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# The Unrelenting Libertarian Challenge to Public Accommodations Law

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# THE UNRELENTING LIBERTARIAN CHALLENGE TO PUBLIC ACCOMMODATIONS LAW

Samuel R. Bagenstos*

*There seems to be a broad consensus that Title II of the Civil Rights Act of 1964, which prohibits race discrimination in places of public accommodation, was a remarkable success. But the consensus is illusory. Laws prohibiting discrimination by public accommodations currently exist under a significant legal threat. And this threat is merely the latest iteration in the controversy over public accommodations laws that began as early as Reconstruction. This Essay begins by discussing the controversy in the Reconstruction and civil rights eras over the penetration of antidiscrimination principles into the realm of private businesses' choice of customers. Although the controversy was discussed in the earlier era in terms of civil versus social rights, and in the later era in terms of property, contract, and association, the same fundamental concerns motivated objections to public accommodations laws in both periods. The Essay then turns to the current controversy. It begins by discussing Rand Paul's 2010 comments questioning whether public accommodations laws are consistent with libertarian principles as well as the harsh response those comments drew from prominent libertarian commentators. It shows that Paul's libertarian opponents disagreed with him only on pragmatic—not principled—grounds. The Essay then turns to an analysis of* Boy Scouts of America v. Dale *and of recent developments that promise to undermine the expressive-commercial distinction that has kept* Dale *from threatening the core of public accommodations law.*

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## INTRODUCTION

There seems to be a broad consensus that Title II of the Civil Rights Act of 1964, which prohibits race discrimination in "place[s] of public accommodation,"[1] was a remarkable success. Although Title II triggered the most controversy of all of the bill's titles as the Civil Rights Act proceeded through Congress—including objections from such notables as Robert Bork[2] and William Rehnquist[3] (pressed in Congress by Senators Barry Goldwater[4] and Strom Thurmond[5])—compliance, it is said, came quickly and easily once the Supreme Court upheld the law late in 1964.[6] Title II is now the one piece of the Civil Rights Act that everyone can support. Even Richard Epstein, in his book arguing for repeal of Title VII of the Civil Rights Act (which prohibits employment discrimination), offers supportive words for Title II's prohibition on discrimination by public accommodations.[7] And when a rare voice rises up to object to Title II—as Rand Paul did, briefly, while he was a candidate for Senate in 2010—the reaction is swift and comes equally harshly from left and right.[8] Title II seems to have traveled far. It began its life as the most controversial antidiscrimination provision, but it seems to have become the one island of consensus in the highly contentious debate over civil rights laws.[9]

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1. 42 U.S.C. § 2000a (2012).

2. *See* Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21, 21-22.

3. *See* RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS 363 (2001).

4. *See* Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417, 433-35 (Sally E. Hadden & Patricia Hagler Minter eds., 2013).

5. *See* Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of* Heart of Atlanta Motel, Inc. v. United States, 71 MD. L. REV. 83, 136-41 (2011).

6. *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964). *See generally* Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 156, 159 (Bernard Grofman ed., 2000) ("Although Title II was probably the most talked about section of the Civil Rights Act, the section about which emotions ran highest, the section over which the most blood had been spilled, it quickly faded in significance. It became, to paraphrase Hugh Davis Graham, a welcome casualty of success.").

7. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 127-28 (1992).

8. *See infra* Part II.A.

9. *See, e.g.*, Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996) (asserting that there is a "settled

But the consensus is illusory. Notwithstanding the swift reaction to Rand Paul's 2010 comments and Paul's own backtracking on the issue,[10] laws prohibiting discrimination by public accommodations currently exist under a significant legal threat. And this threat is merely the latest iteration in the controversy over public accommodations laws that began as early as Reconstruction. To be sure, the *language* in which the controversy is expressed has changed. During Reconstruction, opponents of laws prohibiting discrimination by public accommodations argued that those laws impermissibly sought to extend equality beyond the sphere of "civil rights" to the sphere of "social rights." Two of the Supreme Court's key cases punctuating the end of Reconstruction—the *Civil Rights Cases*[11] and *Plessy v. Ferguson*[12]—relied on this civil-rights/social-rights distinction to bless discrimination by public accommodations.[13] By contrast, during the civil rights era, and continuing to today, opponents have framed their arguments in terms of property, contract, or freedom of association rather than in terms of civil rights and social rights. But the underlying concerns have been the same. Since the Reconstruction era, continuing through the civil rights era to today, public accommodations laws have triggered legal controversy over the extent to which antidiscrimination principles should penetrate into spaces that had at one time been understood as "private" or "social."

My suggestion that the legal controversy remains ongoing may be surprising. After all, *Plessy* is decisively confined to the constitutional anticanon.[14] And the Court has, to be sure, continued to reaffirm the state-action holding of the *Civil Rights Cases*.[15] But that decision's invalidation of the Civil Rights Act of 1875 has been completely displaced as a matter of reality—if not doctrine—by the Court's rulings upholding Title II of the Civil Rights Act of 1964 in the *McClung* and *Heart of Atlanta* cases. The adoption of the Fair Housing Act of 1968,[16] and the Court's subsequent expansive interpretation of Congress's power to enforce the Thirteenth Amendment in *Jones v. Alfred H. Mayer Co.*,[17] would seem to have entirely laid to rest the civil-rights/social-rights

social consensus" that businesses open to the public should have no right to exclude customers based on race or sex).

10. *See infra* Part II.A.

11. 109 U.S. 3 (1883).

12. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

13. *See Plessy*, 163 U.S. at 544, 551-52; *The Civil Rights Cases*, 109 U.S. at 22.

14. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 412-17 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244-45 (1998).

15. *See* United States v. Morrison, 529 U.S. 598, 621-22 (2000).

16. Pub. L. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (2012)).

17. 392 U.S. 409, 437-44 (1968).

distinction on which the *Civil Rights Cases* was based.[18] And the harsh reaction—even from leading libertarian legal scholars—to Paul's comments questioning Title II makes it appear that even skeptics of civil rights laws are unwilling to challenge these legal developments.

But, I shall argue, appearances are deceiving. Although the reaction to Paul's comments shows that skeptics of public accommodations laws are unwilling to attack Title II itself, the reasons for that unwillingness are essentially pragmatic. These skeptics appear to agree that laws prohibiting private businesses from excluding classes of customers violate libertarian principles, but they recognize that a frontal attack on Title II of the Civil Rights Act is a political nonstarter.[19] Instead, they have sought to retreat to safer political and legal ground from which to challenge the expansion of public accommodations laws to businesses and bases of discrimination not addressed by Title II.[20] This strategic retreat shows increasing signs of success. The Supreme Court's decision in *Boy Scouts of America v. Dale*[21] offered a tool to challenge public accommodations laws as violations of the First Amendment freedom of association. Initially, that tool was weakened by the prevailing reading of *Dale* as limited to cases in which a public accommodations law applies to a nonprofit, "expressive" association. That reading has essentially limited *Dale* to the fringes of public accommodations doctrine. It has kept free-association arguments from threatening the application of public accommodations law to for-profit commercial businesses. But ongoing legal developments—both in the area of public accommodations law itself and in the litigation surrounding the Affordable Care Act's "contraception mandate"[22]—are poised to undermine this expressive-commercial distinction. If these challenges succeed, *Dale*'s freedom-of-association principles will threaten the core of public accommodations law—including, perhaps, Title II itself. Richard Epstein's contribution to this Symposium, which argues that "[t]he original justifications for [Title II] have become weaker" at the same time that "the scope of the law has become ever more extensive," is the perfect embodiment of the threat I describe.[23]

My argument proceeds as follows. In Part I of this Essay, I discuss the controversy in the Reconstruction and civil rights eras over the penetration of anti-discrimination principles into the realm of private businesses' choice of customers. Although the controversy was discussed in the earlier era in terms of civil versus social rights, and in the later era in terms of property, contract, and

18. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 209-17 (2014).

19. *See infra* Part II.A.

20. *See infra* Part II.

21. 530 U.S. 640 (2000).

22. *See infra* Part II.C.

23. Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1261 (2014).

association, I argue that the same fundamental concerns motivated objections to public accommodations laws in both periods. In Part II, I turn to the current controversy. I begin by discussing the response to Rand Paul's 2010 comments and showing that Paul's libertarian opponents disagreed with him only on pragmatic—not principled—grounds. I then turn to an analysis of *Dale* and of the recent developments that promise to undermine the expressive-commercial distinction that has kept *Dale* from threatening the core of public accommodations law.

My main goal in this Essay is analytic and descriptive. I aim to show that although we no longer use the language of civil and social rights, the law of public accommodations discrimination remains preoccupied by the same sorts of questions that it once confronted using that language. Today's controversy regarding public accommodations laws is a controversy about whether the civil rights category should cede back some of the territory it once conquered from the category of social rights. Although I have my own normative views about that controversy, I hope that my analytic account is one on which participants on both sides of the debate can agree.

## I. THE EXPANDING TERRITORY OF "CIVIL RIGHTS," FROM RECONSTRUCTION THROUGH THE CIVIL RIGHTS ERA

From the moment the American civil rights project began, tension and conflict have existed regarding how broadly and deeply equality principles should extend into civil, economic, and social relations. During Reconstruction, these tensions and conflicts were expressed through the language of the tripartite theory of civil, political, and social rights. By the civil rights era of the mid-twentieth century, the language of the tripartite theory had largely dropped out of the mainstream discourse. But the same *substantive* tensions and conflicts continued. As the civil rights era proceeded, political and judicial actors expanded the domain of the equality principle more and more broadly. In so doing, Congress and the courts repeatedly overrode objections that the expanding civil rights laws intruded too deeply into private decisions—objections that would, a century earlier, have been framed in terms of the civil-rights/social-rights distinction. Although Congress and the courts overrode those objections, the objections never disappeared. Rather, the degree to which civil rights laws could properly intrude into the formerly "private" or "social" sphere remained contested from Reconstruction through the end of the civil rights era.

In this Part, I introduce the conflict over the breadth of the civil rights project in the Reconstruction and civil rights eras. My aim is not to tell anything close to the entire history of this conflict. Instead, I aim to show that, in both periods, influential skeptics objected that the project of racial equality was improperly intruding on what should be understood as private choices; and to show that those objections, although expressed in the language of social rights during Reconstruction and of property, contract, and free association during the

civil rights era, were substantively similar. My discussion in this Part thus provides important background for Part II of this Essay, which shows how the same conflict continues today.

