

THE ANTI-APARTHEID PRINCIPLE IN AMERICAN PROPERTY LAW

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“I can only agree with the Court of Appeals which viewed the city’s action as nothing more than ‘one more of the many humiliations which society has historically visited’ on Negro citizens.”¹ Justice Thurgood Marshall

I. INTRODUCTION

Two customers enter a retail clothing store. One customer, who happens to be white, is left alone to browse for a while, then, is politely offered assistance by the sales staff and treated courteously as she tries on clothes. She brings a sweater to the check-out counter where the cashier helps her, smiles at her, and wishes her a good day. A second customer, who happens to be African-American, has an entirely different experience. From the moment he walks in the store, store employees follow him around, hovering over him and pointedly failing to offer assistance. When he goes to try on clothes, two sales clerks stand guard outside the changing room. When he brings the clothes to the checkout counter, he is treated to racially derogatory remarks and accosted with obscenities. Although this treatment is insulting and upsetting, it does not prevent him from actually purchasing the items. Does federal law prohibit such racially discriminatory treatment?

You might think, in the year 2010, that the answer to this question would be a solid yes. But you would be mistaken. Some courts do hold that federal law prohibits racially discriminatory treatment of customers in retail stores, but most do not. And this failure to protect persons from racially

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1. *City of Memphis v. Green*, 451 U.S. 100, 147 (1981) (Marshall, J., dissenting), quoting Judge Engel’s majority opinion in *Green v. City of Memphis*, 610 F.2d 395, 404 (6th Cir. 1979), that was overturned in *City of Memphis v. Green*.

discriminatory treatment is not limited to the area of public accommodations. Although the federal Fair Housing Act (FHA)² has prohibited racial discrimination in the sale of rental or housing since 1968, some courts have recently held that the FHA does not protect condominium owners or residential tenants from discriminatory harassment by neighbors. Although the Seventh Circuit has recently ruled that the FHA does prohibit such conduct in at least some cases, there is no judicial consensus on the question of whether federal law prohibits post-acquisition racially motivated harassment of owners or renters of real property by neighbors.

This is a shocking and demoralizing situation. Most people would be surprised to find out that stores are legally entitled to treat customers differently because of their race. Most people would not imagine that they could harass their neighbors because of their race. Federal law, as interpreted by many federal judges, seems out of line with ordinary expectations.³ What accounts for this?

One answer is that federal judges have an overly narrow conception of statutory interpretation. I will argue that this is indeed a part of the problem. But a second answer relates to deeper concerns. These judges have not only shown a deep failure of empathy but have based their rulings on a flawed model of the concept and institution of property, as well as flawed models of equality and liberty. They are legitimately worried about intrusive government regulation of business, but they wrongly fail to give equal weight to the crucial task of enforcing the minimum standards for market relationships appropriate to a free and democratic society that treats each person with equal concern and respect. Contrary to the view that federal regulations are inherently coercive interferences with individual liberties and thus should be interpreted narrowly even when they concern racial discrimination, I will argue that American property and contract law are defined by baseline principles that outlaw market relationships associated with racial caste.

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. The civil rights movement and civil rights laws have altered the foundational principles of contract and property law on which our market system is based. Before 1964, racial discrimination was not only common in many states but actually mandated by law. After passage of the public accommodations law in 1964, our conception of the obligations of businesses open to the public changed and with it the meaning of the right to contract and to purchase property. Those who operate public accommodations take on the obligation to serve the public without invidious discrimination. Patrons have the right

2. 42 U.S.C. §§ 3601–3619, 3631 (2010).

3. It is possible, of course, that I am wrong about this and that racially discriminatory treatment of African Americans in the marketplace is thought by some to be justified. *See, e.g.*, Walter E. Williams, *The Intelligent Bayesian*, THE NEW REPUBLIC, Nov. 10, 1986, at 18.

to enter public accommodations on equal terms. Although we have rights to choose our friends on whatever basis we like, we do not have the right to choose our customers on the basis of race; nor are we free to treat some customers worse than others for racially discriminatory reasons. Civil rights statutes should, therefore, be read with this baseline principle in line.

II. DISCRIMINATORY HARASSMENT IN PUBLIC ACCOMMODATIONS

Does federal law prohibit racially discriminatory treatment of patrons of public accommodations? The answer is surprising. Federal law prohibits discrimination in public accommodations, but the protection it grants to customers of retail stores is surprisingly weak.⁴ The Civil Rights Act of 1964 prohibits discrimination in “place[s] of public accommodation” and also guarantees “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations” of those places.⁵ However, the 1964 statute has a narrow definition of what constitutes a public accommodation, covering only inns, restaurants, places of entertainment, and gas stations.⁶ Although one might read the list in the statute to be illustrative rather than exhaustive, it is generally assumed that the act does not extend to unlisted places, such as retail stores.⁷

The Civil Rights Act of 1866 may constitute an alternative source for protecting people from discrimination in access to retail stores. Section 1981 grants all persons equal rights to contract and § 1982 grants all citizens equal rights to acquire property. Those sections now read as follows:

§ 1981. Equal Rights Under the Laws

(a) *Statement of equal rights.* All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁸

(b) *“Make and enforce contracts” defined.* For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the en-

4. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

5. 42 U.S.C. § 2000a(a) (2010).

6. 42 U.S.C. § 2000a(b) (2010).

7. *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006) (finding the list to be exhaustive).

