178 (Neb. 1902)); SUTHERLAND, *supra* note 588, §§ 573-575.

⁶¹² Llewellyn, *Canons on Statutes*, *supra* note 588, at 526 (citing *Springer v. Philippine Islands*, 277 U.S. 189 (1928)); SUTHERLAND, *supra* note 588, § 495.

⁶¹³ Llewellyn, *Canons on Statutes*, *supra* note 588, at 524 (citing *Clark v. Murray*, 41 P.2d 1042 (Kan. 1935)); SUTHERLAND, *supra* note 588, § 363.

with the policies underlying the statute for allowing retail stores to discriminate on the basis of race.

Of course, the statute may represent a compromise between competing factions. This does not change the fact that it was not drafted to state unequivocally that businesses not listed in the statute have the right to discriminate. On the contrary, the statute *does* contain an express exemption for "private clubs." Section 2000a(e) provides that Section 2000a "shall not apply to a private club or other establishment not in fact open to the public"⁶¹⁴ Arguably, this section is surplusage since paragraph (b) already states that a business is a public accommodation only if it "serves the public."⁶¹⁵ Thus, Congress knew how to clarify the language when specific places were intended to be exempted. There is no such exemption for businesses not included in the list in Section 2000a(b). There is no warrant for the conclusion that Congress expressly intended to exclude them. The statute should be interpreted to cover retail stores unless *expressly* exempted.

Support for this interpretation can be found in state court opinions, which have interpreted lists in state civil rights laws to be illustrative. The New Jersey Supreme Court interpreted a statute that included a long list of places as merely illustrative rather than exhaustive.⁶¹⁶ The California Supreme Court interpreted the state Unruh Civil Rights Act to prohibit all forms of invidious discrimination, whether or not they are listed in the statute; the categories of race, sex, and other prohibited categories were deemed illustrative rather than exhaustive.⁶¹⁷

⁶¹⁴ 42 U.S.C. § 2000a(e) (1994).

⁶¹⁵ 42 U.S.C. § 2000a(b) (1994).

⁶¹⁶ *Fraser v. Robin Dee Day Camp*, 210 A.2d 208, 211 (N.J. 1965) (holding that a day camp was a place of public accommodation within the meaning of the New Jersey statute even though it was not listed on the ground that the list was illustrative rather than exhaustive). The New Jersey statute in question contained a *long* list of places; the list was still deemed illustrative. The statute, N.J. STAT. ANN. § 18:25-5(*l*) provided:

"A place of public accommodation" shall include any tavern, roadhouse, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any retail shop or store; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, and stations and terminals thereof; any public bathhouse, public boardwalk, public seashore accommodation; any auditorium, meeting place, or public hall; any theatre, or other place of public amusement, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor; any comfort station; any dispensary, clinic or hospital; and any public library, any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Id. at 210-11.

⁶¹⁷ *In Re Cox*, 474 P.2d 992 (Cal. 1970) (In Bank).

Finally, and perhaps most importantly, if the Court is mistaken in its interpretation, Congress can always correct the mistake by amendatory legislation. Traditional statutory interpretation rigidly focuses on the intent of the legislators who passed the statute. Yet, such a focus is not logically required to comply with democratic values in the court-legislature relationship. For one thing, the legislature drafted (deliberately?) an ambiguous statute. Sometimes legislatures do this because they cannot completely agree on a particular issue either way and they defer the decision to the courts. This clearly occurred, for example, when Congress could not agree on whether the Civil Rights Act of 1991 should be applied retroactively to cases that were pending before the effective date of the law.⁶¹⁸

Additionally, it is not clear that deference to majority will is best served by a theory that statutes must always be interpreted in light of original intent when they include ambiguous, value-laden language such as "place of public accommodation," whose definition has changed over time. Rigidly enforcing outdated conceptions of what constitutes a "place of public accommodation" might have the effect of enshrining public policies that are outdated and have been repudiated by later legislation. The 1990 Americans with Disabilities Act contains a much longer list of "places of public accommodation" than that contained in the 1964 statute. If the 1964 statute can be interpreted as ambiguous, perhaps a broad interpretation of the 1964 Act could be justified by reference to contemporary values and policies as implemented in the complex of statutes and laws in effect at the time the Court must render its legal interpretation of the statute.

Viewed in light of contemporary public policies, it is appropriate to ask whether it is likely that Congress would pass legislation specifically authorizing owners of retail stores to discriminate on the basis of race. When the question is posed in this manner, it becomes clear that the likelihood is close to zero. The legislature is unlikely to believe that retail stores have free association or privacy interests, or any other conceivable legitimate interests, in racially discriminatory treatment of customers. Thus, interpreting the statute broadly to effectuate the anti-discrimination policy is likely to accord with current legislative policy and to be congruent with principles of democratic governance. It is much more likely that Congress would repeal a narrow interpretation of the federal law than a broad interpretation of the 1964 statute. It therefore is consistent with the role of the courts in a democratic society to broadly interpret the statute. In fact, one could argue that it would be *undemocratic* for the current Supreme Court to ignore the likely wishes of the current legislature, since the

⁶¹⁸ Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

Court would be promulgating a rule of law at odds with the wishes of the legislature when it does not have to do so.

This latter interpretation can be supported by the notion that some kinds of statutes have been effectively treated by the courts as invitations to do the equivalent of common-law reasoning. Indeed, some statutes of long standing have been treated as delegations of power to the courts to engage in the equivalent of common-law decisionmaking. For example, the Sherman Antitrust Act has been interpreted as prohibiting contracts that "unreasonably" restrain trade.⁶¹⁹ This vague injunction has spawned case law that operates in a manner equivalent to common law. The Congress effectively delegated to the courts the duty to define what is a contract in restraint of trade.

Civil rights laws also comprise a major category of statutes that have effectively been treated as delegating the equivalent of common-lawmaking power to the courts. Consider, for example, the law that has developed under 42 U.S.C. § 1983. Interpreting ambiguities in the 1964 Civil Rights Act as empowering the courts to apply *contemporary* notions of equality—rather than those in effect at the time the statute was passed—thus has substantial legal precedent in the treatment of both property and civil rights law.

Similarly, courts have adopted exceptions to various statutes in a manner that arguably defies their clear terms, in order to effectuate current values. Examples include equitable exceptions to the statute of frauds⁶²⁰ and the statute of limitations,⁶²¹ and equitable interpretations of state recording acts.⁶²² In many areas, state courts have created judicial exceptions to rigid statutes.

If I were a judge, I would be comfortable interpreting the 1964 statute in light of subsequent public accommodations statutes and current public policies in a broad manner to find that it applied to retail stores, as well as to the listed establishments. However, despite the possibility of constructing arguments to interpret the public accommodations law of 1964 as covering retail stores, it is fair to say that it is extremely unlikely that the current Supreme Court would adopt this interpretation. Unless there is a remedy under the Civil Rights Act of 1866, it is likely that no federal law prohibits discrimination on the basis of race by retail stores in their treatment of their customers.

⁶¹⁹ 15 U.S.C. §§ 1-7 (1994).

⁶²⁰ JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 369-73 (1993); *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976) (easements by estoppel).

⁶²¹ SINGER, *supra* note 620, at 181; *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980) (adopting a discovery rule).

⁶²² SINGER, *supra* note 620, at 903-06; *Martin v. Carter*, 400 A.2d 326 (D.C. 1979) (refusing to enforce the letter of the recording statutes when a forged deed is involved).

b. *The Civil Rights Act of 1866.*—Section 1981 grants “all persons” the same rights “to make and enforce contracts . . . as is enjoyed by white citizens.”⁶²³ Section 1982 protects the right to “purchase . . . personal property.”⁶²⁴ Do these statutes prohibit retail stores from excluding customers on the basis of race? Perhaps surprisingly, the answer is less than clear. Some courts in the Reconstruction era interpreted the Act as akin to a public accommodations law.⁶²⁵ Several courts have recently applied Section 1981 in a manner that may convert it into a general public accommodations law.⁶²⁶ The Supreme Court has held that both Section 1981 and Section 1982 govern private conduct of nongovernmental actors.⁶²⁷ It has also held that these statutes prohibit discriminatory refusals to deal because of race.⁶²⁸ Yet, the Supreme Court has never held that either of these statutes constitutes a general public accommodations law. Moreover, there is a substantial possibility that the Supreme Court, as currently constituted, would refuse to interpret either Section 1981 or Section 1982 as requiring retail stores to serve customers without regard to race.

Relying on its 1968 interpretation of Section 1982 in *Jones v. Alfred Mayer Co.*⁶²⁹ prohibiting racial discrimination in the private housing market, the Supreme Court in 1976 similarly interpreted Section 1981 to prohibit a racially discriminatory refusal by a private school to contract with a black student in the case of *Runyon v. McCrary*.⁶³⁰ Although the Supreme Court reaffirmed *Runyon v. McCrary* in 1989

⁶²³ 42 U.S.C. § 1981 (1994). The full text states:

§ 1981 *Equal rights under the law*

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

⁶²⁴ Section 1982 states that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (1988).

⁶²⁵ *Coger v. North Western Union Packet Co.*, 37 Iowa 145 (1873) (holding that the 1866 Civil Rights Act prohibited a steamboat from excluding a black woman from a first-class seating table reserved for white passengers); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-76*, at 8 (1985).

⁶²⁶ *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990) (applying § 1981 to a beauty parlor that refused to serve an African-American customer); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990) (applying § 1981 to a private club which rented its premises to the public when it refused to serve a black guest at a wedding reception).

⁶²⁷ *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁶²⁸ *Runyon*, 410 U.S. 160; *Jones*, 392 U.S. 409.

⁶²⁹ 392 U.S. 409 (1968).

⁶³⁰ 427 U.S. 160 (1976).

in *Patterson v. McLean Credit Union (Patterson II)*, it did so grudgingly and only after having called for argument on the question of whether *Runyon* should be overruled.⁶³¹ Moreover, although reaffirming *Runyon*, the Court interpreted Section 1981 in an incredibly narrow and formalistic fashion to deny a remedy for racial harassment of an African-American employee on the job, on the ground that bad working conditions were a term and condition of employment not implicated in the right to “make and enforce contracts.”⁶³² Although the result in *Patterson* was quickly overruled by Congress in the Civil Rights Act of 1991,⁶³³ the current make-up of the Supreme Court, when viewed in conjunction with the results in the civil rights cases decided by the Court in 1995,⁶³⁴ does not warrant confidence in the possibility of expansive interpretations of Section 1981.

How might the Supreme Court interpret Section 1981 as inapplicable to a claim of discrimination by a retail store? First, Section 1981 protects the “right to contract” and Section 1982 protects the right “to purchase personal property.” How does the act of refusing to admit a customer constitute a refusal to contract? No contract is involved. The issue is one of access to real property and the ability to limit public invitation to enter real property. In other words, the question is arguably whether a property owner has a duty to grant a license to members of the public to enter its property. Section 1982—the section dealing with the right to purchase property—does not address in any way rights of access or licenses to enter property in the absence of a contract. It provides only that “[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁶³⁵ Entry into a retail store does not constitute a right to inherit, lease, sell, hold, or convey real property. The only basis for finding liability on the part of the retail store for refusing to allow a customer to enter rests on the “right . . . to purchase . . . personal property”—a right identical to the “right to contract” protected by Section 1981. Although the customer may seek to enter a contract to buy goods, the issue here is whether

⁶³¹ *Patterson I*, 485 U.S. 617 (1988).

⁶³² *Patterson II*, 491 U.S. 164, 178 (1989); see also AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 133-37 (1995) (criticizing *Patterson I* and *II*); Allan H. Macurdy, *Racism, Contract Ideology, and Formalist Legal Reasoning*, in *Patterson v. McLean Credit Union*, 18 N.Y.U. REV. L. & SOC. CHANGE 947 (1990-91).

⁶³³ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

⁶³⁴ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995); *United States v. Hays*, 115 S. Ct. 2431 (1995).

⁶³⁵ 42 U.S.C. § 1982 (1994). The cases which have applied § 1981 to private contracts generally involve long term contracts, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), contracts to attend private schools, *Runyon v. McCrary*, 427 U.S. 160 (1976), or membership in swimclubs, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973), rather than entry to stores to purchase goods.

the customer has a preliminary right to enter real property against the owner's wishes. The issue is one of access to real property; this issue is covered, if at all, by a public accommodations law, such as that passed in 1875 or 1964.

It might be argued that Section 1981 only requires states to enforce contracts made by African-Americans who are able to find others willing to contract with them (a power merely of enforcement).⁶³⁶ However, this view was repudiated by the Supreme Court in *Jones v. Alfred H. Mayer Co.* and *Runyon v. McCrary*, which interpreted Section 1981 as prohibiting racially motivated refusals to deal. Section 1981 not only compels enforcement of contracts but requires businesses to enter into contracts with African-Americans, at least to the extent that race cannot be a reason for refusing to contract (it provides the power to compel businesses open to the public to contract without regard to race). If Section 1981 prohibits racially motivated refusals to deal, it may well prohibit a public accommodation from refusing to serve a customer based solely on that customer's race. Although this argument is a plausible consequence of the Supreme Court's decisions in *Jones* and *Runyon*, it faces an obstacle. That obstacle is the effect this interpretation of the 1866 Civil Rights Act has on the 1875 public accommodations law. This brings us to the second argument the Supreme Court might accept against interpreting Section 1981 as a general public accommodations law.

This second argument requires one to consider the relationship between the Civil Rights Act of 1866, as passed in 1866 and re-enacted in 1870, the Civil Rights Act of 1871, and the federal public accommodations law of 1875. The 1875 public accommodations law, which was struck down in the *Civil Rights Cases*⁶³⁷ in 1883, provided that

all persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.⁶³⁸

This statute was passed less than ten years after the 1866 Civil Rights Act and only five years after readoption of that law in 1870 pursuant to the Fourteenth Amendment. The 1875 act was passed less than *four years* after the Civil Rights Act of 1871 created a damages remedy for civil rights victims. If the 1866 statute constituted a general public accommodations law requiring all places open to the public to

⁶³⁶ See Alfred Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and The Right to Buy Property*, 40 S. CAL. L. REV. 274, 305 (1967) (expressing this view one year before the decision in *Jones v. Alfred H. Mayer Co.* to the contrary).

⁶³⁷ 109 U.S. 3 (1883).

⁶³⁸ *Id.* at 9.

serve customers without regard to race, why was the 1875 statute necessary? Statutes *in pari materia* (on the same subject) should be read together in a manner that harmonizes them.⁶³⁹ Moreover, statutes should be read to give every word effect and to avoid surplusage and duplication.⁶⁴⁰

One possibility is that the 1875 statute provided a remedy that was not available under the 1866 and 1870 statutes. The Civil Rights Act of 1866, as enacted in 1866 and as re-enacted in 1870, provided for criminal punishment of a fine of up to one thousand dollars and up to a year in prison or both. It implied, but by no means clearly stated, that a civil action for damages might be brought against a private defendant who had failed to respect a plaintiff's right "to make and enforce contracts." The operative section of the Civil Rights Act of 1866 (section 1) granted all persons the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" while section 2 provided for criminal enforcement. Section 3 granted the federal district and circuit courts "cognizance [*jurisdiction*] . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."⁶⁴¹ Section 3 grants jurisdiction over *civil* claims brought under section 1. If the only remedy available for violation of section 1 is the criminal enforcement provided in section 2, then jurisdiction over civil claims would have been unnecessary and superfluous. This argument was made in the historians' brief to the Supreme Court upon reargument of *Patterson v. McLean Credit Union*.⁶⁴² One might argue, in response, that the 1866 Civil Rights Act is at least unclear about whether it intended to grant a civil damages remedy for violation of the rights granted in section 1 since it only mentioned jurisdiction for civil causes of action without expressly establishing those causes of action. Thus, the 1875 Act arguably clarified, for the first time, that a damages action was available against a public accommodation defendant with damages of up to five hundred dollars for each offense.⁶⁴³ Under this view, the 1875 statute was necessary to create a damages remedy that was not clearly provided in the 1866 statute. Whatever one thinks of this argument, it is arguably foreclosed by the Supreme Court's interpretations of the Civil Rights Act of 1866 in *Jones, Run-*

⁶³⁹ Llewellyn, *Canons on Statutes*, *supra* note 588, at 523 (citing *Milner v. Gibson*, 61 S.W.2d 273 (Ky. 1933)); SUTHERLAND, *supra* note 588, §§ 443-448.

⁶⁴⁰ Llewellyn, *Canons on Statutes*, *supra* note 588, at 525 (citing *In re Terry's Estate*, 112 N.E. 931 (N.Y. 1916)); SUTHERLAND, *supra* note 588, § 380.

⁶⁴¹ Civil Rights Act of 1866, § 3, 14 Stat. 27 (emphasis added).

⁶⁴² Amicus Curiae Brief for Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, and Mary Frances Berry, *Patterson v. McLean Credit Union (Patterson II)*, 491 U.S. 164 (1989).

⁶⁴³ 17 Stat. 13 (1871).

yon, and Patterson. Current interpretation of those laws *does* interpret them as both regulating private conduct and as impliedly creating a damages remedy.⁶⁴⁴

The debates surrounding passage of the public accommodations law of 1875 suggest that the law was intended to do much more than merely make clear that a remedy for damages was available for previously unlawful conduct. Opponents of the 1875 statute objected that it would “compel the social mixing of the races.”⁶⁴⁵ They could hardly have made this argument if the statutes passed in 1866 and 1870 were already thought to require public accommodations to serve customers without regard to race. Charles Sumner, the drafter and major proponent of the bill, argued that it was intended to abolish segregation⁶⁴⁶ and that this would not constitute compelled “social mixing.”⁶⁴⁷ The whole tenor of the debate revolves around the question of segregation versus integration. There is no indication that legislators in 1875 thought they were merely adding a private damages remedy to the criminal punishment already available for violation of the Civil Rights Act of 1866.⁶⁴⁸

In addition, the civil damages remedy in the 1875 civil rights act was limited to five hundred dollars while the criminal fine in the 1866 and 1870 acts went up to one thousand dollars. Moreover, if a plaintiff chose the civil damages remedy under the 1875 act, the defendant was immune from criminal punishment—including the thousand-dollar fine and the year in prison. It is hard to see why the opponents of civil rights would fight a statute that lessened the legal exposure of the defendant. They must have understood it to regulate previously unregulated behavior.

It could also be argued that interpreting the Civil Rights Act of 1866 as a general public accommodations law would have made the 1964 public accommodations law unnecessary. The 1964 statute pro-

⁶⁴⁴ Cf. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (holding, in an employment discrimination case, that an “individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages”); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (writing before the Civil Rights Acts of 1866 and 1870 were interpreted as providing for private remedies and noting that they did not authorize any private remedies).

⁶⁴⁵ DAVID DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 536 (1970).

⁶⁴⁶ Avins, *Racial Segregation*, *supra* note 460, at 1254; DONALD, *supra* note 645, at 537; FONER, *supra* note 221, at 504-05.

⁶⁴⁷ DONALD, *supra* note 645, at 536 (“This is no question of society, no question of social life, no question of social equality.”); Avins, *The Civil Rights Act of 1875*, *supra* note 456 (both proponents and opponents of the public accommodations law of 1875 considered it necessary and not merely duplicative of the substantive provisions of the Civil Rights Act of 1866).