During Reconstruction, the conflicts over the scope of civil rights laws were often expressed in the language of the tripartite theory of rights. Most public actors at the time seem to have taken for granted that there was a distinction between three classes of rights: civil rights (understood as basic rights attendant to participation in civil society), political rights (understood as rights to participate in the governance of the community), and social rights (understood as rights involving the participation in social life).[24] The boundaries between these different spheres of rights were highly contested, and there was no consensus on precisely what each sphere included. But there was a relatively clear consensus about the "core of each conception": "The core civil rights included the rights to sue and testify; social rights included the right to select one's associates; voting was the central political right."[25]

As a number of scholars have demonstrated, Reconstruction-era congressional debates acknowledged that civil, political, and social rights represented three distinct dimensions of equality.[26] Instead of challenging the tripartite theory, those debates concerned whether particular areas of life should be understood as implicating civil rights or instead social or political rights. In the standard account of those debates, most participants agreed that the Thirteenth and Fourteenth Amendments (and the Civil Rights Act of 1866) focused on protecting civil rights, the Fifteenth Amendment (and its enforcing legislation) protected political rights, and no provision of federal law protected equality in social rights.[27] Throughout this period, the scope of the civil rights category

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24. Richard Primus argues, with considerable force, that Republicans before and after the Civil War developed and relied on this tripartite theory to justify the "selective extension of rights to blacks"—"guaranteeing blacks the rights necessary to a free labor system, such as rights of contract, property, movement, and access to courts of law" without "grant[ing] blacks rights to vote and hold office." RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 154 (1999).

25. Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) ("Distinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision. But it was generally understood that civil rights were those rights exercised by economic man, such as the capacity to hold property and enter into contracts, and to bring suit to defend those rights in the legal system. Voting was the core political right. Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the 'amalgamation' of the races." (footnotes omitted)).

26. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 220-28 (2011).

27. *See, e.g.*, *id.* Primus argues instead that the Reconstruction-era Republicans actually saw all three Amendments as protecting civil rights and that the Fifteenth Amendment reflects the expansion of the concept of civil rights rather than the extension of constitutional protection to political rights. *See* PRIMUS, *supra* note 24, at 156-60.

remained highly contested, and social rights—almost an epithet[28]—represented a residual category of activities that the law did not reach. Perhaps the broadest congressional understanding of the civil rights category during the Reconstruction era appears in the Civil Rights Act of 1875, which treated race discrimination in public accommodations as a violation of civil, rather than merely social, rights.[29]

In its decisions that punctuated the end of Reconstruction, the Supreme Court rejected the Forty-Third Congress's broad understanding of the civil rights category. Insisting that the Reconstruction Amendments did not regulate—and did not authorize Congress to regulate—practices that implicated only social rights, the Court read the civil rights category narrowly and the social rights category broadly. In the *Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875 and specifically described the rights enforced by the statute—rights to nondiscrimination in public accommodations—as "social rights."[30] Justice Harlan's dissent accepted the civil-rights/social-rights distinction, though he argued forcefully that the rights enforced by the statute were not social rights but civil rights.[31] And in *Plessy v. Ferguson*,[32] the Court upheld a state law that required the segregation of accommodations on railroad cars against a Fourteenth Amendment challenge. The Court explained that the Fourteenth Amendment "could not have been intended" to "enforce social . . . equality."[33] It elaborated: "If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[34] Again, Justice Harlan's dissent agreed that the Fourteenth Amendment did not reach inequalities in social rights.[35] His disagreement with

28. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 781 (2008) ("To conflate the phrase 'social equality' with an imagined taxonomy of civil, political, and social rights is to mistake an insult for an analytic exercise.").

29. *See* ch. 114, 18 Stat. 335, 335-36, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 556 (1988) (describing the Civil Rights Act of 1875 as "an unprecedented exercise of national authority" that "breached traditional federalist principles more fully than any previous Reconstruction legislation"). For an illuminating treatment of the discussion of the civil rights and social rights categories in the legislative debates preceding enactment of the Civil Rights Act of 1875, see Patrick O. Gudridge, *Privileges and Permissions: The Civil Rights Act of 1875*, 8 LAW & PHIL. 83 (1989).

30. 109 U.S. at 22.

31. *See id.* at 59-60 (Harlan, J., dissenting); *see also* Siegel, *supra* note 25, at 1126-27 ("Justice Harlan broke with the majority because he, like the Congress that enacted the 1875 Civil Rights Act, viewed equal access to public transportation as a *civil right* which, accordingly, could not be the subject of racially discriminatory regulation . . . .").

32. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

33. *Id.* at 544.

34. *Id.* at 551-52.

35. *See id.* at 561 (Harlan, J., dissenting).

the Court rested on his conclusion that railroad segregation implicated civil, rather than social, equality.[36]

The decisions in the *Civil Rights Cases* and *Plessy* highlight the consensus at the time that social equality was beyond the power of law to achieve. For many during the Reconstruction era, the civil-rights/social-rights distinction served a function like the one that the structurally similar public-private distinction would later be understood to serve—to preserve a sphere of private, individual choice.[37] "In essence," argue Robert Post and Reva Siegel, "the Court used the distinction between civil and social rights to mark a sphere of associational freedom in which law would allow practices of race discrimination to flourish."[38] In the context of race relations specifically, a key aim of the civil-rights/social-rights distinction was to ensure that "[w]hites could refuse to have social contacts with blacks and could exclude blacks from their homes."[39] As Jack Balkin puts it, Reconstruction-era figures believed that "[s]ocial equality and social inequality were not the business of the state; rather social equality and social inequality were natural features of human interaction produced through the preferences and behavior of private individuals, and normally the state should not interfere with these decisions."[40]

In *Plessy* and subsequent cases, however, the Court applied the social rights concept beyond cases in which it merely protected the private choice of the litigants before it. Rather, the Court applied the concept to uphold statutes that *required* race segregation in public conveyances and schools—statutes that might override the individual choices of private actors.[41] And the social rights concept also played a key role in ensuring that prohibitions on interracial marriage—which perforce override private choices—would not be held unconstitutional.[42]

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36. *See id.* at 562-63.

37. It is hardly surprising, for this reason, that the civil-rights/social-rights distinction proved to be unstable and continually contested. For examples of discussions of the similar instability of the public-private distinction, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); and Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988).

38. Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 490 (2000).

39. Tushnet, *supra* note 25, at 887.

40. Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1694 (2005).

41. *See, e.g.*, Berea Coll. v. Kentucky, 211 U.S. 45 (1908) (upholding a law that prohibited racial integration in private colleges).

42. *See* Balkin, *supra* note 40, at 1694-95 ("'[S]ocial equality' had another, more racially charged meaning. It was also a code word for miscegenation and racial intermarriage."); Siegel, *supra* note 25, at 1123 ("Courts upholding antimiscegenation statutes relied upon the distinction between civil and social rights until they were confident enough—which they were not initially—simply to assert that regulating marriage lay beyond the scope of federal power."); *see also* Scott, *supra* note 28, at 781 ("'Social equality,' by contrast, was a label the[] enemies [of Homer Plessy's supporters] had long attempted to pin on the propo-

There was an undeniable tension between these two instantiations of the concept of social equality,[43] but the basic animating argument for distinguishing between civil and social equality remained one of preserving private choice. In Balkin's words, the dominant thinking at the time rested on the idea that "social equality and inequality are produced in the realm of private choice" and that the government could take account of widespread social understandings through "reasonable restrictions designed to soothe social tensions and diffuse social conflicts."[44] Such restrictions, rather than constituting "social engineering," were understood by *Plessy*-era thinkers to "facilitate the private sphere."[45] This embrace of regulation as a means to protect private choice was unstable—as became increasingly obvious during the *Lochner* period—but that is somewhat beside my point. Rather, my point is simply that the civil-rights/social-rights distinction served, by the end of Reconstruction, to protect race discrimination in public accommodations and that the justification offered for that distinction was one of protecting a "social" sphere of private choice in race relations.

When the civil rights era began nearly a hundred years later, people no longer spoke in terms of civil rights versus social rights. Balkin suggests that the questions of the civil rights era no longer "fit well into the tripartite theory."[46] Speaking of *Brown v. Board of Education* specifically, he argues that "[i]t is hard to say whether education is a question of political, civil, or social equality."[47] That is of course true. But I doubt it is any more true for education than for many other areas of life. The scope of the civil rights and social rights categories has always been contested. There is good evidence that many Reconstruction-era Republicans believed that education was a matter of social, rather than civil, equality.[48] As Balkin argues, those Reconstruction-era figures did not anticipate the development of "a pervasive welfare state."[49] He suggests that the New Deal revolution therefore rendered the tripartite theory obsolete.[50] One could, however, just as easily say that the rise of the American social welfare state was an important development that should affect our understanding of what belongs in the civil and social rights categories but that should not invali-

nents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women.").

43. *See* Balkin, *supra* note 40, at 1695.

44. *Id.* at 1701.

45. *Id.*

46. *See id.* at 1709.

47. *Id.*

48. *See, e.g.*, Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 325 ("Many northern Republicans in 1866 continued to resist the extension to blacks of either equal political rights, such as voting or jury service, or social rights, such as interracial marriage or school integration.").

49. Balkin, *supra* note 40, at 1709.

50. *See id.* at 1709-10.

date the efforts at categorization. In Great Britain, for example, T.H. Marshall argued in 1950 that the rise of the welfare state meant that access to education *and* social services should be considered an element of citizenship.[51] One could readily envision the jurisprudence of the civil rights era in the United States as having followed a similar path of explicitly expanding the civil rights category—and concomitantly contracting the social rights category.