8. 42 U.S.C. § 1981(a) (2010).

joyment of all benefits, privileges, terms, and conditions of the contractual relationship.⁹

(c) *Protection against impairment.* The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.¹⁰

§ 1982 Property Rights of Citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.¹¹

At first glance, the statutes appear to provide capacious rights to enter the marketplace free from invidious racial discrimination. Indeed, all federal courts that have considered the issue have found that these statutes at least require stores open to the public to let patrons into the store without regard to race.¹² These rulings are based on the case of *Runyon v. McCrary*¹³, which held that § 1981 prohibits commercially operated, nonreligious schools from excluding qualified children solely on the basis of race. However, the court rulings are surprisingly mixed on the question of whether the Civil Rights Act of 1866 prohibits discriminatory treatment once one gets inside the store. Do these statutes, for example, prohibit racially discriminatory surveillance of store customers?

A minority of courts hold that such conduct does violate the right to contract under § 1981, the right to purchase personal property under § 1982, or both.¹⁴ In *Phillip v. University of Rochester*,¹⁵ for example, the Ninth Circuit held that § 1981 applied to a private university whose security guards detained African American students but not their white friends in the library lobby and called the police, who arrested them and kept them detained overnight. The court found that the “full and equal benefits” clause in

9. 42 U.S.C. § 1981(b) (2010).

10. 42 U.S.C. § 1981(c) (2010).

11. 42 U.S.C. § 1982 (2010).

12. See, e.g., *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001); *Ackaa v. Tommy Hilfiger Co.*, No. 96-8262, 1998 WL 136522 (E.D. Pa. Mar. 24, 1998).

13. 427 U.S. 160 (1976).

14. *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) (equal benefits clause in § 1981 gives right to equal treatment in seeking a contract); *Phillip v. Univ. of Rochester*, 316 F.3d 291 (2d Cir. 2003) (equal benefits clause of § 1981 applies in private university whose security guards detained African American students but not their white friends in library lobby, calling police who arrested them and kept them detained overnight); *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043 (N.D. Ill. 1998) (family denied “full benefits” of the contract when denied utensils and harassed and threatened while at restaurant); *Nwakupuda v. Falley’s, Inc.*, 14 F. Supp. 2d 1213 (D. Kan. 1998) (§ 1981 claim for store patron who was wrongfully detained because he was thought to be individual who had previously robbed the store); *Turner v. Wong*, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003).

15. 316 F.3d 291 (2d Cir. 2003).

§ 1981(a), when combined with § 1981(c)'s extension of the right to private relationships, sufficed to grant the plaintiffs a remedy if they could prove that they were treated differently because of their race.¹⁶ Similarly, a federal court in Illinois applied the equal benefits clause in § 1981 to allow a claim to be brought by an African American family who were denied utensils and harassed and threatened while at a restaurant.¹⁷

However, most courts have interpreted the “right to make contracts” extremely narrowly, holding that this right is denied *only* when a patron is “actually prevented, and not merely deterred, from making a purchase or receiv[ing] service after attempting to do so.”¹⁸ These courts have denied relief when a patron was treated disrespectfully or refused assistance;¹⁹ subjected to discriminatory surveillance, searches, or detention;²⁰ removed from a store for discriminatory reasons after making a purchase;²¹ or put under surveillance and accused of shoplifting after purchasing items and leaving the store.²² The Fifth Circuit, for example, in *Arguello v. Conoco, Inc.*, found no remedy when a clerk shouted obscenities and made racially derogatory remarks directed at a Latina customer after she completed her purchase at a gas station.²³ The remarks frustrated not only her but her father, who decided not to complete his purchase of beer in the store portion of the gas station.²⁴

The courts that find no violation of the Civil Rights Acts when customers are treated unequally on the premises because of race have done so because they have an inappropriately narrow conception of the “right to contract,” as well as an inappropriate approach to statutory interpretation. Judge Jerry E. Smith’s opinion for the Fifth Circuit’s decision in *Arguello* argues, for example, that “[s]ection 1981 does not provide a general cause of action for race discrimination.”²⁵ Rather, to show a denial of a right to contract, the claimant must “demonstrate ‘the loss of an actual, not speculative or prospective, contract interest’” by offering evidence of “‘some tangible attempt to contract’ that in some way was ‘thwarted’ by the defendant.”²⁶ This suggests that contracts take place at the magic moment when the customer of-

16. *Id.* at 297–98.

17. *McCaleb v. Pizza Hut of Am., Inc.*, 28 F.Supp. 2d 1043 (N.D. Ill. 1998).

18. *Ackerman v. Food-4-Less*, No. 98-CV-1011, 1998 WL 316084, at *4 (E.D. Pa. June 10, 1998) quoting *Henderson v. Jewel Food Stores, Inc.*, No. 96-C-3666, 1996 WL 617165, at *3 (N.D. Ill. Oct. 23, 1996). *Accord*, *Hampton v. Dillard Dep’t Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001).

19. *Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003) (no § 1981 claim when clerk shouted obscenities and made racially derogatory remarks at Latino customer after she completed her purchase); *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192 (D. Kan. 1999).

20. *Gregory v. Dillard’s, Inc.*, 565 F.3d 464 (8th Cir. 2009) (no § 1981 violation when store employees follow African Americans around the store and stand guard outside changing rooms when such customers try on clothes); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996).

21. *Flowers v. TJX Cos.*, No. 91-CV-1339, 1994 WL 382515 (N.D.N.Y. July 15, 1994).

22. *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002).

23. 330 F.3d 355 (5th Cir. 2003).