⁶⁴⁸ See also Avins, *Racial Segregation*, *supra* note 460, at 1253-65 (further describing the congressional opposition to what was viewed as forced segregation imposed by the 1875 Civil Rights Act).

vided for no damages at all—it provided only injunctive relief. Injunctive relief is available under Section 1981 as well. If the 1866 statute already provided a remedy, then the 1964 statute served no purpose. Perhaps one could argue that it was not accepted in 1964 that injunctive relief was available under Section 1981 against a private defendant. After all, the first Supreme Court case to hold that it was (at least in the context of employment discrimination) was *Johnson v. Railway Express Agency*,⁶⁴⁹ decided in 1975. Again, as with the 1875 civil rights statute, it defies both history and logic to conclude that the 1964 statute was merely intended to create new remedies and procedures. The 1964 Civil Rights Act was intended to end segregation and to require inns, restaurants, and places of entertainment to comply with the common-law duty to serve the public without regard to race.

One can argue, of course, that the Civil Rights Act of 1866 was either wrongly disregarded or misinterpreted for one hundred years, thereby making the 1964 public accommodations law necessary. In fact, the Supreme Court has held that the 1964 and 1968 Civil Rights Acts did not implicitly repeal or limit the Civil Rights Act of 1866. This was partly on the ground that they were not duplicative because they created new remedies not available under the Civil Rights Act of 1866.⁶⁵⁰

To answer this objection, consider another argument for interpreting the Civil Rights Act of 1866 as not regulating the practices of retail stores—the explicit exemptions in the 1964 Act. We have already noted that the 1964 public accommodations statute fails to regulate retail stores. If the 1866 statute requires retail stores to serve customers without regard to race, why were retail stores excluded from the 1964 public accommodations law? If a remedy exists under the 1866 Civil Rights Act, why was it necessary to pass the 1964 Civil Rights Act? What is the meaning of the exclusion of retail stores from the 1964 statute? If they are covered by the 1866 statute, does this mean that the list in the 1964 act is, in effect, illustrative, rather than exhaustive? Or does it mean that the 1964 statute *amended* the 1866 statute, giving retail stores, for the first time, a right to discriminate on the basis of race?

Is it plausible to argue that Congress intended the remedies available under the 1964 public accommodations law to apply to inns, restaurants, and places of entertainment, but not to retail stores? Since the 1964 statute was limited to injunctive relief, it is hard to argue that it strengthened civil rights enforcement.

⁶⁴⁹ 421 U.S. 454, 459 (1975).

⁶⁵⁰ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Consider further, the “private club” exemption to the 1964 federal public accommodations law. That exemption states that “[t]he provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public”⁶⁵¹ The Supreme Court has never addressed the question of whether the private club exemption in Section 2000a (the 1964 act) should be read by implication into Section 1981 (the 1866 act). Lower federal courts have disagreed about this. Two federal courts have held that no Section 1981 claim can be brought against a private club exempted from Section 2000a by Section 2000a(e).⁶⁵² One court has reached the opposite conclusion.⁶⁵³

It is well accepted that passage of the 1964 Act did not imply repeal of Section 1981. At the same time, as one district court judge held in 1974 in *Cornelius v. Benevolent Protective Order of the Elks*,⁶⁵⁴ an irrevocable conflict between a statute that authorizes conduct and one that prohibits it must be adjudicated by applying the later act.⁶⁵⁵ As Judge Blumenfeld argued:

First, “courts may properly take into account . . . [a] later Act when asked to extend the reach of . . . [an] earlier Act’s vague language to the limits which, read literally, the words might permit.”

Second, “the provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage.”

Third, the legislative history of the 1964 Act supports a harmonization of the statutes. When Congress passed the 1964 Act, it believed it was enacting the first federal legislation prohibiting private discrimination in public accommodations. Prior to *Jones v. Mayer, supra*, sections 1981 and 1982 were thought to apply only to “state action. . . .” Thus, the absence of express language in the 1964 Act limiting the 1866 Act is hardly evidence of an intention not to have that effect.

In addition, the savings clause in the 1964 Act, 42 U.S.C. § 2000a-6(b), provides for the possibility of a limitation of earlier legislation because it provides that “nothing in [Section 2000a] shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law *not inconsistent* with [Section 2000a].” If the 1964 Act failed to regulate retail stores, this must evince an intent to allow such stores to be free from federal regulation. Even if Section 1981 provided a remedy, it would be overruled by Section 2000a since it would be “inconsistent” with Section 2000a

⁶⁵¹ 42 U.S.C. § 2000a(e) (1994).

⁶⁵² *Wright v. Salisbury Club, Ltd.*, 479 F. Supp. 378 (E.D. Va. 1979); *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182 (D. Conn. 1974).

⁶⁵³ *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990).

⁶⁵⁴ 382 F. Supp. 1182 (D. Conn. 1974).

⁶⁵⁵ *Id.* at 1201.

to prohibit conduct that was deliberately left unregulated by the Congress that passed Section 2000a.

This problem of the relationship between the 1866 Civil Rights Act and the civil rights statutes of the 1960s is not unique to the public accommodations area. The Fair Housing Act of 1968 has exemptions for owner-occupied dwellings with four units or less.⁶⁵⁶ Title VII of the Civil Rights Act of 1964, regulating employment, exempts employers with fewer than fifteen employees.⁶⁵⁷ Although lower federal courts have held that employers and housing providers exempt from the 1960s civil rights laws are covered by the 1866 Civil Rights Act, the Supreme Court has never answered this question directly.⁶⁵⁸

It is easy to see why the Supreme Court has never addressed directly the relationship between the exemptions in the 1964 and 1968 civil rights statutes and the 1866 Civil Rights Act. If the 1866 Civil Rights Act covers employers and housing providers and public accommodations exempt from the 1964 and 1968 statutes, why were those exemptions created? Were they attempts to narrow the scope of the 1866 statute? If so, then remedies should not be available under the 1866 statute. If they were not attempts to narrow the coverage of the 1866 statute, did Congress intend simply to deny particular remedies otherwise available under the 1964 and 1968 statutes to plaintiffs in such situations? No evidence exists to support such an interpretation. If, on the other hand, it was assumed in 1964 and 1968 that the Civil Rights Act of 1866 did *not* provide remedies for private discrimina-

⁶⁵⁶ 42 U.S.C. § 3603(b)(2) (1994).

⁶⁵⁷ 42 U.S.C. § 2000e(b) (1994).

⁶⁵⁸ The Supreme Court has implied, *but never held*, that employers with fewer than 15 employees are regulated by § 1981. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 n.33 (1994) (noting, but not holding that “[e]ven in the employment context, § 1981’s coverage is broader than Title VII’s, for Title VII applies only to employers with 15 or more employees, see 42 U.S.C. § 2000e(b), whereas § 1981 has no such limitation”); *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (noting but not holding that “Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U.S.C. § 2000e(b).”). In Justice Brennan’s concurring and dissenting opinion in *Patterson v. McLean Credit Union (Patterson II)*, 491 U.S. 164 (1989), he states that “§ 1981 is not limited in scope to employment discrimination by businesses with 15 or more employees, *cf.* 42 U.S.C. § 2000e(b), and hence *may* reach the nearly 15% of the workforce not covered by Title VII.” *Id.* at 211 (emphasis added). Justice Brennan cites no cases for this proposition, only a law review article, Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988). *Patterson II*, 491 U.S. at 211; *see also* *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 380-81 (1979) (Powell, J., concurring) (noting that “Congress, in the exercise of its powers under the Commerce Clause of the Constitution, has accorded less than full protection to private employees. It excluded several classes of employers from the coverage of Title VII, for example, employers of fewer than 15 employees. See 42 U.S.C. § 2000e(b).”).

The Supreme Court has never addressed the question of whether § 1982 applies to housing that is exempt from the Fair Housing Act of 1968. A couple of lower courts have held that such housing is covered by § 1982. *See Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974); *Johnson v. Zaremba*, 381 F. Supp. 165 (N.D. Ill. 1973).

tion, this suggests the reasons why the 1964 and 1968 statutes were deemed necessary by Congress. The 1968 case of *Jones v. Alfred H. Mayer Co.* constituted a new interpretation of the 1866 Act that effectively overruled one hundred years of marginalization of the Act. Yet this new interpretation creates significant problems for the Court. How is it to interpret the intent of the Congress that included exemptions in the 1964 and 1968 statutes? Are those exemptions rendered meaningless because of the Court's new, expansive interpretation of the 1866 Civil Rights Act? Consider, finally, that the current Supreme Court is the one that decided *Patterson*, not *Jones* or *Runyon*. The upshot is that, although several lower courts have held Section 1981 to apply to public accommodations exempt from the 1964 public accommodations law,⁶⁵⁹ it is substantially less than certain that the Supreme Court, as currently constituted, would hold that the 1866 Civil Rights Act prohibits retail stores from excluding customers on account of race.

Third, because the Civil Rights Act of 1991 amended Section 1981 substantively for the first time since the 1866 Civil Rights Act was repassed in 1870, the congressional intent that matters is that of the Congress in 1991, not 1866 or 1870. By overruling several Supreme Court cases, Congress intended a broader interpretation of Section 1981 than the cramped interpretation of it granted by the Supreme Court in recent years. At the same time, Congress did not provide that the Civil Rights Act of 1991 would overrule *all* prior case law. Rather, as to Section 1981, it was merely intended to overrule the *specific* holding of *Patterson*. That case had nothing whatsoever to do with public accommodations; it concerned the question of whether racial discrimination in terms and conditions of employment was covered by Section 1981 when the initial employment contract had no discriminatory features. Thus, it is arguable that nothing in the amendments to Section 1981 in 1991 changes our argument in any way.

How might the Supreme Court interpret Section 1981 or Section 1982 as prohibiting a retail store from discriminating on the basis of race? First, the Supreme Court *has* held that both statutes apply to private discriminatory conduct.⁶⁶⁰ In addition, the statutes not only ensure that individuals are granted the *capacity to contract* (if you can find someone willing to contract with you, your contract will be enforceable in court), but also place a *duty on others to contract without*

⁶⁵⁹ *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990) (applying § 1981 to a beauty parlor that refused to serve an African-American customer); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990) (applying § 1981 to a private club that rented its premises to the public when it refused to serve a black guest at a wedding reception).

⁶⁶⁰ *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

regard to race (allowing for a damages remedy for a discriminatory refusal to deal).⁶⁶¹ Refusal to allow a customer to enter the store is equivalent to a refusal to contract; it is a discriminatory refusal to deal. The license to enter the store is necessary to make good on the store's implicit invitation to deal.

Second, both statutes are worded very broadly. Section 1981 describes the "right to contract," while Section 1982 describes the "right . . . to purchase . . . personal property." There is no textual basis for interpreting the statutes as intended to apply only to certain types of contracts.

Third, the decided cases are not factually distinguishable from the retail store case. It is legal trickery to claim that no "right to contract" is involved in being excluded from a retail store. Sections 1981 and 1982 have been interpreted to grant remedies when a defendant has engaged in a racially discriminatory refusal to deal in the context of employment, housing, and schooling. One must enter a store before a contractual relationship can commence. Making a technical distinction between access to real property and the right to contract is an insufficient basis for finding no remedy under Section 1981. It is precisely this kind of specious distinction that the Court made in *Patterson* and that Congress rejected in the Civil Rights Act of 1991.

Fourth, although the Supreme Court has only addressed the issue through dicta, it has strongly suggested that Section 1981 covers employers who are exempt from Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). Moreover, the theory that interprets Section 1981 and Section 1982 as governing private conduct, first accepted by the Supreme Court in *Jones v. Alfred H. Mayer Co.*,⁶⁶² rests on the assumption that Congress did not intend to repeal any aspect of the Civil Rights Act of 1866 when it adopted the civil rights statutes of the 1960s and that it understood that it might be adopting legislation that was both duplicative in some respects and might have a different scope than the Civil Rights Act of 1866.

In addition, the private club exemption in Section 2000a(e) is an *express* exemption. There is no express exemption in the 1964 public accommodations law for retail stores. They are merely not listed. Even if Congress intended the private club exemption to modify Section 1981, there is no warrant for concluding that Congress intended to exclude retail stores from Section 1981. In the absence of an express exemption, we should conclude that Congress did not intend affirmatively to give such stores a right to discriminate; they only intended them not to be covered by Section 2000a(a) or Section

⁶⁶¹ *Jones*, 392 U.S. 409.

⁶⁶² *Id.*

2000a(b). Thus a remedy under Section 1981 or Section 1982 remains available.

Finally, whatever the original intent of the Congress that passed Section 1981 and Section 1982, the relevant baseline for interpretation is the Congress that passed the Civil Rights Act of 1991, amending Section 1981 for the first time since it was re-passed in 1870. The Civil Rights Act of 1991 was expressly intended to overrule restrictive and narrow Supreme Court interpretations of several civil rights statutes. In particular, the 1991 act overruled *Patterson*, explicitly rejecting the notion that the “right to contract” should be interpreted narrowly. This argument also answers the charge that interpretation of the 1866 statute as a general public accommodations law renders unnecessary the 1875 statute. The intent that matters is that of the 1991 Congress that amended Section 1981 in a manner that clarifies Congress’s intent to have a broad interpretation.

The federal and state courts should interpret Section 1981 as prohibiting racial discrimination in retail stores and other businesses not covered by Section 2000a. Such a holding would be consistent with the general view that the civil rights laws of the 1960s were not intended to limit the Reconstruction Civil Rights Acts in any way. It would also best comply with current settled values as well as the policies underlying the Civil Rights Act of 1991. This conclusion is especially powerful given the lack of state public accommodations laws applicable to retail stores in at least seven states. In addition, one state—Mississippi—expressly authorizes discriminatory choice of customers in retail stores. Unless some federal statute or state or federal constitutional provision preempts that law, no remedy could exist for racial discrimination in a retail store in Mississippi.

At the same time, one must conclude that it is by no means certain that the current Supreme Court would so interpret the law. This conclusion presents a powerful reason for altering the common-law rule as it has been understood for one hundred years. That common-law rule suggests that neither white citizens nor people of color have rights of access to retail stores. If the federal courts cannot bring themselves to interpret either Title II of the Civil Rights Act of 1964 or the Civil Rights Act of 1866 to provide a remedy for racial discrimination in retail stores, the common law is the last defense in those states without applicable state public accommodations statutes.

c. The Americans with Disabilities Act of 1990.—The Americans with Disabilities Act of 1990 contains an expansive definition of public accommodations and includes a long list of establishments that have duties to serve the public without discrimination on the basis of disability. In addition to common carriers, innkeepers, restaurants, and places of entertainment, the statute regulates all retail

stores, doctors' and lawyers' offices, laundromats, barber shops and beauty shops, funeral parlors, hospitals, insurance agents, and schools, including daycare centers.⁶⁶³

This statute is instructive for several reasons. First, by including a long list of places, the Americans with Disabilities Act (the ADA) will have an effect on judicial interpretation of Title II of the 1964 Civil Rights Act. It is likely to reinforce the notion that the 1964 statute was intended not to cover retail stores. Congress knows how to write an inclusive list if it wants to do so; the short list in the 1964 act contrasts sharply with the list in the ADA. This both strengthens the legal argument for a narrow interpretation of the 1964 act and may indirectly affect the debate about the coverage of the 1866 Civil Rights Act. It may affect the 1866 statute by again emphasizing that Congress knows how to be clear when it wants to do so. The 1875 public accommodations law was not intended merely to add a new remedy to the 1866 Civil Rights Act but to expand its coverage. If Congress wants to amend either the 1866 or 1964 statutes to include retail stores within their coverage, it is free to do so. Absent such amendment, however, since these federal statutes lack clear language for covering retail stores, such as that in the ADA, it is more likely the Supreme Court would interpret those laws to exclude retail stores.

I have argued that it is possible to use the more expansive definition of public accommodation in the ADA to argue for an expansive interpretation of the list in the 1964 public accommodations statute on

⁶⁶³ The statute provides, at 42 U.S.C. § 12181:

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

the ground that ambiguous statutes should be interpreted in light of later statutes and contemporary public values at the time the interpretive decision is being made. I think it is fair to say, however, that most courts would read the more expansive list in the ADA as evidence that the Congress that passed the 1964 statute *intended to exclude* retail stores and that it would constitute an illegitimate arrogation of judicial power to “rewrite” the statute to include retail stores within its ambit.

Second, the ADA is significant because it both represents the most recent legislative definition of the scope of the public accommodations concept and gives evidence of a widespread social consensus about the kinds of businesses that are thought by the public at large to have legitimate obligations to serve the public. In other words, it demonstrates that the list included in the 1964 Civil Rights Act is outdated and inconsistent with current settled values.

What significance does this fact have for interpreting the common law? Judicial role considerations are murky here. On one hand, some judges and scholars argue that the common law should not be changed when legislatures act in a particular field. When the legislature has acted in a field, going so far and not farther, it is appropriate to leave further changes to the legislature. Changing the common law upsets the compromises and policy balance reached by the legislature. The counterargument is that statutes are the best source of current public policy. It would be undemocratic for judges to continue rigidly to enforce common-law rules implemented in an earlier era when different public policies and social values prevailed. Courts should implement the current values underlying statutes by altering outdated common-law rules to further those policies. I have argued in favor of this second approach. Whichever argument is accepted, the expansive definition of public accommodations in the ADA is likely to affect the future development of both state statutory and common law.

2. *State Statutes.*—Seven states do not prohibit race discrimination in retail stores.⁶⁶⁴ They are Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas. Those states comprise more than twenty percent of the population of the United States (21.36% to be exact). *No state in the deep South (except Louisiana) has protected its citizens from racial discrimination in retail stores.* The entire region from Texas to North Carolina (excluding Louisiana) effectively allows racial discrimination in retail stores unless their common-law rules can be interpreted as prohibiting such discrimina-

⁶⁶⁴ For a comprehensive, but somewhat outdated, survey of state public accommodations laws, see Lerman & Sanderson, *supra* note 595. An older survey is Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841 (1965).

tion or segregation. Worse yet, Mississippi has a statute that expressly authorizes discrimination in retail stores, as well as other public accommodations.⁶⁶⁵ In these states, the common law thus assumes immense importance.⁶⁶⁶ Given the possibility that no federal law prohibits race discrimination in retail stores, the common law is the only remaining basis for a remedy under current law.

Several states still have statutes on the books that authorize places of public accommodation to choose their customers at will with no limitations. Those states include Arkansas (1959),⁶⁶⁷ Delaware (1875),⁶⁶⁸ Florida (1943),⁶⁶⁹ Mississippi (1956),⁶⁷⁰ and Tennessee (1875).⁶⁷¹ To the extent those statutes authorize racial discrimination by public accommodations covered by the federal public accommodations law of 1964 or the Civil Rights Act of 1866, they are preempted and unenforceable. To the extent those statutes have been impliedly repealed by later state laws, they are similarly unenforceable. The statutes in Arkansas, Delaware, Florida, and Tennessee have been

⁶⁶⁵ MISS. STAT. ANN. § 97-23-17 (1994) provides:

§ 97-23-17. Customers, patrons or clients; right to choose or refuse to serve; penalty for violation.

