LAW OFFICE HISTORY AND THE UNRELENTING ATTACK ON PUBLIC ACCOMMODATIONS LAW[†]

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> [W]e must ultimately return to the perfect commercial liberty dictated by nature, from which we should never have diverged, had there been a proper limitation of state power.
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> —Herbert Spencer, 1843[1]

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.
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> —Oliver Wendell Holmes, 1905[2]

> There is . . . reason to think that someday soon the Court may give entrepreneurial liberty the sort of attention it received from the Fourteenth Amendment's adopters . . . .
>
> —Christopher R. Green, 2023[3]

In recent years, the cause of commercial liberty has found new life in litigation challenging public accommodations laws that prohibit discrimination by businesses on the basis of sexual orientation.[4] Considerable scholarly attention has been paid to the use of the First Amendment as a liability shield in these cases,[5] which have

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[†] *Cf.* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

* Professor, Lewis & Clark Law School. I am indebted to Liz Sepper and Joe Singer, with whom I had the great privilege of collaborating on amicus briefs that first developed some of the arguments I build upon in this Essay.

[1] HERBERT SPENCER, THE PROPER SPHERE OF GOVERNMENT 39 (London, 1843); *see also* HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 298 (London, J. Chapman 1851) (decrying "tyranny in commercial laws" and arguing that there has been a "constant ratio" between "commercial liberty" and "general liberty").

[2] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[3] Christopher R. Green, *Speech, Complicity, Scarcity, and Public Accommodation*, 2023 CATO SUP. CT. REV. 93, 111.

[4] *See* Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 274 ("[O]ver the last decade, a movement for exemptions from antidiscrimination laws has taken hold. For-profit businesses refuse to take photos or videos, bake cakes, print invitations, rent accommodations, or arrange flowers for same-sex couples out of religion-based objections to same-sex relationships." (footnote omitted)).

[5] *See generally, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015); Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244 (2023).

primarily been litigated on the terrain of free speech and religious liberty.[6] But in amicus briefs filed in both cases that have reached the Supreme Court—*303 Creative LLC v. Elenis*[7] and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[8]—scholars who are skeptical of commercial regulation have also offered the more sweeping argument that the Court should "tie the legitimate goals of public-accommodation law directly to local scarcity."[9] On this view, only businesses with monopoly power can be subject to nondiscrimination rules, while non-monopoly businesses enjoy a constitutional right to refuse service as part of the "entrepreneurial liberty"[10] guaranteed by the Fourteenth Amendment.[11] Curtailing the reach of public accommodation laws so they only protect customers against discrimination by monopolists, the argument goes, would be "in line with the Court's limited historic permission for special regulation of businesses 'clothed with a public interest.'"[12]

Striking down commercial legislation on the ground that states lack the power to regulate businesses insufficiently "affected" or "clothed" with a public interest was common in the *Lochner*-era.[13] And today's chief academic proponents of limiting public accommodations laws to monopoly businesses—Richard Epstein and Christopher Green[14]—do not shy away from association with that era. Quite the

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[6] *See* Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. IRVINE L. REV. 907, 922–23 (2022) (collecting cases).

[7] 600 U.S. 570 (2023).

[8] 584 U.S. 617 (2018).

[9] Green, *supra* note 3, at 100 (describing the argument made in two amicus briefs filed in *303 Creative LLC*); *see* Brief of Amici Curiae Law & Economics Scholars in Support of Petitioners at 7–10, *Masterpiece Cakeshop*, 584 U.S. 617 (No. 16-111) [hereinafter Brief of Law & Economics Scholars].

[10] Green, *supra* note 3, at 100, 111; *see id.* at 98 ("Entrepreneurial rights . . . are critically important for citizens against states . . . ."). In both *303 Creative LLC* and *Masterpiece Cakeshop*, I co-authored briefs that criticized the monopoly theory. *See* Brief of Public Accommodations Law Scholars as Amici Curiae in Support of Respondents at 1, 23–31, *303 Creative LLC*, 584 U.S. 617 (No. 21-476); Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 1, 9–11, *Masterpiece Cakeshop*, 600 U.S. 570 (No. 16-111).

[11] *See* Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1278 (2014) (maintaining that "only the presence of monopoly power should trigger a generalized obligation of universal service on nondiscriminatory terms"); Brief of Law & Economics Scholars, *supra* note 9, at 7–8 (arguing that "the right of providers and consumers to choose their trading partners is . . . . part and parcel of the right to pursue an ordinary calling or trade, which is the 'very essence of the personal freedom' protected by the Fourteenth Amendment." (quoting Truax v. Raich, 239 U.S. 33, 41 (1915))).