24. *Id.* at 357.

25. *Id.* at 358.

26. *Id.*, citing *Morris v. Dillard Dep’t Stores, Inc.*, 277 F.3d 743, 751–52 (5th Cir. 2001); *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 275 (5th Cir. 1997).

fers money for goods or services, and the store either accepts or does not accept. Contract, in this view, does not include the treatment that occurs while one is on the store premises but before one has purchased items; nor does it include treatment one receives after one has purchased an item.²⁷

This conclusion is not only unwarranted, but it is also absurd. First, the courts seem united in the conclusion that § 1981 at least requires stores to allow patrons to cross the threshold of their stores. One would indeed be denied the right to contract if one were not allowed to enter the store. But, if that is so, then it is peculiar indeed to find that § 1981 regulates the moment of entrance and the moment of attempted purchase, but nothing that happens in between. This defies common sense. Contracts do not occur magically at discrete moments in time. To find the right shirt or to order the desired food in the restaurant, patrons depend on the services provided by store personnel and wait staff. The treatment of customers in the course of looking for goods to buy is a necessary part of the contracting process.

Second, to find a violation of the right to contract only when one has been “thwarted”²⁸ in making a purchase grants remedies only to those who refuse to stand for disgraceful treatment while denying remedies to those willing to go through with a deal. This suggests that if one is stalwart enough to ignore racial insults and surveillance or desirous enough of the product one is attempting to purchase that one has no right to complain of discriminatory treatment along the way. But it is not at all clear why this should be so. Why provide a remedy only for those who are either too proud or too sensitive to racial taunts to complete the deal while denying a remedy to those who insist on asserting their rights by going through with it and demanding service?

Third, denial of rights to those who suffer discriminatory harassment while in a public accommodation ignores both the statutory language and the legislative history of § 1981. Although at one time it was unclear whether § 1981 applied to private discriminatory conduct, that issue was laid to rest in 1972 when the Supreme Court ruled, in *Runyon v. McCrary*,²⁹ that § 1981 applied to private conduct. It is true that the Supreme Court issued an ungenerous interpretation of the language of § 1981 in the 1989 case of *Patterson v. McLean Credit Union*,³⁰ when it found that § 1981 required employers to hire employees without regard to their race but provided no remedies if employees were discriminatorily harassed on the job. But that decision was *specifically overturned* by the Civil Rights Act of 1991.³¹ To understand current law, we must revisit the reasoning of *Patterson* to see

27. For a full canvass of the cases in this area and a cogent analysis, see Charlotte H. Sanders, *Come Down and Make Bargains in Good Faith: The Application of 42 U.S.C. § 1981 to Race and National Origin Discrimination in Retail Stores*, 4 HASTINGS RACE & POVERTY L. J. 281 (2007).

28. *Arguello*, 330 F.3d at 358 (internal citation omitted).

29. 427 U.S. 160 (1976).

30. 491 U.S. 164 (1989).

31. Civil Rights Acts of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

what Congress sought to change when it passed the amendatory 1991 statute.

In the majority opinion in *Patterson*, Justice Kennedy began by interpreting § 1981 narrowly: “Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contract.”³² One might have thought that the language “making and enforcement” would encompass all aspects of the contracting process rather than a limited intervention. Why, for example, would the Congress in 1866 think it appropriate to regulate contract making but not treatment during the contractual relationship? That would prevent parties from making a contract of slavery but would not prevent an employer from treating a worker like a slave while on the job.

Kennedy explained the Court’s narrow view of the “right to make contracts” by arguing that it “extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment.”³³ At the same time, he conceded that § 1981 would grant a remedy if an employer “offer[ed] to make a contract only on discriminatory terms.”³⁴ This assumes that what one gets from a contract is the specific terms bargained for. More importantly, it assumes that if a contract does not include discriminatory terms, then *actual* discrimination on the job cannot be a violation of the contract terms. This means that if one wants equal treatment, one must bargain for specific contract terms that prohibit the employer from discriminatory harassment on the job. That, in turn, assumes that if the contract is *silent* on the question that the employer must have reserved the right to treat the employee differently because of the employee’s race.

That is an extraordinarily odd assumption to make. One could easily conclude that if the employer wanted the right to treat workers differently because of their race, that the employer should include the discriminatory term in the contract. Of course, no employer would include such a term in the contract today, and that is exactly the point. The Civil Rights Act of 1866 prohibits discriminatory terms in contracts.³⁵ For that reason, prospective employees assume, based on the language of § 1981, that their contract rights will be the same as those of white citizens, who obviously do not have to bargain for special protection against racial discrimination. Why make the background assumption be that employers are free to discriminate on the basis of race absent a federal law limiting their power to do so or a contract term promising equal treatment on the job?

Justice Kennedy further argued that it was wrong to interpret § 1981 broadly because a later statute, Title VII of the Civil Rights Act of 1964, not

32. *Patterson*, 491 U.S. at 176.

33. *Id.*

34. *Id.* at 177.