(1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve. The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

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

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

⁶⁶⁶ Of course in Mississippi, the common law is overridden by the state statute. The *only* remedy in Mississippi would be to interpret the statute as preempted by the Civil Rights Act of 1866 or to interpret the statute as implementing an unconstitutional deprivation of equal protection of the laws under either the Fourteenth Amendment or the Mississippi Constitution.

⁶⁶⁷ ARK. CODE ANN. § 4-70-101 (Michie 1991).

⁶⁶⁸ DEL. CODE ANN. tit. 24, § 1501 (1987).

⁶⁶⁹ FLA. STAT. ANN. § 509.141 (West 1995 Supp.).

⁶⁷⁰ MISS. CODE ANN. § 97-23-17 (1994).

⁶⁷¹ TENN. CODE ANN. § 62-7-109 (1990).

superceded by later legislation.⁶⁷² The Mississippi statute has been undermined—although not eviscerated—by the Supreme Court ruling in *Adickes v. S.H. Kress & Co.*⁶⁷³ In the absence of a state-enforced custom of promoting racial discrimination in retail stores, it may be the case that no federal law preempts the Mississippi statute. If the statute violates state or federal equal protection guarantees (which it may not under current law), the common law of Mississippi may still authorize racial discrimination in retail stores.

3. *Common Law.*—There is not much recent law on the question of the obligations of businesses to serve the public. Much of the field has been taken over by state statutes and local ordinances, in addition to the federal public accommodations law of 1964. Yet, a few common-law decisions exist. Most of the cases decided since World War II involve places of entertainment that are engaged in gambling, such as racetracks and casinos. These establishments are heavily regulated and have both commercial and legal incentives to keep criminals out of their places of business.⁶⁷⁴

The cases generally recite the rule that innkeepers and common carriers have duties to serve the public and that other businesses have no such duties.⁶⁷⁵ For example, in ruling in 1977 that a casino in Nevada could exclude a “card counter” who used his memory to count cards and win blackjack games, the Ninth Circuit explained that the “policies upon which the innkeeper’s special common law duties rested are not present” in the relationship between gambling casino and patron.⁶⁷⁶ The leading case, cited in most of the others, is the

⁶⁷² ARK. CODE ANN. § 16-123-105 (Michie 1993 Supp.); DEL. CODE ANN. tit. 6, § 4504 (1993); FLA. STAT. ANN. § 509.092 (1995); TENN. CODE ANN. § 4-21-501 (1995 Supp.).

⁶⁷³ 398 U.S. 144 (1970). *Adickes* held that a person who was excluded from a public accommodation because of her race could bring a § 1983 civil rights claim against the public accommodation if she could prove the existence of a state-enforced custom of acting in concert with state officials (including police) to enforce racial segregation. If the police enforce trespass laws in a manner that creates a state-enforced custom of requiring racial segregation or exclusion in public accommodations, a § 1983 claim might be shown. On the other hand, if the state does not have a general policy of enforcing racial segregation in places of public accommodation, but merely responds to particular owners seeking to exclude particular persons, a state-enforced custom may not be shown, even if the owner is racially motivated.

⁶⁷⁴ Perry Z. Binder, *Arbitrary Exclusions of “Undesirable” Racetrack and Casino Patrons: The Courts’ Illusory Perception of Common Law Public/Private Distinctions*, 32 BUFF. L. REV. 699 (1983).

⁶⁷⁵ See *Alpaugh v. Wolverton*, 36 S.E.2d 906, 908 (Va. 1946) (holding that restaurants and shops can serve whomever they like while innkeepers must serve everyone who applies for service).

⁶⁷⁶ *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977); see also *Madden v. Queens County Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y. 1947) (holding that racetracks, unlike common carriers and innkeepers, had an “unlimited power of exclusion”).

New York case of *Madden v. Queens County Jockey Club, Inc.*⁶⁷⁷ In that case, the defendant racetrack barred the plaintiff "Coley" Madden from attending races at its racetrack on the mistaken belief that he was "Owney" Madden, a well-known bookmaker. Plaintiff sued the racetrack, claiming that he had a right "as citizen and taxpayer—upon paying the required admission price—to enter the race course and patronize the pari-mutuel betting there conducted."⁶⁷⁸ Rather than admit it had made a mistake and allow him to patronize the racetrack, the defendant sought to establish an "unlimited power of exclusion" as a matter of law. The court agreed. Citing Wyman's law review article on *The Law of Public Callings as a Solution to the Trust Problem*,⁶⁷⁹ the court of appeals concluded that the common law right of access applied only to innkeepers and common carriers, not to places of amusement and resort, which enjoyed an "absolute power to serve whom they pleased."⁶⁸⁰ The right to exclude remained, according to the court, until expressly changed by the legislature.

The plaintiff in *Madden* argued that the racetrack operated pursuant to a state license and that it violated his rights to equal protection of the laws to allow a business licensed by the state to act arbitrarily.⁶⁸¹ The court rejected this argument, distinguishing between a "license" and a "franchise." A franchise, the court noted, was a privilege to do something that had previously been forbidden by the common law.⁶⁸² Since operating a racetrack with betting was not prohibited by the common law, the franchise concept did not apply.⁶⁸³ Operation of the racetrack existed by license of the state, which is "no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare."⁶⁸⁴ "The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the

⁶⁷⁷ 72 N.E.2d 697 (N.Y. 1947); see also *Brooks v. Chicago Downs Ass'n*, 791 F.2d 512 (7th Cir. 1986) (racetrack has no common-law duty to serve the public under Illinois law); *Uston*, 564 F.2d at 1216 (racetrack has no common-law duty to serve the public under Nevada law); *Ziskis v. Kowalski*, 726 F. Supp. 902 (D. Conn. 1989) (gambling establishment had no common-law duty to serve the public under Connecticut law); *Nation v. Apache Greyhound Park, Inc.*, 579 P.2d 580 (Ariz. 1978) (racetrack has no common-law duty to serve the public); *Tropical Park, Inc. v. Jock*, 374 So. 2d 639 (Fla. Dist. Ct. App. 1979) (racetrack has no common-law duty to serve the public); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981) (racetrack had no common-law duty to serve the public); *Silbert v. Ramsey*, 482 A.2d 147 (Md. 1984) (racetrack has no common-law duty to serve the public).

⁶⁷⁸ *Madden*, 72 N.E.2d at 698.

⁶⁷⁹ Wyman, *The Law of Public Callings*, *supra* note 26.

⁶⁸⁰ *Madden*, 72 N.E.2d at 698.

⁶⁸¹ *Id.* at 699.

⁶⁸² *Id.*

⁶⁸³ *Id.*

⁶⁸⁴ *Id.*

licensee under obligation to the public.”⁶⁸⁵ Without a statutorily imposed obligation, the racetrack owner maintains its right to control its property. The court quoted from *Woollcott v. Shubert*,⁶⁸⁶ a 1916 New York case granting a theater owner the absolute right to exclude a theater critic, to the effect that theaters licensed by the state are “in no sense public property or a public enterprise.”⁶⁸⁷ Rather, the “proprietor” retains the right to control his property; “[h]is right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.”⁶⁸⁸ In the absence of change by the legislature, the racetrack owner, as a “proprietor,” retains the property right to exclude non-owners from his property.

Thus, the primary arguments presented by the New York Court of Appeals for retention of the right to exclude for racetrack owners are (1) precedent; (2) the private property rights of the owner; and (3) the fact that the legislature has not acted to limit those common-law property rights. The baseline for the analysis is the property owner’s right to exclude, which persists unless limited by statute or common-law precedent.

Why does this baseline not apply to innkeepers and common carriers? One answer is precedent. The court presents no explicit argument to explain why precedent placed such obligations on common carriers and innkeepers. The court implies two reasons. First, by citing Bruce Wyman, the court arguably implicitly adopts his theory, which focuses on the problem of monopoly. Yet, it gives no convincing reasons why we should continue to accept this argument as applied to innkeepers and common carriers.

Second, the court relies on the franchise concept, suggesting that innkeepers and common carriers engaged in activities that had been prohibited “at common law,” while the common law contained no rules prohibiting operation of racetracks or gambling establishments. This implication is difficult, if not impossible, to sustain. At a time when it was considered illegal to operate an inn without a license from the state, it is very likely that it would similarly have been illegal to operate a gambling establishment without a state license, given the extensive use of licensing in the antebellum period and the dim view taken of gambling in the common law.

Other cases present two additional justifications for the common-law rule. The Arizona Court of Appeals ruled in 1978 in *Nation v. Apache Greyhound Park, Inc.*⁶⁸⁹ that the policy underlying the race-

⁶⁸⁵ *Id.*

⁶⁸⁶ 111 N.E. 829 (N.Y. 1916).

⁶⁸⁷ *Madden*, 72 N.E.2d at 699 (quoting *Woollcott*, 111 N.E. at 830).

⁶⁸⁸ *Id.*

⁶⁸⁹ 579 P.2d 580 (Ariz. Ct. App. 1978).

track owner's right to exclude is that it "must be able to control admission to its facilities without risk of a lawsuit and the necessity of proving that every person excluded would actually engage in some unlawful activity."⁶⁹⁰ This justification appears to apply equally to innkeepers and common carriers and thus does nothing to distinguish them. Similarly, like the Arizona Court of Appeals, the Seventh Circuit argued in *Brooks v. Chicago Downs Association, Inc.*⁶⁹¹ that the proprietor has a right not to face the possibility of being haled into court in which the proprietor would "have to . . . *prove* or *explain* that his reason for exclusion is a *just* reason."⁶⁹² In addition, regulation is unnecessary since "proprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so."⁶⁹³ In other words, "market forces would preclude any outrageous excesses—such as excluding anyone who has blond hair, or (like the plaintiffs) who is from Pennsylvania, or (even more outrageous) who has \$250,000 to spend in one day of betting."⁶⁹⁴ Given the existence of competition, "the market here is not so demonstrably imperfect that there is a monopoly or any allegation of consumer fraud."⁶⁹⁵ Thus, in the absence of a statute, it must be presumed that the business owner has a right to keep someone off its property for any reason deemed reasonable by the owner. Again, none of these arguments distinguishes common carriers and innkeepers. Today, racetracks are *more* likely to be local monopolies than are common carriers or inns. The only basis for continuing to treat the two categories differently is naked precedent.

The only exception to this uniform pattern of cases is the State of New Jersey. In 1982, in *Uston v. Resorts International Hotel, Inc.*,⁶⁹⁶ the Supreme Court of New Jersey gave a victory to the same card counter who had lost his lawsuit in Nevada in 1978. The court ruled that

when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline service stations, or to private hospitals, but to all property owners who open their premises to the public. Property own-

⁶⁹⁰ *Id.* at 582.

⁶⁹¹ 791 F.2d 512 (7th Cir. 1986).

⁶⁹² *Id.* at 517.

⁶⁹³ *Id.*

⁶⁹⁴ *Id.* at 518.

⁶⁹⁵ *Id.* at 519.

⁶⁹⁶ 445 A.2d 370 (N.J. 1982); *see also* *Marzocca v. Ferone*, 461 A.2d 1133, 1137 (N.J. 1983) (right to exclude patrons from place of public accommodation is limited by public policy).

ers have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.⁶⁹⁷ The language used by Justice Pashman in *Uston* rejects the idea that businesses open to the public have inherent rights as owners of property to determine whom they will serve. It is also reminiscent of the policy reasons for the right of access articulated in the antebellum era—that businesses that hold themselves out as open to the public thereby become, to a limited extent, public servants with duties to exercise their trade in a nondiscriminatory fashion. This reasoning rejects the classical theory of the public service corporation, as well as the justification based on monopoly. It also rejects the view of private property articulated by the New York Court of Appeals in *Madden* in 1947.

B. Expanding the Public Right of Access

1. *Justifications for Limiting the Right of Access to Public Access to Common Carriers and Innkeepers and a Critique of Those Justifications.*—What justifies granting members of the public a right of access to inns and common carriers but not to other places of business open to the public? Several arguments might justify this distinction: (a) precedent; (b) the problem of monopoly; (c) the need to protect the fundamental right to travel.

a. *Precedent.*—Most courts recite the rule imposing a duty to serve on innkeepers and common carriers without any justification other than the fact that it is the established rule under prior judicial decisions and that the rule has not been changed by the legislature. They refer to civil rights statutes as limits on the right of business owners to exclude and thereby suggest that this is an area addressed by legislation with which the courts should not interfere. This argument is premised on a particular conception of the judicial role and the relationship between the courts and the legislature.

First, this argument assumes that it is particularly important for courts to enforce established rules of property law. Property rights comprise particularly strong interests, which deserve substantial protection from the legal system. Takings of property rights are unconstitutional without compensation from the government. Thus, courts should be loathe to change the definition of property rights in ways that redistribute property from owners to nonowners. In addition, people rely on established rules of property in determining how to act; those rules shape the course of investments and reliance on those rules is crucial for the functioning of a well-regulated market system. Enforcement of established property rules is therefore both fair and promotes investment.

⁶⁹⁷ *Uston*, 445 A.2d at 375 (citations omitted).

Second, the legislatures of the states, as well as the United States Congress, have enacted substantial legislation in this area. The federal government has enacted a public accommodations statute, as have the overwhelming majority of the states. Those statutes entail policy compromises. They choose which businesses are subject to the duty to serve the public; some include retail stores and places of entertainment and some do not. They also choose which forms of discrimination to regulate, thereby choosing which vulnerable groups need or deserve protection. For example, no federal law prohibits sex discrimination in places of public accommodation. Some state laws prohibit discrimination on the basis of sexual orientation; most do not. Given the controversial nature of the choices in this area and the fact that legislatures have acted, the courts should refrain from altering common-law rules that concern the same legal question. The rule is that businesses other than common carriers and innkeepers have no duty to serve the public, unless a civil rights statute imposes such a duty. This is an area for legislative action. Changing the common law in the absence of statute would constitute an illegitimate interference by the courts in the legislative process and would be undemocratic.

Neither of the above arguments is persuasive. First, although it has sometimes been argued that businesses will lose income if they are not able to defer to the prejudices of their customers, it is not possible to credit the argument that the right to exclude customers at will is the kind of property rule whose alteration would upset substantial investment-backed expectations. To the extent that businesses defer to customer prejudices by excluding, for example, homeless people or teenagers, a change in the rule of law affects all businesses and is unlikely to put any particular business at a competitive disadvantage. In addition, the right of reasonable access does allow exclusion of patrons who are disruptive. Thus, alteration of this rule is likely to have little or no effect on profits and therefore not constitute the kind of property rule whose retroactive change will interfere with an individual's just expectations. It is therefore an appropriate legal rule to alter through the common-law process.

Second, contrary to the argument presented above in favor of the current rule, retention of the common-law rule defies current legislatures by stubbornly refusing to implement public policy as understood by the legislature. The current common-law rule is based on a particular conception of property rights that prevailed in the era of classical legal thought—otherwise known as the *Lochner* era. In addition, as I have demonstrated in this Article, the common-law rule was instituted as part of a general movement to limit rights of access for African-Americans—a process that culminated in racial segregation and the “separate but equal” doctrine of *Plessy v. Ferguson*. Giving businesses an absolute right to exclude thus not only protects a conception

of property rights that has been repudiated by both legislatures and the general public but allows businesses to act in a discriminatory fashion under the guise of a seemingly neutral rule of law.

Despite recent moves to deregulate property and protect property rights, no one has advocated repealing public accommodations laws. Quite the contrary: President George Bush, a Republican, signed the Americans with Disabilities Act of 1990, a statute with an enormous impact on society and that imposed costs on existing and future businesses. That statute, as well as the generally expansive state statutes, contain broad definitions of businesses that constitute "public accommodations" with duties to serve the public. Almost all the state statutes include retail stores in this regulated category. Retaining the common-law distinction between innkeepers, common carriers, and others defies current social values and public policy as implemented in both state and federal statutory law and implements a discredited social policy. It therefore can be considered undemocratic to continue to implement the common-law rule when it is so far out of line with current expressed legislative policy.

Another way to think about this question is to ask whether state legislatures are likely to overturn court decisions to impose on retail stores obligations to serve the public. It is unlikely they will so react. It is no answer to this observation that there are impediments to legislatures adopting laws and that change in the common law may create a result that is not supported by the majority of the legislature but that cannot be overturned easily. If there are impediments to overturning a judicial decision granting a general right of access to businesses open to the public, then there were impediments to the legislature's *adopting* a contrary rule in the first place.

While the point is debatable, there is no strong reason to believe that the court would be acting in an undemocratic fashion by altering the common-law rule to accord with current social values and public policy as expressed in statutes, when it is extremely unlikely such a common-law decision would be overturned by subsequent legislation.

b. Monopoly.—A second argument for the common-law rule is that innkeepers and common carriers are more likely than other businesses to represent monopolies or, if not monopolies, to be operating in markets with a limited number of competitors. At the same time, access to inns and carriers is necessary, justifying regulation of these markets.

This argument no longer makes sense, if it ever did. It is not clear that innkeepers and common carriers operate in a less competitive environment than other businesses. On the one hand, competition does exist for both inns and carriers. Cities uniformly have more than one hotel. This is also true for many towns. Towns that are small

enough to have only one hotel or none at all are likely to have limited competition for other businesses as well, such as grocery stores. Carriers face competition, as well. Passengers generally have a choice of airlines. Moreover, they can choose between bus, train, air, or motor vehicle transportation. On the other hand, to the extent that there are limits on competition for inns and carriers, it is not at all clear that other businesses are necessarily more competitive. In towns where only one bus line operates, there may also be limits on competition among grocery stores, hardware stores, clothing stores, and the like.

Both limited competition and the assumption that other businesses face substantial competition are doubtful as a general matter. Rather, more competition is likely to exist in all businesses in larger cities than in small towns. In small towns and villages, limits on competition are likely to affect many kinds of business. Thus, the monopoly argument fails to distinguish the businesses subject to the duty to serve from those not subject to the duty.⁶⁹⁸

c. The right to travel.—The right to travel is important, but so is the right to eat. A small town may have only one grocery store and limited (if any) public transportation. Yet, grocery stores are not subject to the common-law duty to serve. If the importance of the right to travel is the basis for placing a duty to serve on inns and common carriers, then surely the duty should extend to businesses that sell food and clothing.⁶⁹⁹ Such a rule would attempt to distinguish between “necessaries” and “luxuries.” This rule would not only be difficult to implement, but cannot be justified normatively. If the reason for imposing a right of access is a lack of competition, there is no reason to believe that competition is more of a problem for necessities than luxuries. If a right of access is granted because it is thought fair to grant members of the public rights to enter businesses open to the public without unjust discrimination, then again there is no reason to allow businesses that sell “luxuries” to exclude people arbitrarily. Places of entertainment have been traditionally excluded from the category of businesses with duties to serve the public, even though such places may very well operate in markets with limited competition—how many sports stadiums and theaters exist in most towns?—and even though exclusion from such places significantly harms individuals.

⁶⁹⁸ See Avins, *What Is a Place of “Public” Accommodation*, *supra* note 22, at 73 (arguing that only businesses that are monopolies should have a duty to serve the public).