[12] Green, *supra* note 3, at 100.

[13] *See* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 892 (2022).

[14] Both Professor Epstein and Professor Green have authored articles and amicus briefs to the Supreme Court on this topic. *See* Green, *supra* note 3, at 100; Epstein, *supra* note 11, at 1241; Brief of Amicus Curiae Professor Christopher R. Green Supporting Petitioners at 33, *303 Creative LLC*, 600 U.S. 570 (No. 21-476); Brief of Law & Economics Scholars, *supra* note 9, at 5.

opposite, they place heavy reliance on (1) the Court's 1923 decision in *Charles Wolff Packing Co. of Kansas v. Court of Industrial Relations*,[15] which Epstein acknowledges was "abrogated" in 1934 by *Nebbia v. New York*,[16] and (2) the early-twentieth-century scholarship of Bruce Wyman,[17] which has been aptly described by Joseph Singer as an "attempt[] to rationalize the Lochnerian view that public service companies were exceptional and legitimately subject to much more extensive legislative regulation than were other business corporations."[18]

Given that Justices across the ideological spectrum continue to treat the *Lochner* Era as Exhibit A for judicial activism gone awry,[19] one might wonder how the Epstein-Green attack on public accommodations laws amounts to anything more than tilting at windmills.[20] But in his recent essay on *303 Creative LLC* for the *Cato Supreme Court Review*, Professor Green celebrates the foothold he believes their argument gained in the Court's decision and expresses "considerable optimism for its future success."[21] The source of Green's optimism is the brief reference to monopoly in the following passage from the majority's opinion in *303 Creative LLC*: "Statutes like Colorado's grow from nondiscrimination rules the common law sometimes

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[15] 262 U.S. 522 (1923); *see* Epstein, *supra* note 11, at 1262; Green, *supra* note 3, at 101, 109, 111.

[16] 291 U.S. 502, 536–37 (1934) ("[T]here is no closed class or category of businesses affected with a public interest . . . ."); Epstein, *supra* note 11, at 1262 n.53.

[17] *See* Green, *supra* note 3, at 101 n.41 (first citing BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS (1911); then citing Bruce Wyman, *The Inherent Limitation of the Public Service Duty to Particular Classes*, 23 HARV. L. REV. 339 (1910); and then citing Bruce Wyman, *Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904)).

[18] Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1404 (1996). For contemporary critiques of Wyman's conclusion that monopoly was the original basis for imposing a duty to serve on those engaged in "common" or "public" callings, see Edward Adler, *Business Jurisprudence*, 28 HARV L. REV. 135, 147–58 & nn.32, 76 (1914); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 514–22 (1911); John B. Cheadle, *Government Control of Business*, 20 COLUM. L. REV. 438, 579–85 (1920). For modern critiques, see David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51, 51–52, 89 n.192 (1996); Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 97–98 (2008).

[19] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240, 265 (2022) (opinion of the Court by Alito, J., joined by Thomas, Gorsuch, Kavanaugh & Barrett, JJ.); NFIB v. Sebelius, 567 U.S. 519, 623 (2012) (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., concurring in part and dissenting in part).

[20] It should be noted that Green and Epstein are not alone, and fourteen other scholars have joined them in pressing the monopoly argument to the Court. *See* Brief of Law & Economics Scholars, *supra* note 9, at 1a–2a (listing thirteen signatories in addition to Epstein); Brief of Amici Curiae Professors Christopher R. Green and David R. Upham Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018) (No. 16-111) (listing Professor David R. Upham as a co-author).

[21] Green, *supra* note 3, at 100.

imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees."[22] As Green notes, Justice Sotomayor's dissent (1) reads this passage to "suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power,"[23] and (2) responds "at length" rejecting the suggestion,[24] instead concluding that "a business's duty to serve all comers derived from its choice to hold itself out as ready to serve the public."[25] In Green's view, "[t]he Court's failure to agree with the dissenters on this point leaves a scarcity-based approach to Fourteenth Amendment entrepreneurial liberty clearly viable."[26] Encouraged by this perceived opening, Green then proceeds—at length—to suggest what the Court "might have said in response to the dissent," or might say "in the future," in support of "a scarcity-based limit" on public accommodations law.[27]

Before proceeding any further, it is worth noting that Green's optimism may well be misplaced. The majority in *303 Creative LLC* went out of its way to say that it did "not question the vital role public accommodations laws play in realizing the civil rights of all Americans";[28] it reiterated the Court's prior recognition "that public accommodations laws 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'";[29] it emphasized that "States may 'protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public'";[30] and it portrayed as common ground the understanding that "States are generally free to apply their public accommodations laws . . . to a vast array of businesses."[31] These do not sound like the statements of a court that has an appetite for imposing a strict monopolies-based limit on the reach of public accommodations law.[32]

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[22] 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023).