35. 42 U.S.C. § 1981 (2010).

only prohibited racial discrimination in employment but extended such regulations to the “terms and conditions” of such employment.³⁶ He further argued that Congress may have intended the “mediation and conciliation procedures” of Title VII to be applicable to post-hiring harassment claims while leaving plaintiffs free to sue under § 1981 for initial refusal to hire on equal terms.³⁷ This suggests that Congress, in 1964, intended to *limit* the ability to sue under § 1981. While it is true that it was not clear in 1964 whether § 1981 applied to private conduct, the Supreme Court later determined that the statute did apply to such conduct. While courts sometimes view later, specific statutes as impliedly limiting earlier, broader statutes, the courts have generally eschewed that line of interpretation in interpreting the civil rights laws of the 1960s. For example, although the 1964 Civil Rights Act exempts small employers, the Supreme Court unanimously held that § 1981 applies to such employers, prohibiting them from engaging in discriminatory employment practices.³⁸

More importantly, Congress definitively repudiated the Supreme Court’s interpretation of § 1981 in *Patterson* by enacting the Civil Rights Act of 1991.³⁹ Overturning a number of Supreme Court decisions that had narrowly interpreted federal civil rights acts, Congress affirmed, not only that § 1981 applies to private conduct, but that it extends to “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”⁴⁰ This was the first time the Civil Rights Act of 1866 had been amended, and the language of the 1991 act suggests not only that Congress wanted the rights in the statute to be read broadly but that Congress intended to redefine the “right to contract” to include “*all benefits. . . of the contractual relationship.*”

The only way to interpret this new language to exclude discriminatory harassment while in a retail store is to understand an ongoing contract like an employment relationship to be fundamentally different from a transitory purchase contract typical of a retail store. Yet, there is no basis for such a conclusion. It is true that the employment contract extends over time and means the parties have duties to each other that extend over time. However, a purchase in a store is not something that happens in an instant. To buy a shirt, one must be allowed in the store; to find the shirt, one must be free to browse and to seek assistance. One must, in other words, feel welcome not only when one is deciding whether to enter the store, but when one is engaged in the American pastime called “shopping.”

The Civil Rights Act of 1991 does list as one of its findings that “additional remedies. . . are needed to deter unlawful harassment and intentional

36. 42 U.S.C. § 2000e-2(a)(1) (2010).

37. *Patterson*, 491 U.S. at 182.

38. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

39. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

40. 42 U.S.C. § 1981(b) (2010).

discrimination in the workplace,”⁴¹ and that one of its purposes is “to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.”⁴² These purposes are designed to show that the statute is intended to overrule the *Patterson* decision. But another purpose stated in the 1991 act is “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statute in order to provide adequate protection to victims of discrimination.”⁴³ The language of the revised § 1981, when viewed in light of the latter expressed purpose, is sufficient to give a strong basis for interpreting § 1981 to apply to not only the moment one seeks entrance to a store and the moment one offers to buy goods, but to the conduct in between those moments that is a necessary and customary part of the process of purchasing goods and services in a non-discriminatory fashion.

Congress does not want a narrow, cramped interpretation of the “right to contract.” Rather, it intends the right to encompass *all* aspects of the contractual relationship. For retail stores, the relationship between the store and patrons does not begin and end at the moment a customer steps in front of the cashier. Indeed, the courts themselves recognize that the relationship starts when the customer seeks entrance to the store. Did Congress intend to regulate the moment of entrance and the moment the customer offers cash for the goods, but to leave the time in between an unregulated war zone? It defies reason to believe that Congress intended to prohibit racially discriminatory harassment on the job but found harassment of customers in retail stores to be perfectly fine. Decisions to that effect are likely to lead to future legislation closing the gap; the reverse is unthinkable. Court decisions prohibiting discriminatory harassment of customers would never be overruled by Congress. This alone is sufficient to give us a sense of how Congress would want the § 1981 language interpreted.

III. DISCRIMINATORY HARASSMENT IN HOUSING

The Fair Housing Act of 1968 (FHA) makes it unlawful “[t]o refuse to sell or rent” housing because of race; to “otherwise make unavailable or deny” housing because of race; and to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling.”⁴⁴ Section 3617 of the FHA makes it “unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected” by the Act.⁴⁵ Do the rights granted by the Act include the right to be free from harassment or intimidation by neighbors?

41. Civil Rights Act of 1991, Pub. L. 102-166, § 2(1), 105 Stat. 1071, 1071 (1991).

42. *Id.* at § 3(1).

43. *Id.* at § 3(4).

44. 42 U.S.C. § 3604(a)-(b) (2010).

45. 42 U.S.C. § 3617 (2010).

In *Fowler v. Borough of West*,⁴⁶ the court held that fair housing rights were denied if the town government engaged in harassing activity designed to induce recovering alcoholics or drug users to move out of a residential facility, even if they did not in fact move out. Such activity “make[s] unavailable or den[ies]” housing even if the residents choose to stay.⁴⁷ “It would run contrary to the remedial purposes of the statute to hold that a defendant, acting with the intent of denying a handicapped person housing, could avoid liability merely because his efforts were unsuccessful.”⁴⁸ The court also found a potential violation of § 3617 because of acts intended “to disrupt the exercise or enjoyment of a protected right.”⁴⁹

However, the Seventh Circuit initially expressed skepticism toward such claims. In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*,⁵⁰ plaintiffs claimed not that they were prevented from acquiring housing, but that both their neighbors and the homeowners’ association itself ganged up on them and subjected them to continuing harassment because they were Jewish. Those acts allegedly included writing anti-Semitic graffiti on their wall, damaging their trees, and destroying minutes of board meetings at which the president had threatened “to ‘make an example’” of them.⁵¹ Judge Posner noted that the statutory language in § 3617 only covers activities such as redlining that prevent people from acquiring property and says nothing about post-acquisition harassment.⁵² He distinguished Title VII of the 1964 Civil Rights Act, which “protects the job holder as well as the job applicant,” but noted that “[t]he Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but access to housing.”⁵³ He suggested that § 3604 focuses on the right to acquire housing on equal terms and does not identify post-acquisition conduct as subject to legal regulation. The court held that such harassment was a violation of § 3617 only because a HUD regulation interprets § 3617 as prohibiting post-acquisition conduct that interferes with the “enjoyment of a dwelling.”⁵⁴ The court did not reach the question of whether the regulation was a valid interpretation of § 3617.⁵⁵

46. 97 F. Supp. 2d 602 (D.N.J. 2000).

