

Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations

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May a hotel owner that objects to same-sex marriage on religious grounds refuse to host a same-sex wedding in its ballroom or deny the couple the right to book the honeymoon suite? Do public accommodation laws oppress religious dissidents by forcing them to act contrary to their religious beliefs or does discriminatory exclusion threaten equal access to the market economy and deny equal citizenship to LGBTQ persons? Answering these questions requires explaining why one property claim should prevail over another and why one liberty should prevail when it clashes with another. And answering those questions requires analysis of the relationship between property and sovereignty.

Sovereign power both creates and regulates the types of property rights that can be tolerated in a free and democratic society that values each person equally. Should we view sovereignty as a threat to property or property as a threat to sovereignty? Libertarians choose the first and liberals the second. But this is the wrong way to understand the relation between property and sovereignty. Property and sovereignty are not separate and independent concepts or spheres of social life that can be brought into relationship with each other. Rather, they are imbricated; they overlap like roof tiles. Our aspiration to live

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in a free and democratic society places certain constraints on both property and sovereignty. Such societies do not recognize absolute power, whether public or private. Free and democratic societies are committed to a substantive vision of both social relations and politics. We have fruitful debates about property and sovereignty and, in the end, must construct a legal system that effects an acceptable compromise between access and exclusion in the property regime.

Our historic practices regarding racial and other forms of discrimination and our evolving norms suggest that public accommodation laws enable access to the marketplace without regard to invidious discrimination. Religious freedom cannot operate to deny equal citizenship or opportunity. For that reason, a same-sex couple should not have to call ahead to see if they are welcome to book the honeymoon suite. Public accommodation laws do not infringe on legitimate property rights or religious freedoms; rather, they define the legitimate contours of liberty and property in a society that treats each person with equal concern and respect.

Discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.

New Jersey Law Against Discrimination¹

[W]hose general welfare must be served or not violated in the field of land use regulation[?]

Justice Frederick Wilson Hall²

INTRODUCTION

As same-sex marriage has become the law of the land, business owners who have religious objections to state recognition of such marriages have claimed the “right not to participate” in such marriages by providing goods and services such as flowers, photography services, or wedding cakes.³ Do

¹ N.J. STAT. § 10:5-3 (West 2006).

² S. Burlington Cty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 726 (1975).

³ See, e.g., Mullins v. Masterpiece Cakeshop, Inc., 2015 COA 115, 2015 Colo. App. LEXIS 1217 (Colo. Ct. App. 2015), cert. denied by Masterpiece Cakeshop, Inc. v. Colo. Civ. Rights Comm’n, 2016 Colo. LEXIS 429 (2016); Elane Photography,

public accommodation laws oppress religious dissidents by forcing them to act contrary to their religious beliefs in serving same-sex couples or does discriminatory exclusion threaten equal access to the market economy and deny equal citizenship to LGBTQ persons? Imagine two men who want to marry each other. They are adherents of a religion that solemnizes and celebrates such marriages. They approach a hotel with the goal of having the ceremony and the reception in the hotel's facilities, followed by spending their wedding night in one of the hotel's rooms. The hotel is one that has a special "honeymoon suite" marketed to couples that have just celebrated their wedding. The hotel acknowledges the men's right to marry each other, established in the *Obergefell* case,⁴ but refuses to accommodate them, citing the *Hobby Lobby* case.⁵ The owner is of a religion that opposes same-sex marriage and does not want in any way to participate in a religious ceremony that violates the owner's religious beliefs. The hotel allows male-female couples to hold weddings at the hotel and does not otherwise discriminate on the basis of religion. Ceremonies held at the hotel have been Christian, Jewish, Moslem and Hindu. Should the law protect the religious freedom of the couple or the religious freedom of the hotel owner?⁶ Should the law grant the couple a right of access to a public accommodation or does the owner of real estate have a right to exclude guests as non-owners in order to exercise his religious beliefs?

Sovereign power both creates and regulates the types of property rights that can be tolerated in a free and democratic society that values each person equally. Do property rights tell us how to limit the exercise of sovereignty? Do democratic norms tell us how to define property rights? Is sovereignty a threat to property or is property a threat to sovereignty?

The answer to these questions may depend on whether you are a libertarian or a liberal. Libertarians often endorse John Locke's claim that property rights precede government and that the legitimate purpose of government is to protect

LLC v. Willock, 309 P.3d 53 (N.M. 2013); *Gifford v. McCarthy*, 2016 N.Y. App. Div. LEXIS 238, 2016 WL 155543, 2016 NY Slip Op 00230 (N.Y. App. Div. 2016); *Matter of Klein, dba Sweetcakes by Melissa*, 2015 WL 4503460 (Or. Div. of Fin. & Corp. Sec. 2015).

4 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

5 *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014) (holding that a closely-held corporation may exercise religious liberty).

6 See James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 101-02 (2015) (discussing actual hotel discrimination against gay and lesbian couples).

them.⁷ In the libertarian view, property rights limit the legitimate scope of sovereignty. Sovereignty may be necessary to provide security for property, but it is also the biggest threat to property. Liberals, on the other hand, worry about the antidemocratic effects of increasingly unequal income and wealth. The exercise of a property right is never a completely self-regarding act; both individually and collectively, property rights can work in practice to exclude non-owners from access to the things they need to live.⁸ Equal opportunity and economic mobility may be obstructed if they are not sustained through necessary institutional support.⁹ For that reason, liberals support laws that can counter the power of concentrated wealth, both in politics and in social and economic life.

Libertarians often appeal to natural rights theories to define the limits of government power. Locke argued that reason tells us what rights individuals have and that government gets its legitimacy from an implied social contract to band together to protect those rights. But sometimes libertarians use utilitarian theory to argue that limited government regulation best promotes the wellbeing of citizens.¹⁰ Liberals find support in positivists like Jeremy Bentham who claim that property rights are defined by law and cannot exist outside a legal system and must be defined to achieve social ends.¹¹ They may also look to mixed theorists like Thomas Hobbes and William Blackstone who champion natural rights but who also argue that property is defined by the state through positive laws designed to promote “commodious living.”¹² Other liberals join libertarians in making justice or social contract arguments for both government power and private rights; they appeal, for example, to John Rawls’s principles of justice or his conception of public reason or to a robust conception of equal opportunity like that offered by Brian Barry.¹³

7 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 350-51, 353, 358 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

8 *See generally* LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

9 BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* (2005).

10 Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL’Y 107 (1986).

11 1 JEREMY BENTHAM, *THEORY OF LEGISLATION* 139 (1840).

12 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 3, 4, 11 (Univ. Chi. 1979) (1766); THOMAS HOBBS, *LEVIATHAN* 91, 93, 125 (Richard Tuck ed., Cambridge Univ. Press rev. Student ed. 1996) (1651).