[23] Green, *supra* note 3, at 99 n.34 (quoting *303 Creative LLC*, 600 U.S. at 611 (Sotomayor, J., dissenting)).

[24] *Id.* at 100.

[25] *303 Creative LLC*, 600 U.S. at 610 (Sotomayor, J., dissenting) ("This holding-out rationale became firmly established in early American law."); *see id.* at 615 (describing "the fundamental principle—rooted in the common law, but alive and blossoming in statutory law—that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public").

[26] Green, *supra* note 3, at 100.

[27] *Id.* at 100–11.

[28] *303 Creative LLC*, 600 U.S. at 590.

[29] *Id.* (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

[30] *Id.* at 591 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018)).

[31] *Id.* at 591–92.

[32] Like Professor Green's essay, this Essay focuses on the strength of scarcity-based

Nonetheless, because the current Court has not been shy about abandoning prior doctrine based on appeals to "history and tradition,"[33] and because Professor Green portrays his argument as "historically grounded" and based on a "detailed knowledge of traditional uses of the police power,"[34] it would be a mistake to ignore Green's claim. Fortunately for supporters of public accommodations laws, it is not difficult to refute the Epstein-Green historical account, as the remainder of this short Essay will demonstrate.

Let's begin in 1964, a year that both Epstein and Green highlight as one in which the alleged historical limitations on public accommodations laws were still being honored. Citing *Heart of Atlanta Motel, Inc. v. United States*,[35] which concerned a challenge to the public accommodations title of the federal Civil Rights Act,[36] Epstein asserts that "[t]he paradigmatic case of Title II's application in 1964 was against monopolists who used their powers of exclusion to limit the options of politically vulnerable persons,"[37] a claim Green quotes approvingly in his *303 Creative LLC* amicus brief.[38]

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arguments for limiting public accommodations laws in cases where "speech claims fall short." Green, *supra* note 3, at 99. It remains to be seen how often speech claims will be successful after *303 Creative LLC*. *See* Yoshino, *supra* note 5, at 275 ("By resting on the parties' stipulations, the Court avoided articulating any guidance for lower courts or future cases about what would constitute expressive behavior. Perhaps strictures on what counts as expression will be the real limitation the Court will place on this case. But . . . it is hard to believe that the [expressive] exemptions could be particularly limited."); *see also* Bagenstos, *supra* note †, at 1235 ("If the fact that the service provided by a business incorporates an expressive element is sufficient to create a First Amendment defense against the application of a public accommodations law, then [many] businesses should have a First Amendment defense to a law that prohibits them from discriminating against customers on the basis of sexual orientation—or race, or any other group status, for that matter."). *But see* Dale Carpenter, *How to Read* 303 Creative v. Elenis, VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/FP2B-KPHF] (arguing that the decision "should apply only to a narrow range of commercial products" that constitute "the vendor's own expression" under a test that includes an "objective" requirement that turns on "the onlooker's perception whether the message has actually been communicated").

[33] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) (disavowing the *Lemon* test and "its endorsement test offshoot" in favor of an approach grounded by "reference to historical practices and understandings"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling prior decisions recognizing a right to abortion based on an analysis grounded in "history and tradition"); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022) (disavowing "means-end scrutiny" in favor of an "historical approach").

[34] Green, *supra* note 3, at 99.

[35] 379 U.S. 241 (1964).

[36] 42 U.S.C. § 2000a(a).

[37] Epstein, *supra* note 11, at 1243.

[38] Brief of Amicus Curiae Professor Christopher R. Green Supporting Petitioners, *supra* note 14, at 26.