47. 42 U.S.C. § 3604(a).

48. *Fowler*, 97 F. Supp. 2d at 611.

49. *Id.* at 613. *Accord*, *Schroeder v. DeBertolo*, 879 F. Supp. 173, 175–77 (D.P.R. 1995) (post-acquisition harassment of a condo unit owner by the condominium association’s board of directors because of her disability violated her “continuing right to quiet enjoyment and use of her condominium unit” and thus violated both § 3617 and the “otherwise make unavailable or deny” provision of § 3604); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006) (arguing that the FHA regulates post-acquisition harassment).

50. 388 F.3d 327 (7th Cir. 2004).

51. *Id.* at 328.

52. *Id.* at 328–39.

53. *Id.* at 329 (emphasis in original). For a similar ruling holding that the Fair Housing Act does not regulate post-acquisition harassment, see *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005).

54. 24 C.F.R. § 100.400(c)(2) (2010).

55. 388 F.3d at 330.

Similarly, in *Bloch v. Frischholz*,⁵⁶ plaintiffs sought a religious exception to a condominium rule that prohibited them from placing a mezuzah on the doorpost of their unit. They initially lost in the Seventh Circuit.⁵⁷ Judge Frank Easterbrook explained that the Fair Housing Act does not prohibit post-acquisition racial or religious discrimination against condominium owners by the condominium association, since it only protects the right to acquire property on equal terms.⁵⁸ On rehearing en banc, the Seventh Circuit agreed that § 3604(a)'s protections of the right to acquire housing do not extend to post-acquisition harassment:⁵⁹ "Availability, not simply habitability, is the right that § 3604(a) protects."⁶⁰ The court did hold that denial of the right to post a mezuzah might indeed make the property "unavailable" but also held that the Blochs could sustain that claim *only if they moved out of the premises*.⁶¹ Judge Tinder explained that the Blochs "never moved out" and "give no reason why they failed to vacate."⁶² Although the court refused to conclude that "a plaintiff must, in every case, vacate the premises to have a § 3604 claim," it did conclude that "we see no possibility that a reasonable jury could conclude that the defendants' conduct rendered Shoreline Towers 'unavailable' to the Blochs, which is what § 3604(a) requires."⁶³

As with the public accommodations laws, the court grants a remedy to someone who refuses to go through with the deal or who ends the relationship but refuses to grant a remedy to someone who insists on exercising her rights to participate in the deal or remain in the housing. This interpretation is based on the idea that the statute was intended only to allow access to housing, not to allow non-discriminatory treatment once one is there—precisely the assumption in *Patterson* that was overruled in the Civil Rights Act of 1991.

On the other hand, the Seventh Circuit did find a claim rooted in the protections in § 3604(b) against discriminatory terms and conditions in the contractual relationship.⁶⁴ Just as tenants have continuing relationships with landlords, condominium buyers have continuing relationships with the condominium board. Thus, the claim that the board intentionally discriminated on the basis of religion when it enforced its rules in a discriminatory manner does constitute a possible violation of § 3604(b).⁶⁵ At the same time, the

56. 533 F.3d 562 (7th Cir. 2008), *rev'd*, 587 F.3d 771 (7th Cir. 2009).

57. In response to this decision, both the City of Chicago and the State of Illinois passed laws guaranteeing the right to place religious symbols on the door or entrance to one's home. 765 ILL. COMP. STAT. 605/18.4(h) (2010); MUNICIPAL CODE OF CHICAGO § 5-8-030(h) (2010).

58. 533 F.3d at 563.

59. 587 F.3d at 776–78.

60. 587 F.3d at 777.

61. The court makes this ruling based on an analogy with the common law doctrine of constructive eviction, which traditionally cannot be a defense to a rent claim unless the tenant actually vacates the premises. *Id.* at 777–78. See also JOSEPH WILLIAM SINGER, PROPERTY § 10.6.1 (3d ed. 2010).

62. 587 F.3d at 778.

63. *Id.*

64. *Id.* at 779–781.

65. *Id.* at 780.

court refused to overrule the language of *Halprin* that found it implausible to apply § 3604(b) to conduct by neighbors who are not in a contractual relationship with the tenant or owner.⁶⁶

The Seventh Circuit also reversed the ruling of the three-judge panel that had held that § 3617 does not prohibit post-acquisition discriminatory harassment of owners by neighbors or by a homeowners' association.⁶⁷ By prohibiting coercion, intimidation, threats, and interference with rights to be free from discrimination guaranteed by the FHA, § 3617 extends to *attempts* to get people to leave their homes even if they do not choose to move out.⁶⁸

Like the courts interpreting the public accommodation laws narrowly, some federal courts have approached the Fair Housing Act with a cramped and narrow interpretive lens, assuming that there is a heavy burden of persuasion on those who seek to interpret the act to apply to discriminatory harassment that does not have the effect of preventing initial acquisition of property or prompting an owner or tenant to move out. The recent ruling by the Seventh Circuit en banc in *Bloch v. Frischholz* is welcome because it may help to begin redrawing the balance in a manner that recognizes Congress's intent to protect everyone from discriminatory treatment at all stages of the process of participation in the public accommodations and housing markets. But that will only happen if we rethink the relationship between law and society and between the concepts of regulation, property, and freedom of contract.