13 BARRY, *supra* note 9; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001); JOHN RAWLS, *POLITICAL LIBERALISM* (1993). *See generally* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

To explore the question whether public accommodations law should have religious exemptions, it will be helpful to understand the nuanced relationship between property and sovereignty. It turns out that both the libertarian and the liberal traditions have insights to offer that inquiry. Part I explains why property and sovereignty are imbricated; they imply each other and overlap rather than constituting concepts that are wholly distinct and separate. Part II illustrates this imbrication concretely by exploring the history of racial discrimination in public accommodations and the different ways the law has regulated it. An overview of the historical record reveals a surprising number of accommodations of property rights and sovereign power. These multiple property regimes demonstrate the multiple ways in which sovereign power shapes property norms and entitlements and the ways that different property regimes call upon state power to shape social relationships. Part III analyzes the substantive question whether religious liberty ever justifies exemption from public accommodation laws, using the example of same-sex marriage as a test case. I argue that religious liberty does not justify allowing owners of public accommodations to discriminate on the basis of sexual orientation or to refuse to serve same-sex couples. Part IV concludes by reminding us of things that we would like to take for granted when we enter the world of the market.

I. WHY PROPERTY AND SOVEREIGNTY ARE IMBRICATED

Liberals and libertarians suggest that we must choose one approach or the other. Either property rights limit legitimate sovereign power or officials chosen by the people have the room to pass laws that shape the contours of property rights. The truth is that they both emphasize one side of a dichotomy. Liberals emphasize the laws needed to promote equality and enable “government of the people, by the people, for the people,” while libertarians emphasize the need to limit sovereign power to protect freedom and the rights of owners. Rather than choose between these approaches, it would be helpful to understand that they reflect what Clifford Geertz called “a choice of worries.”¹⁴ Libertarians and natural rights theorists are worried about the abuse of government power and its potential to interfere with individual liberty. This is a considerable worry and it is one that liberals share.¹⁵ On the other hand, both liberals and

14 Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 265 (1984).

15 Both liberals and conservatives reacted with alarm, for example, to the Supreme Court’s *Kelo* decision. For a measured defense of *Kelo*, see Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 336-38 (2006).

positivists are worried about the harmful consequences of absolute rights, including property rights.¹⁶ There are valid concerns on both sides. If that is so, can we solve the problem by asking which set of worries is more of a problem? Does it help to ask whether public power is a greater threat than private power or the reverse?

I submit that this way of thinking about the issue will get us nowhere. The answer depends on the context. We have just celebrated the 800th anniversary of the signing of the Magna Carta. That agreement tried to limit the power of King John to protect the liberties of the nobles. The lords sought to limit the King's sovereign power to protect their property rights. But protecting the rights of the lords gave them power over their tenants. It was the royal common law courts created by the King that intervened to protect the tenants from the lords. From the standpoint of the peasants, it was centralized government regulation that protected their property rights from the sovereign power of the lords.

In this dance of power and right, threats came both from the sovereign and from property owners. Indeed, in the feudal context, it was impossible to tell the difference. King William claimed seisin of all England when he arrived from Normandy in 1066.¹⁷ But of course that property claim was indistinguishable from his claim of a right to rule. That was the point of feudalism: to merge property and sovereignty and tie legitimate power to control of land.

In our time, we distinguish between property and sovereignty. Landlords have the right to receive rent but not the right to tell the tenant where to attend church or who to befriend. Landlords may evict tenants but must use court procedures to do so to ensure fair adjudication of claims and to avoid the violence that self-help remedies may engender. Democracies separate control of land from the power to make law; they confer power on the people to govern themselves while enabling individuals to control their property subject to limits set by elected representatives.

Natural rights theories seek to develop an objective account of private rights that can limit sovereign power. The strategy is to reject the feudal unification of property and sovereignty and instead to separate them into their proper spheres. From this perspective, the positivist approach poses a clear and present danger to both property and liberty because it gives the sovereign

16 See Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in *PROPERTY AND COMMUNITY* 57 (Gregory S. Alexander & Eduardo Peñalver eds., 2009).

17 PETER REX, 1066: A NEW HISTORY OF THE NORMAN CONQUEST 14 (2d ed. 2011).

the power to define and declare what property rights are. If the sovereign can define property rights as it pleases, it cannot be limited by them.¹⁸

Conversely, the positivist approach gives the sovereign the power to define what property rights are. Legal realist Morris Cohen adopted this approach when he described property as a delegation of sovereign powers.¹⁹ On this view, property and sovereignty cannot be separated because they are not two different things. They are simply different ways of exercising power: the power of the state or the power of the owner. All forms of power can be used for good or ill. The function of law is to define the allowable and prohibited uses of power, whether by state officials or private owners.

We are left with competing sets of worries. The fear of oppressive government power leads natural rights theorists to define property rights that are immune from regulation, while the fear of oppressive and malfunctioning property rights leads positivists to empower governments to define property so as to promote “commodious living” and the “pursuit of happiness.” Both sets of worries are valid. Where does that leave us?

The natural rights approach separates property and sovereignty while the positivist approach unifies them. Neither approach works. We do not want the sovereign to have absolute power; the American Revolution rejected that idea. On that score, we chose Locke over Hobbes. But we also do not want to be ruled by philosopher kings; we want instead to have government of the people, by the people, and for the people. On that score, we chose John Adams, Thomas Jefferson, and Abraham Lincoln over Plato or King George. What we need is a conception of the relation between property and sovereignty that is appropriate for a free and democratic society that treats each person with equal concern and respect and enables government by the people. If that is our goal, then property and sovereignty can be neither separated nor unified. They are neither opposites nor synonyms. Property and sovereignty can be distinguished but not segregated.

18 Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1415 (1991) (“To reconcile American law’s double-edged reliance on property concepts, this theory must successfully distinguish between courts’ role as definers and defenders of property rights.”).

19 Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 14 (1927):

[T]he recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have. . . . While, however, government is a necessity, not all forms of it are of equal value. At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.

Property and sovereignty are not separate and independent concepts or spheres of social life that can be brought into relationship with each other. They are different but not disconnected. Rather, they are imbricated; they overlap like roof tiles. Property and sovereignty are neither independent from each other nor one and the same. Property and sovereignty are embedded within each other. Sovereign power is not an enemy of private rights; indeed, private rights cannot function in a modern world without sovereignty. Nor does property limit sovereignty the way a red light stops traffic. Rather, sovereignty is exercised both to define and to defend property rights.

Sometimes we define property rights through common law procedures that depend on recognition of custom and moral norms based in both rights-based theories and utilitarian or consequentialist theories. Sometimes we engage in constitutional analysis to protect owners from fundamentally unjust deprivations of property or personal rights. And sometimes we define rights politically through democratically-elected legislatures. As owners, we may choose how to use our own homes, but as citizens we choose representatives who enact laws that we (collectively) want. Those laws set the environment within which we enjoy our property. Those laws set rules of the game and define minimum standards for the exercise and enjoyment of rights.²⁰ Constitutional norms limit the ability of legislatures to violate property rights in ways that deny equal protection or fundamental liberties. We have, in other words, a mixed system that cannot be reduced to a simple formula. We do not use rigid property concepts to delimit sovereignty, nor do we allow democratic majorities to run roughshod over individuals.