Much of *Brown* itself is consistent with an argument that education, while considered a matter of social equality in the Reconstruction era, had become, by the middle of the twentieth century, a matter of civil equality. Chief Justice Warren's famous statement that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,"[52] referred specifically to the increasingly central contribution of public education to citizenship. The very next sentence in the *Brown* opinion makes this clear: "We must consider *public education* in the light of its full development and its present place in American life throughout the Nation."[53] The *Brown* opinion notes that unlike in the middle to late nineteenth century, public education in 1954 was "perhaps the most important function of state and local governments," something recognized as central to participation in "our democratic society."[54] And the Court described its ultimate holding as follows: "We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place."[55]

On its face, *Brown* readily lends itself to the reading that the Court was leaving in place the tripartite theory but merely redrawing the line between civil and social rights, shifting education into the civil category. But that is not how *Brown* came to be understood. Instead, that decision came to be understood as embracing a generic principle of equality—though whether that principle is an antidiscrimination or an antisubordination principle remains very much the subject of debate.[56] Still, although the *language* of the tripartite theory largely dropped out of the mainstream discourse, the substantive *concerns* that underlay that theory continued to play a major role in political and legal debates. The public accommodations context—which provided the setting for the Court to enforce a strong civil-rights/social-rights distinction in the *Civil Rights Cases* and *Plessy*—continued to provide a key setting in which the underlying concerns would be expressed in the 1960s and later. This is evident in the objections expressed by opponents of Title II of the Civil Rights Act. Although these opponents couched their objections in more straightforward libertarian terms

51. *See* T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 10-11, 46-48 (1950).

52. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

53. *Id.* at 492-93 (emphasis added).

54. *Id.* at 493.

55. *Id.* at 495 (emphasis added).

56. *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1532-46 (2004).

than did the nineteenth-century defenders of the civil-rights/social-rights distinction, their concerns were fundamentally the same.

Opponents of Title II sometimes framed their arguments in terms of freedom of contract or association. Robert Bork's famous critique of the Civil Rights Act took this form.[57] Notwithstanding that framing, Bork's argument sounded themes quite resonant with the nineteenth-century defense of a protected sphere of social rights—though with the line between civil and social rights substantially shifted. Where the Court of the late nineteenth century thought it an appropriate role of the law to enforce social customs against integration in the social sphere as in *Plessy*, Bork acknowledged that it was appropriate to displace state "laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them."[58] But like the Court of the *Civil Rights Cases*, Bork argued that the law should not override private choices in favor of discrimination in the social sphere—that it should not "tell [individuals] they may not act on their racial preferences in particular areas of life."[59] Bork offered the same views privately to Senator Barry Goldwater, who relied on them in opposing the Civil Rights Act.[60]

As Kevin Kruse shows, opposition to civil rights laws during this period, though often framed in the libertarian terms of freedom of association, often precisely duplicated the *Plessy*-era conception of social rights, in which government intervention to enforce segregation in the social sphere was understood as permissible.[61] Kruse demonstrates that "freedom of association" became a key rallying cry for opponents of both Title II of the Civil Rights Act and desegregation of public schools. Herbert Wechsler's pained assessment of *Brown*, of course, similarly invoked freedom of association.[62]

Other times, the arguments against Title II were framed in terms of the Thirteenth Amendment. The argument was not the one we might have expected from the *Civil Rights Cases*—that discrimination in public accommodations was not a badge and incident of slavery that Congress had Thirteenth Amendment power to target.[63] Instead, it was the rather stunning argument that prohibiting businesses from discriminating on the basis of race conscripted the

57. *See* Bork, *supra* note 2, at 21-22.

58. *Id.* at 22.

59. *Id.*

60. *See* PERLSTEIN, *supra* note 3, at 363-64.

61. *See* KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 161-80 (2005); Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 99, 100-01 (Clive Webb ed., 2005).

62. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

63. *See* The Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

*business owners* into involuntary servitude.[64] Strom Thurmond made this argument in his separate views attached to the Senate Report on the proposed Civil Rights Act.[65] Senator Thurmond described the Thirteenth Amendment as "an insurmountable constitutional barrier" to Title II, because, by forcing businesses to serve customers their owners desired not to serve, the bill would impose "involuntary servitude" on them.[66] As Christopher Schmidt explains, "in the early 1960s, this unusual Thirteenth Amendment argument featured prominently in the debate over the appropriate line between antidiscrimination policy and personal liberties."[67] Alfred Avins, a scholar whose work was widely cited by opponents of Title II, put the point this way in a prominent article:

> The fact that Negroes, or those who sympathize with their aspirations, may believe that white persons who refuse to serve them are being arbitrary or capricious, does not alter in any way the legal effect of the thirteenth amendment. This provision bans absolutely, and in the most express terms, the claim of any person to force any other person to serve him, for any reason whatsoever.[68]

Avins, in turn, relied on Washington Supreme Court Justice Joseph Mallery's dissent in the 1959 case of *Browning v. Slenderella Systems*.[69] The *Browning* majority upheld the award of damages under the state's public accommodations law to an African American woman who had been refused service at a weight loss clinic because of her race.[70] Dissenting, Justice Mallery argued that the law violated the Thirteenth Amendment. In a much-quoted line, Mallery asserted that "[w]hen a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude."[71] Earlier in his opinion, Justice Mallery described the basis for his position in terms that align very closely with the nineteenth-century civil-rights/social-rights distinction:

> The few [businesses] that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele

64. For an excellent and extensive discussion of these arguments, see McClain, *supra* note 5, at 136-41. *See also* George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1561 (2012) ("Paradoxically, it was the opponents of the Act, not its supporters, who relied upon the Thirteenth Amendment.").

65. *See* S. REP. NO. 88-872, at 42-53 (1964) (individual views of Sen. Strom Thurmond).

66. *Id.* at 53 (emphasis omitted).

67. Schmidt, *supra* note 4, at 425.

68. Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228, 254-55 (1964).

69. 341 P.2d 859 (Wash. 1959) (en banc).

70. *See id.* at 861, 866.

71. *Id.* at 869 (Mallery, J., dissenting).

> and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom.[72]

Whether framed as rights of contract, association, or freedom from involuntary servitude, these libertarian objections invoked the same notions of preserving private choice that underlay the civil-rights/social-rights distinction. And, indeed, Avins himself specifically argued that Title II violated not only the Thirteenth Amendment but also what he characterized as the Fourteenth Amendment's protection of free association—a protection he viewed as deriving from the Reconstruction-era refusal to "enact social equality."[73] Justice Mallery, too, made clear the connection between his Thirteenth Amendment position and the civil-rights/social-rights distinction, in a concurring opinion in the 1960 case of *Price v. Evergreen Cemetery Co.*[74] The majority held that a state statute prohibiting race discrimination in burial services violated the Washington State Constitution's single-subject rule.[75] But Justice Mallery added a concurrence to note what he thought was the broader significance of the case in "reveal[ing] an ultimate aspiration of the Negro race":

> This case demonstrates that the Negro desegregation program is not limited to *public* affairs. The right of white people to enjoy a choice of associates in their *private* lives is marked for extinction by the N.A.A.C.P. Compulsory total togetherness of Negroes and whites is to be achieved by judicial decrees in a series of Negro court actions.[76]

This passage, with its overtones of interracial marriage, resonates strongly with the *Plessy*-era civil-rights/social-rights distinction.

Congress, of course, rejected these arguments when it enacted Title II.[77] The Supreme Court also rejected them out of hand in the *Heart of Atlanta* case.[78] Although we read *Heart of Atlanta* today for its congressional-power holding, the Court also explicitly rejected a challenge to the statute based on property, contract, free-association, and involuntary-servitude principles.[79] And over the next decade or so, the civil-rights/social-rights distinction seemed to collapse, with the civil rights category capturing nearly all of the territory that

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72. *Id.*

73. Alfred Avins, *Social Equality and the Fourteenth Amendment: The Original Understanding*, 4 HOUS. L. REV. 640, 656 (1967).

74. 357 P.2d 702 (Wash. 1960) (en banc).

75. *See id.* at 703.

76. *Id.* (Mallery, J., concurring); *see also id.* at 704 ("The Negro race, ably led by N.A.A.C.P., makes the result of every Negro lawsuit the measure of its success in securing not only rights equal to whites in public affairs, but also of *special privileges* for Negroes in *private* affairs.").

77. *See, e.g.*, McClain, *supra* note 5, at 128-35 (discussing the Senate report to the Civil Rights Act).

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

79. *Id.* at 258-61.

had formerly been occupied by social rights.[80] In the 1967 *Loving* case, the Court ruled that the Fourteenth Amendment prohibited state laws barring interracial marriage.[81] During the Reconstruction era, marriage had of course been thought to fall within the domain of *social* equality, to which the Fourteenth Amendment did not extend.[82] In 1968, Congress extended civil rights law to prohibit discrimination in the choice of a buyer to whom to sell (or a lessee to whom to rent) a house.[83] The Court upheld that extension two months later by ruling that Congress could rationally believe that private housing discrimination was a badge and incident of slavery.[84] When the Court extended that precedent to race discrimination in private decisions to enter into contracts—in the specific context of private schools, but in a decision that seemed to apply to any contractual setting—it seemed that the triumph of civil rights over social rights was complete.[85] Though some voices continued to sound social rights themes,[86] they were largely drowned out by the overarching expansion of the civil rights sphere.

This history might lead us to conclude that the civil-rights/social-rights distinction no longer matters in the law. As I hope to show in the rest of this Essay, I think that conclusion would be a mistake. There have always been conflicts regarding the proper boundary between antidiscrimination protections and

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80. At the same time, the civil rights category was occupying the territory formerly occupied by political rights, as Congress and the courts increasingly characterized voting as a civil right protected by the Fourteenth Amendment. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966). *See generally* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009) (discussing these developments). For Justice Harlan's effort to close the barn door on these developments, see Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).

81. Loving v. Virginia, 388 U.S. 1, 2 (1967).

82. *See supra* text accompanying note 42.

83. *See* Fair Housing Act of 1968, Pub. L. 90-284, tit. VIII, § 804, 82 Stat. 81, 83 (codified as amended at 42 U.S.C. § 3604 (2012)).

84. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412-13, 440-41 (1968). *Jones* did not directly address the constitutionality of the Fair Housing Act, but, as a doctrinal matter, the Court's decision necessarily implies that the statute is constitutional. All of the key actors at the time understood that point. *See* 3 ACKERMAN, *supra* note 18, at 415-16.

85. *See* Runyon v. McCrary, 427 U.S. 160, 179 (1976).