IV. PROPERTY IN A FREE AND DEMOCRATIC SOCIETY

It is surprising that the federal courts have been interpreting federal statutes to deny protection from racially discriminatory treatment in both public accommodations and housing. After all, it has been more than forty years since the major Civil Rights Acts were passed in 1964 and 1968, and one might have thought that these laws, combined with modern interpretation of the Civil Rights Acts passed immediately after the Civil War, would have guaranteed comprehensive protection from affirmative discriminatory treatment in the marketplace. We are addressing old-fashioned intentional discrimination against persons because of their race, not controversial questions of affirmative action (treating people "better" because of their race) or disparate impact (finding facially neutral rules to have a discriminatory effect on protected groups). In case after case, we find federal judges empowering retail stores to engage in offensive, racially discriminatory treatment of customers, and we find reluctance on the part of some federal judges to protect homeowners and tenants from discriminatory conduct designed to deny them quiet enjoyment of their homes. What accounts for this?

66. *Id.*

67. *Id. Accord*, Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713–715 (9th Cir. 2009).

68. *Bloch*, 587 F.3d at 782–83

One answer is that the judges are reading federal civil rights statutes in a stingy manner. They are presuming that individuals are free from government regulation unless those regulations, by express and unmistakably clear language, limit their freedom. That leads judges to interpret “the right to make contracts” in a manner that encompasses the formation stage of the contractual relationship but not what happens after the contract is formed. It also leads judges to interpret rights to rent or buy on equal terms as not encompassing conduct that interferes with quiet enjoyment after one becomes an owner. It leads judges to interpret rights to have housing not made “unavailable” to apply only if one actually leaves one’s home.

This attitude to statutory language may be thought by some to be admirable care for the textual sources of law, based on the notions that Congress has a duty to be clear about what it is prohibiting and that, in a free society, anything that is not prohibited is allowed. This is all well and good, but it ignores a more traditional method of reading civil rights law based on the canon of interpretation that remedial statutes should be broadly construed to effectuate their purposes. Statutes designed to grant full rights to contract and acquire property on the same basis as is enjoyed by white citizens, i.e., those who do not experience discrimination or unequal treatment because of their race, might just as easily be interpreted to encompass the full range of rights enjoyed by the more privileged social group.

If statutes are ambiguous, the traditional “remedial statutes” canon of construction allows for interpretation in line with the values underlying the statutes—values that change over time. It is commonplace that “separate but equal” was once thought to be compatible with equal protection of the law but that this interpretation changed over time. Women were denied equal rights at the time the Fourteenth Amendment was adopted and the Civil Rights Act of 1866 was passed, but no one today thinks that the equal protection clause does not prohibit discrimination on the basis of sex. Civil rights statutes similarly are written with broad language designed to extend to all persons’ rights to participate in economic life without disadvantage because of race. They too should be interpreted in light of evolving values, especially in light of changing conceptions of what equality demands.

Later statutes may clarify what is meant by equal rights to contract and acquire property. The Civil Rights Acts of the 1960s require “full and equal enjoyment” of places of public accommodation and nondiscriminatory “terms and conditions” of housing and employment. If the rights to contract and purchase property are ambiguous, judges should look to contemporary values embedded in similar statutes to determine what those concepts mean. Instead, some courts have decided that the textual guarantee of “full and equal enjoyment” of a place of public accommodation in the 1964 Civil Rights Act shows that Congress intended *not* to grant such protection in 1866.⁶⁹ But the 1866 Act says nothing of the kind. It not only does not state

69. *Patterson*, 491 U.S. 164.

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that unequal treatment is allowed but guarantees all persons the *same* right to contract as is enjoyed by white citizens. The contemporary view of what that entails should be the baseline for interpreting the broad rights guaranteed by §§ 1981 and 1982.

More fundamentally, the narrow view presumes that Congress cared about requiring formally equal contract terms but cared nothing about substantively equal treatment in the contracting process or in the enjoyment of rights obtained by contract. But this is a bizarre conception of what equality demands. One might concede that racial segregation in public accommodations and housing may have been the norm in 1866, but the idea that equality today requires only formally equal terms while allowing substantively unequal enjoyment of rights gained by contract does not accord with any sensible current interpretation of what the concept of equality requires.

Nor is there anything amiss with reading ambiguous terms like “right to contract” in light of contemporary norms embodied in similar statutes and in common law. If that were so, then *Plessy v. Ferguson*⁷⁰ should never have been overruled. The purpose of interpreting a statute is to do what Congress wants, and if Congress is deliberately vague about that, then democracy is promoted rather than undermined by deferring to current values, as embodied in other statutes and common law principles, rather than the will of the legislature that passed the law 150 years ago. In overturning the Supreme Court’s decision in *Patterson*, Congress demonstrated its intent to prohibit discriminatory treatment in market relationships, not merely discriminatory contract terms. That principle, not the views of Congress in 1866, should govern current interpretations of the Civil Rights Act of 1866. A ruling that retail stores cannot discriminate on the basis of race in their treatment of customers will not be overruled by Congress; the opposing ruling very well may be. In a democracy that vests lawmaking power in the legislature, it promotes democracy rather than undermines it to interpret the “right to contract” in light of contemporary values embedded in statutes governing civil rights.