Cohen was right that sovereignty and property are both ways of exercising power, but they are both also ways of exercising liberty and rights.²¹ Zoning law may limit what you can do on your own land, but it does so to structure the context within which we enjoy our property rights. Property and sovereignty are neither strangers nor enemies. They are the trees and the forest. They are the player and the cards.

We aspire to live in a free and democratic society and that aspiration places certain constraints on both property and sovereignty. Such societies do not recognize absolute power, whether public or private. Free and democratic societies are committed to a particular vision of both social relations and politics. Premised on the ideas of liberty, equality, and government by, for, and of the people, our democratic ideals shape our property system and our property system shapes both our markets and our politics. Property and

20 JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 2 (2015).

21 Cohen, *supra* note 19, at 19, 29.

sovereignty are imbricated because we have multiple ways of determining the legitimate scope of private rights and of exercising lawmaking power. To understand this point concretely, it will be helpful to explore the multiple accommodations of property and sovereignty in the historical treatment of racial discrimination in access to public accommodations. That, in turn, will help us analyze the question whether LGBTQ persons should have access to public accommodations over the religious objections of owners.

II. RACE, PUBLIC ACCOMMODATIONS AND THE PROPERTY/SOVEREIGNTY INTERFACE

A historic overview of the law governing racial discrimination in public accommodations reveals a bewildering variety of ways in which public power has shaped the contours of property rights in businesses open to the public. Remembering these alternative regimes will not only clarify the choices that confront us in the same-sex marriage case, but will provide concrete examples of the ways in which property and sovereignty are imbricated. We can start with an historical overview and then catalogue the various worlds encompassed by different accommodations of access and exclusion to public accommodations.

A. History of Race and Public Accommodation Law

Before the Civil War, the states either tolerated racial discrimination or required it; at the same time, public accommodations in the North were under a general common law obligation to serve the public.²² The Supreme Court tolerated discrimination, eventually ruling in *Dred Scott* that African Americans “had no rights which the white man was bound to respect.”²³ Slaves obviously had no legal capacity to engage in enforceable contracts, to purchase property, to sue or be sued, or to testify in court. They had the same disabilities that children have today or married women before passage of the Married Women’s Property Acts in the nineteenth century.

Immediately after the Civil War, the southern states passed laws prohibiting racial discrimination in public accommodations, as did the Congress in 1875.²⁴

22 This general history of public accommodations law is extensively documented in Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. U. L. REV.* 1283 (1996).

23 *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

24 Singer, *supra* note 22, at 1374-86.

Congress also passed the Civil Rights Act of 1866 granting African American citizens the same “right to contract” and to acquire and hold property as is enjoyed by white citizens.²⁵ But at the same time, the Commonwealth of Massachusetts ruled that only inns and common carriers had a duty to serve the public, allowing places of entertainment to exclude a patron because of his race.²⁶ For a while, we had the anomalous situation of common law allowing discrimination in the North with statutes prohibiting it in the South.

But then the Supreme Court struck down the federal public accommodations law of 1875 in its 1883 ruling in the *Civil Rights Cases*.²⁷ That case held that the Fourteenth Amendment gave Congress the power to stop the states from discriminating; Congress could, for example, outlaw state statutes that denied African Americans the power to enter enforceable contracts or to own property. However, the Civil War amendments apparently did not give Congress the power to prohibit private discrimination. Only the states could pass such laws under their plenary police powers. Thus the “state action” doctrine was born.

Following the *Civil Rights Cases*, the southern states repealed the public accommodation laws they had passed immediately after the Civil War, thereby allowing discrimination in places of public accommodation. Once the federal public accommodations law was held unconstitutional, nothing stood in the way of racial discrimination in public accommodations. But soon the states moved from a laissez-faire policy of not interfering in private discrimination to actively requiring segregation and discrimination through the southern Jim Crow laws. The Supreme Court approved those arrangements in *Plessy v. Ferguson* by defining separate facilities as “equal” and thus in compliance with the Fourteenth Amendment.²⁸

In the twentieth century, the Supreme Court began to regulate some types of discrimination. It did this, first, by prohibiting the states from interfering with voluntary private sales of property. The 1917 case of *Buchanan v. Warley* held that local zoning laws could not prevent a white seller from selling property to an African American buyer.²⁹ That case protected the white privilege to sell but did not ensure the black privilege to buy. The 1926 case of *Village of Euclid* approved zoning law, thereby allowing the exclusion of apartment complexes from single-family home districts.³⁰ To the extent that African

25 Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982.

26 *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858); see Singer, *supra* note 22, at 1339-40.

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

28 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

29 *Buchanan v. Warley*, 245 U.S. 60 (1917).

30 *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Americans could not afford single-family homes, the *Euclid* case enabled municipalities to segregate through facially neutral laws. The Supreme Court then prohibited enforcement of racial covenants in 1948 in *Shelley v. Kraemer*, while enabling owners to continue to engage in discriminatory refusals to sell.³¹ Discrimination accomplished voluntarily by sellers remained lawful except in those states that passed fair housing laws. Of course, southern states did not pass such laws and one state (Mississippi) passed a law actively affirming the right to discriminate; Mississippi law allows any business to refuse goods or services to any customer for any reason.³² That law remains on the books in the state of Mississippi to this day.³³

It was not until the 1960s that federal laws were passed and upheld by the Supreme Court that prohibited discrimination in public accommodations,³⁴ housing,³⁵ employment,³⁶ and voting.³⁷ The Fair Housing Act has been interpreted to prohibit both intentional discrimination and neutral practices that have a disparate impact or a segregative effect.³⁸ The Supreme Court recently affirmed that the Fair Housing Act includes a disparate impact claim; however, towns that adopt facially neutral zoning laws may be allowed to do so despite their disparate impacts if the courts believe that they have a legally sufficient justification for doing so.³⁹ Only a handful of states have adopted New Jersey's *Mount Laurel* doctrine that requires most municipalities to ensure that zoning law does not prevent housing affordable for the poor from being constructed.⁴⁰

31 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

32 MISS. CODE ANN. § 97-23-17 (2016).

33 For criticism of the Mississippi statute, see Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015).

34 42 U.S.C. § 2000a.

35 *Id.* §§ 3601-3631.

36 *Id.* § 2000e.

37 52 U.S.C. §§ 10101-10702.

38 *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (interpreting and applying the disparate impact test). See also the disparate impact rule promulgated by the Department of Housing and Urban Development (HUD), 24 C.F.R. § 100.500.