⁶⁹⁹ See Robinson, *supra* note 582 (arguing that many “private businesses” not subject to regulation as “public utilities” or common callings provide “necessary” services and that the distinctions advanced to explain why some businesses are classified as “public service” businesses subject to substantial statutory and common-law regulation while “private” businesses are exempt from such regulation have been inconsistent and unconvincing).

2. *Current Policy Justifications for the Right to Exclude.*—If we assume that the distinction between inns and common carriers versus other businesses cannot be sustained, we still face the question of whether the baseline common-law rule should be a right to exclude or a right of access.⁷⁰⁰ The argument for a general right to exclude, absent a civil rights statute, goes as follows.

First, there is no need for regulation. Businesses are in the business of making money and do not exclude customers without a reason. This is true even if the business constitutes a monopoly. Market pressures and incentives are sufficient to cause businesses to act reasonably.

Second, not only is legislation unnecessary, but it increases the costs of doing business without any countervailing benefit. Since businesses can be trusted to admit customers unless they have a good reason to exclude them, adoption of a rule of law to this effect does nothing other than expose businesses to unfounded litigation. Property owners should not have to worry about litigation every time they make a decision to exclude someone. They are not claiming a right to act unreasonably, but a right not to be hauled into court to justify their actions every time someone is excluded. Businesses have a right to be free from fear of constant litigation over the way they manage their business. Thus, because profit motives can be trusted to induce businesses to act reasonably, common-law regulation does nothing but line the pockets of attorneys and subject businesses to needless litigation to prove that they acted reasonably. Common-law regulation also induces businesses to settle cases when the costs of settlement are less than the costs of litigation, thereby subjecting businesses to needless and unfair costs.

Third, to the extent that market pressures cannot be trusted to work—as in the case of invidious discrimination that is supported by the majority of customers—civil rights statutes adequately remedy the problem. If those statutes do not adequately remedy the problem, legislatures can amend them. The federal government adopted the Americans with Disabilities Act of 1990. A number of states have added sexual orientation as a protected category in recent years.

Fourth, limiting regulation of business not only benefits the economy by maximizing social wealth, but also protects individual liberty from overbearing government regulation. Businesses have property rights to manage their businesses without undue regulation by courts seeking to second-guess their decisions.

⁷⁰⁰ For another discussion of the policy justifications of the traditional common-law right to exclude, see Sutherland, *supra* note 23, at 538-40.

3. *Why the Right of Access Should Be Extended to All Places Open to the Public.*—First, while the current common-law rule appears neutral on its face, it has been my purpose here to demonstrate that it both originated in an attempt to deny equal rights to African-Americans and has the current effect of authorizing such conduct in states that lack their own public accommodations laws. A rule with racist origins may not necessarily continue to function to support racial discrimination, but this rule does so. By immunizing certain businesses open to the public from any regulation of their conduct toward their customers, it authorizes racial discrimination.⁷⁰¹ If one believes that such discrimination does not occur, I would simply remind the reader of the case of Denny's Restaurants and the Eddie Bauer incident.⁷⁰²

Second, individuals should not have to face invidious discrimination when they enter the marketplace. Members of the public have legitimate interests in not being excluded from access to the marketplace solely on the basis of group membership or immutable individual characteristics. This principle is in accord with current settled values, and adoption of a general right of access to businesses open to the public will fill a substantial gap in the law.

Third, the common-law rule allowing arbitrary exclusion of customers is based on an illegitimate conception of private property, which supposes that businesses open to the public are indistinguishable from private homes. On the contrary, by opening one's property to the public for business purposes, the owner waives a part of her right to exclude, since she no longer can claim any legitimate privacy interests.

Fourth, regulation of business conduct is required because market mechanisms will not, on their own, accomplish the result of weeding out invidious discrimination. It is not the case that competition among businesses or the profit incentive will ensure that access is provided to all on an equal basis. For example, because homeless persons are a small minority, and because widespread prejudice against homeless persons exists, the normal operation of the market will mean that consumer preferences (to not have to see homeless persons inside stores) will prevail.

Fifth, imposition of a general right of access will not increase business costs or subject businesses to added litigation. For one thing, the current rule has not prevented litigation. It did not prevent Kenneth Uston from suing a casino in Nevada in 1977. Nor did his loss of that lawsuit prevent him from bringing the same claim in 1982 in New

⁷⁰¹ For another argument that the common-law rule should be interpreted to prevent racial discrimination by public accommodations not covered by state or federal civil rights laws, see Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989).

⁷⁰² See *supra* text accompanying notes 4-6.

Jersey. Given the fact that it is generally accepted that businesses should not exclude people unreasonably, customers who feel they have been wrongly excluded have incentives to sue to change the current common-law rule. Thus, adopting a rigid rule that grants businesses freedom to serve whomever they like does not prevent litigation. On the other hand, adopting a right of access does not prevent businesses from excluding customers when they have a good reason to do so. There is therefore no reason to believe that a rule protecting a right to exclude protects businesses from litigation costs—or the need to explain themselves in court. There is also no reason to believe that adoption of a general right of access in New Jersey has posed any burden whatsoever on businesses there that they had not taken on themselves already.

Finally, if business will not be substantially burdened by a rule of law creating a right of access, the decision comes down to a judgment about the correct rule of law from a moral point of view. A general right of access to places open to the public should be adopted because it is not only consistent with the institution of private property, but better implements the values underlying a property system than does a rule granting businesses open to the public *carte blanche* to exclude customers at will. Those values are best implemented by adopting a legal regime that expresses and furthers them explicitly.

How do we define the values underlying a private property regime? After all, rights arguments exist on both sides of the issue. On the one hand, property owners have interests in being free to manage their businesses without undue interference from the state. If regulation is not necessary to induce them to act reasonably, it is sometimes better to eschew regulation even if regulation better expresses prevailing social values and customs. On the other hand, individuals have a right to participate in the marketplace without unjust discrimination. Businesses have no legitimate interests in excluding members of the public unreasonably. How do we adjudicate between these competing arguments?

The answer must depend upon a vision of the just contours of social relations. The elaboration and definition of public accommodations law, of necessity, involves the construction of a vision of the kinds of social relationships that should be both reflected in and fostered by the legal system. Defining the social vision that should be expressed by public accommodations law requires an elaboration of the meaning of private property in the context of businesses that serve the public. This requires an understanding of property as a social system.

IV. WHAT PUBLIC ACCOMMODATIONS LAW TEACHES US ABOUT PRIVATE PROPERTY

*What we do cannot be understood except in relation to those we touch.*⁷⁰³

—Justice Jack Pope
Supreme Court of Texas

*Property rights serve human values. They are recognized to that end, and are limited by it.*⁷⁰⁴

—Chief Justice Joseph Weintraub
Supreme Court of New Jersey

A. *Family Squabbles: Inconsistencies and Ambiguities in the Concept of Property*

What can the history of public accommodations law teach us about private property?⁷⁰⁵ It suggests that there are substantial limitations to the classical conception of property as ownership. This conception is premised on the notion that property rights identify an “owner” who has title to a set of valued resources with a presumption of full power over those resources. The history of public accommodations law suggests that the model of ownership built on the privacy and autonomy interests of a homeowner may be an inappropriate paradigm for conceptualizing the obligations and rights of owners of property open to the public. It further suggests that all rights—even the basic right to exclude—are limited by the rights of others and by social interests. Moreover, it suggests that property rules contain within them built-in distributive principles; the limits on the right to exclude created by public accommodations law are premised on an assumption that property rights cannot legitimately be invoked to exclude groups of people from access to the market based on invidious racial discrimination. The right to exclude may conflict with the right to contract to purchase property; thus the power to transfer property and the right to exclude need to be limited or shaped in ways that ensure the right to purchase property without regard to race. Perhaps most importantly, the rules of property not only determine the distribution of wealth; they also both reflect and structure the contours of social relationships.

The passage of the public accommodations law of 1964 required an enormous change in both popular and legal conceptions of private

⁷⁰³ *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 33 (Tex. 1978) (Pope, J., dissenting).

⁷⁰⁴ *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

⁷⁰⁵ On the relationship between critical work and reconstructive legal theory, see Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); J.W.G. van der Walt, *Squaring up to the Difficulty of Life: Hermeneutic and Deconstructive Considerations Concerning Positivism and the Rule of Law in a Future South Africa*, 2 STELLENBOSCH L. REV./STELLENBOSSE REGSTYDSKRIF 231 (1992).

property. In the debates about the bill, opponents strongly emphasized that it would interfere with property rights by destroying the owner's ability to control access to its property and would interfere with liberty by requiring persons to serve others against their will.⁷⁰⁶ In such a conception, the public accommodations law takes the right to exclude and destroys freedom of contract by forcing individuals to enter contracts against their will. Acceptance of the values underlying public accommodations laws required a new understanding of the rights of property owners in the marketplace. Property owners who serve the public have no right to exclude individuals or groups of customers on an invidious basis; rather, the right of all persons to contract and to acquire property entitles members of the public to enter the market on an equal basis. Refusal to serve a customer on the basis of race therefore deprives customers of the right to contract and destroys their ability to purchase property.⁷⁰⁷ Equality under the law requires that "a dollar in the hands of [an African-American] will purchase the same thing as a dollar in the hands of a [caucasian]."⁷⁰⁸

Discrimination in public accommodations does not exist only at the instance of a "private" business owner. That owner seeks to obtain the aid of the state in enforcing the trespass laws. By invoking the aid of the state, the owner's interests become imbricated with state action. This was the theory of *Shelley v. Kraemer*,⁷⁰⁹ striking down state enforcement of racially restrictive covenants. It is true that this theory, taken to the extreme, would remove any restraints on public changes in property rights, given that all property rights achieve their force through state enforcement. In order to give the theory normative significance, it is necessary to distinguish those structures of property rights that deny "equal protection of the laws" from those that are compatible with it. After all, the critics of *Shelley* argued that enforcement of voluntary agreements could not, by definition, constitute state action premised on denial of equal protection; neutral application of the law would enforce restrictive covenants made by African-

⁷⁰⁶ CAROTHERS, *supra* note 585, at 7 (discussing testimony of Florida Governor Bryant to the effect that "[m]en acquire property through personal effort; ownership is earned and therefore just. To compel a man to serve is to appropriate part of his rights of ownership without compensation and hand these rights over to the public in the name of equality."); *id.* at xix ("the source of the right to discriminate is allegedly the rights of ownership protected by the Fifth and Fourteenth Amendments of the Constitution").

⁷⁰⁷ *Id.* at 11 (noting that supporters of the public accommodations law distinguished between the privacy interests of homeowners and the implied obligations of businesses whose conduct in the "public" realm of the market is legitimately subject to regulation because "when a man chooses to go into business . . . he loses part of his freedom of action because his capacity to injure others has increased"); *id.* at 15 (stating that proponents stressed "equal opportunity" or the idea that "every man can grasp the opportunity to improve his economic and social position").

⁷⁰⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

⁷⁰⁹ 334 U.S. 1 (1948).

Americans excluding white families as well as such covenants by white owners excluding African-Americans.⁷¹⁰ In contrast, the supporters of *Shelley* attempted to defend its claim that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.”⁷¹¹ Supporting such an interpretation of equality requires a conception of property rights that would define certain state actions as uses of public force to create and sustain a racial caste system. This, in turn, requires a willingness to focus attention on, and to judge substantively, the social relationships shaped by property rules.

Property rights regulate relations among people by distributing powers to control valued resources. Property rights often involve bundles of particular entitlements. Among the most important of those entitlements are the privilege to use property, the right to exclude nonowners, the power to transfer property, and immunity from nonconsensual harm or loss. It is often assumed that these rights naturally go together and that a property system based on them is feasible. Yet if property involves a bundle of rights, it is not at all clear that all the sticks in the bundle fit comfortably together.

Liberties such as the privilege to use or develop resources as one sees fit may conflict with rights to be secure from nonconsensual invasion or loss; uses of property that further the owner’s interests may harm others or interfere with their settled and legitimate expectations.⁷¹² The owner’s right to exclude and her power to transfer may conflict with—and may be limited by—the public’s rights of access to the market without discrimination based on race, sex, or disability. If the individual entitlements comprising ownership constitute a family of rights of a certain class, the members of the family do not necessarily all get along with each other all the time. How should such conflicts be resolved?

Perhaps the notion of protecting reasonable expectations will help us. Yet, some of the legal rules defining property entitlements protect expectations actually developed by individuals in the course of dealing with each other to exploit or enjoy resources, while other rules *shape* those expectations by determining which expectations are reasonable. Rather than reflecting *what people expect*, they define what people have *a right to expect*. What happens when actual expectations deviate from moral or legal judgments about which expectations are legitimate or justified?

In analyzing such questions, scholars and judges appeal, more or less unconsciously, to a conception of property. The classical conception focuses on the concepts of title and ownership and presumes full

⁷¹⁰ Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777 (1989).

⁷¹¹ *Shelley*, 334 U.S. at 21.

⁷¹² Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

control of specific valued resources by the “owner,” backed up by state power. This conception remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law. The legal realists criticized the classical conception and argued that we should disaggregate property rights into their component parts, discussing each particular entitlement separately. Such a view presumes no utility for the general concept of property. I will present and criticize each of these conceptions. I will then develop a new model of property, which conceptualizes it as a social system composed of entitlements that shape the contours of social relationships. I will argue that the traditional classical conception of property centered around absolute control of an owner should be replaced by some version of this social relations model.

B. *The Classical Conception*

1. *Title and Ownership: Absolute Powers Within Rigid Boundaries.*—The classical view is premised on the notion that property rights identify a private “owner” who has “title” to a set of valued resources with a presumption of full power over those resources. That property may be subject to some state regulation, but this regulation is always layered on top of the baseline property right of the title holder. This view presumes that it is always possible to identify some person as the “title holder” and that, in the absence of a contract or specific rule of law to the contrary, the “title holder” is an “owner” who possesses the full bundle of privileges, rights, powers, and immunities⁷¹³ that accompany fee simple title to property. The concept of ownership sometimes refers to the consolidation of all these rights in the same person. Often, however, the title holder is still conceptualized as the owner even when most of her rights have been transferred to others. In either case, the image underlying ownership is absolute power of the owner within rigidly defined spatial boundaries. The classical conception assumes (1) consolidated rights; (2) a single, identifiable owner of that bundle of rights; (3) who is identifiable by formal title rather than informal relations or moral claims; (4) rigid, permanent rights; (5) absolute control; (6) conceptualized in terms of boundaries that protect the owner from nonowners by granting the owner the absolute power to exclude; and (7) full power of the owner to transfer those rights completely or partially on such terms as the owner may choose.

This classical conception of property underlies the common-law rule, which grants most businesses the absolute right to exclude and immunizes them from the duty to serve the public. It is a conception that assumes that no fundamental difference exists between private

⁷¹³ Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

homes and businesses and that “private property” (owned by nongovernmental actors) remains “private” even though it is open to the public. It places a heavy burden on those wishing to limit the right to exclude to promote social policies such as equality.

2. *Critique of the Classical Conception.*—The classical conception is supported by widely shared norms of promoting autonomy, security, and privacy. It is also premised on the value of protecting reasonable expectations. Yet, the classical model of property is distorted and misleading, both because it is descriptively inaccurate and because it is normatively flawed.⁷¹⁴ The classical model misdescribes the way private property systems normally function by vastly oversimplifying both the kinds of property rights that exist and the rules governing the exercise of those rights. It also distorts normative judgment by hiding from consciousness relevant moral choices and by wrongly allocating burdens of proof. The classical conception makes it hard to formulate legal issues about property in a manner that is sufficiently nuanced and responsive to the normative choices implicated in conflicts over property rights.

The classical view not only assumes that most rights associated with property are ordinarily consolidated in the same owner but that it is possible to determine in a relatively nondiscretionary manner who that owner is by reference to formal indicia of title. In other words, the classical view presumes that it is easy to tell who the title holder is. But in many cases, this is not easy at all. When a house is subject to a mortgage, for example, some states in the United States grant title to the homeowner, reserving a lien for the bank, while other states grant title to the bank and grant the owner a mere equity of redemption. When a couple divorces, title to the house may be shifted from husband to wife or vice versa, as part of the property division awarded by the court. Thus the formal title holder’s rights may be defeasible on divorce; it is not clear why one should not conceptualize the non-title-holding spouse as the owner of rights in the property, which can be confirmed by a property division on divorce. Additionally, title can be lost through longstanding possession by a nonowner under the doctrine of adverse possession. Similarly, an owner who gives others permission to occupy a portion of her land may be held to have waived her right to exclude them under the doctrines of constructive trust or easement by estoppel. Once again, the formal title holder may not be the lawful title holder if circumstances are such that the elements of adverse possession have been satisfied. Title is sometimes based on formal transfer and written documents and sometimes based on actual possession (as in the adverse possession case) or on supervening rela-

⁷¹⁴ See Underkuffler, *On Property*, *supra* note 50; Robert W. Gordon, *Paradoxical Property*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* (John Brewer & Susan Staves eds., 1995).

tionships (as in the case of divorcing spouses or easements by estoppel).

Who owns a corporation? We are accustomed to saying that the shareholders own it. Yet shareholders' rights have traditionally been severely limited in the United States. Courts have strictly limited the ability of shareholders to interfere with the day-to-day management of the business. More fundamentally, courts have placed roadblocks in the way of shareholder attempts to present independent candidates for the board of directors or to communicate with other shareholders. It has taken a new movement in recent years to reassert the rights of shareholders as owners.⁷¹⁵ Moreover, recent statutes have authorized corporate boards of directors to take into account the interests of stakeholders other than the shareholders when formulating corporate policy, such as workers, creditors, and the communities in which corporations operate.⁷¹⁶

Title is important to the classical conception because of the presumption that owners ordinarily win disputes about use or control of property. If it is not easy to identify which of several claimants is the title holder, it will be difficult to assign ownership rights and thus to adjudicate disputes concerning control of the property. Yet a simple, noncontroversial, morally defensible method for identifying the title holder is exactly what we lack.⁷¹⁷

Even if one could easily identify the title holder, we must recognize that many disputes about property involve conflicts *among* title holders. Consider land use disputes among neighbors. Property uses by one owner or title holder that interfere with the legitimate interests of neighboring owners are adjudicated through nuisance law as well as specific rules about particular types of interests.⁷¹⁸ In these situations, the legal issue involves multiple title holders whose property uses conflict. Such cases cannot reasonably be resolved or analyzed by reference to the concept of title.

In other cases, property rights in the same parcel of land have been divided—by contract or law—between two or more persons. If we observe the operation of private property systems, we see that full consolidation of property rights in the same person is the exception rather than the rule; most property rights are shared or divided among

⁷¹⁵ ROBERT A.G. MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* (1991).

⁷¹⁶ Singer, *Jobs and Justice*, *supra* note 50.

⁷¹⁷ Perhaps more importantly, as I discuss below, it is not clear that it is morally appropriate to presume that the "owner" win certain types of disputes over land use; this presumption may require "nonowners" to defend their claims to have rights to use the property when it is the owner who should, in all fairness and justice, have to justify the harms her property use causes those ostensible "nonowners."