86. *See id.* at 189 (Powell, J., concurring) (arguing that the Civil Rights Act of 1866, "as interpreted by our prior decisions, does reach certain acts of racial discrimination that are 'private' in the sense that they involve no *state* action," but concluding that "choices, including those involved in entering into a contract, that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts"); *id.* at 212 (White, J., dissenting) ("As the associational or contractual relationships become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word 'contract' is foreseeable; Thirteenth Amendment limitations on Congress' power to ban 'badges and incidents of slavery' may be discovered; the doctrine of the right to association may be bent to cover a given situation.").

private choices—the conflicts that the civil-rights/social-rights distinction once mediated. The Court and Congress of the civil rights era drew this boundary in a different place than did the Court of the *Plessy* era. But it did not eliminate the boundary. And it most especially did not end the contest over where the boundary should lie. As I argue in the next Part, we have seen increasing conflicts over the past decade and a half over the proper scope of public accommodations law. These conflicts implicate the same tensions between public responsibility and private choice that informed the civil-rights/social-rights distinction.

## II. THE CONTEST TODAY

The proper reach of civil rights laws regulating private business conduct is contested today to a degree that it has not been since the 1960s. Indeed, we are edging closer to reengaging precisely the same fights that occurred in the years surrounding the passage of Title II of the Civil Rights Act. This contest is a bit hidden, as even libertarian conservatives profess allegiance to Title II these days. But a close analysis of their arguments suggests that the position of these libertarians and conservatives is largely a tactical one—an effort to retreat to stronger political ground on which to fight the continued extensions of (and perhaps to commence a rollback of) the laws that prohibit discrimination by private parties.[87] Although many libertarians have formally given up the effort to eliminate prohibitions on race discrimination by private places of public accommodation, many have continued to oppose extensions of public accommodations laws to new defendants and bases of discrimination. And their opposition to those extensions has been based on principles that, taken seriously, threaten the core of Title II.

My argument in this Part unfolds in three stages. First, I examine a recent occasion in which libertarian opposition to public accommodations laws received prominent airing in mainstream American politics: Rand Paul's statements questioning Title II during his 2010 Senate campaign. I argue that Paul's statements, the reaction among prominent libertarians to those statements, and Paul's subsequent backing away from them are telling of the continued controversy over the penetration of antidiscrimination norms into spheres once thought "private." Paul's statements sounded the same civil-rights/social-rights themes that could be heard in the Supreme Court's decision in the *Civil Rights Cases*—and especially in the opposition of Bork and Senator Goldwater to the Civil Rights Act of 1964. The reaction of prominent libertarians and Paul's own retreat highlighted the degree to which a frontal assault remains *politically*

87. I should emphasize that an agenda to roll back the coverage of laws prohibiting private-sector discrimination is not the same as an agenda to promote private-sector discrimination. One can honestly and vehemently oppose discrimination by private actors while still believing, on libertarian principle, that the government should not intervene to prevent it—and many libertarians take this precise position.

untenable. But they also demonstrated the degree to which the same prominent libertarians remain committed to a civil-rights/social-rights distinction that is in deep tension with *any* modern-day law prohibiting discrimination by private businesses.

The second stage of my argument examines one of the key positions to which libertarians retreated when they gave up their frontal attack on Title II: a distinction between "commercial" and "expressive" enterprises. Prominent libertarian commentators, notably Dale Carpenter,[88] have argued that this distinction makes the most sense of the Supreme Court's decision in *Boy Scouts of America v. Dale*. *Dale* held that the First Amendment right of free association entitled the Boy Scouts of America to an exemption from a state public accommodations law that prohibited discrimination based on sexual orientation.[89] Commentators have read *Dale* broadly to shield nonprofit "expressive associations" from the application of public accommodations antidiscrimination laws. But they have typically assured skeptics that *Dale* poses no threat to the application of public accommodations laws to for-profit businesses. The commercial-expressive distinction is unstable, however. The same libertarian arguments that justify shielding "expressive" organizations from antidiscrimination laws would also readily justify shielding for-profit businesses from those laws. These arguments thus threaten to reinstitute a form of the civil-rights/social-rights distinction, with the line drawn in almost exactly the same place Robert Bork would have drawn it in the 1960s.

In the final stage of my argument, I show that the threat is not just a theoretical one. Rather, a current wave of litigation pursuing the expressive and religious rights of for-profit corporations—through challenges to the application of public accommodations laws as well as challenges to the Affordable Care Act's "contraception mandate"—relies on a theory that would collapse the expressive-commercial distinction. Although these challenges have had mixed success, they highlight the difficulty of cabining libertarian attacks on public accommodations laws to the marginal cases. Whether or not one thinks that these challenges *should* succeed, they demonstrate that we continue to struggle over the proper placement of the civil-rights/social-rights line, nearly fifty years after Congress and the Supreme Court supposedly laid that distinction to rest.

### A. *Rand Paul and the Political Untenability of a Frontal Attack on Public Accommodations Laws*

It is unusual these days to hear arguments against public accommodations laws based on property rights and freedom of contract. After all, as a doctrinal matter, the Supreme Court's *Heart of Atlanta* decision resolved the property-

88. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1517-18 (2001).

89. *See* 530 U.S. 640, 644 (2000).

and-contract challenge to Title II of the Civil Rights Act.[90] More recently, courts have rejected similar challenges to other laws prohibiting discrimination in public accommodations.[91] Occasionally, however, a property-and-contract argument against laws prohibiting discrimination in public accommodations breaks through to prominence. And the result is revealing—about the continuing contest over the line between civil rights and social rights and about different political factions' views of their strongest ground in that contest.

The controversy over Rand Paul's discussion of the Civil Rights Act in his 2010 campaign offers a prominent recent example of this dynamic. The controversy "started when the Louisville Courier-Journal placed on its Web site an April 17, 2010, interview between Paul and the paper's editorial board."[92] When asked if he would have supported the Civil Rights Act of 1964, Paul said that he supported the parts of the law that prohibited discrimination by state actors.[93] But he suggested that he did not support the law's prohibition on discrimination by private businesses, because, he said, "I do believe in private ownership."[94] Paul said that he found racism "abhorrent" and "a bad business decision," but, in language very similar to Bork's forty-seven years earlier, he suggested that allowing a business owner to discriminate was "the hard part about believing in freedom."[95] In an appearance on the Rachel Maddow Show a month after his *Courier-Journal* interview, Paul made clear that his skepticism of laws prohibiting discrimination by private businesses rested on a theory that the institution of private property required that a business be free from regulations limiting its choice of what customers to serve.[96] He analogized Title II to a decision "that restaurants are publicly owned and not privately owned" and asked, rhetorically, "Does the owner of the restaurant own his restaurant? Or does the government own his restaurant?"[97] Paul's comments on this point

90. Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 258-261 (1964).

91. *See, e.g.*, Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 586-89 (S.D. Cal. 1993) (rejecting a Fifth Amendment property rights challenge to the public accommodations provisions of the Americans with Disabilities Act).

92. Glenn Kessler, *Rand Paul's Rewriting of His Own Remarks on the Civil Rights Act*, WASH. POST (Apr. 11, 2013, 6:00 AM ET), http://www.washingtonpost.com/blogs/fact-checker/post/rand-pauls-rewriting-of-his-own-remarks-on-the-civil-rights-act/2013/04/10/5b8d91c4-a235-11e2-82bc-511538ae90a4_blog.html; *see also* Andrew Wolfson, *Rand Paul Has Long History of Controversial Views*, COURIER-J. (Louisville, Ky.) (June 20, 2010, 3:12 PM), http://www.courier-journal.com/article/20100621/NEWS0106/6210302/Rand-Paul-has-long-history-controversial-views.

93. *See id.*

94. *See id.*

95. *Id.*; *see also* Bork, *supra* note 2, at 24 ("The trouble with freedom is that it will be used in ways we abhor. It then takes great self restraint to avoid sacrificing it, just this once, to another end.").

96. *See* Kessler, *supra* note 92.

97. T.J. Ortenzi, *Rand Paul on "Maddow" Defends Criticism of Civil Rights Act, Says He Would Have Worked to Change Bill*, HUFFINGTON POST (May 25, 2011, 5:30 PM ET), http://www.huffingtonpost.com/2010/05/20/rand-paul-tells-maddow-th_n_582872.html.

called to mind those of his father, Representative Ron Paul, when Representative Paul cast the lone vote against a resolution of the House of Representatives honoring the fortieth anniversary of the Civil Rights Act in 2004.[98]

Substantively, Rand Paul's argument rests on an understanding of property that fails to take account of the lessons of legal realism. In a postrealist world, we understand that regulation is not incompatible with private ownership. Laws delimiting the rights and obligations of property owners and those with whom they deal do not, in Paul's phrasing, make the government the owner of the property. Indeed, the institutions of property and contract depend on background legal rules delimiting those rights and obligations and enforcing them in cases of breach. These rules may block certain transactions in which willing property owners wish to engage (such as by prohibiting the sale of landlocked parcels), but doing so may serve broader interests in democracy, freedom, and the operation of a system in which individuals have an opportunity to acquire and exchange property.[99] As Morris Cohen put it almost a century ago, "[t]o be really effective," property rights "must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others."[100] "Ownership" cannot plausibly be defined as a state of nature in which the "owner" has complete authority to do whatever she wants with her property. If that is the definition, then nobody "owns" anything. We may agree or disagree about whether a particular restriction on an owner's use of property is appropriate.[101] But Paul was wrong to describe regulation that limits a business's choice of customers as rendering the proprietor no longer an "owner."[102]

Unlike his father, Rand Paul later sought to clarify that, despite his concerns with Title II, he would have voted for the Civil Rights Act of 1964 be-

98. *See* McClain, *supra* note 5, at 144-47; *see also* Kessler, *supra* note 92.

99. *See* Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 144 (2008).

100. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927). For a contemporary argument—building on the work of the legal realists—against treating the right to exclude as the essential aspect of ownership, see Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1066 (2009); and Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747 (2009).

101. My argument in this Essay is an analytic one, not a normative one. Accordingly, it is of no particular moment whether I think prohibitions on discrimination by businesses that hold themselves open to the public are justified. For whatever it is worth, I do tend to agree that such antidiscrimination rules are justified, largely for the reasons set forth by Singer, *supra* note 99, at 147. *See generally* Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91, 92 (2011) ("United States law does and should recognize a foundational anti-apartheid principle that puts out of bounds market conduct that deprives individuals of equal opportunities because of their race.").