But this characterization of the market power wielded by the owners of Heart of Atlanta ignores the historical record. Eleven months before the Court decided *Heart of Atlanta*, nine months before the case was argued, and six months before Congress passed the Civil Rights Act, the front page of the New York Times heralded the following news in all caps: "ATLANTA HOTELS DROP COLOR LINE; 14 Leading Establishments Agree to Admit Negroes in Bid to Avert Protests."[39] And lest one think the Justices might have missed this news, it was highlighted in the Solicitor General's brief,[40] and then explicitly relied upon by the hotel's counsel in his oral argument.[41] That argument was pitched in terms of "the personal liberty of a person to . . . run his business,"[42] and counsel explicitly made the "monopoly" argument in an effort to distinguish railroads and public utilities from hotel operators, pointing to extensive market competition in the lodging context.[43] Thus, under the Epstein-Green theory of entrepreneurial liberty for non-monopoly business owners, Heart of Atlanta should have prevailed. But its appeal on this ground garnered no votes at the Court.[44] Nor did the Court rule in favor of Ollie's Barbeque simply because other restaurants existed at the time in Birmingham.[45] In short, the landmark

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[39] *ATLANTA HOTELS DROP COLOR LINE; 14 Leading Establishments Agree to Admit Negroes in Bid to Avert Protests*, N.Y. TIMES (Jan. 12, 1964), https://www.nytimes.com/1964/01/12/archives/atlanta-hotels-drop-color-line-14-leading-establishments-agree-to.html [https://perma.cc/Q28P-NJZL].

[40] Brief for Appellees at 46, *Heart of Atlanta Motel, Inc.*, 379 U.S. 241 (No. 515).

[41] Oral Argument at 01:58:55, *Heart of Atlanta Motel, Inc.*, 379 U.S. 241 (No. 515), https://www.oyez.org/cases/1964/515 [https://perma.cc/A76X-8BPL] (last visited Apr. 30, 2024).

[42] *Id.* at 02:18:32; *see id.* at 00:09:39 ("[T]he fundamental question, I submit, is whether or not Congress has the power to take away the liberty of an individual to run his business as he sees fit in the selection and choice of his customers."); *id.* at 02:05:47 ("I didn't come here to talk about commerce, I didn't come here to argue the question of whether or not this motel has an effect on commerce[;] certainly everything that happens in this country has an effect on commerce. But I did perceive, I hope that in the writings of memos of this Court there is still the great facet of personal liberty that this Court stands for. This Court under the Constitution is the last bulwark of personal liberty[.] [W]here else can a man go to defend personal liberty[?]"). The quotations reproduced here from the *Heart of Atlanta* argument are based on the author's transcription of the audio, which differs slightly from the Oyez transcript.

[43] *Id.* at 02:11:05 ("[F]or ten years, I've been president of a corporation that owns and operates a Negro motel in Atlanta. . . . [M]y manager . . . knows almost firsthand the owners and operators of some 60 Negro motels up and down the East Coast of this country. But in addition to that, most chains—Holiday Inn has 500 units. They've all desegregated before the Act. Howard Johnson has about 400 and they've all desegregated before the Act. Quality Court has 600, and in . . . half of the states they operate under state law which requires them to desegregate and the rest of them have. You take most of the major chains of motels in the United States, and I know for a fact now, have already desegregated and whoa, before they passed the 1964 Act. . . . So as a matter of fact, when Congress passed the Act—when Congress passed the Act, there was not any shortage of rooms in the United States for colored people to use.").

[44] *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 258–62.

[45] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

decisions upholding Title II of the 1964 Civil Rights Act provide no support for the "local scarcity" limit.

In declining to endorse a monopoly theory of public accommodations law, the Civil Rights Era Court acted in accord with the eighteenth-century teachings of Lord Chief Justice Holt. In his famously influential dissent in the 1701 case of *Lane v. Cotton*,[46] which involved the question of when the duties of common carriers attach, Holt wrote:

> But it is objected [by the defendant], that one may choose whether he will send his letter by post or not, for he may send a messenger of his own; and that is true; yet it is no excuse for the defendant; for if there be several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper.[47]

Professor Green does not dispute the influence of Holt's views about common carriers and innkeepers on nineteenth-century jurisprudence in the United States,[48] but he pointedly ignores Holt's explicit rejection of the scarcity-based limit for common carrier and innkeeper duties. This omission is particularly notable given that Holt's reasoning above was highlighted by Joseph Singer[49] in the very article that Green criticizes for failing to see a monopoly limit in Holt's jurisprudence.[50]

Consistent with Holt's rejection of the monopoly limit, the King's Bench held in the oft-cited 1820 case of *Thompson v. Lacy* that the Globe Tavern and Coffee-House in London, which provided lodging and entertainment for guests, owed innkeeper duties to an in-town guest who had previously been lodging elsewhere in the city.[51] Likewise, in discussing the duties of "Common Carrier[s]" and other

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[46] 88 Eng. Rep. 1458, 1461–69 (KB 1701).