⁷¹⁸ Special rules exist to allocate water rights (conflicts over ownership of groundwater, the use of surface streams, or the disposal of diffuse surface water), support rights (both lateral and subjacent), and light and air.

several persons. Indeed, almost every interesting dispute about control of or access to property can be described as a conflict between property holders or between conflicting property rights. Typical situations include relations between landlords and tenants, mortgagors and mortgagees, homeowners and lien holders, servitude or easement owners and servient estates, present and future estate owners, parents and children, husbands and wives, testators and heirs, homeowners associations and unit owners, shareholders and managers, trustees of charitable foundations and their beneficiaries, employers and employees, creditors and debtors, buyers and sellers, bailors and bailees. In all these cases, property rights in the same parcel of land or structure or resource have been divided among two or more parties. When the owners of different rights in the same resource act in ways that impinge on each other's legally protected interests, we face the same problem present in nuisance cases—action by one owner that interferes with the use and enjoyment of another's property rights. In these cases, title and ownership are not helpful ways to conceptualize the dispute. Adjustment of the relationship between the parties is required.

Even if conventions exist to identify the owner or title holder, and even if no conflict of owners is involved, knowing who the owner is does not help us to adjudicate most disputes concerning property. I often joke that most of the rules in my property casebook describe situations in which the owner loses.⁷¹⁹ Property owners' rights are often limited to promote the interests of nonowners.⁷²⁰

Consider public accommodations laws that prohibit businesses open to the public from excluding or segregating customers on the basis of race. Convention dictates that the business or individual who has title to the land or who is the lessee of the space is the owner and that customers—members of the public—are not called owners. The most central right associated with property, according to tradition and current constitutional law, is the right to exclude. Yet federal and state statutes substantially limit the right of the owner to exclude members of the public on an invidious basis like race. This is not a minor glitch in the system. It cannot usefully be described as a minimal interference with the property rights of the owner. It was not until 1964 that federal law unambiguously prohibited racial discrimination in places of public accommodation, and even then the statute did not regulate most businesses open to the public.

⁷¹⁹ See SINGER, *PROPERTY LAW*, *supra* note 620.

⁷²⁰ Of course, when the "owner" loses, one could easily state that some of the property rights we originally thought were vested in the owner are in fact owned by the person we called the "nonowner." In such cases, ownership rights have been shared or divided among the parties, and each is a partial owner of some of the sticks in the bundle of rights comprising full fee simple title.

The fact that property rights are often limited to promote the interests of other property owners or the public at large suggests the reason why the classical conception of property has distinct disadvantages from a moral point of view. The classical conception leads one to attempt to identify the owner and to presume that the owner's interests prevail in any dispute over use of the property unless some sufficiently strong reason can be evinced to strip the owner of her rights. In this way, the classical conception allocates burdens of proof.

In the abstract, it appears useful to adopt conceptions that establish presumptions, which then allocate burdens of proof. Indeed, one might characterize all property rules as creating presumptions about who gets to control particular aspects of the external world. At the same time, the classical conception of ownership makes it hard to formulate legal issues about property in a manner that is sufficiently nuanced and responsive to our rational, intuitive judgments about the relevant moral features of some disputes about property use.⁷²¹ The ownership model of property utterly fails to incorporate an understanding of property rights as inherently limited both by the property rights of others and by public policies designed to ensure that property rights are exercised in a manner compatible with the public good. It makes "regulations" of "property" appear inherently suspect. It presumes that when property rights are limited by government regulation, an evil has been effectuated that bears a heavy burden of justification. It places the burden of proof *consistently* in one direction. It has no vocabulary for describing or expressing certain types of property use as themselves inherently suspect. Nor can it adequately express the existence of conflicts between property owners.

For example, public accommodations laws appear to limit and interfere with property rights in order to promote equality. To justify them, we must explain why interests in equality justify taking or interfering with established property rights. The classical conception of property suggests that all owners have rights to exclude nonowners with a few exceptions; business owners have the same rights as homeowners to determine whom they will admit to their property. An alternative model might presume, for example, that businesses generally held open to the public have effectively transferred some of their property rights to the public at large. Businesses open to the public are in the public world in a way that homes are not. They are public accommodations. This model suggests that property used in a way that affects the interests of nonowners or the community at large can be regulated in a way that responds to public policy concerns without impinging illegitimately on the owner's property rights. In such cases, it might be preferable to conceptualize the property right not in ab-

⁷²¹ See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

stract terms with a presumptive right in the title holder to exclude, but in more situated terms as a public accommodation—a form of property ownership that has limitations on the right to exclude built into it. If this model is chosen, the burden will be on the owner of the public accommodation to justify her claim to be entitled to exclude members of the public arbitrarily. Rather than asking the excluded patron to justify her claim to access to property possessed by another, one could conceptualize public accommodations laws as remedies available against actors who wrongfully violate the rights of others to contract and purchase property in the marketplace. The presumption should be that there is an equality right to participate in the market; actions that limit this right must be justified by market actors. The classical conception warps our understanding of the policies involved in the context of public accommodations law. It is pernicious in defining the moral question in an inappropriate manner, not only by putting the burden of proof on the wrong party but by defining a discriminatory exclusion from the market system as a presumptive exercise of protected property rights.

Perhaps more importantly, the ownership conception hides from consciousness the fact that exclusion from the marketplace on the basis of race interferes with the ability of those who are excluded to contract to purchase property in their own right. By presuming that the basic question is one of identifying the owner and justifying limits on the owner's rights, the classical conception obscures the conflict of interests that must be adjudicated by reference to a moral theory. Further, it obscures the fact that property rights exist on both sides: the right of the store owner to exclude and the right of members of the public to enter public accommodations and to engage in contractual relationships to purchase property. Truthful recognition of the conflict is a prerequisite to an adequate moral judgment. A better approach would express the inherent tensions within both property law and theory, freeing for judgment the actual moral choices implicated in developing property law.

C. *The Legal Realist Conception*

1. *Rights as Legally Protected Interests and Property as a Bundle of Rights.*—According to the legal realists, from Hohfeld to Corbin to the American Law Institutes' *Restatement of Property* to Thomas Grey's famous article on the disintegration of property, property has been destroyed as a useful concept.⁷²² It merely describes a collection

⁷²² RESTATEMENT OF PROPERTY (1936); Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980); Arthur Corbin, *Offer, Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

of legally protected interests that can be disaggregated into their component parts. Under this conception of legal rights, the crucial steps are (1) identifying the interests for which individuals seek legal protection and (2) using policy analysis to adjudicate conflicts among those interests and to determine the appropriate extent of legal protection for each interest. Further, this conception describes legal relations among people with regard to control of valued resources, rather than relations between persons and things. Under this conception, property as a category has no utility except to obfuscate the underlying policy choices that must be made at the level of the detailed individual rules. Specific entitlements and policy concerns should replace the formalist and conceptualist attempt to imbue the concept of property with operative force in its own right.

2. *Critique of the Bundle of Rights Idea.*—This view is appealing because it requires attention to specific social contexts, disputes, relationships, and relevant values and policies, rather than the use of formalistic arguments to adjudicate those disputes. It rightfully rejects the idea that a simple, all-encompassing theory can cleanly answer questions about property law. Despite its attractions, the legal realist view is limited and defective for one major reason: it fails to recognize the enduring cultural power of the concept of property for both citizens and judges. The ownership idea—for good or for ill—is extremely powerful and affects the way legal and social problems are analyzed. Demonstrating that it can be deconstructed does not deprive it of cultural force as an organizing category. It retains its power to create unconscious presumptions about who should win particular disputes by appealing to common-sense assumptions about who the owner is. In addition, it affects public discourse in ways that limit the creation of alternative solutions to public problems by presuming that all rights over property are ordinarily consolidated in the owner and that they are presumptively absolute.⁷²³

We should recognize that property concepts perform a number of rhetorical functions. First, common discourse often identifies a particular person as the owner even when property rights have been split or distributed among several (or many) persons. Identification of someone as the owner establishes a presumption that the owner wins any dispute over use of the resource. In other words, the ownership concept structures legal doctrines in a rule-exception format to the effect that owners win unless specified conditions are established. Second, the property concept sometimes creates an assumption that certain sets of rights are bundled or consolidated together and must be owned

⁷²³ Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) (arguing that the legal realist image of disaggregated property failed to deprive the concept of property of operative significance).

by the same person. This idea is implemented, for example, through rules about estates and compulsory contract terms. Sometimes, however, the assumption is that particular rights can be disaggregated, as in landlord-tenant relationships. The structure of property doctrine effects presumptions about allowable forms of disaggregation. Third, calling something a property right often reflects an intuition that the right in question implicates a strong moral claim to immunity from loss by the voluntary action of both private and public actors, and places a heavy burden on those seeking to regulate or limit the property right. Fourth, the property right idea often creates a perception that there should be a strong presumption that the right in question is alienable in the marketplace, and conversely, that nonalienable interests do not count as property rights.

Given the continuing force of the classical conception, it is important to bring to consciousness the hidden work of the property idea in setting presumptions such as these. In some cases, these presumptions are justified. But in other cases, it is better from the standpoint of either social justice or efficiency to reconceptualize the legal problem in question to alter the unconscious presumption. This might be done by shifting the presumption to the other party—perhaps by identifying that party as the owner. Or it might be done by describing the situation as one in which legitimate property rights exist on both sides. By reconceptualizing the dispute in these ways, we can even attempt to harness the property conception in a way that can alter burdens of proof in a manner that more closely accords with our moral intuitions. I do not pretend this will be easy, but it must be done.⁷²⁴

The legal realist wrongly assumes that it is possible to engage in policy analysis without implicit baselines. Property concepts distribute burdens of proof. The cases that apply the traditional common-law rule giving businesses the freedom to choose their customers appeal to the notion of private property as their fundamental justification. Characterizing this as a policy choice does not aid in changing the perception of the appropriate baseline to apply in the absence of legislative action to the contrary. Only the creation of a new category—the public accommodation—can work to redistribute burdens of proof in a morally acceptable manner. Recognizing the role that the property idea plays in setting the baselines for analysis is crucial to developing an adequate conceptual vocabulary to understand and address legal disputes about the meaning and structure of property law rules. Lawyers know that when we cannot figure out how to adjudicate a dispute between conflicting interests, values, or policies, we often do so by default—through adopting presumptions and burdens

⁷²⁴ See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990) (suggesting that it will not be easy to reform the property concept).

of proof. Property law, to a large extent, is about allocating those presumptions and those burdens. We need to reconstruct policy analysis by elucidating the structure of the tensions *within the concept of property itself*.⁷²⁵

D. The Social Relations Model

1. *Entitlements Shaping the Contours of Social Relationships.*— Both the classical and the legal realist views of property tend to focus on individual rights in isolation. The classical view focuses on the relation between the owner and the thing, presuming that the state cannot interfere with the owner's power over the thing. The legal realist view shifts attention to relations among people with respect to the valued resource. At the same time, it both individualizes those relationships and universalizes the policies that justify the rules regulating those relationships. The legal realists jumped back and forth between individual interests and social policies. What they lacked was an adequate language that could comprehend social relationships as mediating terms. In addition, because of their preoccupation with combating formalism, the realists were loathe to generalize. They saw rules in particular context and failed adequately to describe property as a system.

I propose a conception of property that is distinct from both the classical or the legal realist models: the social relations model. This model reconceptualizes property as a social system composed of entitlements that shape the contours of social relationships. The legal realist model was correct in recognizing that property rights can be and often are disaggregated. It was also correct in understanding property laws as beset by conflicting values and competing interests. Most important, it was correct in analyzing property rights in terms of human relationships rather than relations between persons and things. However, the classical model was correct in recognizing the pull of the ownership ideal in our culture generally and in the legal system in particular, especially the role property rhetoric plays in setting baselines for legal analysis. Moreover, it suggests, as the legal realist conception did not, that it may be possible to generalize about the tensions within property law and that both property doctrine and policy analysis contain a socially constructed structure that can be elucidated.

We should understand property as a social system. That system involves, not relations between people and things, but relations among people, both at the level of society as a whole (the macro level) and in the context of particular relationships (the micro level). Four features

⁷²⁵ See John A. Powell, *New Property Disaggregated: A Model to Address Employment Discrimination*, 24 U.S.F. L. REV. 363, 379 (1990); Underkuffler, *supra* note 50.

of this system deserve emphasis. First, multiple models exist for defining and controlling property relationships. Second, property rights must be understood as both contingent and contextually determined. Third, property law and property rights have an inescapable distributive component. Fourth, property law helps to structure and shape the contours of social relationships.

2. *Multiple Models of Property.*—

a. Bundles of rights.—Multiple models exist for defining and controlling property relationships. These models can be described in more detail than the specific level of individual rules that were the focus of legal realist analysis. They effectively create paradigms that function as baselines in the consciousness of decisionmakers. Bringing these paradigms to the forefront should help to emphasize and clarify the choices that decisionmakers need to make in setting particular legal rules.⁷²⁶

When most people think of property, they have an image in their minds of an individual owning a plot of land with a house on it. The land has clear borders, and no doubt exists about who the owner is. Only one person is involved. Others enter the picture only if the owner invites them in or voluntarily transfers some of his rights to them.⁷²⁷ The “ownership” model is misleading even in the case of ownership of a single family home. It is particularly misleading if one considers the multiple contexts in which property is owned—in the family, in the business world, and by government entities. When our view is broadened, it becomes evident that we have multiple models of property in the legal system rather than the simple ownership model.

It is implicit in our understanding that we have different models of property in different spheres of social life, such as family relations, business organization, and housing. Multiple models exist even within each of these social spheres. In the family, we have multiple models of marital property both during marriage and at divorce (community property versus separate property; enforceable antenuptial agreements versus equitable distribution), child support (children’s claims on family assets), inheritance, parental support, obligations to care for siblings or other relatives, and marital ownership of real estate (tenancy by the entirety). In the field of housing, we have models of ownership that include individual ownership, joint ownership (tenancy in common, joint tenancy), leasing arrangements (perhaps subsidized by

⁷²⁶ powell, *supra* note 725.

⁷²⁷ I have deliberately used the masculine pronoun. The traditional image of the owner assumes the family members who may share use of the property with the owner have rights derivative of that owner and the traditional, patriarchal structure of the family—supported by legal rules—gave control over the property to the man.

government welfare payments), cooperatives, condominiums, subdivisions, homeowners' associations, ground leases, charitable land trusts, limited equity cooperatives, tribal property (including original Indian title, recognized tribal title, and restricted trust allotments), public housing, and government property. In the field of business, we have individual proprietorships, partnerships (both general and limited), corporations (close and public), quasi-public corporations and non-profit charitable institutions, such as hospitals, universities, museums, and private trusts and foundations.

These models are not merely glosses on the basic "title" or "full ownership" theory. Many of them depart so far from the basic model of a single owner with consolidated rights that use of that basic model is essentially misleading as a conceptual baseline from which to understand and critically analyze legal rules regarding that form of social relationship. For example, community property and equitable distribution laws reverse the usual presumption and vest interests in family members without regard to title; for many kinds of property, title is substantially irrelevant in dividing those interests on divorce. Similarly, title is not helpful in adjudicating conflicts between shareholders and managers in corporate law. Traditionally, corporate law has narrowly circumscribed the rights of shareholders. Recent expansions in those rights have been accompanied by state laws that arguably cut back on shareholder rights by requiring or authorizing managers to consider the interests of constituencies other than shareholders in managing corporate affairs.⁷²⁸

Explicitly identifying multiple models of property can help to alter presumptions and burdens of proof in appropriate directions. Homeowners should be presumptively entitled to exclude others from their homes, but public accommodations should be presumptively obligated to serve members of the public who accept their implicit invitation to enter the business for service. Single persons generally possess immunities from forcible conscription of their property for the needs of others; those who marry, enter into long-term intimate relationships, or have children, on the other hand, have implicit obligations to their spouses, lovers, and children that cannot be avoided without adequate cause.

b. Formality and informality as sources of property rights.— The classical conception of property suggests or assumes that ownership can be determined by reference to relatively formal indicia of title through such written documents as deeds, wills, marriage certificates, and leases. It may be useful to adopt presumptions that title vests in the person identified in those formal documents. At the same

⁷²⁸ Singer, *Jobs and Justice*, *supra* note 50.

time, numerous legal rules protect reliance interests of persons who have developed relationships with the owner or have been granted informal access to the property.⁷²⁹ Oral representations, informal permission, a course of dealing, a personal relationship, and business custom all form crucial cultural backgrounds to property arrangements and often prevail over formal indicia of title. It may be possible to develop presumptions about the kinds of situations in which such relationships (rather than formal title) constitute the determining factor for allocation of property rights.

3. *The Contingency of Property Rights.*—

a. Property situated in human relations over space and time.—Property rights must be understood as both contingent and contextual. That context includes both effects of exercises of property rights on others and changing conditions and values. Property rights are contingent because changing circumstances change the rights that are recognized by the system. This is true of *all* property rules, not merely rules that, within themselves, refer to effects on others, such as nuisance law. Effectively, the model of property law contained in nuisance doctrine can be used as the basis of a new conceptual system for property law in general.

The classical title theory of property rights conceptualizes them as fixed and certain, alterable only when the owner voluntarily relinquishes them. Property rights are *owned* and cannot be taken without the owner's consent. The meaning of ownership is that the owner has the right to use the property as the owner sees fit without having to account to others for how the property is used. This model legitimately focuses on property rights as describing strong claims to security for protection of the right to control the use of particular resources. At the same time, this model fails to recognize that all property rights in the legal system have in fact been contextual, changing over time, and dependent on the effects their exercise has on others.⁷³⁰ In place of the title theory, it is useful to consider the model of nuisance doctrine.

b. Nuisance as the basis for a new model of property rights.—Nuisance doctrine expressly qualifies property rights by reference to their effects on other property owners and on the public at large. It is premised on the notion that any action, if taken to the extreme, may become unlawful. Property rights must be exercised in

⁷²⁹ Singer, *Reliance Interest*, *supra* note 50.

⁷³⁰ ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY, PART I OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987) (working out a conception of property rights that incorporates contingency).

a manner that allows similarly situated owners to have some reasonable use of their property and to be protected from undue interference with their legitimate property interests. A similar example is antitrust law. A business that is operating perfectly lawfully may come to monopolize a particular industry. When it gets too much power and acts to inhibit other entrants to the market in a wrongful manner, the law may step in to limit activity that used to be perfectly lawful simply because the effects of the conduct of the business have changed over time. The actual *effects* of uses of property may qualify property rights, such that a nuisance is a "pig in the parlor instead of the barnyard."⁷³¹ Whether an action constitutes an improper use of property that violates the property or personal rights of others is something that cannot be determined in the abstract.