102. For a contribution that describes public accommodations laws as one of a number of restrictions on alienability within property law, see Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1447 (2009).

cause he supported the portions of the statute that prohibited discrimination by state actors.[103] But his ultimate position on the Civil Rights Act is not what interests me here. Rather, what interests me is the reaction that his comments drew from libertarian scholars and commentators in 2010. Although some libertarian commentators supported Paul's suggestion that Title II violated basic liberties of property and contract,[104] the most prominent of them embraced Title II. Law professors Richard Epstein and David Bernstein, and the Cato Institute's Jason Kuznicki, all argued that Paul had gotten it wrong.[105] Moreover, all seemed to regard Paul's comments as a bit of an embarrassment. Epstein noted ruefully that "[a]s Rand Paul captures the Republican senatorial nomination in Kentucky, libertarian theory takes its lumps in the popular press," and he criticized Paul's answer to Maddow as reflecting "a rote application of the [Ayn] Randian approach."[106] Bernstein bemoaned "[t]he progressive libel of libertarians as racial troglodytes for their consistent defense of private-sector autonomy" and argued that "from both a moral and tactical perspective, opposition to ['basic private sector antidiscrimination legislation'] should be rather low on the libertarian priority list."[107] And Kuznicki, after arguing that Title II was consistent with libertarian principles but might not be constitutional on an originalist account, observed that "it is bizarre and embarrassing to me that *this* should be the hill that anyone wants to die on in the name of originalism."[108]

The *substance* of Epstein's, Bernstein's, and Kuznicki's arguments against Paul's position, I contend, reflected what these writers understood to be their *political* dilemma. Each of these writers sought to articulate a theory that reconciled Title II with libertarian principles while providing a principled, libertarian basis for opposing expansion of public accommodations laws beyond race-based protections covering a narrow class of businesses. But the balance is too precarious; the arguments offered by these writers either fail to reconcile Title II with libertarian principles or fail to provide a principled basis for opposing expansion of public accommodations laws beyond Title II. One suspects, therefore, that the driving force behind the articulation of these arguments is not principled so much as it is political. On a deeper level, one doubts that Epstein,

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103. *See* Kessler, *supra* note 92.

104. *See, e.g.*, Jeff Jacoby, Op-Ed., *Tough Stand: Freedom to Be Odious*, BOS. GLOBE (May 26, 2010), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/05/26/tough_stand_freedom_to_be_odious.

105. *See* Richard A. Epstein, *Rand Paul's Wrong Answer*, FORBES (Apr. 24, 2010, 12:48 PM), http://www.forbes.com/2010/05/24/rand-paul-rachel-maddow-opinions-columnists-richard-a-epstein.html; David E. Bernstein, *Context Matters: A Better Libertarian Approach to Antidiscrimination Law*, CATO UNBOUND (June 16, 2010), http://www.cato-unbound.org/2010/06/16/david-e-bernstein/context-matters-better-libertarian-approach-anti discrimination-law; Jason Kuznicki, *The Garden Paths of Ideology*, CATO UNBOUND (June 21, 2010), http://www.cato-unbound.org/2010/06/21/jason-kuznicki/garden-paths-ideology.

106. Epstein, *supra* note 105.

107. Bernstein, *supra* note 105.

108. Kuznicki, *supra* note 105.

Bernstein, and Kuznicki really accept that Title II is consistent with libertarian principles. But they hope to avoid the "embarrass[ment]" that opposition to a deeply entrenched, widely accepted law would cause, so they are willing—as a "tactical" move—to concede that "hill" to the civil rights revolution while retreating to stronger political ground to fight off further advances of the public accommodations antidiscrimination project.[109]

Bernstein's intervention in the intralibertarian debate over Paul's comments exemplifies the problem. Bernstein notes approvingly that "libertarians are loath to concede the principle that the government may ban private sector discrimination," because "the concept of antidiscrimination is almost infinitely malleable."[110] He observes that defenders of antidiscrimination laws "typically focus on laws banning racial discrimination" and says that "[t]hey do so because opposition to race discrimination has great historical and emotional resonance."[111] But he notes that antidiscrimination laws extend far more broadly, "to discrimination based on religion, sex, age, disability (including one's status as a recovering drug or alcohol addict), pregnancy, marital status, [or] veteran status," and even to "everything from sexual orientation to political ideology to weight to appearance to membership in a motorcycle gang."[112] Thus, he concludes, "to concede the general power of government to redress private discrimination through legislation would be to concede virtually unlimited power to the government."[113]

So why does Bernstein defend Title II? Well, he argues, libertarians "are often willing to make certain exceptions to their opposition to antidiscrimination laws, so long as they can identify an appropriate limiting principle."[114] And what is the limiting principle that should allow libertarians to make an exception to Title II? Bernstein makes two essential points. First, he argues, race discrimination in private business at the time Congress enacted the Civil Rights Act was not really *private* discrimination, because "the common law rule barred discrimination in places of public accommodation," but courts after the Civil War "manipulated, changed, or ignored their preexisting common law to deprive African Americans the benefit of that rule."[115] Second, race discrimination at the time "wasn't entirely a voluntary choice of business owners," because those who did not discriminate faced "the implicit threat of pri-

109. I am not the only one who reads the situation this way. Other libertarians accused these commentators in real time of pulling their punches for political reasons. *See, e.g.*, Jeffrey Miron, *What Matters Are Consequences, Not Context*, CATO UNBOUND (June 23, 2010), http://www.cato-unbound.org/2010/06/23/jeffrey-miron/what-matters-are-consequences-not-context (responding directly to Bernstein).

110. Bernstein, *supra* note 105.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

vate violence and extra-legal harassment"—harassment "often undertaken with the approval of local officials."[116] This second argument is consistent with the position Epstein takes in *Forbidden Grounds*, in which he argues that Title II was necessary to overcome local "political forces" and "gangs bent on violence" against businesses in the South that would serve black and white customers as equals.[117] Not surprisingly, Epstein's objection to Paul's statement relies heavily on this point,[118] as does Kuznicki's.[119]

These, however, are not strong arguments of libertarian principle for accepting Title II while rejecting broader extensions of public accommodations laws. The first—state action—point is initially appealing, but it extends far beyond Title II. As Joseph Singer has shown extensively, the common law doctrine before the Civil War in many jurisdictions at least plausibly prohibited *any* discrimination by *any* business holding itself out as serving the public. The prohibition on the right to refuse service does not appear to have been limited to cases in which the refusal was based on race, and there is evidence that the prohibition was not limited to the narrow class of "public accommodations" later covered by Title II of the Civil Rights Act.[120] So the common law history might in fact justify a wide array of antidiscrimination protections, as applied to a wide array of businesses. More important, Bernstein's acceptance of the baseline common law rule means that he can have no principled objection to the government imposing antidiscrimination laws on private businesses. If the government may impose such a rule through the actions of courts, there is no *libertarian* reason why it may not impose such a rule through legislation. (To return to Paul's articulation of the point, Bernstein never explains why a *statutory* prohibition on discrimination would make the government the "owner" of the business, while a judicially imposed prohibition would leave "ownership" in private hands.)

As for the second point, that discrimination in the South was enforced by private violence and harassment in which local officials sometimes acquiesced, the essential problem is that Title II extends far beyond cases in which private-sector discrimination is supported by "a white supremacist cartel."[121] Bernstein tacitly admits that such a cartel did not generally exist in the North,[122] yet Title II applies there as well. And Title II continues to apply today even after the flagrant public and private discriminatory system of Jim Crow has been eliminated.[123] Indeed, it is notable that when Epstein made a version of the white-

116. *Id.*

117. EPSTEIN, *supra* note 7, at 127-28.

118. *See* Epstein, *supra* note 105.

119. *See* Kuznicki, *supra* note 105.

120. *See* Singer, *supra* note 9, at 1303-31.

121. Bernstein, *supra* note 105.

122. *See id.*

123. *See, e.g.*, Jacoby, *supra* note 104 ("What is the justification for laws banning private discrimination *today*, when Jim Crow is dead, racism is overwhelmingly abominated,

supremacist-cartel argument in *Forbidden Grounds*, he said only that "[i]n the *Old South* Title II was needed" to overcome a "coordination problem" caused "by the selective use of private force to interfere with ordinary common law rights of trade."[124] In his response to Paul, Epstein again argued that Title II was necessary at the time it was enacted, but he argued against current repeal only on the narrower pragmatic ground that today the statute basically does nothing: it "has been moribund for years," and its "practical inconvenience is zero," though its "symbolic importance is enormous."[125]

Although Epstein resists a repeal of Title II, the *enactment* of such a law today, in the absence of a regime like Jim Crow, would contravene his libertarian principles. This is clear from his discussion in *Forbidden Grounds* itself, which rests its support for Title II on white-supremacist-cartel grounds. It is even clearer from Epstein's subsequent article analyzing *Boy Scouts of America v. Dale*—a case I discuss extensively in the next Subpart.[126] In that article, Epstein is explicit that "the state has no interest in counteracting discrimination by private associations"—commercial or noncommercial—"that do not possess monopoly power."[127] In his contribution to this Symposium, Epstein not only elaborates the monopoly-power position he articulated in his *Dale* piece but also argues that the monopoly power of traditional public accommodations has eroded substantially in the last fifty years.[128]

As Epstein himself acknowledges in his contribution to this Symposium,[129] the white-supremacist-cartel justification would not easily support Title II today. Even as of 1964, if the problem was a cartel that enforced discrimination by businesses via threats, violence, and harassment, why is the proper libertarian response not to directly target the threats, violence, harassment, and monop-

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and a black man is president of the United States?"). None of this is to say that the *effects* of Jim Crow are entirely in the past or that intentional race discrimination is in the past at all. For good recent discussions of the continuing significance of race in America, see generally DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014) (analogizing persistent racial inequality in the United States to a cartel); THOMAS J. SUGRUE, NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE (2010) (discussing persistent racial divisions in America); and Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010) (arguing that "the promise of post-racialism is still premature" (capitalization altered)). But I doubt that Bernstein, Epstein, and other libertarians would find persistent racial inequality to be the sort of pervasive "white supremacist cartel" that they believe is necessary to justify Title II.

124. EPSTEIN, *supra* note 7, at 128 (emphasis added).

125. Epstein, *supra* note 105. Epstein takes a similar position in his contribution to this Symposium. *See* Epstein, *supra* note 23, at 1264.

126. *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 138-39 (2000).

127. *Id.* at 120.

128. *See* Epstein, *supra* note 23, at 1261.