[47] *Id.* at 1468.

[48] *See* Green, *supra* note 3, at 104–05.

[49] Singer, *supra* note 18, at 1306.

[50] Instead of addressing Holt's explicit rejection of a monopoly argument in *Lane*, Green strains to read an implicit market-scarcity rationale into language Holt penned in a subsequent case—language that nowhere mentions monopoly power. *See* Green, *supra* note 3, at 104 (quoting *Coggs v. Bernard*, 92 Eng. Rep. 107, 112 (KB 1703) for the proposition that the strict bailment liability of common carriers serves "the safety of all persons, the *necessity of whose affairs* oblige them to trust these sorts of persons"). This unconvincing effort to convert a focus on (1) the *characteristics of customer affairs* that make it necessary for customers to rely on certain types of providers (those who, as Holt explains in the rest of the passage, would be in the position to conspire with thieves without being discovered) into (2) a rule focused on *monopoly characteristics of providers* also characterizes Green's treatment of the relevant commentary from James Kent, Joseph Story, and Theophilus Parsons. *See id.* at 106–07, 109–10.

[51] *See* 3 Barn. & Ald. 283, 285 (1820); *see also* Bogen, *supra* note 18, at 89 ("[I]nnkeeping

"Common . . . Tradesmen," Sir Matthew Hale grounded them in "[I]mplied Contract," not monopoly.[52] All of this is in accord with Holt's teaching in *Lane* that "one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public."[53]

Of course, for purposes of determining whether the Fourteenth Amendment somehow constitutionalized an alleged monopoly-based limitation on public accommodations laws, the most relevant case law is that involving the application of such laws in the years following ratification in 1868. That case law, which goes unmentioned in Professor Green's essay,[54] belies any argument that such laws were viewed as limited to monopoly situations. For example, in a case involving discrimination by a theater in New Orleans, the Louisiana Supreme Court upheld statutory enforcement of a state constitutional provision mandating that "*all* places of business, or of public resort, or for which a license is required . . . shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons."[55] In the course of doing so, the court favorably cited its earlier application of the same law to a New Orleans coffee house.[56]

The Louisiana Supreme Court was far from alone in broadly enforcing its state's public accommodations law against businesses that often bore no indicia of monopoly. The Michigan Supreme Court applied its law to a restaurant in Detroit,[57] the

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was not an exclusive business, and indeed, there were often concerns that too many inns existed and there was too much competition."); Nachbar, *supra* note 18, at 97–98 ("[I]nns have traditionally been subject to the same liability in the presence or absence of competition. . . . The duties imposed on both innkeepers and common carriers have traditionally had little direct relation to the amount of market power they happen to possess.").

[52] MATTHEW HALE, THE ANALYSIS OF THE LAW: BEING A SCHEME, OR ABSTRACT, OF THE SEVERAL TITLES AND PARTITIONS OF THE LAW OF ENGLAND 123 (Stafford, 1713). The cover of the first edition of Hale's Analysis indicated only that it was "Written by a Learned Hand." *Id.* The cover of the second edition, published in 1716, replaced that attribution with "By Sir Matthew Hale." MATTHEW HALE, THE ANALYSIS OF THE LAW (2d ed. 1716).

[53] 88 Eng. Rep. 1458, 1465 (KB 1701).

[54] *See generally* Green, *supra* note 3.

[55] Joseph v. Bidwell, 28 La. Ann. 382, 383 (1876) (emphasis added).

[56] *Id.* at 383 (citing Sauvinet v. Walker, 27 La. Ann. 14, *aff'd*, 92 U.S. 90 (1875)); *see* Jack M. Beermann, *The Role of the Courts in Creating Racial Identity in Early New Orleans*, 51 TULSA L. REV. 545, 555 (2016) (reviewing KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS (2014)) ("Sauvinet went . . . to the Bank Coffeehouse in the French Quarter of New Orleans to collect the Bank's rent . . . . After the owner, Joseph Walker, served Sauvinet a drink in the bar's office and handed over the rent, Walker asked Sauvinet to stop frequenting his establishment on the ground that Sauvinet was colored. Sauvinet ignored the request and after the bartender would not serve him, he sued Walker for violating Louisiana's antidiscrimination laws, requesting $10,000 in damages. Sauvinet won his case and was awarded $1,000 in damages.").