All contested questions of property law can be recast either as disputes about which party has title generally or as debates about which party has title to the particular strand of property right at issue in the case. In other words, the nuisance model can be used to reconceptualize all the basic rights of owners, including privileges to use, rights to exclude, powers to transfer, and immunities from loss. The privilege to use property is limited by nuisance doctrine, as well as other legal rules, to protect the legitimate interests of other property owners and the public at large from the harmful effects of the use of property. The extent of the privilege to use is thus *contingent* on its effects on others. The right to exclude is limited, for example, by public accommodations law and the defense of necessity. The power to transfer is limited by the estates system to prevent the re-emergence of feudalism and to devolve power over property to present generations. The immunity from loss is limited by adverse possession law, and the laws of constructive trusts, estoppel, and necessity, which redistribute property rights from owners to nonowners when the owner has acted so as to create legitimate reliance interests in others. Title to property and even title to the particular right in question does not settle the question of whether an owner is entitled to protection for a claimed property interest; ownership is not a solving word for most disputes about property.⁷³²

In all of these cases, the scope and extent of property rights is dependent on the effects that the exercise of those rights has on other people. In the context of public accommodations, given the probable absence of any statutory remedy in certain states, continued adherence to a common-law doctrine granting retail stores absolute rights to exclude will effectively allow them to engage in racial discrimination. Authorizing such conduct has enormous negative social conse-

⁷³¹ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1962).

⁷³² Gordon, *supra* note 714.

quences from depriving whole groups of people of the right to enter the market for the purpose of contracting and purchasing property to establishing a racial caste system. Considerations of the legitimacy of, and limits to, the right to exclude are essential to understanding and formulating property law. Questions about the proper rules of property law therefore are better understood as contingent on the context within which property rights operate and the effects those rights have on other people than on rules that assign title.

4. *The Distributive Component of Property.*—

a. “Everyone should have some.”—John Kenneth Galbraith reports that Professor Robert Montgomery, an economist at the University of Texas, was unpopular with the Texas legislature because of his liberal views. When asked whether he favored private property, he replied, “I do—so strongly that I want everyone in Texas to have some.”⁷³³ His answer contains a brilliant insight into the nature of property. Property law and property rights have an inescapable distributive component. As Jeremy Waldron explains, “people need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person’s private property away from him, and that is why it is wrong that some individuals should have had no private property at all.”⁷³⁴

Other analysts suggest that property rights can be legitimately limited by other ideals, like equality and liberty, or that common-law understandings of property can be legitimately regulated by administrative and legislative action. Their perspectives, while useful, obfuscate a basic fact: both property theory and our historical practice of property law contain principles that promote the norms of decentralization and distributive justice *within the concept and institution of property itself*. Once we recognize this, it makes no sense to argue that property rights must always be limited to achieve distributive justice; private property systems always contain within them a partial system of distributive justice and the prevailing norms of private property, as it has operated in the United States, have always contained a tension between the norm of protecting the rights of “titleholders” (however defined) and the norm of shaping property rules to ensure widespread access to the system by which such titles are acquired.

The classical view of property concentrates on protecting those who *have* property. It addresses the conditions under which people *get* property but does not include the premise that such conditions must be structured so that everyone has the *right to get* property. The

⁷³³ THE LITTLE, BROWN BOOK OF ANECDOTES 395 (Clifton Fadiman ed., 1985).

⁷³⁴ JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 329 (1988).

classical view focuses on individual owners and the actions they must take to acquire property rights, which will then be defended by the state.⁷³⁵ It assumes that the distribution of property is a consequence of the voluntary actions of individuals rather than a decision by the state. Property law does nothing more than protect property rights acquired by individual action. Distributional questions, in this conception, are foreign to property as a system. If the community is unhappy with the distribution of property that emerges from individual actions, it is free to *redistribute* property through the tax system. Such a tax would constitute the first time the legal system became involved in determining the distribution of property; before such a tax, distribution was privately determined by individuals acting in their own interest. Governmental compulsion is absent from this property-acquiring process. No public policy decisions need to be made about property distribution for such a system to work.

This view is fundamentally mistaken. It is both normatively deficient and descriptively flawed. It distorts our understanding of private property as a social and legal institution. The distortions apply both to property theory and to historical practice of property law in the United States.

b. Distributive norms in political theories justifying property.—John Locke's theory of private property is the source of the classical conception of property. It has been monumentally influential in the history of the United States as a justificatory scheme.⁷³⁶ Locke justified property by arguing that individuals who took actions to mix their labor with natural resources became entitled to be protected in controlling the fruits of their labor. This entitlement was based both on the moral claim of rights and on the utilitarian ground that legal protection for property justly produced, or possessed through labor, promoted useful work, and increased social welfare. Locke qualified this theory by a significant proviso. He noted that labor creates property rights "*at least where there is enough and as good left in common for others.*"⁷³⁷

⁷³⁵ *Id.*

⁷³⁶ It has been far less successful as an accurate description of legal and social practice.

⁷³⁷ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (Bobbs-Merrill ed., 1962) (1690). A second significant proviso was that the use of money allowed and enabled a market system to operate in which individuals could legitimately acquire more resources than were necessary to satisfy their immediate wants. Exchange of resources meant that the property would not be wasted. For my purposes, this argument is peripheral to the underlying moral basis for initial acquisition which itself is qualified by the proviso that individual property rights are only justified if the system is administered so as not to exclude any individual from the opportunity to acquire property in the first place.

Jeremy Waldron has characterized Locke's argument as a "special rights" theory.⁷³⁸ Property rights are premised on individual actions. No general right to own property emerges from this kind of theory. One has a right to own property only if one undertakes the actions needed to generate a legitimate claim. Waldron has made two crucial criticisms of special rights theories. First, it is not at all clear why the actions of an individual, acting alone, can impose any legitimate obligations on others who have agreed neither to that individual's course of action nor to the rules of the game that define what actions create enforceable property rights. Second, there is no reason to believe that individual actions should have a binding moral effect on others if those actions inhibit or prevent others from exercising similar actions.

To some extent, Waldron's twin critiques state, in a more precise form, the Lockean proviso. Property rights can be justified only if their creation and exercise do not wrongly deprive others of similar rights. Waldron took the proviso one step further, however, and argued that it undermines Locke's theory itself. Possession of unowned land cannot be justified, in Locke's view, if it leaves others out of the system by which such property can be acquired. Waldron went further and argued that property rights initially could not be justified merely by appealing to actions taken by individuals. Rather, one had to go back one step further to the social contract itself to determine whether free and rational individuals would accept a system that would leave them with nothing.

From this perspective, the Lockean proviso looms large. The very legitimacy of a property system depends on the effect of conferring property rights on individuals and allowing those individuals to assert those rights against others. As Frank Michelman has explained,

In a capitalist order, one person's proprietary value (or power) is obviously relative to other people's. A constitutional system of proprietary liberty is, therefore, incomplete without attending to the configurations of the values of various people's proprietary liberties. The question of distribution is endemic in the very idea of a constitutional scheme of proprietary liberty.⁷³⁹

⁷³⁸ WALDRON, *supra* note 734, at 109-15, 127; *see also id.* at 176 ("Locke" has to explain "how a bare corporal Act" such as labouring on an object "should be able to prejudice the right and power of others' without their consent") (citations omitted); *id.* at 224 (arguing that recognition of property rights may negatively affect those who are effectively excluded from exercising similar opportunities and that such persons cannot be taken to have implicitly consented to such an arrangement); *id.* at 249-52 (arguing that no individual act of appropriation can legitimately place a duty on others if it deprives them of equal opportunities to acquire property). For a sympathetic critique of Waldron's theory, see Jeremy Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622 (1990) (reviewing JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988)).

⁷³⁹ Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 99 (1992) (citation omitted).

A system of private property not only protects the rights of those who have acquired resources, but ensures the conditions that enable individuals to acquire those resources.⁷⁴⁰

c. Distributive norms in historical practice in the United States.—This ineluctable distributive component of private property has also pervaded both historical practice and the social understanding of property in the United States. To put the argument in its simplest form, consider that a private property system requires more than one owner. This is not a *logical* requirement. After all, the state of New Jersey, where I grew up, was originally owned by two men, Sir George Carteret and John Lord Berkeley, while the Commonwealth of Pennsylvania was originally owned by William Penn, and several other colonies were similarly “proprietary.”⁷⁴¹ Nonetheless, under modern understandings of what it means to create a private property system, it is not an exaggeration to say that the existence of multiple owners is close to a *definitional* component of a private property system. In the modern view, a private property system—in order to *count* as a private property system—requires some dispersal of property ownership. If an Eastern European country moved from communism to a market system by distributing all the land in the country to ten families, it would be hard to conclude that the rulers of the country understood the normative premises underlying the private property systems of Western Europe and the United States.

This conception is not only suggested by the political theory justifying private property but is embedded in United States history. First, in the nineteenth century, the United States adopted a practice of transferring public lands to many of its citizens through homestead laws that attempted (some of the time) to give priority to actual settlers.⁷⁴² These policies were premised on the idea that property was not a special right but a general right; everyone had the right to own some.

This policy had a pernicious aspect to it. Where did the United States get the land to give out to white settlers? It took the land from American Indian nations. How were those seizures justified? From the beginning, English colonists justified conquest and displacement of American Indians by arguing that the native nations had more property than they needed, were misusing it by not developing it properly, and had a moral obligation to share it with the Europeans

⁷⁴⁰ powell, *supra* note 725, at 374-78.

⁷⁴¹ RICHARD MIDDLETON, *COLONIAL AMERICA* 131-32 (1992). Other proprietary colonies included North and South Carolina. *Id.* at 172.

⁷⁴² LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230-34, 414-19 (2d ed. 1985).

who needed access to it.⁷⁴³ Locke himself attempted to characterize America as a vast unclaimed territory free for settlement by industrious Europeans. His theory, in conjunction with the colonial justifications for conquest, rationalized a massive redistribution of property from American Indian nations to the colonial powers, then to the United States and its white citizens. Both the conquest of Indian nations and the homestead laws defy the typical characterization of nineteenth century American law as opposed to redistribution of property.

d. Distributive norms in current property law.—

(1) Distributive justice of property systems at the macro level.—

*(a) The estates system and decentralization: combating class hierarchy.—*Throughout the nineteenth century—including the *Lochner* era—the common law of property in the United States revolved around the *estates system*, a complicated regulatory framework designed to limit and systematize property rights into established channels. This system originated in the rules that mediated the relations between feudal lords and their tenants and between the generations. The underlying premise of the estates system is that strict regulation of property rights is necessary both to prevent the reemergence of feudalism and to ensure that current generations are not unduly controlled by their great-grandparents. The goal is to move power downwards from the feudal lord to the actual possessor of the land and from donors (prior generations) to current owners to ensure that power over property is decentralized and widely dispersed. The system did this by the rules governing future interests and property transfers.

Substantial regulation of property transfers is required to ensure that sellers of land do not load it down with restrictions on use and ownership that will be enforceable far into the future. In other words, a system premised on absolute ownership rights must restrict freedom of contract (the power to transfer) to ensure that, most of the time, sellers transfer to buyers most of the interests associated with property ownership. The rules operate partially to decentralize control over property by bundling certain rights together and ensuring control in the actual possessors (buyers) of the land. By creating the fee sim-

⁷⁴³ ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 151-286 (1990); see also Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, in CRITICAL RACE THEORY, *supra* note 32, at 98, 104 (originally published in 31 ARIZ. L. REV. 237 (1989)) (quoting Locke's argument that, in America, "there are still *great tracts of ground* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in the consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common").

ple form of property ownership (the closest thing we have to absolute ownership), power is vested in current possessors of land rather than absentee lords. The rules of the estates system, such as the rule against perpetuities, are intended to shape overall social relations to ensure a certain amount and quality of dispersal of power over land.⁷⁴⁴

(b) *Public accommodations and fair housing law: combating racial caste.*—Another example of rules of property law that operate systemically to shape social relationships are antidiscrimination laws that prohibit racial discrimination in housing markets (both sale and rental) and in public accommodations (businesses that serve the public). These rules regulate property use and transfer by limiting the rights of public accommodations to exclude customers on such grounds as race and by limiting the rights of housing sellers and employers to refuse to contract on invidious grounds. This complex of rules is intended to combat and prevent the establishment of a racial caste system supported by law. It is analogous at a deep level to the property rules embodied in the estates system that created the idea of absolute ownership. Both sets of rules are intended to combat pernicious forms of social hierarchy and to establish protected legal rights to participate on equal terms in the public sphere of the marketplace.

Public accommodations laws can therefore be understood as systemic requirements of a property system committed to abolishing apartheid. Rather than limitations of property rights, they are positive requirements of property systems that eschew legally enforceable connections between race and property ownership. In other words, they not only constitute a fundamental distributive commitment, but institute the basic values of private property systems. It is true that those values raise conflicts between private rights to control one's own property and rights to obtain access to the market to obtain property. At the same time, the fundamental commitment to racial equality suggests that it is appropriate to understand such laws not as limits on property rights needed to achieve equality but as requirements of property systems committed to promoting access to property rights regardless of race.

(2) *Distributive justice of property relations at the micro level.*—The distributive function of property law is evident not only on the level of overall social relations but in the context of ongoing spe-

⁷⁴⁴ I do not mean to argue that the system always functions this way in practice. Until recently, land ownership in the state of Hawaii was extremely concentrated with fewer than one hundred owners of much of the land in the state. This concentration of ownership persisted until the state passed a land reform act forcibly redistributing property from landlords to tenants. I mean to argue that the policy behind the estates system rules is to combat the kinds of social hierarchy and centralized power over land associated with feudalism.

cific relationships. One major function of nuisance doctrine is to ensure that property use, as well as ownership, does not result in an unfair distribution of burdens associated with the development of land. Land uses that are perfectly legitimate, when done in an isolated district, become illegal if done in a built-up community. Each owner is entitled to *some* benefit from his or her land, and nuisance law ensures that the benefits and burdens of conflicting property uses are not distributed unfairly. Water law has a similar structure. Owners are generally entitled to withdraw water from beneath their land and even sell it on the market. However, when they withdraw so much water that they undermine the subjacent support for neighboring land and begin to sink the surface of land in the surrounding area, the legal system may step in to limit their activities. Use of one's property cannot unreasonably interfere with the enjoyment of neighboring land.

The nuisance idea is based on the notion that the use of property rights cannot unfairly deprive others of the ability to use their own property. It has always suggested a limitation on property rights that cannot be fully comprehended by efficiency analysis. Certain types of property use will be prohibited because they interfere too much with the property rights of others, even if the social value of the defendant's conduct seems clearly to outweigh the social value of the plaintiff's property harmed by that conduct.⁷⁴⁵ Nuisance is therefore at least partly based on the notion that each owner should receive some benefit from the use of their land and the benefits and burdens of land ownership should not be unfairly distributed between the parties. While a developer of a subdivision with a hundred houses may be required to pay for a drainage system on neighboring land to ensure that two or three neighboring houses are not flooded, it is not clear that the owner of a single-family home at the top of a hill should be required to pay for a drainage system for the hundred houses located further down on the hill. Nuisance law allows consideration of the appropriate distribution of benefits and burdens of land ownership and use among neighbors.

Other rules that exhibit distributive concerns at the micro level are those that protect reliance interests of parties who have been granted access to the owner's property or have a long-term relationship with the owner that justifies forced sharing of property rights when the relationship ends. Such reliance interests distribute the benefits and burdens of social life by defining property rights to effectuate an appropriate balance between the interests of formal title holders

⁷⁴⁵ Nuisance law does not have to be interpreted this way. One can argue for a rigorously utilitarian, efficiency-oriented form of nuisance law. This simply would not represent the way nuisance law has been used or understood historically in the United States and rejects a portion of the normative underpinning of the doctrine.

and those with whom the title holder forms a relationship of mutual dependence.⁷⁴⁶

By substituting the concept of “entitlement” for the concept of “title,” we can better express the inherent distributive component of a private property system and the defeasible quality of property rights. Entitlement expresses something missing from the title or ownership conception of property—that is, a right to be accorded the right in question. The very word entitlement includes a verb within itself; it describes not just the result (being granted title or control), but the process by which that control came to be recognized (becoming entitled). In its uses to refer to government welfare benefits, it may also connote the right to get a minimum, a raising up to a basic level. It therefore expresses not only the right to secure control of property one has; it expresses property rights as control rights that should be granted or recognized. The entitlement idea brings within the property concept itself the notion that property is a social system that organizes access to and control over valued resources in order to create and maintain universal ability to obtain access to the system by which property rights are acquired.

Entitlement also suggests a right that may not be absolute. I am aware that others have used the concept of entitlement to express an absolute property right. I believe the concept of entitlement is simply not used with the same presumption of absoluteness that attaches to the concept of ownership or title. We presume only one person has title to a piece of property, while several people may have entitlements of various kinds in that property. The entitlement idea may therefore suggest a bundle of rights less capacious than fee simple absolute ownership and thus better captures the concept of property rights that are contextually defined. If entitlements are strongly protected legal rights, they are nonetheless subject to limitations to protect the entitlements of others. When the word entitlement is used today to refer to government benefits, it does suggest an absolute right to get some level of benefit, but the *amount* of government benefit has never been thought to be nonmodifiable. The concept of entitlement may express (better than does the concept of title) the ability of property rights to be secure in certain ways and defeasible in others. Public accommodations, for example, may be private businesses, but this does not entitle them to choose their customers on the basis of race; on the contrary, the public is entitled to service in businesses open to the public without regard to race.

5. *Property and Social Relations.*—Property law helps to structure and shape the contours of social relationships. Choices of prop-

⁷⁴⁶ Singer, *Reliance Interest*, *supra* note 50.

erty rules ineluctably entail choices about the quality and character of human relationships. Property law entails myriad choices about the kind of society we will collectively create. Consider a developer of a residential subdivision who includes in each deed a clause requiring all future purchasers of the land both to pay a fee or tax to the developer and to obtain the developer's consent to the sale. Several rules of property law render these clauses void. They constitute an illegal restraint on alienation and an attempt to create an estate that is not recognized by the common law.⁷⁴⁷ On the other hand, a clause that grants a homeowners' association a right of first refusal that can be effectively exercised to control the identity of future purchasers will generally be enforced by courts.⁷⁴⁸ What accounts for the difference?

One might argue that transaction costs might block negotiations between the developer and all the homeowners to induce the developer to give up its control rights while those costs are lower in the presence of a homeowners' association, which can act by majority rule through a managing board rather than through the individual assent of each owner. Yet this distinction does not work. The developer's veto will be struck down by courts even if a homeowners' association exists. A permanent right of first refusal in the developer is likely to be struck down as an invalid restraint on alienation. The real objection is to the developer's attempt to exercise continuing control over the property once all the units have been sold. Continuing control by the developer looks too much like feudalism—control by an absentee lord. The rules of the estates system serve to push power downwards from the lord to the actual possessors of the land. The objection to continuing control by the developer is not an objection based on its inefficiency. It is an objection to a way of life.

Consider the lessons of public accommodations law. In the antebellum era from 1800 to 1860, the law enacted a particular conception of private property in the context of businesses open to the public. I have argued here that any business that held itself out as ready to serve anyone who came seeking services probably had an obligation to serve its customers. This rule of law rested on a combination of moral and social policy considerations. Travelers were vulnerable to both cold weather and bandits if inns refused to take them in and carriers refused to transport them.⁷⁴⁹ The services provided by such businesses were needed by customers who relied on their availability.

⁷⁴⁷ SINGER, *PROPERTY LAW*, *supra* note 620, at 544-56.