129. *See id.* at 1260-61.

oly, so that business owners will be truly free to choose whom to serve?[130] Bernstein says that targeting the cartel directly would have required "a massive federal takeover of local government to prevent violence and threats against, and extralegal harassment of, those who chose to integrate," and that Title II's ban on discrimination by private business owners was a much more "[p]ractical" way of achieving the same end.[131] But that makes no sense. If those who engaged in threats, violence, and harassment to prevent business owners from serving blacks could not be stopped by the threat of federal prosecution—at least without a "massive federal takeover of local government"—then why would they be stopped by a federal law prohibiting business owners from discriminating? Bernstein says that Title II allowed business owners to meet "threats of violence and harassment" with "an appeal to the [business's] obligation to obey federal law."[132] But it is not clear why a Ku Klux Klan member who was not deterred by the threat that he would be *personally* subject to *criminal prosecution* for violent threats against businesses would be deterred by the fear that the *victim* of those threats would be subject to *injunctive relief and civil penalties* for giving into them. And Bernstein never explains why enforcing Title II in this context would not have required the same sort of "massive federal takeover" that he believes it would have taken to enforce the prohibition on threats, violence, and harassment.

The effort by Bernstein, Epstein, and others to construct a limiting principle that allows libertarians to support Title II while opposing the extension of prohibitions on public accommodations discrimination thus should be regarded as a failure on its own terms. The argument either does not provide a principled libertarian justification for Title II or does not provide a basis for limiting the extension of public accommodations laws. The libertarian objections to Paul's comments thus are best regarded as reflecting a keen sense of the politically possible—a concession that our society durably regards a right to be free from *race* discrimination by certain core *public accommodations* as a civil right. But the position leaves open the opportunity to engage in further contest over where to draw the line between civil and social rights—a contest that will be waged on ground that is more politically favorable to skeptics of antidiscrimination laws.

As I show in the rest of the Essay, that contest has indeed moved to more favorable ground for libertarians by focusing on circumstances in which antidiscrimination laws seem to violate not just pre-legal-realist understandings of property ownership but also more modern understandings of civil liberties. I turn to these controversies in the next two Subparts of the Essay. As I note, though, whatever the *doctrinal* heading, the contest is the same one that has

130. *See, e.g.*, EPSTEIN, *supra* note 7, at 29-30 (arguing for state intervention to prevent force and fraud).

131. Bernstein, *supra* note 105.

132. *Id.*

persisted since the Reconstruction-era distinction between civil rights and social rights came to prominence—a contest over defining the degree to which antidiscrimination law may penetrate into spaces once understood as "private" or "social." And, indeed, many of the *arguments* for expanding or contracting the civil rights sphere are the same across the doctrinal contexts. All of this suggests that the doctrinal arguments are merely the latest vehicle for continuing the long-running contest between broad and narrow understandings of civil rights.

### B. Dale *and the Expressive-Commercial Distinction*

Beginning with its decision in *Boy Scouts of America v. Dale*, the Supreme Court has offered libertarian opponents new ground from which to challenge and limit public accommodations laws. *Dale* held that, at least in some circumstances, an organization has a First Amendment right against the application of public accommodations laws. *Dale* itself is not a very clear opinion. Read at its broadest, it threatens all public accommodations laws. But many commentators have argued that no such threat exists.[133] They have read *Dale* as resting implicitly on an expressive-commercial distinction. In their reading, nonprofit "expressive" organizations have a constitutional defense to the application of public accommodations laws, but for-profit "commercial" ones do not.

In this Subpart, I respond to these arguments on their own terms. On its face, *Dale* seems to threaten the constitutionality of applying public accommodations laws in many circumstances beyond the specific context of the case. I then turn to the expressive-commercial distinction, which many commentators have relied on in suggesting the threat is limited. I argue that the distinction is a very unstable basis for confining the libertarian principles of *Dale*.

*Dale* involved a state law prohibiting sexual orientation discrimination by public accommodations. The Court held that application of that law to bar the Boy Scouts from excluding an openly gay assistant scoutmaster from membership violated its First Amendment rights of expressive association.[134] The Boy Scouts stated that it taught that homosexuality was not "morally straight," and that allowing an openly gay individual to serve as an assistant scoutmaster would impair that message.[135] The Court agreed: "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[136] And it concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive as-

133. *See infra* note 151 and accompanying text.

134. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

135. *See id.* at 649-53.

136. *Id.* at 653.

sociation."[137] The Court, however, did not elaborate on what sorts of state interests would be sufficient to justify such an intrusion.

The risk *Dale* poses to all public accommodations laws is evident. If the mere requirement that an organization not discriminate against gays in admission to membership is compelled association or forced speech that violates the organization's First Amendment rights, the requirement that a business not discriminate against African American customers could readily be understood as compelled association or forced speech by a parallel argument. A business corporation, just like a nonprofit association, has First Amendment rights—including rights against being compelled to support the messages of others in some circumstances—under current doctrine.[138] Serving an African American customer in a restaurant side by side with white customers sends the message of equal citizenship of blacks and whites at least as strongly as admitting gay members to the Boy Scouts sends the message that homosexuality is acceptable.[139] Indeed, the compelled-message argument is plausibly *stronger* in the restaurant case than in the Boy Scouts case. When a restaurant gives equal service to black and white customers, it necessarily sends the message that blacks and whites deserve equal service. The message has a direct nexus to the restaurant's action. But when an organization admits an individual to membership, it does not necessarily send a message of endorsing everything the individual does outside of activities sponsored by the organization.[140]

And, of course, freedom of association has long been a key argument offered against public accommodations laws. Bork's classic *New Republic* article

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137. *Id.* at 659.

138. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405, 410-11 (2001) (applying the First Amendment compelled-speech doctrine to invalidate a requirement that mushroom producers "subsidize speech with which they disagree"); *see also* Citizens United v. FEC, 558 U.S. 310, 342-43 (2010) (holding that "political speech does not lose First Amendment protection 'simply because its source is a corporation'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978))).

139. *See* Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1822-23 (2002) ("Consider the following hypothetical: Ollie's Barbecue is a restaurant notorious in some quarters for the time, some decades ago, when it litigated its right to exclude blacks, all the way to the Supreme Court. Suppose that tomorrow it decides that it expresses a message of white supremacy and segregation. It therefore claims a right to exclude blacks, since including them would burden the expression of its viewpoint of white supremacy." (footnote omitted)). Ollie's Barbecue, of course, was the business involved in *Katzenbach v. McClung*, 379 U.S. 294 (1964), a companion case to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). On the same point, see Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 808 (2001) ("The truth, however, is that antidiscrimination laws *do* centrally interfere with the ability of many people to communicate certain messages and values.").

140. *See* Hans Allhoff, *Membership & Messages: The (Il)logic of Expressive Association Doctrine*, 15 U. PA. J. CONST. L. 1455, 1456 (2013) ("[I]t will almost always be the case that an unwanted member's presence in an organization can mean any number of things beyond the organization's approval of what he or she stands for.").

objecting to the Civil Rights Act repeatedly invokes associational freedom arguments.[141] And, as we have seen, William Rehnquist, then a private attorney in Phoenix, joined Bork in advising Senator Barry Goldwater to vote against the bill.[142] Rehnquist, as Chief Justice, authored the opinion of the Court in *Dale*.

Given this background, it should be no surprise that the *Dale* dissenters charged the majority with "convert[ing] the right of expressive association into an easy trump of any antidiscrimination law."[143] And a number of commentators similarly saw *Dale* as a general threat to antidiscrimination and public accommodations laws.[144] As Andrew Koppelman and Tobias Wolff show, however, the threat has not (yet) come to pass; the lower courts have not read *Dale* as broadly as its logic might imply.[145]

One key means by which lower courts have limited *Dale* is by erecting an expressive-commercial distinction. This distinction finds its origin in Justice O'Connor's partial concurrence in *Roberts v. United States Jaycees*.[146] Justice O'Connor said that "an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members," while she found "only minimal constitutional protection of the freedom of *commercial* association."[147] She stated flatly that "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[148] In deciding whether an organization is expressive or commercial, she argued, a court should look to whether the organization "is predominantly engaged in protected expression"[149]: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[150]

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141. *See* Bork, *supra* note 2.

142. *See* PERLSTEIN, *supra* note 3, at 363-64.

143. Boy Scouts of Am. v. Dale, 530 U.S. 640, 701-02 (2000) (Souter, J., dissenting); *see also id.* at 695 (Stevens, J., dissenting) (noting that the majority's rule implies "a limitless right to exclude for every organization").

144. *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 601 (2001) (stating that *Dale* "means that any group that wants to discriminate and exempt itself from state anti-bias laws can do so by claiming, during litigation, that it has a discriminatory purpose"); Rubenfeld, *supra* note 139, at 812.

145. *See* ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 48-52 (2009).

146. 468 U.S. 609, 631 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

147. *Id.* at 633-34.

148. *Id.* at 634.

149. *Id.* at 635.

150. *Id.* at 636.

In response to the claims that *Dale* threatens antidiscrimination laws generally, a number of scholars have looked to Justice O'Connor's commercial-expressive distinction. Dale Carpenter and Seana Shiffrin have offered the most extensive defenses of that approach.[151] The commercial-expressive distinction, Carpenter argues, "preserves valuable associational freedom while saving antidiscrimination law from constitutional invalidation in the areas where equality guarantees are most critically needed—employment and similar predominantly commercial arenas."[152] Shiffrin, who is troubled by *Dale* but largely defends Justice O'Connor's *Roberts* concurrence, similarly argues for drawing "an important distinction between social associations and business associations or associations that significantly operate as parts of the competitive economy."[153] Shiffrin argues that the former class of associations should have "a nearly absolute right . . . to exclude unwanted members," while the latter should not.[154] Like Carpenter, she argues that the commercial-noncommercial distinction appropriately balances associational and nondiscrimination interests:

> First, regulation to promote inclusive membership practices is justified when applied to associations whose primary purpose is participation in the commercial milieu because of the central importance of fair access to material resources and mechanisms of power. Second, because such associations operate within a highly competitive marketplace and have a fairly focused singular purpose whose pursuit is largely guided by this competitive context and aim of profitable operation, these associations do not function in a context that is likely to be conducive to the free, sincere, uninhibited, and undirected social interaction and consideration of ideas and ways of life.[155]

But the expressive-commercial distinction is not a stable one, for at least three reasons. First, though *Dale* contains some language noting the "extreme[] br[eadth]" of New Jersey's public accommodations law,[156] nothing in the Court's *analysis* turned on the law's application to a noncommercial entity. Second, the line between expression and commerce is conceptually indistinct. Much, if not all, commercial activity is also expressive. As Rubenfeld notes, businesses "engage in expressive activity"[157] in a variety of settings: "in their commercial advertising, in their choice of what to sell, and in their hiring practices."[158] In all of these actions, a business will often self-consciously seek to transmit a message about what sort of person buys its goods or services. Carpenter and Shiffrin concede that there are hard cases in which it will be difficult

151. *See* Carpenter, *supra* note 88, at 1517; Seana Valentine Shiffrin, Essay, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 841 (2005).