[57] *See* Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890); *see also* Bryan v. Adler, 72

Mississippi Supreme Court applied its law to an individual reseller of concert tickets,[58] the Nebraska Supreme Court applied its law to a barbershop,[59] and the New York Court of Appeals applied its law to a skating rink.[60] And the Nebraska decision includes a classic articulation of the holding-out theory of public accommodations law: "A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter this shop during business hours."[61]

In accord with these state court decisions, the U.S. Supreme Court, in a unanimous decision written by Justice Harlan, relied on the holding-out theory in 1907 to uphold the application of a state public accommodations law to a non-monopoly business:

> The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public . . . .[62]

In other words, even in the *Lochner* Era, when the Court was sometimes applying the "affected with a public interest test" restrictively, it embraced in a non-monopoly case

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N.W. 368, 368–70 (Wis. 1897) (applying public accommodations law to a restaurant in Milwaukee).

[58] *See* Donnell v. State, 48 Miss. 661, 682 (1873); *see also* Baylies v. Curry, 21 N.E. 595, 595–96 (Ill. 1889) (applying public accommodations law to a theater in Chicago).

[59] *See* Messenger v. State, 41 N.W. 638, 639 (Neb. 1889).

[60] *See* People v. King, 18 N.E. 245, 248–49 (N.Y. 1888).

[61] *Messenger*, 41 N.W. at 639. For earlier articulations of the holding-out theory in American case law, see *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7,258) (Story, Circuit Justice) (explaining that "steamboat proprietors, holding themselves out as common-carriers, are bound to receive passengers on board under ordinary circumstances"); *Markham v. Brown*, 8 N.H. 523, 528 (1837) ("An innkeeper holds out his house as a public place to which travellers may resort, and of course surrenders some of the rights which he would otherwise have over it.").

[62] W. Turf Ass'n v. Greenberg, 204 U.S. 359, 364 (1907); *see* Greenberg v. W. Turf Ass'n, 73 P. 1050, 1050 (Cal. 1903) (quoting plaintiff's pleading, which indicated that he also visited "other race tracks in the vicinity of said city and county of San Francisco"). For other early twentieth century decisions applying state public accommodations laws to businesses bearing no indicia of monopoly, see *Darius v. Apostolos*, 190 P. 510, 512–13 (Colo. 1919) (bootblacking stand); *Anderson v. State*, 40 Ohio C.C. 510, 511 (Ct. App. 1918) (dance hall); *Miller v. Stampul*, 84 A. 201, 202 (N.J. 1912) (theater); *Joyner v. Moore-Wiggins Co.*, 136 N.Y.S. 578, 581 (App. Div. 1912) (theater), *aff'd*, 105 N.E. 1088 (N.Y. 1914); *Humburd v. Crawford*, 105 N.W. 330, 330–31 (Iowa 1905) (public eating house); *Johnson v. Humphrey Pop Corn Co.*, 24 Ohio C.C. 135, 135–39 (Cir. Ct. 1902) (bowling alley), *aff'd*, 72 N.E. 1160 (Ohio 1904) (mem.).

the very same holding-out rationale that Professor Green claims is only applicable in public accommodations cases involving monopoly situations.[63]

Rather than discussing any of the public accommodations cases, Green—following Epstein—places principal reliance on two analyses recognizing that rate-regulation is justified in monopoly circumstances: (1) Sir Hale's discussion of excessive wharf rates in *De Portibus Maris*—which was first published in 1787,[64] eight decades after Chief Justice Holt's discussion of common carrier and innkeeper duties in *Lane*,[65] and seven decades after the publication of Hale's own discussion of such duties in *Analysis of the Law*,[66] neither of which relied on monopoly rationales, and (2) the Supreme Court's 1877 decision in *Munn v. Illinois*[67] upholding rate-regulation of grain warehouses in Chicago, which the Court subsequently applied to uphold rate-regulation of non-monopolies in North Dakota seventeen years later.[68] Without getting into all of the potential shortcomings of this reliance on *De Portibus Maris* and *Munn*,[69] suffice it to say that the Epstein-Green argument rests on a logical fallacy: that because the existence of monopoly power was *sufficient* to warrant rate-regulation under the common law, the existence of monopoly power must be a constitutionally *necessary* predicate to the legislative imposition of a nondiscrimination requirement for businesses that offer their goods and services to the general public.[70] Although there is support for the former proposition in cases

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[63] Green, *supra* note 3, at 105–10.