39 *Tex. Dep't of Hous. & Comty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2014); 24 C.F.R. § 100.500(b).

40 *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 726 (1975).

B. Accommodations of Property and Sovereignty in Different Social and Economic Worlds

This historical excursion reveals a perplexing array of accommodations of property and sovereignty that form the contours of different social and economic worlds. To understand why this is so, let's consider the parameters of property and sovereignty in eight different worlds. Those worlds include (1) slavery (*Dred Scott*); (2) laissez-faire (*Civil Rights Cases*); (3) separate but equal (*Plessy*); (4) white privilege (*Buchanan*); (5) economic segregation (*Euclid*); (6) voluntary discrimination (*Shelley*); (7) civil rights (*Public Accommodations Act of 1964*); and (8) disparate impact & inclusionary zoning (*Mount Laurel*).

1. Slavery

The *Dred Scott* world is the world of slavery and the exclusion of African Americans from the team of humanity. African Americans, in this world, had “no rights which the white man was bound to respect.”⁴¹ Slavery was constitutional and the courts would not interfere with state regulatory systems that allow and enforce property rights in human beings. Property is obviously present in such a world; people are treated as property. Sovereignty is also being exercised both to constrain slaves and to provide spheres of “autonomy” to slave owners to exercise their free will with regard to their own property.

This *Dred Scott* world seems deregulatory from the standpoint of slave owners. They are free to capture and to enslave certain human beings. But this world is a decidedly regulatory one from the perspective of those who are enslaved. The law will enforce their imprisonment and servitude. And it will not intervene to help them when they are beaten and raped by their masters. In such a world, the sovereign state delegates to masters the freedom to use force and it disables slaves from liberating themselves from bondage.

We might note that with respect to gay rights this world is, in certain respects, a version of the world that existed until quite recently in the United States. Many states had laws that outlawed sexual relationships between persons of the same sex. This changed only in the year 2003 with the case of *Lawrence v. Texas*.⁴² Given the recent mad pace of events regarding same-sex marriage, it behooves us to recall that we left this world only in 2003, fourteen short years before I write these words. The pre-*Lawrence* world denied humanity to LGBTQ persons; they were subject to deprivation of liberty through criminal process simply for being themselves. The *Lawrence*

41 *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

42 *Lawrence v. Texas*, 539 U.S. 558 (2003) (determining that it is unconstitutional to criminalize sexual relations between persons of the same sex).

decision frees the hotel from criminal responsibility for aiding and abetting illegal conduct by renting the hotel room to a same-sex couple. It frees the hotel owner to exercise its property rights to deal with LGBT patrons. It also protects the same-sex couple from criminal prosecution for sexual behavior in the honeymoon suite.

2. *Laissez-Faire*

The *Civil Rights Cases* decided in 1883 appear to promote a form of *laissez-faire*; they enact a world where state discrimination is prohibited but private discrimination is allowed. In such a world, individuals are free to enter the marketplace if they can find people willing to deal with them. Those already in the market are free to choose to deal — or not to deal — with any potential customer. This world is the one promoted by the Mississippi statute still in effect today that allows all businesses to refuse service on any ground whatsoever.⁴³ No state law deprives any individual of the power to enter contracts or buy property, but no law requires anyone to deal with others without regard to race.

In this *laissez-faire* world, access to property is dependent on there being sellers who will agree to deal with buyers. The more sellers are prejudiced against African Americans, the harder it will be for African Americans to obtain what they need to live and prosper. In such a world, one might think the state has withdrawn by refusing to regulate; it allows but does not compel. Only a willing buyer and a willing seller can commit themselves to an enforceable contract. But of course, African Americans have no right to enter hotels unless the owner lets them in. And it is the police who will aid the hotel owner in enforcing the trespass laws. The *laissez-faire* world regulates the non-owner and liberates the owner. It protects the right to exclude and denies the right to buy. It protects people who are owners and denies others the ability to become owners.

We might note that this *laissez-faire* world is the one promoted by those who want the freedom to refuse to sell products or services to gay customers. They either support the absence of any laws prohibiting discrimination on the basis of sexual orientation or a religious exemption from such laws. Customers who seek the aid of the state to force sellers to engage in commercial transactions with LGBTQ customers are viewed as interfering with both the liberty and property rights of owners. Those owners, including our hotel, seek to be “left alone” by the state and by pushy customers. They seek liberation from regulation and the ability to control their own property. They seek “space” to live in accord with their religious values. They do not view their claims as depriving others of liberty or property because those patrons are free to seek

43 MISS. CODE ANN. § 97-23-17 (2016).

service elsewhere and, in any event, have no right to impose themselves on others against their will.

One might think the profit motive would be sufficient to induce some owners to do just that. But in a world beset by prejudice — one where a hotel might not want a reputation as a “gay hotel” — the availability of alternative service depends on the courage of owners who buck social norms. In the case of racial discrimination, we have historical evidence that the profit motive was not sufficient to create nondiscriminatory access to hotels in the pre-civil rights era. And it is still the case today that there are only certain communities in the United States where LGBTQ people are free to be themselves.

3. *Separate but Equal*

In between the laissez-faire world of the *Civil Rights Cases* and the slavery world of *Dred Scott*, we have a number of accommodations between state power on the one hand and liberty and property on the other. We also have a complicated array of ways of defining the relative property rights of the parties. The *Plessy v. Ferguson* world continues the *Civil Rights Cases* world since most businesses remain free to deny access to customers at will. But those few that are designated public accommodations, such as railroads, do have a duty under the law to provide access to everyone who wants accommodation. However, the *Plessy* world allows service to be segregated; state-mandated segregation does not violate equal protection of the laws in the *Plessy* world because “separate” facilities are purportedly “equal.” That means that even when businesses are obligated to let customers in, they are entitled to keep them apart. There can be one car for whites and another for nonwhites.

We might note that this world would resemble the laissez-faire world for LGBTQ persons since retail stores, after the Civil War, were not thought to be public accommodations.⁴⁴ However, hotels were thought to be public accommodations and that might allow a hotel to have separate honeymoon suites — one for “traditional” male-female couples and another for same-sex couples. Such a world denies same-sex couples the right to be treated like male-female couples while mandating that they be served — albeit in a degrading manner. In such a world, the sovereign forces hotels to open their property to strangers, but allows them to keep some rooms pristine and protected from contamination by persons classified as outcasts.