152. Carpenter, *supra* note 88, at 1518.

153. Shiffrin, *supra* note 151, at 876.

154. *See id.* at 875-76.

155. *Id.* at 877.

156. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

157. Rubenfeld, *supra* note 139, at 812 (quoting *Dale*, 530 U.S. at 655).

158. *Id.*

to determine whether to treat a given organization as expressive or commercial.[159] But given the conceptual overlap between the categories, a court's decision to place an organization in one category or the other is less likely to represent a principled application of a clear definition than a court's background views about the relative importance of nondiscrimination and free association.

This brings me to a third problem with the commercial-expressive distinction. To the extent that its supporters have offered a defense of the distinction, they have, like Carpenter and Shiffrin, defended it as resulting from a balancing of the interest in associational freedom against the interest in avoiding discrimination. But there is no obvious reason why that balance fits perfectly within the line between commercial and expressive activities—even if we could figure out where that line fell. The more strongly one believes in the value of free association, the more likely one is to think that an exemption from the anti-discrimination principle for even some classes of commercial businesses is tolerable. At the limit, one might take Epstein's position that "the state has no interest in counteracting discrimination by private associations that do not possess monopoly power"—whether those associations are commercial or noncommercial.[160] After all, if an individual who is discriminated against has somewhere else to turn for her goods or services, how could the desire to open up economic opportunities for her justify the impingement on free association? Once we are balancing associational and nondiscrimination interests as Carpenter and Shiffrin are, it is very difficult to cabin the associational-freedom principle to noncommercial entities.

### C. *Current Challenges to the Expressive-Commercial Distinction*

I argued in the previous Subpart that the expressive-commercial distinction is an untenable one. And, indeed, the instability of the distinction has become more and more apparent. In this Subpart, I discuss two recent legal developments that press on the distinction. First, in a series of state-law public accommodations cases brought against businesses that have refused to serve same-sex couples' weddings or commitment ceremonies, for-profit businesses have argued that their goods or services are inherently expressive and that the First Amendment negative-speech doctrine thus precludes application of public ac-

159. *See* Carpenter, *supra* note 88, at 1576-80; Shiffrin, *supra* note 151, at 879.

160. Epstein, *supra* note 126, at 120. Epstein elaborates that position in his contribution to this Symposium and acknowledges that the expressive-commercial line is shaky at best. *See* Epstein, *supra* note 23, at 1277-78. For an example of another scholar taking a similar monopoly-power position, see John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 205 (2010) ("In my view, the protections for assembly ought to be constrained when a private group wields so much power in a given situation—as private groups did in the American South from the decades following the Civil War to the end of the Civil Rights Era—that it prevents other groups from meaningfully pursuing their own visions of pluralism and dissent.").

commodations laws to them. Second, a number of for-profit corporations have challenged the Affordable Care Act's so-called "contraception mandate" as violating their own or their owners' religious rights under the First Amendment and the Religious Freedom Restoration Act.

These developments—one inside and one outside of the public accommodations context—threaten to eliminate any expressive-commercial distinction. If that is right, then the strategic retreat by libertarian opponents of public accommodations laws seems to have worked. The property-and-contract objection to public accommodations laws that Bork and others pressed in the 1960s was politically vulnerable in a post-*Lochner* world. But First Amendment arguments have remained resonant across the political spectrum. By withdrawing from the vulnerable ground of property and contract to the more politically congenial ground of the First Amendment—and by directing their objections, in the first instance, at laws that do not focus on *race* discrimination—libertarian skeptics have put themselves in a position to threaten even the core applications of public accommodations laws.

As in *Boy Scouts of America v. Dale*, the application of state public accommodations laws to prohibit sexual orientation discrimination has provided a key context for the development of these challenges. In *Elane Photography, LLC v. Willock*,[161] the New Mexico Supreme Court addressed a case in which a photography company refused to photograph a same-sex commitment ceremony. Although the company sold its photographic services to the public generally, its co-owner and lead photographer opposed same-sex marriage and refused to "photograph any image or event that violates her religious beliefs."[162] New Mexico law prohibits discrimination on the basis of sexual orientation by public accommodations.[163] When the New Mexico Human Rights Commission found Elane Photography liable for violating that law, the company challenged the ruling in state court. The company argued, among other things, that applying the public accommodations law to it violated its First Amendment free speech rights.[164]

Although the New Mexico Supreme Court rejected Elane Photography's First Amendment free speech claim,[165] that claim deserves close analysis, for businesses subject to public accommodations laws will surely raise similar arguments in the future. Notably, after Elane Photography petitioned the U.S. Supreme Court for a writ of certiorari, Dale Carpenter filed an amicus brief

161. 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

162. *Id.* at 59-60.

163. In the New Mexico Supreme Court, Elane Photography did not deny that it was a public accommodation. *See id.* at 60-61.

164. *See id.* at 63.

165. *See id.* at 63-72.

(joined by the Cato Institute and Eugene Volokh) in support of the company.[166] Because that brief, filed by a leading exponent of the expressive-commercial distinction, in fact highlights the instability of that distinction, I focus particular attention on its argument.

In arguing that application of the New Mexico public accommodations law was unconstitutional, Elane Photography and its amici exploited a key ambiguity in the expressive-commercial distinction: what if a for-profit commercial entity sells a good or service that is itself expressive? The company and its amici essentially argued that when the expressive and commercial categories overlap, it is expression that dominates—and the First Amendment accordingly bars application of a public accommodations law. Because photography is an expressive activity, they said, it would violate the First Amendment to require even a commercial photographer to take pictures of an event to which its owners objected.[167] The company and its amici urged that this result followed from a straightforward application of the Supreme Court's negative-speech precedents.[168] Forcing a photography company to take pictures its owners do not wish to take, they argued, is forcing the company to engage in unwanted expression—just like the individuals forced to express New Hampshire's message of "Live Free or Die" on their license plates.[169]

Although this argument does give some commercial businesses a First Amendment defense to the application of public accommodations laws, Elane Photography and its amici insisted that the constitutional constraints on those laws would be limited. In particular, the amici argued that First Amendment protection would "extend[] only to people who are being compelled to engage in expression."[170] Yet this line is not as "clear and administrable"[171] as they suggested. The amici argued that "[u]nder *Wooley*, photographers' First Amendment freedom of expression protects their right to choose which photographs to create," but "caterers, hotels, and limousine companies do not have such a right to refuse to deliver food, rent out rooms, or provide livery services,

166. *See* Brief of Amici Curiae Cato Inst., Eugene Volokh, & Dale Carpenter in Support of Petitioner, Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014) (No. 13-585), 2013 WL 6665006 [hereinafter Carpenter Brief].

167. *See Elane Photography*, 309 P.3d at 66 ("Elane Photography argues that because the service it provides is photography, and because photography is expressive, 'some of [the] images will inevitably express the messages inherent in [the] event.' In essence, then, Elane Photography argues that by limiting its ability to choose its clients, the [New Mexico Human Rights Act] forces it to produce photographs expressing its clients' messages even when the messages are contrary to Elane Photography's beliefs." (alterations in original)).

168. *See id.* at 64 (noting Elane Photography's reliance on *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

169. *See Wooley*, 430 U.S. at 713.

170. Carpenter Brief, *supra* note 166, at 17.

171. *Id.* at 18.

respectively, for use in same-sex commitment ceremonies."[172] That is because, they said, photography is expression but catering and so forth are not.[173]

But that is a bit coy. As anyone who has ever hired a caterer for a wedding, bar mitzvah, or other occasion knows, catering has inevitably expressive elements. It is common for chefs to describe their food as "art" and "creations."[174] And the presentation of food at an event typically expresses a message deemed appropriate to the event—be it celebratory (as at a graduation) or somber (as at a funeral). Hotels that host weddings often do more than provide a room for the ceremony; they set up and decorate the space in undeniably expressive ways. Even limousine companies often write "Just Married" on the cars that carry newlywed couples. If the fact that the service provided by a business incorporates an expressive element is sufficient to create a First Amendment defense against the application of a public accommodations law, then all of these businesses should have a First Amendment defense to a law that prohibits them from discriminating against customers on the basis of sexual orientation—or race, or any other group status, for that matter. Not surprisingly, a cake shop that refused to serve a same-sex couple's wedding recently responded to allegations that it violated a state public accommodations law by making an argument that was identical to Elane Photography's.[175] And in *Elane Photography*, the New Mexico Supreme Court itself cited examples of another cake shop and a florist that asserted that their First Amendment rights protected them against liability for refusing to serve gay couples.[176]

More generally, *any* business's provision of a good or service to someone on an equal basis with others can always be characterized as expressive. The provision of the good or service expresses the message, at the least, that the customer is entitled to be treated like any other customer.[177] The statement of Elane Photography's co-owner—that she would not photograph an event that violates her religious beliefs—suggests that it was the refusal to send *that* message that motivated her objection to the application of the public accommodations law. If the First Amendment prohibits for-profit businesses that offer their goods and services to the public from being required to send messages they do not want to send, then it is difficult to see a principled basis for limiting that prohibition to cases in which the good or service the business sells is itself ex-

172. *Id.* at 17.

173. *See id.*

174. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 71 (N.M. 2013) ("Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic."), *cert. denied*, 134 S. Ct. 1787 (2014).

175. *See* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008 (Colo. Civ. Rights Comm'n Dec. 6, 2013) (ALJ), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf, *aff'd*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_--_commissions_final_order.pdf.

176. *See Elane Photography*, 309 P.3d at 71.

177. *See supra* note 139 and accompanying text.

pressive. Even when a business is selling nothing but motor oil, an antidiscrimination law will force it to send a message that it may not want to send. Once we expand the "expressive" zone to include for-profit businesses that sell their goods or services to the public, it becomes clear that the expressive-commercial distinction cannot be counted on to cabin *Dale*'s constitutional exemption from public accommodations laws.