⁷⁴⁸ At the same time, the right of first refusal will not be upheld if it is exercised in a racially discriminatory manner. This confirms the hypothesis that the objection is to a way of life—here a racial caste system by which white people have greater access to participation in the real estate market than do African-Americans.

⁷⁴⁹ Joseph H. Beale, Jr., *The Medieval Innkeeper and His Responsibility*, 18 *GREEN BAG* 269, 270 (1906).

On the other side, the business was conceptualized as having voluntarily agreed to enter the public world to provide these services. It could not renege on its commitment to serve the public in particular cases without adequate reason. Property rights, in this conception, are not premised on the absolute right of owners to control their property as they see fit. Rather, property owners have obligations as well as rights. In return for the rights property law confers on them, owners have duties to others to use their property so as not to cause harm or let others down who rely on the public uses to which they have devoted their property.⁷⁵⁰

From the time of the Civil War until 1964, public accommodations law was constantly changing and contested. The primary question was whether the public right to be served in places of public accommodation should extend to African-Americans. Some states required access to all businesses open to the public regardless of race. Others required public service, but allowed, and eventually required, segregation. These states eventually allowed businesses such as hotels and restaurants to refuse entirely to serve African-Americans. In all states, the common-law rule was substantially narrowed. Rather than a general rule requiring businesses to serve the public, most businesses (other than innkeepers and common carriers) were exempted from this obligation on the ground that property owners have a right to control access to their property and have no duty to contract with others if they do not wish to do so. This conception of property presumed that title holders have full rights to control access to their property without regard to the effects this control has on others. In addition, this new conception of property reinforced and helped to implement the emerging Jim Crow system, which at first encouraged and then required businesses to segregate customers on the basis of race. This emerging system replaced the right of access with a right to exclude and eventually with a *duty to exclude on account of race*.

This legal system was overturned in many Northern states over the course of the twentieth century. However, not until the civil rights movement in the 1940s and 1950s and the civil rights statutes of the 1960s did both law and custom significantly alter the social practice of racial segregation in both the North and the South. Current law in the United States is therefore characterized by an odd mixture of the antebellum model (requiring access) and the classical Jim Crow model (authorizing exclusion).

The history of public accommodations law is the history of race relations. The antebellum law presented itself in a neutral framework,

⁷⁵⁰ "The task is to expand private property rights into a conception of civil rights, into the right to expect civility from others." Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in *CRITICAL RACE THEORY*, *supra* note 32, at 84, 92 (originally published in 22 *HARV. C.R.-C.L. L. REV.* 401 (1987)).

yet obscured the fact that African-Americans were not included among the right-holders protected by the right of access to businesses that held themselves out as open to the public. The post-Civil War period brought in an era of confusion and turmoil as social groups attempted to work out the new relations between the races, experimenting with options from full, equal, and integrated access to segregation to outright exclusion. The Jim Crow era constituted property rights in a manner that both established and perpetuated a racial caste system, while suppressing the contradiction between segregation laws and emerging conceptions of absolute private property rights. The civil rights era again revolutionized social relations in the 1960s.

Public accommodations are clearly private property because they are privately owned; yet, they are public both in the sense that they are open to the public and in the sense that they should be open to the public. They should be open because they constitute a form of property use that injects the property into market relations—a sphere of social life to which everyone should have access. Property rights used in this way are regulated to ensure that they do not exclude particular individuals or segments of the population from participation in this inherently social area of life. In addition, the history of the duty to serve, and the changes in race relations it reflected and helped to shape, strongly suggest that property rules do not merely concern efficiency and the distribution of wealth and power, but help to create a form of social life. It is often said today that all interesting legal questions can be reduced to two: is the legal rule efficient (does it maximize the size of the pie) and is it distributively fair (is the pie cut up and distributed in a fair manner)? Reduction of all questions about legal rights, including property rights, to questions of efficiency and distribution, is woefully inadequate.⁷⁵¹ The question of whether a black man gets to sit next to a white woman on a bus or in a restaurant is not merely a question of how wealth and power are distributed—although it surely is that. It is a question about what form of social life we are going to have.⁷⁵²

Jennifer Nedelsky argues that “we must now think about the problem [of property] differently. We can no longer believe that

⁷⁵¹ ANDERSON, *supra* note 721.

⁷⁵² John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995) (noting that the remedial strategies adopted by the Fair Housing Act sought to protect individual victims of intentional discrimination but do not address the problem of improving the quality of both housing and social life in communities dominated by an African-American population); Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of The Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989) (explaining the enormous changes in social relations embodied in the civil rights movement, as well as the social conflicts required to change those relations).

'property' has a single, fixed meaning."⁷⁵³ But if it no longer has a "single, fixed meaning," what good is it? She answers that "[t]he concept of property reflects collective choices about what sorts of goods should be given the status of secure entitlements, and what sort of security and what sort of entitlement—and those choices change."⁷⁵⁴

Property is a social system, as the law of public accommodations demonstrates. It is designed to disaggregate power and to promote equal access to the conditions necessary for a full human life. Property law implicates and structures social relationships and can be adequately understood and judged only in that light.

⁷⁵³ NEDELSKY, *supra* note 724, at 209. On the connection between public accommodations law and relational interests, see AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 40 (1995).

⁷⁵⁴ NEDELSKY, *supra* note 724, at 209.

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APPENDIX I

State Public Accommodations Laws

The following is a list of all state public accommodations laws with citations to the relevant statutes applicable to different protected categories. The footnotes following the list explain complications. The statutes contain definitions of “public accommodations” and the operative language. Omitted are statutes defining procedures and remedies.

ALABAMA	(ALA. CODE)
Race	-----
Nat. or.	-----
Religion	-----
Sex	-----
Disab.	§§ 21-7-1 to -5; § 3-1-7.
Sex or.	-----
Mar. st.	-----
Uniform	§ 31-2-21
ALASKA	(ALASKA STAT.)
Race	§§ 18.80.200, .230, .300
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; § 11.76.130
Sex or.	-----
Mar. st.	§§ 18.80.200, .230, .330
Uniform	-----
ARIZONA	(ARIZ. REV. STAT. ANN.)
Race	§§ 41-1441 to -1442
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	-----
Disab.	§§ 41-1492 to -1492-12
Sex or.	-----
Mar. st.	-----
Uniform	§ 26-169
ARKANSAS	(ARK. CODE ANN.)
Race	§§ 16-123-101 to -108
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; § 20-14-303 to -304
Sex or.	-----
Mar. st.	-----
Uniform	-----

CALIFORNIA	(CAL. CODE)
Race	CAL. CIV. CODE § 51
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	CAL. CIV. CODE § 51 ⁷⁵⁵
Mar. st.	-----
Uniform	CAL. MIL. & VET. CODE § 394
COLORADO	(COLO. REV. STAT.)
Race	§§ 24-34-601 to -605
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	<i>Id.</i>
Uniform	§ 28-3-505
CONNECTICUT	(CONN. GEN. STAT.)
Race	§§ 46a-63 to -64
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	§§ 46a-81a, -81d
Mar. st.	§§ 46a-63 to -64
Uniform	§ 52-571
DELAWARE	(DEL. CODE ANN.)
Race	tit. 6, §§ 4501 — 4516
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	tit. 6, §§ 4501 — 4516
Uniform	-----

⁷⁵⁵ The case law indicates that sexual orientation may be covered. *See Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982) (holding that the Unruh Act prohibits all forms of arbitrary discrimination by business establishments); *Hubert v. Williams*, 184 Cal. Rptr. 161 (Ct. App. 1982) (stating that homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act); *Curran v. Mount Diablo Council of the Boy Scouts*, 195 Cal. Rptr. 325 (Ct. App. 1983) (stating that the plaintiff's exclusion from the Boy Scouts on ground that he was homosexual and hence not a good moral example for younger scouts would violate § 51 of the Unruh Act prohibiting discrimination "in all business establishments of every kind whatsoever").

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DISTRICT OF COLUMBIA (D.C. CODE ANN.)	
Race	§§ 47-2901, -2902, -2907; §§ 1-2501 to -2505, -2519
Nat. or.	§§ 1-2501 to -2505, -2519
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	<i>Id.</i>
Mar. st.	<i>Id.</i>
Uniform	<i>Id.</i> ⁷⁵⁶ ; 18 U.S.C. § 244
FLORIDA (FLA. STAT. ANN.)	
Race	§ 509.092
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; § 413.08; § 760.50 ⁷⁵⁷
Sex or.	-----
Mar. st.	§ 760.07 ⁷⁵⁸
Uniform	§ 250.45
GEORGIA (GA. CODE ANN.)	
Race	-----
Nat. or.	-----
Religion	-----
Sex	-----
Disab.	§ 30-4-1 ⁷⁵⁹
Sex or.	-----
Mar. st.	-----
Uniform	§ 38-2-281

⁷⁵⁶ While the wearing of military uniform is not expressly mentioned, the broad policy statement of § 1.2501 ("It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to . . .") suggests its inclusion. But *cf.* § 1.2519, which does not have such broad language. Nevertheless, it seems likely that a court would interpret either one or more of the phrases contained in that section ["personal appearance, . . . political affiliation, source of income, or place of residence or business of any individual"] as covering the wearing of military uniform.

The federal provision, 18 U.S.C. § 244, covers only theaters and public places of entertainment or amusement.

⁷⁵⁷ Covers those with H.I.V.

⁷⁵⁸ Section 760.07 reads:

Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or *marital status* in the areas of education, employment, housing, or *public accommodations* gives rise to a cause of action. . . . The term 'public accommodations' does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically"

There is no Florida statute making unlawful discrimination because of marital status in the area of public accommodations, nor is there any case law on point.

⁷⁵⁹ Covers only the blind and deaf.

HAWAII	(HAW. REV. STAT.)
Race	§ 368-1; §§ 489-1 to -8
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; § 347-13
Sex or.	§ 368-1
Mar. st.	<i>Id.</i>
Uniform	-----
IDAHO	(IDAHO CODE)
Race	§§ 18-7301, -7302, -7303; §§ 67-5901, -5902
Nat. or.	<i>Id.</i>
Religion	§ 67-5901
Sex	<i>Id.</i>
Disab.	§§ 39-3201 to -3210; §§ 56-702, -703; §§ 67-5901, -5902
Sex or.	-----
Mar. st.	-----
Uniform	-----
ILLINOIS	(ILL. COMP. STAT.)
Race	775 ILL. COMP. STAT. §§ 5/1-101 to -103, 5/5-101 to -103
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	775 ILL. COMP. STAT. §§ 5/1-101 to -103, 5/5-101 to -103
Uniform	-----
INDIANA	(IND. CODE ANN.)
Race	§§ 22-9-1-1 to -18
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	-----
Uniform	-----
IOWA	(IOWA CODE ANN.)
Race	§§ 216.1 — .20
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	-----
Uniform	-----

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KANSAS	(KAN. STAT. ANN.)
Race	§§ 44-1001, -1002, -1009.
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; § 39-1101
Sex or.	-----
Mar. st.	-----
Uniform	§ 44-1126
KENTUCKY	(KY. REV. STAT. ANN.)
Race	§ 344.120 — .140
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	§ 344.145
Disab.	§ 207.135 ⁷⁶⁰ ; § 344.120 — .140
Sex or.	-----
Mar. st.	-----
Uniform	-----
LOUISIANA	(LA. REV. STAT. ANN.)
Race	§ 49:146; §§ 51:2231, 2232, 2247; CONST. art. I, § 12
Nat. or.	§ 49:146; CONST. art. I, § 12
Religion	§§ 51:2247, 2232; CONST. art. I, § 12
Sex	§ 49:146 ⁷⁶¹ ; §§ 51:2247, 2232; CONST. art. I, § 12 ⁷⁶²
Disab.	§ 49:146 ⁷⁶³ ; §§ 51:2247, 2232; CONST. art. I, § 12 ⁷⁶⁴
Sex or.	-----
Mar. st.	-----
Uniform	-----
MAINE	(ME. REV. STAT. ANN.)
Race	tit. 5, §§ 4551 — 4553, 4592 — 4594
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; tit. 17, § 1312; tit. 20-A, § 18102
Sex or.	-----
Mar. st.	-----
Uniform	tit. 37-B, § 342

⁷⁶⁰ Covers those with H.I.V.

⁷⁶¹ The section prohibits “arbitrary, capricious, or unreasonable discrimination” based on sex, as distinct from unqualified discrimination.

⁷⁶² *Id.*

⁷⁶³ The section prohibits “arbitrary, capricious, or unreasonable discrimination” based on physical or mental disability, as distinct from unqualified discrimination.

⁷⁶⁴ *Id.*

MARYLAND	(MD. CODE ANN.)
Race	art. 49B, § 5
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; art. 30, § 33
Sex or.	-----
Mar. st.	art. 49B, § 5
Uniform	art. 65, § 51
MASSACHUSETTS	(MASS. GEN. L.)
Race	ch. 272, §§ 92A, 98; ch. 160, § 205
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; ch. 272, § 98A
Sex or.	ch. 272, §§ 92A, 98; ch. 160, § 205
Mar. st.	-----
Uniform	-----
MICHIGAN	(MICH. COMP. LAWS)
Race	§§ 37.2301 — .2303
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	§§ 37.1301 — .1303
Sex or.	-----
Mar. st.	§§ 37.2301 — .2303
Uniform	§ 4.1251
MINNESOTA	(MINN. STAT.)
Race	§§ 363.01 — .03
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	<i>Id.</i>
Mar. st.	<i>Id.</i>
Uniform	§ 192.32
MISSISSIPPI	(MISS. CODE ANN.)
Race	-----
Nat. or.	-----
Religion	-----
Sex	-----
Disab.	§ 43-6-5
Sex or.	-----
Mar. st.	-----
Uniform	§ 33-1-13

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MISSOURI	(MO. REV. STAT.)
Race	§§ 213.010, .065
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	-----
Uniform	§ 41.730
MONTANA	(MONT. CODE ANN.)
Race	§§ 49-1-201, -2-101, -2-304
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	§ 49-1-201, -2-101, -2-304
Uniform	-----
NEBRASKA	(NEB. REV. STAT.)
Race	§§ 20-132 to -143
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	§§ 20-127, -128
Sex or.	-----
Mar. st.	----- ⁷⁶⁵
Uniform	§ 55-175
NEVADA	(NEV. REV. STAT.)
Race	§§ 651.050 — 651.120
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	----- ⁷⁶⁶
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	-----
Uniform	§ 412.606

⁷⁶⁵ While there is no provision of marital status in the public accommodation statutes, § 18-1724 serves as an enabling statute for local governments:

Notwithstanding any other law or laws heretofore enacted, all cities and villages in this state shall have the power by ordinance to define, regulate, suppress, and prevent discrimination on the basis of race, color, creed, religion, ancestry, sex, *marital status*, national origin, familial status as defined in section 20-311, handicap as defined in section 20-313, age, or disability in employment, *public accommodation*, and housing and may provide for the enforcement of such ordinances by providing appropriate penalties for the violation thereof (Emphasis added).

⁷⁶⁶ While there is no provision for sex in the public accommodations statutes, § 233.010(1) states:

It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the state, and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations, and

NEW HAMPSHIRE (N.H. REV. STAT. ANN.)

Race §§ 354-A:2, :16, :17
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. -----
 Mar. st. *Id.*
 Uniform -----

NEW JERSEY (N.J. REV. STAT.)

Race §§ 10-:1-3, :5-4, :5-5, :5-12
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. § 5:12-136
 Sex or. § 10:5-4, :5-5, :5-12
 Mar. st. §§ 10-:1-3, :5-4, :5-5, :5-12
 Uniform § 38A:14-3

NEW MEXICO (N.M. STAT. ANN.)

Race §§ 28-1-2, -1-7
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. -----
 Mar. st. -----
 Uniform -----

NEW YORK (N.Y. LAW)

Race EXEC. §§ 291, 292, 296; CIV. RIGHTS §§ 40 — 45
 Nat. or. *Id.*
 Religion *Id.*
 Sex EXEC. § 291, 292, 296; CIV. RIGHTS § 40-c
 Disab. EXEC. § 296; CIV. RIGHTS §§ 40-c, 47
 Sex or. -----
 Mar. st. EXEC. §§ 291, 292, 296; CIV. RIGHTS § 40-c
 Uniform CIV. RIGHTS § 40-g

reasonably to seek and be granted services in *places of public accommodation* without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, national origin or ancestry. (Emphasis added).

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NORTH CAROLINA (N.C. GEN. STAT.)

Race -----
 Nat. or. -----
 Religion -----
 Sex -----
 Disab. § 130A-148⁷⁶⁷; § 168-2, -3; § 168A-1, -4, -6, -8, -11
 Sex or. -----
 Mar. st. -----
 Uniform § 127B-13

NORTH DAKOTA (N.D. CENT. CODE)

Race § 14-02.4-01, .4-02, .4-14, .4-16
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*; § 25-13-02⁷⁶⁸
 Sex or. -----
 Mar. st. *Id.*
 Uniform -----

OHIO (OHIO REV. CODE ANN.)

Race §§ 4112.01, .02
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. -----
 Mar. st. -----
 Uniform -----

OKLAHOMA (OKLA. STAT.)

Race tit. 25, §§ 1401, 1402
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. -----
 Mar. st. -----
 Uniform tit. 44, § 208

OREGON (OR. REV. STAT.)

Race § 30.670 — .685; § 659.037, .045
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. § 659.405, .425
 Sex or. -----
 Mar. st. § 30.670 — .685; § 659.037, .045
 Uniform -----

⁷⁶⁷ Covers those with H.I.V. or A.I.D.S.

⁷⁶⁸ Covers the blind and handicapped accompanied by dogs.

PENNSYLVANIA (PA. STAT. ANN.)	
Race	tit. 43, §§ 951 — 955
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	tit. 43, §§ 951 — 955
Uniform	tit. 18, § 7323
PUERTO RICO (P.R. LAWS. ANN.)	
Race	tit. 1, §§ 13, 18
Nat. or.	<i>Id.</i> ⁷⁶⁹
Religion	<i>Id.</i>
Sex	-----
Disab.	tit. 1, §§ 501 — 509
Sex or.	-----
Mar. st.	-----
Uniform	-----
RHODE ISLAND (R.I. GEN. LAWS)	
Race	§§ 11-24-1, -2, -3
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> ; 23-6-22 ⁷⁷⁰
Sex or.	§ 11-24-2.2
Mar. st.	-----
Uniform	§§ 11-24-7, -8; § 30-12-10
SOUTH CAROLINA (S.C. CODE ANN.)	
Race	§§ 45-9-20, -30 ⁷⁷¹
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	-----
Disab.	§§ 43-33-20, -40, -520, -530
Sex or.	-----
Mar. st.	-----
Uniform	-----

⁷⁶⁹ While tit. 1 § 13 does not explicitly mention 'national origin', its broad language would seem to allow for its inclusion:

No person shall be denied in the Commonwealth of Puerto Rico any access, service and like treatment in public places and businesses and in the means of transportation because of any political, religious, race, or color question, or because of any other reason not applicable to all persons in general. (Emphasis added).

⁷⁷⁰ Section 23-6-22 prohibits discrimination based on "a positive AIDS test result, or perception of same."