44 Singer, *supra* note 22, at 1390-411.

4. *White Privilege*

The world of *Buchanan v. Warley* begins to chip away at discrimination. That case struck down a local zoning law that sought to segregate housing by race; the zoning law promoted segregation by prohibiting the sale of land to someone of a different race than the race of the majority of owners on a street.⁴⁵ The Supreme Court ruled the law unconstitutional, not because it denied the rights of African American buyers, but because it prevented a white owner from selling land to a buyer of that owner's choice. In the *Buchanan* world, sellers who want to serve customers regardless of race are entitled to do so and any laws preventing them from freely contracting are deemed unconstitutional deprivations of their liberty. In this world, owners are free to discriminate, but they cannot be required to do so. In such a world, buyers can obtain access to housing only if there are some sellers willing to sell to them. This resembles the world that still exists in states that do not prohibit discrimination on the basis of sexual orientation. In such states, access is contingent on the kindness of owners.

5. *Economic Segregation*

An alternative world is the one in *Village of Euclid*, the case that upheld zoning ordinances that segregate different land uses.⁴⁶ In that world, governments can pass laws that regulate the use of land as long as those laws do not violate the *Buchanan* proviso that owners must be free to sell to African American customers. The *Euclid* reasoning focused on the reasons for segregating single-family homes from apartment buildings. Apartments were viewed as close to nuisances and as “parasites” that take advantage of the family atmosphere in the single-family home district, only to destroy the very thing they are attracted to.⁴⁷

In such a world, if it is the case that income and wealth are different for people of different races — if, for example, African Americans are on average poorer than whites — then the exclusion of apartment buildings might have the effect of segregating housing by race. According to the *Euclid* Court, that is perfectly fine and indeed salutary. Discriminatory goals are fine as long as achieved in formally neutral ways.

We might note that a hotel might allow same-sex couples to occupy the wedding suite as long as they had a religious service. While an increasing number of religions affirm and consecrate same-sex marriages, many Christian denominations do not. Limiting the wedding suite to those who had a religious

45 *Buchanan v. Warley*, 245 U.S. 60 (1917).

46 *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

47 *Id.* at 394.

ceremony might have a disparate impact on same-sex couples, meaning that a greater percentage of them than of male-female couples would not qualify for the wedding suite. In such a world, access to the hotel would depend on your religion (or lack thereof) and that would mean that sovereign power would be exercised differently for those of different religious beliefs.

6. *Voluntary Discrimination*

The world of *Shelley v. Kraemer* held that racially restrictive covenants cannot be enforced, but it did not stop owners from making such agreements. Nor did it prohibit discrimination. Owners in such a world can refuse to sell property to African American buyers. In this world, sovereignty (state action) is thought to be absent if private persons make decisions about whether to sell their land, employ others, or open their businesses to customers. The state is “involved” only if someone asks the state to use its coercive power to enforce private arrangements, perhaps by stopping willing parties from dealing with each other. This world goes beyond the *Buchanan* world because it not only strikes down laws that prevent owners from selling to willing customers, but also refuses court enforcement of private agreements that seek to achieve the same thing.

At the same time, the *Shelley* world finds private discrimination perfectly legitimate, deeming the state uninvolved when an owner denies access to her property to non-owners. As in the laissez-faire world, we might be inclined to find the state absent if there is no “state action.” As we have seen, however, police and court enforcement of trespass law does not mean we are in a world where the sovereign has withdrawn; it is very present and intended to channel behavior in an approved manner. We might note that this world would open the hotel’s wedding facilities and the honeymoon suite to a same-sex couple as long as the owner was willing to rent it to them, but would grant them no rights if the owner were unwilling.

7. *Civil Rights*

Only now do we reach the world of civil rights. The laws passed in the 1960s, especially the Civil Rights Act of 1964⁴⁸ and the Fair Housing Act of 1968,⁴⁹ as well as the Supreme Court’s reinterpretation of the Civil Rights Act of 1866 in the case of *Jones v. Alfred H. Mayer Co.*,⁵⁰ all require businesses to deal with customers without regard to race or religion. Sex and disability

48 42 U.S.C. §§ 2000a.

49 42 U.S.C. §§ 3601-3631.

50 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

were eventually added to the list. Rather than empowering sellers to sell, these laws enable buyers to buy. They obligate sellers to enter contracts they might wish to avoid if the only reason for their refusal to deal is the race (or religion or sex or disability) of the customer.⁵¹

We might note that this world exists in the states that have state laws prohibiting discrimination on the basis of sexual orientation, while those that do not prohibit such discrimination remain in the *laissez-faire* world where private owners are free to deny access on the basis of sexual orientation. The recent controversies have been about efforts to create exemptions from sexual orientation discrimination laws in states that have them or to formalize the right to deny service because of the religious scruples of the owner in the states where denial of service because of sexual orientation is already lawful.⁵²

Such a world might be thought to impose the sovereign state on private owners or to threaten their property rights by telling them that they must open their land to persons they want to keep out. Public accommodation laws take a piece of the owner's right to exclude, a right that the Supreme Court has classified as one of the core rights of property owners.⁵³ As we have seen, however, state coercion is relative. From the standpoint of hotels that want to exclude same-sex couples, civil rights laws are imposed regulations and deprivations of freedom, religious or otherwise, as well as a taking of the right to exclude. But from the standpoint of same-sex couples, civil rights law enables them to travel, to buy, to enter the world of the market without fear of ostracism or exclusion. Their freedom is enlarged considerably by such laws. From their standpoint, the exercise of sovereignty through civil rights laws promotes their freedom and right to equal treatment.

8. *Disparate Impact*

In the *Mount Laurel* decision, the Supreme Court of New Jersey outlawed municipal zoning laws that make it functionally and economically unfeasible for low- and moderate-income housing to be built.⁵⁴ A law that excludes all

51 For a defense of this obligation, see Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91 (2011).

52 See, for example, Mississippi's HB 1523 — the Protecting Freedom of Conscience from Government Discrimination Act, 2016 Miss. Laws ch. 334.

53 *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (“In this case, we hold that the right to exclude so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”).

54 *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 726 (1975). For a recent affirmation of this principle, see *In re the Adoption of*

apartment buildings from the town might well pass muster under *Euclid*, but it failed to achieve legal support in the case of *Mount Laurel*. That case held that individual municipalities could not think of themselves alone or regulate land use so as to make it available only to those who could afford single-family homes. Each municipality had an obligation to make room for low-income housing to be built somewhere in town.

The *Mount Laurel* court noted that the state constitution conferred power on the government to act to promote the “general welfare of the people.”⁵⁵ The people, the court concluded, include the poor as well as the rich. That meant that the towns and cities could not restrict land use in a way that made it illegal for owners who wanted to build low-income housing to find someplace in the municipality where it was legal to create that housing.

Owners who did not want low-income housing next door experienced the *Mount Laurel* opinion as an attack on their property rights. Such housing next door might reduce the value of their homes. They agreed with the Supreme Court in *Euclid* in viewing apartment buildings as parasites that destroy the residential character of the neighborhood. But from the standpoint of low-income families, laws like that in *Euclid* made it financially and legally impossible to create housing in which they could live. Seemingly neutral zoning laws made it illegal for them to move into town.