This brings me to my final and most important point. The federal courts are interpreting civil rights laws in the light of a flawed conception of the relations between law and society and between freedom and equality. They are presuming that the baseline is negative liberty, or freedom from restrictions on one’s actions, and that all government regulations take our liberty away. In particular, they are assuming that laws that promote equality can only be enforced at the expense of liberty. But these assumptions are false.

It is commonplace that there is no liberty without law. The liberty we care about is not unrestricted freedom; that would be anarchy. It would be, as Thomas Hobbes vividly described it, a “war of all against all.”⁷¹ There

70. 163 U.S. 537 (1896).

71. THOMAS HOBBS, DE CIVI 13 (Sterling P. Lamprecht ed., Appleton-Century-Crofts 1949) (1651).

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are places in the world that have little government and little law, and most Americans would not want to live there. They are war zones governed by chaos, or they are in the thrall of warlords. There are places that do not effectively enforce criminal law preventing people from harming each other. In such places, one is not free to walk the streets because of fear of being killed. Law and liberty are not opposites. It is true that laws often limit what we can do and in this sense limit the liberty we would have in the “state of nature.” But that does not mean they are infringements on our freedom; indeed, *they are what makes us free*. Civil rights statutes do prohibit discrimination on the basis of race, but it does not follow that they deny liberty; indeed, the very opposite is true.

The courts are presuming that we read statutes against a background of absolute freedom of action. The “free market” in this view is a realm where people have no duties to each other beyond those they voluntarily assume. Of course, there are background rules against murder and battery; assaulting your competitor is not within the realm of free and fair competition. You are also not allowed to invade, harm, or take your neighbors’ property without their consent. But beyond that, we have no duties to others. We are free to contract on whatever terms we like, and we are free not to contract if we do not feel like it. We are free to deny others entrance to our property, whether the property in question is a home or a place of employment, or a retail store. This view assumes that any and all contractual relationships are tolerated in a “free market.” But nothing could be further from the truth.

The United States Constitution prohibits Congress from granting titles of nobility.⁷² This not only prevents differentiation of class based on superficial things like being called Lord or Duke, but it also prevents the conferral of unequal status. Its counterpart in state statutes and common law is the abolition of feudalism. This is not merely a hypothetical problem. Feudal property relations were indeed established originally in states like New York and New Jersey. The advent of the Constitution and the development of state property law following 1789 saw case law that expressly abolished the fee tail and other forms of property that were associated with feudalism.⁷³ This means that we are not free to create enforceable contracts that establish relationships that resemble feudalism. It means that tenants cannot be “tied to the land” but must be free to move. It means that landowners cannot have permanent and inheritable obligations to a distant “lord” or his family. It means that land can generally be sold rather kept forever within a particular family. It means that we do not have debtor’s prisons in the United States or workhouses in the absence of criminal conduct.

The Thirteenth Amendment abolished slavery, and the Civil Rights Act of 1866 guarantees rights to participate in economic life without being subject to contracts that differ from slavery in name only.⁷⁴ The Married Wom-

72. U.S. CONST. art. I, § 9, cl. 8.

73. See, e.g., *DePeyster v. Michael*, 6 N.Y. 467 (1852).

74. U.S. CONST. amend. XIII, § 1.

en's Property Acts of the late nineteenth century guaranteed married women equal rights to contract and to own property.⁷⁵ The Civil Rights Acts of the 1960s guaranteed rights to public accommodations, housing, and employment without regard to race or sex or religion.⁷⁶ The Americans with Disabilities Act of 1990 extended those rights to persons with disabilities.⁷⁷

Civil rights statutes are not intrusive interferences with liberty. *They are what make us a free and democratic society.* Without them, people could be free to make whatever contracts they like. But private contracts, no less than public laws, can create relationships that are foreign to those that are acceptable in a democracy. Our constitutions, statutes, and common law protect our democracy from devolving into a racial caste society, feudal society, or a patriarchy. This protection comes from setting minimum standards for economic relationships compatible with the norms of a free and democratic society that treats every person with equal concern and respect. Beyond that, we have consumer protection statutes at both the federal and state levels that comprehensively regulate market relations to ensure that contracts accord with minimum standards of decency. Those standards ensure that products and workplaces and houses are safe, and they perform as expected. Laws set minimum standards for market relationships; they define things that we would like to take for granted.⁷⁸ They are not unwelcome limitations on our natural liberty. They are what makes us equally free to enjoy our liberties; they are what defines our society as a free and democratic society.

Libertarians believe in law. Yet, their focus on freedom from government interference sometimes leads them to forget their own commitments. Immediately after winning the Republican primary for Senate in Kentucky, Rand Paul admitted that his libertarian philosophy made him skeptical of the 1964 public accommodations law that requires restaurants and hotels to serve people regardless of their race.⁷⁹ He worried that such a law interfered with the right of property owners and forced them to enter contracts against their will.⁸⁰

Rand Paul was soon forced to back down, mostly because supporting the repeal of civil rights laws is political suicide in 2010. But he should have repudiated his view for another, more fundamental reason. The values that libertarians cherish cannot exist in a society without law. One cannot travel

75. The Married Women's Property Acts were enacted by states throughout the eighteenth and nineteenth centuries. The New York statute initially enacted in 1848 served as the model for the statutes of many other states. N. Y. DOMESTIC RELATIONS LAW § 50 (McKinney 1999) (which was revised from the 1848 statute).

76. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2010). Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2010).

77. 42 U.S.C. §§ 12101–12117 (2010).

78. Joseph William 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 (2008).

79. Jeff Jacoby, *Tough Stand: Freedom to Be Odious*, BOSTON GLOBE, May 25, 2010, at 15.

80. Adam Nagourney & Carl Hulse, *Tea Party Pick Causes Uproar on Civil Rights*, N. Y. TIMES, May 20, 2010, at A1.

if one is excluded from hotels and restaurants. One cannot acquire property if stores will not let you in. One cannot become a homeowner if no one will sell to you. One is not free unless property ownership is widespread and access to the market system is not closed to you because of your race or ancestry or sex.

One might think that laws prohibiting racial discrimination in retail establishments are not needed in the twenty-first century. If so, repealing the 1964 public accommodations law would have no impact. As Boston Globe columnist Jeff Jacoby argued:

What is the justification for laws banning private discrimination *to-day*, when Jim Crow is dead, racism is overwhelmingly abominated, and a black man is president of the United States? If a bigoted store owner today wants to refuse service to blacks, why should he be barred by law from doing so?⁸¹

Rachel Maddow noted that, without such a law, segregation could re-emerge.⁸² Jacoby opines that this is not possible today: "A firm that adopted a 'No Blacks' policy would set off a storm of public outrage; if it didn't back down, it would be driven out of business within a week."⁸³

There are two problems with Jacoby's reasoning. First, even if a store could not adopt a formal policy of racial exclusion today, that does not mean that it cannot engage in more subtle forms of discrimination. In fact, many stores engage in higher levels of surveillance of black customers and disrespectful treatment is not uncommon. Dozens of federal court cases give evidence of such treatment, and federal law does not go far enough in protecting customers from such conduct. In 2003, for example, the Fifth Circuit Court of Appeals found no violation of federal law when a clerk shouted obscenities and made racially derogatory remarks directed at a Latina customer after she completed her purchase at a gas station.⁸⁴

Second, and more importantly, Jacoby misses the point. Segregation and exclusion on the basis of race are outside the bounds of acceptable conduct by owners and operators of public accommodations in a free and democratic society. Store owners are obviously not allowed to assault their customers or detain them without reason. And in the twenty-first century, they are also not allowed to treat customers differently because of race. It is simply unacceptable under our current settled convictions about the contours of economic relationships in a free and democratic society for public accommodations to deny service on the grounds of race. Whether this is accomplished through voluntary acceptance of custom or law is beside the

81. Jacoby, *supra* note 79 (emphasis in original).

82. *Id.*

83. *Id.*

84. *Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003).

point. The law would not be necessary if adherence to the custom were universal. Law becomes necessary when such adherence is not universal.

Jacoby wants to have his cake and eat it too. He wants to voice support for the practice of allowing entrance to stores without regard to race while adhering to a libertarian philosophy of banning regulation of private property. One cannot have it both ways. Either we have the right to enter stores without regard to race or we do not. If we have such a right, then the rights of private property owners to exclude patrons on the basis of race must be limited. It is no answer that economic competition may drive a particular business into bankruptcy; our settled consensus is that such a business has no right to exclude patrons on the basis of race in the place. A law banning such racial exclusion is not a deprivation of liberty or free choice; it ensures that choice is available. The interest in accessing a store without regard to one's race is a legitimate one; the interest in excluding patrons from one's store on the basis of race is not a legitimate one. You may be free to choose your friends on the basis of race, but you cannot choose your customers on this basis—at least if you want to live in a free and democratic society that eschews racial caste.

In the year 2010, it should finally be accepted that invidious discrimination in the marketplace violates the public policy of both the United States and the several states. People are legally free to choose their friends on any basis they like. But Congress has made clear that employers cannot treat employees differently based on their race. Congress has made clear that businesses cannot choose their customers based on race. It should be abundantly evident that the basic policy of United States law is to grant equal access to the marketplace without regard to race. This includes the right to “full and equal enjoyment” of all the privileges offered to the public in public accommodations and housing as well as employment. We have abolished “separate but equal” policies that grant a particular form of service to white persons and another to African Americans. Owners and tenants are not able to enjoy their property if they are not free from discriminatory harassment by neighbors because of race or religion.

American law now contains a fundamental background principle of equality in the rules governing the marketplace. Congress has made this clear. The common law has always regulated private relationships to prevent the re-emergence of feudalism. Our current understanding of racial equality means that the common law not only prohibits fees tail and feudal rents but also unequal treatment on the basis of race in the enjoyment of things that are for sale.

Our legal baseline for public accommodations and housing is *not* liberty to discriminate on the basis of race; our legal baseline rejects market relations premised on unequal status. We reject feudalism. We reject slavery. *And we reject apartheid.*

If this is so, then the courts should be reading civil rights laws with those premises in mind. They should be assuming that the “right to make contracts” and to “purchase personal and real property” includes rights to

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equal terms and conditions and enjoyment without regard to race. They should be assuming that these rights apply to the entire contracting process and the process of enjoying goods and services one has purchased. Any claim that one is free to treat African Americans worse than white persons in stores or homes should be met with skepticism bordering on incredulity. Courts should reject such interpretations unless statutes affirmatively and unambiguously grant the right to discriminate on the basis of race. Congress has not done this and it never will. Such conduct is unlawful; it violates the basic norms governing market relationships in a free and democratic society. It is time we understood this.