⁷⁷¹ Discrimination is prohibited under § 45-9-10 "if discrimination or segregation [by the place of public accommodation] is supported by state action." "Supported by state action" is defined as "the licensing or permitting of any establishment or any agent of an establishment . . . which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate." *Id.*

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SOUTH DAKOTA (S.D. CODIFIED LAWS ANN.)

Race §§ 20-13-1 (12), -23
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. -----
 Mar. st. -----
 Uniform -----

TENNESSEE (TENN. CODE ANN.)

Race §§ 4-21-101, -101(2)-(3), -102(3), -102(15), -501, -502; § 68-14-602(b)
 Nat. or. *Id.*; § 4-21-102 (13)
 Religion *Id.*
 Sex *Id.*; § 4-21-503
 Disab. § 68-14-602(b); § 4-21-102(9)
 Sex or. -----
 Mar. st. § 68-14-602(b)
 Uniform -----

TEXAS (TEX. CODE ANN.)

Race tit. 8, § 121.003
 Nat. or. -----
 Religion -----
 Sex -----
 Disab. tit. 8, § 121.003
 Sex or. -----
 Mar. st. -----
 Uniform -----

UTAH (UTAH CODE ANN.)

Race §§ 13-7-1 to -4
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. § 26-30-1
 Sex or. -----
 Mar. st. -----
 Uniform -----

VERMONT (VT. STAT. ANN.)

Race tit. 9, §§ 4500 — 4502
 Nat. or. *Id.*
 Religion *Id.*
 Sex *Id.*
 Disab. *Id.*
 Sex or. *Id.*
 Mar. st. *Id.*
 Uniform -----

VIRGINIA	(VA. CODE ANN.)
Race	§§ 2.1-715, -716 ⁷⁷²
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i> § 51.5-44
Sex or.	-----
Mar. st.	§§ 2.1-715, -716 ⁷⁷³
Uniform	-----
WASHINGTON	(WASH. REV. CODE)
Race	§ 9-91.010; §§ 49.60.010, .030, .040, .215
Nat. or.	§§ 49-60.010, .030, .040, .215
Religion	§ 9-91.010; §§ 49.60.010, .030, .040, .215
Sex	§§ 49-60.010, .030, .040, .215
Disab.	§§ 49.60.010, .030, .040, .174, ⁷⁷⁴ .215
Sex or.	-----
Mar. st.	----- ⁷⁷⁵
Uniform	-----
WEST VIRGINIA	(W. VA. CODE)
Race	§ 5-11-2, -3, -4, -9
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	-----
Mar. st.	-----
Uniform	-----
WISCONSIN	(WIS. STAT.)
Race	§ 101.22
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	<i>Id.</i>
Sex or.	<i>Id.</i>
Mar. st.	<i>Id.</i>
Uniform	-----

⁷⁷² Sections 15.1-37.3:8 and 15.1-783.1 serve as enabling statutes for local bodies.

⁷⁷³ *Id.*

⁷⁷⁴ Covers those with H.I.V. or A.I.D.S.

⁷⁷⁵ Section 49.60.010 states that discrimination against state inhabitants on the basis of marital status is "a matter of state concern." However, in the succeeding sections which deal with public accommodations, no mention is made of marital status.

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WYOMING	(WYO. STAT.)
Race	§ 6-9-101
Nat. or.	<i>Id.</i>
Religion	<i>Id.</i>
Sex	<i>Id.</i>
Disab.	§ 35-13-201
Sex or.	-----
Mar. st.	-----
Uniform	§ 19-2-505 ⁷⁷⁶

⁷⁷⁶ The relevant portion of § 19-2-505 reads: "No person shall discriminate against any officer or enlisted man of the national guard or military reserves of the United States because of his membership therein."

APPENDIX II
Places Covered by State Laws

This table summarizes the types of discrimination prohibited in different categories of public accommodation. The ditto marks should be read horizontally; they signify that the categories under the innkeepers column are repeated under the succeeding columns unless otherwise indicated. Complications are explained in the notes. The letters refer to the following protected categories:

r race
n national origin
g religion
s sex
d disability
o sexual orientation
m marital status
u uniform

State	innkeepers	comm. carr.	entertain.	retail	others
Alabama	d u	"	"	"	"
Alaska	r n g s d m	"	"	"	"
Arizona	r n g d u	"	"	"	"
Arkansas	r n g s d	"	"	"	"
California	r n g s d o ⁷⁷⁷ u	"	"	"	"
Colorado	r n g s d m u	"	"	r n g s d m	r n g s d m
Connecticut	r n g s d o m u	"	"	"	"
Delaware	r n g s d m	"	"	"	"
D.C.	r n g s d o m u ⁷⁷⁸	"	"	"	"
Florida	r n g s d	d	d u	d	r n g s d
Georgia	d ⁷⁷⁹	⁷⁸⁰	d u	d	"
Hawaii	r n g s d o m	"	"	"	"
Idaho	r n g s d	"	"	"	"
Illinois	r n g s d m	"	"	"	"

⁷⁷⁷ The case law indicates that sexual orientation may be covered. *See* *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982) (holding that the Unruh Act prohibits all forms of arbitrary discrimination by business establishments); *Hubert v. Williams*, 184 Cal. Rptr. 161 (Ct. App. 1982) (stating that homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act); *Curran v. Mount Diablo Council of the Boy Scouts*, 195 Cal. Rptr. 325 (Ct. App. 1983) (stating that the plaintiff's exclusion from the Boy Scouts on ground that he was homosexual and hence not a good moral example for younger scouts would violate § 51 of the Unruh Act prohibiting discrimination "in all business establishments of every kind whatsoever").

⁷⁷⁸ While the wearing of a military uniform is not expressly mentioned, the broad policy statement of § 1.2501 ("It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to . . .") suggests its inclusion. But *cf.* D.C. CODE ANN. § 1.2519, which does not have such broad language. Nevertheless, it seems likely that a court would interpret either one or more of the phrases contained in that section ("personal appearance, . . . political affiliation, source of income, or place of residence or business of any individual") as covering the wearing of military uniform.

The federal provision, 18 U.S.C. § 244, covers only theaters and public places of entertainment or amusement.

⁷⁷⁹ Section 30.4.1 covers only the blind and deaf. Note: § 43-21-3 states the common law duty to receive guests, but neither it nor the case law elaborates.

⁷⁸⁰ Note: § 46.9.130 states the common law duty to serve, but neither it nor the case law elaborates.

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State	innkeepers	comm. carr.	entertain.	retail	others
Indiana	r n g s d	"	"	"	"
Iowa	r n g s d	"	"	"	"
Kansas	r n g s d u	"	"	"781	"
Kentucky	r n g s d	r n g d	"	"782	r n g s d
Louisiana	r n g s d	"	"	"	"
Maine	r n g s d u	"	"	"	"
Maryland	r n g s d m	"	r n g s d m u	r n g s d m	"
Massachusetts	r n g s d o	"	"	"	"
Michigan	r n g s d m u	"	"	r n g s d m	"
Minnesota	r n g s d o m u	"	"	"	"
Mississippi	d u	d u ⁷⁸³	d u	"	"
Missouri	r n g s d	"	r n g s d u	r n g s d	"
Montana	r n g s d m	"	"	"	"
Nebraska	r n g s d u	"	"	"	"
Nevada	r n g d u	"	"	"	"
New Hampshire	r n g s d m	"	"	"	"
New Jersey	r n g s d ⁷⁸⁴ o m u r n g s o m u	"	"	"	"
New Mexico	r n g s d	"	"	"	"
New York	r n g s d m u	"	"	r n g d s m	"
North Carolina	d u	"	"	"	"

⁷⁸¹ See *Kansas Comm'n on Civil Rights v. Sears, Roebuck & Co.*, 532 P.2d 1263, 1270 (Kan. 1975) ("Place of public accommodation" contemplates such mercantile establishments as shops and stores as well as those enumerated).

⁷⁸² But note the Opinion of the Attorney General which follows § 344.130 in the annotated statutes:

Any attempt by a board of commissioners of a municipality to enact a public accommodation ordinance which would include barber shops and beauty shops as places of public accommodation would be in conflict with, or at least amend or modify, this section which excludes those shops under the definition and terms of the state civil rights act. OAG 70-312.

This reading of the statute is somewhat curious given its language:

"Place of public accommodation, resort, or amusement" includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds

KY. REV. STAT. ANN. § 344.130.

⁷⁸³ Section 77.7.153 states:

It shall be unlawful for any common carrier or restricted common carrier by motor vehicle to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular persons, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. However, this section shall not be construed to apply to discriminations, prejudice or disadvantage to the traffic of any other carrier of whatever description.

It is possible, though unlikely, that the section could be interpreted to cover the refusal to accommodate on the basis of race.

⁷⁸⁴ The coverage for the disabled is narrow. Section 5:12-136 is the only provision:

All hotels and other facilities of a casino licensee, which are public accommodations and are subject to the regulatory powers of the commission under this act, shall be constructed or renovated to conform with the provisions of P.L. 1971, c. 269, as amended and supplemented (C. 52:32-4 et seq.) relating to barrier-free design for providing facilities for the physically handicapped in public buildings, and the rules, regulations and codes thereunder promulgated.

State	innkeepers	comm. carr.	entertain.	retail	others
North Dakota	r n g s d m	"	"	"	"
Ohio	r n g s d	"	"	"	"
Oklahoma	r n g s d ⁷⁸⁵	"	r n g s d u ⁷⁸⁶	r n g s d	" ⁷⁸⁷
Oregon	r n g s d m	"	" ⁷⁸⁸	"	"
Pennsylvania	r n g s d u m	r n g s d m	r n g s d u m	r n g s d m	r n g s d u m
Puerto Rico	r n ⁷⁸⁹ g ⁷⁹⁰ d ⁷⁹¹	"	"	"	"
Rhode Island	r n g s d o u	"	"	r n g s d o	"
South Carolina	r n g d ⁷⁹²	d	r n g d ⁷⁹³	"	"
South Dakota	r n g s d	"	"	"	"
Texas	d	"	"	"	"
Utah	r n g s d	"	"	"	"
Vermont	r n g s d o m	"	"	"	"
Virginia ⁷⁹⁴	r n g s d m	"	"	"	"
Washington	r n g s d	"	"	"	"

⁷⁸⁵ Title 25, § 1401 exempts "establishment[s] located within a building which contains not more than five rooms for rent and which [are] actually occupied by the proprietor of the establishment as his residence."

⁷⁸⁶ Title 25, § 1401 exempts "privately-owned resort or amusement establishments."

⁷⁸⁷ Title 25, § 1401 exempts "barber shops or beauty shops."

⁷⁸⁸ Section 30.675(2) exempts "any institution, bona fide club or place of accomodation which is in its nature distinctly private."

⁷⁸⁹ While title 1, § 13 does not explicitly mention "national origin," its broad language would seem to allow for its inclusion:

No person shall be denied in the Commonwealth of Puerto Rico any access, service and like treatment in public places and businesses and in the means of transportation because of any political, religious, race, or color question, or because of any other reason not applicable to all persons in general. (Emphasis added).

⁷⁹⁰ Note that tit. 10, § 720 provides for an innkeeper right to remove a guest "that is or might be detrimental to the reputation, dignity or credit of the hotel, or that is or threatens to be detrimental to the business of the hotel, whether or not specifically mentioned in any rule or regulation." Tit. 10, § 723 reads:

Nothing in this chapter shall be so construed as to consider a gaming room or casino operated in conjunction with a hotel, either by an innkeeper, or by any other person, as a place of public accommodation, or to deny to such an innkeeper or other person operating such casino or gaming room the discretionary right to refuse admission thereto to any person, or the discretionary right to remove or cause the removal of any person from such gaming room; Provided however, that no person shall be denied admission to any gaming room, or be removed therefrom for political, religious, race, or color reasons or for any other reason not applicable to the public in general.

⁷⁹¹ The provisions for the disabled are limited to those "[p]ublic and private institution[s]" that receive some financial contribution or funds from the Government of Puerto Rico. P.R. LAWS ANN. tit. 1, § 501.

⁷⁹² Discrimination is prohibited under § 45-9-10 "if discrimination or segregation [by the place of public accommodation] is supported by state action." "Supported by state action" is defined as "the licensing or permitting of any establishment or any agent of an establishment . . . which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate." *Id.* The section covers race, national origin, and religion.

⁷⁹³ *Id.*

⁷⁹⁴ Virginia does not expressly define place of public accommodation. In the provisions for race, national origin, religion, sex, and marital status nothing other than "public accommodation" is mentioned. VA. CODE ANN. §§ 2.1-715, -716. However, § 51.5-44, which provides for the disabled, lists places from which the disabled are not to be excluded. This list is similar to those of other states and covers all of the above categories of places. In completing this table, it has been assumed that "public accommodation" is meant to cover the same places for both the disabled and the other categories of persons. There is no case law directly on point.

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State	innkeepers	comm. carr.	entertain.	retail	others
West Virginia	r n g s d	"	"	"	"
Wisconsin	r n g s d o	"	"	"	"
Wyoming	r n g s d u ⁷⁹⁵	"	"	"	"

⁷⁹⁵ The relevant portion of the section reads: "No person shall discriminate against any officer or enlisted man of the national guard or military reserves of the United States because of his membership therein." WYO. STAT. § 19-2-505.

APPENDIX III
Protected Categories

This table shows which states prohibit certain types of discrimination in at least some places of public accommodation. For instance, a state may prohibit sex discrimination by innkeepers. Check marks indicate categories protected by state law. Complications are explained in footnotes.

State	race	nat. or.	religion	sex	disab.	sex or.	mar. st.	uniform
AL	—	—	—	—	√	—	—	√
AK	√	√	√	√	√	—	√	—
AZ	√	√	√	—	√	—	—	√
AR	√	√	√	√	√	—	—	—
CA	√	√	√	√	√	√ ⁷⁹⁶	—	√
CO	√	√	√	√	√	—	√	√
CT	√	√	√	√	√	√	√	√
DE	√	√	√	√	√	—	√	—
DC	√	√	√	√	√	√	√	√
FL	√	√	√	√	√	—	— ⁷⁹⁷	√
GA	—	—	—	—	√ ⁷⁹⁸	—	—	√
HA	√	√	√	√	√	√	√	—
ID	√	√	√	√	√	—	—	—
IL	√	√	√	√	√	—	√	—
IN	√	√	√	√	√	—	—	—
IA	√	√	√	√	√	—	—	—
KS	√	√	√	√	√	—	—	√
KY	√	√	√	√	√	—	—	—
LA	√	√	√	√	√	—	—	—
ME	√	√	√	√	√	—	—	√
MD	√	√	√	√	√	—	√	√
MA	√	√	√	√	√	√	—	—

⁷⁹⁶ The case law indicates that sexual orientation may be covered. See *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982) (holding that the Unruh Act prohibits all forms of arbitrary discrimination by business establishments); *Hubert v. Williams*, 184 Cal. Rptr. 161 (Ct. App. 1982) (stating that homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act); *Curran v. Mount Diablo Council of the Boy Scouts*, 195 Cal. Rptr. 325 (Ct. App. 1983) (stating that the plaintiff's exclusion from the Boy Scouts on ground that he was homosexual and hence not a good moral example for younger scouts would violate § 51 of the Unruh Act prohibiting discrimination "in all business establishments of every kind whatsoever").

⁷⁹⁷ Section 760.07 reads:

Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action. . . . The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically

There is no Florida statute making unlawful discrimination because of marital status in the area of public accommodations, nor is there any case law on point.

⁷⁹⁸ Section 30.4.1 covers only the blind and the deaf.

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State	race	nat. or.	religion	sex	disab.	sex or.	mar. st.	uniform
MI	√	√	√	√	√	—	√	√
MN	√	√	√	√	√	√	√	√
MS	—	—	—	—	√	—	—	√
MO	√	√	√	√	√	—	—	√
MT	√	√	√	√	√	—	√	—
NB	√	√	√	√	√	—	— ⁷⁹⁹	√
NV	√	√	√	—	√	—	—	√
NH	√	√	√	√	√	—	√	—
NJ	√	√	√	√	√	√	√	√
NM	√	√	√	√	√	—	—	—
NY	√	√	√	√	√	—	√	√
NC	—	—	—	—	√	—	—	√
ND	√	√	√	√	√	—	√	—
OH	√	√	√	√	√	—	—	—
OK	√	√	√	√	√	—	—	√
OR	√	√	√	√	√	—	√	—
PA	√	√	√	√	√	—	√	√
PR	√	√ ⁸⁰⁰	√	—	√ ⁸⁰¹	—	—	—
RI	√	√	√	√	√	√	—	√
SC	— ⁸⁰²	— ⁸⁰³	— ⁸⁰⁴	—	√	—	—	—
SD	√	√	√	√	√	—	—	—
TN	√	√	√	√	√	—	√	—

⁷⁹⁹ While there is no provision of marital status in the public accommodation statutes, § 18.1724 serves as an enabling statute for local governments:

Notwithstanding any other law or laws heretofore enacted, all cities and villages in this state shall have the power by ordinance to define, regulate, suppress, and prevent discrimination on the basis of race, color, creed, religion, ancestry, sex, marital status, national origin, familial status as defined in section 20-311, handicap as defined in section 20-313, age, or disability in employment, public accommodation, and housing and may provide for the enforcement of such ordinances by providing appropriate penalties for the violation thereof. . . . (Emphasis added).

⁸⁰⁰ While tit. 1, § 13 does not explicitly mention ‘national origin,’ its broad language would seem to allow for its inclusion:

No person shall be denied in the Commonwealth of Puerto Rico any access, service and like treatment in public places and businesses and in the means of transportation because of any political, religious, race, or color question, or because of any other reason not applicable to all persons in general. (Emphasis added).

⁸⁰¹ The provisions for the disabled are limited to those “public and private institutions” that receive some financial contribution or funds from the Government of Puerto Rico. P.R. LAWS ANN. tit. 1, § 501.

⁸⁰² Discrimination is prohibited under § 45-9-10 “if discrimination or segregation [by the place of public accommodation] is supported by state action.” “Supported by state action” is defined as “the licensing or permitting of any establishment or any agent of an establishment . . . which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate.” *Id.* The section covers race, national origin, and religion.

⁸⁰³ *Id.*

⁸⁰⁴ *Id.*

State	race	nat. or.	religion	sex	disab.	sex or.	mar. st.	uniform
TX	—	—	—	—	√	—	—	—
UT	√	√	√	√	√	—	—	—
VT	√	√	√	√	√	√	√	—
VA	√	√	√	√	√	—	√ ⁸⁰⁵	—
WA	√	√	√	√	√	—	— ⁸⁰⁵	—
WV	√	√	√	√	√	—	—	—
WI	√	√	√	√	√	√	√	—
WY	√	√	√	√	√	—	—	√ ⁸⁰⁶

⁸⁰⁵ Section 49.60.010 states that discrimination against state inhabitants on the basis of marital status is "a matter of state concern." However, in the succeeding sections which deal with public accommodations, no mention is made of marital status.

⁸⁰⁶ The relevant portion of § 19-2-505 reads: "No person shall discriminate against any officer or enlisted man of the national guard or military reserves of the United States because of his membership therein."