The *Mount Laurel* doctrine requires us to pay attention to the cumulative impacts of individual decisions to refuse services. A town that excludes all apartment buildings may be simply trying to create a certain environment for its people. At the same time, those who cannot afford to buy a single-family home are banished to other places. If many towns have similar conceptions of the types of property they want in the town — and if there is a correlation between the type of property and the type of person who occupies or can afford that property — then neutral laws may have a disparate impact that creates a segregative effect. We might note that if one hotel refuses services to a recently married couple and others are open, that is one thing. But if all the hotels in a town or a county refuse service, that is another thing entirely.

N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Housing, 221 N.J. 1 (N.J. 2015).

55 *Mount Laurel*, 336 A.2d at 725-26.

III. DO HOTELS CHOOSE THEIR GUESTS OR DO GUESTS CHOOSE THEIR HOTELS?

What does all this mean for the hotel that wishes to deny the same-sex couple a place to get married, to celebrate their union, and to spend their first night as a married couple? Does civil rights law threaten property rights or do property rights threaten civil liberties? Does sovereignty threaten religious liberty, and if so, the liberty of the hotel or the liberty of the patron? Does the right to exclude threaten the right to contract for the use of property or does the right of reasonable access threaten the right to religious liberty in one's own house? Is the law threatening the lord's castle or is the lord threatening the vulnerable visitor?

Shelley held that state power is not at issue when individuals are free to act as they please. One might therefore think that state power is absent in the states that allow sexual orientation discrimination and present in those that forbid it. But think again.⁵⁶ Imagine a same-sex couple ignoring the decision to exclude them from the premises. They trespass by entering the hotel and they refuse to leave the lobby until they are given a room. They are inspired by the lunch counter demonstrations in the South in the 1960s. The store owner calls the police to have them ejected as trespassers. On the pretense that the state is not acting, they are arrested, thrown in jail, prosecuted and fined for violating the property rights of the hotel owner — all in the service of the idea that the state is “not acting” when it enforces trespass law because it was the private owner, not the state, that engaged in the discriminatory conduct.⁵⁷

Shelley v. Kraemer made housing available to African Americans only if white owners were willing to sell to them. If many owners refuse to sell to African American buyers, then their freedom to purchase property is substantially curtailed. Sovereignty is not absent or withdrawn in such a case; it is exercised on the side of exclusion, segregation, and discrimination.

It has been argued that LGBTQ persons will not suffer if religious persons are allowed to refuse services to them because other businesses will step in to fill the gap. During his 2016 campaign, Presidential candidate Jeb Bush voiced support for businesses who want to deny services associated with same-sex weddings. He explained:

56 For explanations of the role of the state in private life even when it merely “permits,” see JOHAN VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY* (2014).

57 On the ways in which “nonaction” may constitute state action depriving owners of property rights, see Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014).

A big country, a tolerant country, ought to be able to figure out the difference between discriminating [against] someone because of their sexual orientation and not forcing someone to participate in a wedding that they find goes against their moral beliefs. That should not be complicated. Gosh, it is right now.⁵⁸

It is not clear what world Bush is arguing for. In this comment, he appears to be arguing for a world without sexual orientation discrimination but one which has exemptions for businesses who feel their services or goods would involve “participating in a wedding.” At the same time, he has not come out in favor of laws to ban discrimination based on sexual orientation. His own state of Florida has no such law, so in Florida there is no need for religious accommodation. In a *laissez-faire* state, businesses can refuse service for any reason, as long as they do not violate a civil rights law. If no law prohibits discrimination based on sexual orientation, then no religious exemption is needed.

At the same time, one has to wonder what Bush would think about the hotel case. Would renting the facilities for the wedding constitute “participating in a [same-sex] wedding” or not? Would allowing the couple to stay in the honeymoon suite? If it would, then LGBTQ persons face a problem. They cannot tell whether they are welcome anywhere in a state that allows sexual orientation discrimination or which allows exemptions at the point of sale for those who claim them. Their situation is best explained by singer Audra McDonald whose tweets after the Indiana Religious Freedom Restoration Act (RFRA) was passed caught public attention.⁵⁹ She wrote: “Some in my band are gay & we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all? Or maybe I should fire my gay band members just to be on the safe side.”⁶⁰

In other words, in Bush’s world, LGBTQ people must “call ahead.” This world is the world of *laissez faire*. Such a world is also the world of the *Green Book*.⁶¹ That was the name of the book that was published in the 1940s to let African Americans know where they were welcome to sleep and eat if they

58 Marina Fang, *Jeb Bush Says Christian Business Owners Can Refuse to Serve Gay Weddings*, HUFFPOST POL. (May 17, 2015), http://www.huffingtonpost.com/2015/05/17/jeb-bush-gay-weddings_n_7301728.html.

59 Ind. Code § 34-13-9.

60 Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, INT’L N.Y. TIMES (Mar. 27, 2015), http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0.

61 Randall Kennedy, *The Civil Rights Act’s Unsung Victory*, HARPER’S MAG., June 2014, at 35; Singer, *supra* note 33.

traveled in the South. The equivalent exists today of course with websites that tell us which places are “gay friendly.”⁶²

In the world of the *Green Book*, the state does not interfere with hotels that seek to exclude same-sex couples or deny them a place to rest on their wedding night. But that does not mean the state has withdrawn and that sovereignty recedes in the face of property rights. In such a world, the state denies same-sex couples the same freedoms enjoyed by male-female couples; it denies them the right to obtain access to a hotel of their choice or to know that they will be welcome when they enter the marketplace. It is the world of *Buchanan* and *Shelley*. You can obtain services if you can find anyone willing to deal with you. Since property law generally gives owners the right to exclude non-owners from property, the sovereign state — through its property system — will limit your freedom to obtain the same services available to persons who do not occupy a subordinate caste position.

If it is a “big country” as Jeb Bush suggests, perhaps that means gay couples can find florists and hotels willing to serve them. Perhaps LGBTQ persons should be gracious to religious adherents who simply want to be left alone.⁶³ This assumes that services will be available elsewhere. This is not, in any way, a guaranteed proposition, especially if we consider that the distribution of attitudes about same-sex marriage and sexual orientation discrimination is not evenly divided geographically. There is a reason that many states allow sexual orientation discrimination; the majority of voters in those states — at least at the present time — do not view denial of service to LGBTQ persons as discriminatory. Presidential candidate Marco Rubio, for example, opposes federal legislation to prohibit employment discrimination on the basis of sexual orientation because he opposes “special protection” for LGBTQ people.⁶⁴ He also objects to equating that position with bigotry because it is an affirmation of his religious beliefs.⁶⁵

62 See, e.g., YOUR FAVORITE GAY FRIENDLY BUSINESSES, <http://gayfriendlymarket.com> (last visited Mar. 26, 2017).

63 For an argument to that effect, see Andrew M. Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

64 Scott Keyes & Adam Peck, *Rubio Says It Should Be Legal to Fire Someone for Being Gay*, THINKPROGRESS (June 13, 2013), <http://thinkprogress.org/lgbt/2013/06/13/2153451/rubio-enda/>.