The Cato, Volokh, and Carpenter amicus brief argued that the "line between expression and nonexpressive behavior" can be readily drawn by reference to existing First Amendment cases.[178] If a business's "activity may be banned, limited only to certain narrow classes of people, or subjected to discretionary licensing," amici contended, it would not violate the First Amendment to apply antidiscrimination laws to that activity.[179] But if the activity "is protected by the First Amendment against a ban, for instance because it involves writing or photography," they argued, applying antidiscrimination laws to it would violate the First Amendment.[180]

But that conclusion does not follow from the premise. Crucially, the amici failed to take account of the accepted doctrinal distinction between laws that target speech for regulation and neutral laws that do not single out expressive activity.[181] The First Amendment prohibits an ordinance that requires newspaper racks, and only newspaper racks, to obtain a discretionary permit from local officials before being placed on the sidewalk.[182] But the First Amendment does not prohibit an ordinance that requires all vending machines to obtain a discretionary permit before being placed on the sidewalk—nor does it prohibit enforcement of that *general* ordinance against a newspaper company that places its machines on the sidewalk without the required permit.[183] That is true even though enforcing the permit ordinance against the noncompliant newspaper has the *effect* of limiting expression. Being in the business of selling speech does not grant a general First Amendment immunity from the application of neutral laws, "unrelated to expression," that have an effect on speech.[184] So too in the *Elane Photography* case, the application of the public accommodations law may have the *effect* of requiring the photography company to engage in expression against its will, but that is only because of the application of the generally applicable rule prohibiting any business that opens itself up to the public from discriminating against potential customers based on their sexual orientation.[185]

178. Carpenter Brief, *supra* note 166, at 18.

179. *Id.*

180. *Id.* at 18-19.

181. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 491 (1996) (calling this "a distinction as important as any in First Amendment law").

182. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759-60 (1988).

183. *See id.* at 760-61.

184. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001).

185. *See* Rubenfeld, *supra* note 139, at 809.

Because the First Amendment does not give businesses that exist to sell speech any presumptive immunity from generally applicable laws that have an effect on expression, and because *any* business could legitimately claim that the application of public accommodations laws to it forces it to send a message, it is difficult to see how the argument in the Cato, Volokh, and Carpenter amicus brief could be readily cabined to those for-profit corporations that are specifically "expressive."

The amicus brief also highlights the malleability of the balancing approach that underlies Carpenter's and Shiffrin's academic defenses of the expressive-commercial distinction. The brief emphasizes the large number of wedding photographers in the United States, estimating that "even a town of 50,000 people would likely contain over 15 wedding photographers," most of whom "would likely be happy to take the money of anyone who comes to them."[186] Because of these likely alternative sources of the service, the brief argues, sexual orientation discrimination by wedding photographers imposes "comparatively little cost" on its victims.[187] The brief distinguishes that situation from the case of race discrimination at the time the Civil Rights Act was enacted, acknowledging that "[d]iscrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any suitable hotel or restaurant."[188] As I have argued in the previous two Subparts, it is but a short step from this position to one that would invalidate any public accommodations law that reaches beyond businesses with monopoly power.[189]

The contraception mandate cases[190] are somewhat further removed from the context that is my principal interest in this Essay. After all, those cases do not involve public accommodations statutes; they involve a regulation of employer-provided insurance that the federal government imposed pursuant to the Patient Protection and Affordable Care Act (ACA).[191] And they do not rest

186. Carpenter Brief, *supra* note 166, at 19.

187. *Id.* at 20.

188. *Id.*

189. *See supra* Part II.A-B.

190. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013).

191. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code). The ACA requires health insurance plans to provide, without cost sharing, certain preventive services, including preventive care and screening "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4) (2012). The relevant Health Resources and Services Administration guidelines require coverage of all FDA-approved contraceptive methods. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). With certain exceptions, if an employer provides health insurance to its employees, the ACA requires that the insurance cover these preventive services. If an employer provides health insurance that does not include required coverage, it must pay a tax of

primarily on *constitutional* challenges to the application of the ACA in any event. Rather, they principally rest on the Religious Freedom Restoration Act of 1993 (RFRA).[192] RFRA provides, as a rule of construction, that federal statutes will not be interpreted to impose substantial burdens on religious exercise unless doing so is the least restrictive means of achieving a compelling interest.[193] The employers in these cases are private corporations owned by individuals who have a religious opposition to contraception that works by preventing the implantation of a fertilized egg. They argue that, by requiring their health coverage to pay for contraceptive methods that they believe prevent implantation, the ACA imposes a substantial burden on their religious beliefs.[194]

RFRA does not constrain *state* laws[195]—including state antidiscrimination laws—and an expanded *federal* public accommodations law could override it. Perhaps most important, the religious exercise issues presented in these cases do not necessarily say anything about whether a business could maintain a First Amendment defense to the application of public accommodations laws when its owner objected to serving a particular class of customers for *nonreligious* reasons. Nonetheless, one potential outcome of the challenges to the contraception mandate is the further erosion of the already-flimsy commercial-expressive distinction. A crucial premise of the challenges is that secular, for-profit corporations can be a vehicle for the religious exercise of their shareholders and that regulation of those corporations can thus violate rights to free exercise of religion. For the mandate's challengers to prevail, then, there must be no commercial-expressive distinction under RFRA.

And, indeed, that is precisely what the Tenth Circuit held in its decision ruling for the challengers in *Hobby Lobby*. The Tenth Circuit considered the lack of an expressive-commercial distinction to be a matter of simple logic: if "individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping

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$100 per employee per day. *See* I.R.C. § 4980D(b)(1) (2012). There is nothing in the ACA that requires an employer to provide health insurance to its employees at all. But if an employer with fifty or more employees fails to provide health insurance, and any of its employees receive federal subsidies to purchase insurance on an exchange, it must pay a tax of $2000 per year multiplied by the difference between its total number of full-time employees and thirty. *See* I.R.C. § 4980H(a), (c).

192. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). While *City of Boerne* held RFRA unconstitutional as applied to the states, it nevertheless continues to apply against the federal government. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, 439 (2006).

193. *See* 42 U.S.C. §§ 2000bb-1, 2000bb-3.

194. *See Conestoga Wood*, 724 F.3d at 381-82; *Hobby Lobby*, 723 F.3d at 1140-41. There is good reason to doubt that the challenged contraceptive methods actually do prevent implantation, *see* Amicus Curiae Brief of Physicians for Reproductive Health et al. in Support of Defendants-Appellees & Affirmance at 19, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294), 2013 WL 1291178, but that is not especially relevant to my argument here.

195. *See City of Boerne*, 521 U.S. at 536.

their Free Exercise rights," then surely for-profit corporations that pursue profit must retain free exercise rights.[196] One plus one equals two. And the court explained its rejection of an expressive-commercial distinction in terms that would seem to apply equally to First Amendment free speech and free association claims. The court emphasized that "religious conduct includes religious expression" and that such expression "can be communicated by individuals and for-profit corporations alike."[197] Indeed, the Tenth Circuit explained, the two for-profit corporations before it engaged in significant religious expression "by purchasing hundreds of newspaper ads to 'know Jesus as Lord and Savior.'"[198] For-profit corporations also engage in nonreligious expression all the time.[199] If a for-profit corporation has the same rights of *religious* expression as does a nonprofit corporation or an individual, it is difficult to explain why such a corporation should not have the same rights of *nonreligious* expression.

To be sure, the courts *could* say that ruling for the contraception mandate's challengers would not undermine the expressive-commercial distinction in free speech or free association cases. After all, RFRA goes beyond what the First Amendment itself requires.[200] But, until now, RFRA's prophylaxis has been understood as extending broader protections to the entities that are already protected by the First Amendment—not as protecting a broader range of entities than does the First Amendment.[201] And if the Supreme Court holds that secular, for-profit corporations have *religious* rights against the application of the ACA under RFRA, it is a very short leap to say that those corporations have speech and associational rights against the application of public accommodations laws under the First Amendment. Indeed, the latter conclusion may be true a fortiori. There is a plausible argument that religion, which involves personal belief, cannot be exercised by anyone other than a natural person or an association of such persons who join together for the specific purpose of engaging in religious exercise.[202] But it is easy to see how a for-profit corporation can engage in expression. And corporate expression is already understood as constitutionally protected in a variety of circumstances—including when a corporation objects to being forced to express a particular message.[203] The impli-

196. *Hobby Lobby*, 723 F.3d at 1134.

197. *Id.*

198. *Id.* at 1135.

199. *See supra* note 158 and accompanying text.

200. *See City of Boerne*, 521 U.S. at 532.

201. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*. There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence—including jurisprudence regarding who can bring Free Exercise claims.").

202. *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

203. *See supra* note 138 and accompanying text.

cations of the contraception mandate cases for the public accommodations context are therefore likely to be significant.

Neither the public accommodations cases exemplified by *Elane Photography* nor the contraception mandate cases yet touch the core of public accommodations law. They do, however, mark a tightening siege. If the courts extend First Amendment or RFRA protection to for-profit corporations in these cases, the expressive-commercial distinction's potential to limit the risk posed by *Dale* will be substantially eroded. And libertarian opponents of public accommodations statutes will be well positioned to continue the stepwise efforts to contain, and indeed roll back, the penetration of the antidiscrimination norm into what was previously considered the "private" or "social" sphere.

## CONCLUSION

In this Essay, I have argued that the apparent consensus surrounding public accommodations law is illusory. Although libertarian opponents have given up the effort to undertake a frontal assault against Title II of the Civil Rights Act of 1964, they have engaged in what is merely a strategic retreat. By avoiding an attack on Title II itself, and by relying on First Amendment arguments rather than those based on property or contract, skeptics of public accommodations laws have put themselves in a position to potentially block further expansion of those laws—and even to threaten their core applications. Although these skeptics' arguments take a different form than the arguments of opponents of the Civil Rights Act of 1875—focusing on freedom of association rather than the civil-rights/social-rights distinction—they implicate precisely the same concerns as did the arguments raised against public accommodations laws during the Reconstruction and civil rights eras. Neither the Civil Rights Act of 1964 nor the Supreme Court decisions upholding prohibitions on private discrimination have settled the conflict over how deeply the antidiscrimination norm may properly penetrate into previously "social" spheres. That conflict will remain for the foreseeable future.