[64] *See* Breck P. McAllister, *Lord Hale and Business Affected with A Public Interest*, 43 HARV. L. REV. 759, 759 & n.2 (1930) (citing 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (Frances Hargrave ed., Dublin, E. Lynch et al. 1787)).

[65] *See supra* text accompanying notes 46–53.

[66] *See supra* note 52 and accompanying text.

[67] 94 U.S. 113, 135 (1877).

[68] Brass v. North Dakota *ex rel.* Stoeser, 153 U.S. 391, 399–403, 405 (1894).

[69] *See* McAllister, *supra* note 64, at 769 ("If the element of monopoly loomed large in the mind of the Chief Justice [in *Munn*], it is not stressed in the opinion, nor could such a test have been readily reconciled with the cited instances of fixing the fees of chimney sweeps, the rates of hauling by cartmen, the commissions of auctioneers, and the like.").

[70] *See* Cheadle, *supra* note 18, at 580 ("We do not quarrel with Mr. Wyman's belief that virtual monopoly is a sound basis for some interference somewhere; we do object to his assumption that as a matter of law monopoly must be the *exclusive basis* of interference and that the legislature is powerless to interfere with competitive business unless upon a basis wholly historical as in the case of the innkeeper."); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 302 n.43 (1932) (Brandeis, J., dissenting) ("Lord Hale was speaking of the particulars, wharves and cranes in ports; and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament." (citation omitted)); Allnutt v. Inglis, 104 Eng. Rep. 206, 209–11 (KB 1810) (Ellenborough, C.J.) (relying simultaneously on the existence of monopoly power to uphold rate regulation while implicitly refuting a monopoly justification for duties of common callings by noting that "there is a power in the public of increasing the number of public houses or of carriers indefinitely").

and commentary predating the end of Reconstruction, Epstein and Green identify no authority for the latter proposition in that period.[71] And the public accommodations cases discussed above are more than sufficient to refute it.[72]

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When Herbert Spencer was advocating against commercial legislation in nineteenth-century England, he did not pretend that his views were embodied in the governing law at the time. Quite the opposite, he wrote at length about the vast distance between the prevailing legal landscape and his preferences.[73] Today's opponents of public accommodations laws in the United States take a different approach, trying to retroactively write their libertarian views into the Fourteenth Amendment while ignoring the broad application of such laws in the wake of its enactment. This revisionist campaign, which adds another chapter to the unrelenting attack on public accommodations law,[74] deserves to fail.

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[71] Green does attempt to portray Justice Harlan's dissent in the *Civil Rights Cases* as supporting his position merely because it cites *Munn*. *See* Green, *supra* note 3, at 101. But Harlan does not quote the "virtual monopoly" passage in *Munn* that Green claims is critical. Instead, Harlan quotes the decision's broader framing of businesses affected with a public interest:

> Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

The Civil Rights Cases, 109 U.S. 3, 42 (1883) (Harlan, J., dissenting). And based on this broader understanding of what qualifies as a business affected with a public interest, Harlan would have upheld application of the 1975 Civil Rights Acts to theaters in New York and San Francisco, cities where there was ample competition in the theater and entertainment industry.

[72] *See supra* notes 55–62 and accompanying text.

[73] *See, e.g.*, HERBERT SPENCER, SOCIAL STATICS, ABRIDGED AND REVISED; TOGETHER WITH THE MAN *VERSUS* THE STATE 284–88 (London, Williams & Norgate 1892) (cataloguing Parliamentary Acts passed between 1860 and 1883).

[74] *See* Bagenstos, *supra* note †, at 1207 (discussing the enduring legacy of the "civil-rights/social-rights distinction" employed by "opponents of laws prohibiting discrimination by public accommodations," which prevailed in "the Supreme Court's key cases punctuating the end of Reconstruction—the *Civil Rights Cases* and *Plessy v. Ferguson*," was revived and reframed by opponents of the 1964 Civil Rights Act, and was subsequently channeled by Senator Rand Paul in 2010 comments criticizing Title II of that Act).