65 David Badash, *Watch: Marco Rubio Attacks Supporters of Same-Sex Marriage As “Intolerant,”* NEW CIVIL RIGHTS MOVEMENT (July 23, 2014), http://www.thenewcivilrightsmovement.com/watch_marco_rubio_attacks_supporters_of_same_sex_marriage_as_intolerant.

My own perspective on this issue comes from my childhood. I grew up in a small town that had a population of about 3000. There were no florist shops in the town at all. There was a florist shop in a neighboring town and, as may be the case in other small towns, the florist shop was the only one in my small town. We did not have many shops to choose from. Of course, one could go to other towns; we did have a car. Perhaps if one searched far enough, a florist would be found that would provide what you needed. But my experience makes me wary of the assumption that it is easy for people who are the victims of discrimination to find providers willing to cater to them.

I grew up in New Jersey because my father could not find a job in New York City as an engineer. He faced discrimination because he was Jewish. He and my mother moved to Monmouth County in New Jersey because the United States hired Jewish engineers at Fort Monmouth as did Edison and Bell Laboratories. My parents found flowers, but they had to leave their home and travel to another state to do so.

If one is in a small town with one or two florists, and if everyone in the small town is of the same religion, and if that religion opposes same-sex marriage, and if its adherents equate selling flowers to endorsing the use of those flowers in the wedding ceremony, then a same-sex couple will not be able to get flowers for their wedding — at least not from someone in their community. The message this sends is clear: Move. Go someplace where they want you. And if one wants to book the honeymoon suite, the same thing may happen. The hotel owner may think she is saying, “Leave me alone; I need space within which to practice my values,” but what the excluded patron hears is “Go to the city to get married; go to another state. You are free to marry, but no one is obligated to rent you a place to do so or even to celebrate afterwards. Perhaps you grew up here; perhaps you want to get married near your parent’s home. That is not my problem. This is my castle and this is not the place for you.”

If the law enables the hotel to exclude the couple, then this may seem like a deregulatory law from the standpoint of the religious hotel owner. But, as we have seen, from the standpoint of the couple living in hostile country, it is anything but a withdrawal of state power from the marketplace. It is, in effect, an eviction order. It is not a “mere inconvenience.”⁶⁶

Could the hotel owner refuse to allow an interracial couple to book the honeymoon suite? The answer to that question is “no.” The Civil Rights Act of 1964 prohibits discrimination on the basis of race in hotels and no religious

66 Oleske, *supra* note 6, at 129 (discussing Douglas Laycock’s view that “the right to one’s own moral integrity” should prevail over a “mere inconvenience”).

exemption for for-profit businesses was ever proposed or recognized under either statutory or constitutional law.⁶⁷

Perhaps the argument is that sexual orientation discrimination is not as serious as racial discrimination. Race has a special place in our jurisprudence, given our shameful history of slavery, and even though religions that discriminate on the basis of race get no accommodation in the marketplace or in the law, those that make distinctions based on sexual orientation have, for some reason, a better claim to relief from the obligation to make the marketplace open to all. It is hard to see how this distinction passes muster. Why is eradication of sexual orientation discrimination not a compelling government interest?⁶⁸

Do hotels choose their guests or do guests choose their hotels? Answering this question depends on a normative choice about both property rights and social relationships. The state — the sovereign — cannot be “neutral” between competing views because this is an either/or decision. It is true we might develop different rules for different types of hotels (letting the bed-and-breakfast discriminate while regulating the large hotel) or we might distinguish types of market services that seem too close to expressive ones that suggest participation in or support for religious commitments (such as photography). Whatever we do, we cannot simply use property norms to limit sovereignty without first figuring out what property rights we should have. That cannot happen without using public values and democratic procedures to determine what rights should prevail when property rights clash. Conversely, sovereignty cannot define property rights without considering what our fundamental rights are. Is this a question that should be answered by legislative majorities or does it impinge on rights that should be protected from infringement by positive law?

With regard to the honeymoon suite, we are choosing among worlds. From the standpoint of LGBTQ persons, we are choosing between the world of the *Green Book* and the world of Martin Luther King. From the standpoint of religious persons who cannot accept same-sex marriage, we are choosing between the world of the Puritans (who fled England for religious liberty) and the world of the Puritans (who punished residents who deviated from Puritan doctrine).

We will define spheres for the free exercise of religion and control of one’s property; the question is where and how to draw the line. But draw a line we must and wherever a line is drawn, people caught on the wrong side

67 42 U.S.C. § 2000a.

68 See Oleske, *supra* note 6, at 124, 135-47 (explaining and critiquing the idea that sexual orientation discrimination should be tolerated in situations where race discrimination would not be tolerated).

may have reason to complain. At the same time, conflicts of this sort can only be resolved by determining when one claim legitimately prevails over another. Creating “the institutions and foundation of a free democratic State,” as the New Jersey Law Against Discrimination puts it,⁶⁹ sometimes requires a choice about “whose general welfare must be served or not violated in the field of land use regulation.”⁷⁰

Jeb Bush argues that we must give “people of faith . . . the space to act on their conscience.”⁷¹ I agree, wholeheartedly. But the question is: What space? The idea that religious persons should be “left alone” to act on their conscience suggests that doing so does not cause harm to others. That may be plausible if one is talking about religious practice inside a church or other religious institution.⁷² But public accommodations are another matter entirely. Denying access to the hotel is not a self-regarding act from the standpoint of a constitutional democracy; it causes harm.⁷³

Homeowners have robust rights to exclude to protect their privacy and associational rights. But a public accommodation is, by definition, open to the public. It is not a home and it is not a church. If it is a castle, it is a friendly one. Public accommodations extend a general invitation to the public to come in and do business. They can exclude customers who are disruptive or who act in ways that are incompatible with the business purposes of the owner. But they cannot choose which customers to serve.⁷⁴ In a world governed by civil rights law, “the right to contract” and “the right to purchase property”

69 N.J. Stat. § 10:5-3.

70 S. Burlington Cty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 726 (1975).

71 Zack Ford, *Is It Okay to Refuse Service to a Same-Sex Couple for Religious Reasons? Jeb Bush: ‘Absolutely,’* THINKPROGRESS (May 18, 2015), <http://thinkprogress.org/lgbt/2015/05/18/3659900/jeb-bush-same-sex-marriage-discrimination/>.

72 Even so, being shunned by one’s own religion and community is painful despite the fact that the constitution protects the freedom of religious communities to engage in exclusionary conduct.

73 See Oleske, *supra* note 6, at 132 (noting how exclusion causes harm to third parties).

74 Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497 (2015); Louise Melling, *Religious Refusals to Public Accommodations Law: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015); Singer, *supra* note 22; see also Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 99 (2015) (“[S]tate court judges should be deeply hesitant to interpret a state RFFA in ways that permit otherwise unlawful LGBTQ discrimination by commercial actors.”).

mean that one cannot be turned away because of one's race or religion — and increasingly, one's sexual orientation. Our freedom-of-contract norms have evolved legally to include the duty to contract with patrons regardless of their race or other irrelevant characteristics and regardless of the owner's religious beliefs. Our freedom-of-property norms have evolved in the same way. We no longer live in the world of *Shelley v. Kraemer* where the state cannot discriminate on the basis of race but private owners are free to do so. The premise of the law of public accommodations is that property open to the public should be open to the public.

Nonprofit religious organizations are protected by the First Amendment. Churches are free to profess and act on their beliefs, determine their membership, decide who can participate in their rituals and on what terms. They can treat men and women differently; they can exclude those who do not share their beliefs or practices; they can even engage in racial discrimination. Freedom of religion does require us to have some public conception of what is and is not a religious practice. In a pluralistic society, that is not always a simple task. But the U.S. Constitution does provide a special place for religious freedom and, as a member of a minority religion, I am glad that it does. It is one of the main reasons we consider the United States to be a free country.

At the same time, places whose doors are generally open to the public operate in the world of the market. They may be for-profit businesses or nonprofit secular entities like universities or hospitals. We tend to think of the market as on the "private" side and government regulation and the state as on the "public" side. But the world of the market inhabits a very different public/private divide. Here the distinction is between the private world of the home or the church versus the public world of business. Public accommodations are in the business world; they are public because they are open to the public.

In a society that rejects slavery and feudalism, that ensures women the same ability to act as men, and gay people the same rights as straight people, the world of the market for goods and services, the world of employment, and the world of the real estate market are worlds that we should be free to enter without fear, without segregation, without humiliation, without rejection or exclusion. We can enter those worlds no matter our race, no matter our sex, no matter our gender, no matter our religion, no matter whether we have a disability, and no matter our sexual orientation or gender identity. As the Congress and the Supreme Court finally recognized in the 1960s, the right to contract and to acquire property means that buyers have the right to buy without regard to invidious discrimination and sellers have the duty to sell if the only reason for refusing is a discriminatory one. In the civil rights world, hotels do not choose their guests; guests choose their hotels.

There is a rabbinical story (a *Midrash*) about the town of Sodom that illustrates this point.⁷⁵ According to the rabbis, Sodom was destroyed not because of homosexuality but because of its cruelty to strangers and to the poor. Lot received visitors in his home — strangers far from their kin, in need of kindness. They were actually messengers from God, otherwise known as angels. Far from helping them or welcoming the stranger, the men of Sodom demanded that Lot send the strangers outside so they could rape them.⁷⁶ There is no reference to homosexuality in the Biblical Sodom story; the topic of the story is violence to those who are vulnerable. The prophet Ezekiel derived a moral message from the Sodom story. He explained that Sodom was rich but that it refused to help the “poor and the needy.”⁷⁷ Sodom did not want visitors or immigrants; it did not want to share its wealth with outsiders.

The rabbis tell us that the people of Sodom gave money to the poor but marked it with their own names. When the poor would offer the money to the baker for bread, the baker would not accept it when he saw the marks on the money. The poor would die in the streets of starvation, with money in their hands that the baker would not accept, and the people would then take their money back. Money is worthless if the baker will not accept it. In the case that interpreted the “right to contract” as a duty to contract with a customer regardless of race, Justice Potter Stewart explained that the law “assure[d] that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”⁷⁸ Public accommodations law limits the right to exclude so that it can protect the right to acquire property.

I am of the camp that views discrimination on the basis of sexual orientation to be wrongful and unjust. Preventing LGBTQ persons from marrying the people they love is an affront to liberty and religious freedom. Refusing service to LGBTQ persons is similarly wrongful and unjust. If that is hard to grasp, consider whether stores should be free to refuse service to customers that do not share the owner’s religion. If it is hard to understand how a law that requires service to same-sex couples is compatible with religious freedom, consider that the federal public accommodations law of 1964 prohibits both racial and religious discrimination. One need not worry about exclusion because one is, for example, a Catholic. Male-female couples do not need to

75 See Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 *LOY. L. REV.* 243 (2006); Joseph William Singer, *Titles of Nobility: Property, Poverty, and Immigration in a Free and Democratic Society*, 1 *J.L. PROP. & SOC’Y* 1 (2014); Singer, *supra* note 33.

76 *Genesis (Bereishit)* 19:1-3.

77 *Ezekiel* 16:49.

78 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

worry about exclusion when they book the honeymoon suite. They choose their hotel; the hotel does not choose them. Gay and lesbian couples should have the same freedom. The right to choose your customers based on their sexual orientation is not a right that a free and democratic society should recognize. Half the country has come to see this and it is time for the other half to catch up.

I see no need to engage in oppression Olympics to determine whether sexual orientation discrimination is as bad as racial discrimination. What matters is that it is bad. We should be moving to the world where, as Audra McDonald puts it, we do not have to call ahead or to consult a *Green Book*. We should be able to take some things for granted,⁷⁹ and one of them is the freedom to stay at a hotel of your choice if rooms are available. Such a world is not oppressive to dissenting religions; they are free to have the views they have; they are free not to celebrate same-sex marriages; they are free not to accept LGBTQ persons as equal members in their churches. They are free to speak their minds, to encourage people to suppress same-sex attractions, to define LGBTQ people as following an immoral lifestyle.

But such freedoms end at the market's edge. The right to determine whom you invite into your home does not extend to public accommodations, employment and housing. Sovereign power must shape social and economic life and the best values of free and democratic societies privilege giving each person the ability to seek happiness. That requires access to the social and economic mechanisms that make that possible. One of those mechanisms is property.

IV. CONCLUSION: THINGS THAT WE WOULD LIKE TO TAKE FOR GRANTED

In an imbricated world, we have no choice but to define the legitimate contours of sovereign power in choosing between competing property rights. The world of religion is one that can fully embrace either inclusion or exclusion. The world of the public accommodation and the world of the market, on the other hand, are open to all. Money in the hands of a lesbian or a gay man should be worth the same as money in the hands of a straight person. That is why a gay couple should not have to call ahead to see if they are welcome to book the honeymoon suite. Public accommodation laws do not infringe on legitimate property rights or religious freedoms; they define the legitimate

79 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).

contours of liberty and property in a society that treats each person with equal concern and respect. Property may limit sovereignty, but it can only do so through normative judgments about the legitimate scope of property claims. Sovereignty may define property, but in a free and democratic society it can only do so legitimately by ensuring that free and equal persons are neither attacked nor abandoned in the street with money in their hands.