One repeal to freedom:
Essays in American civil rights law

by Florent Boucharel

Prefatory remark. The following essays do not all deal with civil rights law issues in the narrow, technical sense of the term[1]. Some of them do, the others, like the essays on police powers, are about legal issues that may involve in the public's perception some forms of discrimination.

One repeal to freedom:
Terminating the Civil Rights Acts

The most conspicuous, when the Acts are repealed, is that nothing will be changed. The fair employment section has not desegregated the workplace and the fair housing act has not desegregated neighborhoods – as far as those for whom these acts were allegedly passed, the Negroes, are concerned. *Critical race theory* is correct: civil rights legislation is rubbish and the liberals' record a piece of trash.

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Is there rationality in the affirmation that as blacks make a disproportionate part of prison inmates in America the American society is racist? Looking at the figures of wealth beside the figures of prison inmates, one finds consistence across the two sets, that is, the less wealthy group is also the group with disproportionate numbers of prison inmates, which makes perfect sense on the merely economic and sociological level as poverty is ridden with

[1] "*Civil rights* are statutory protections against discrimination, enacted by legislative bodies to regulate activities in the private sector. … *Civil liberties* are the rights we have against the state, that is, against government." (S. Kennedy & D. Schultz, *American Public Service*, 2011)

deprivation and incentives to illegal conduct. As it is to be sociologically expected that crime be more rampant in poor neighborhoods than in wealthy ones, it is also to be expected that blacks have more prison inmates, as the figures show they are poorer in the main. Therefore, although the affirmation according to which the society is racist can be inferred from prison inmates figures is hardly challenged because of the fear the challenge could be construed as a claim that blacks are intrinsically (genetically) more criminal as a race, in fact there exists an entirely economic cause for criminal figures.

This shifts attention to the cause of economic inequalities, as one might then ask if there is something intrinsic to racial groups that some thrive more and some thrive less in the economy. If inequalities in prison figures can be inferred from wealth group status, the latter cannot be inferred away, so to speak.

The antiracist idea is that, given equal opportunities, all racial groups must and would equally thrive in the economy. So, as there are economic differences between racial groups, it must be that the society does not give equal opportunities to all and this because it is racist. Thus, the American society is to be called racist as long as each racial group does not have the same proportions of wealth and poverty as the global average, that is, as long as they are not all the same in terms of wealth. That this can and will result from the free market is, I am sure, what no one among Americans truly believes, so the fact that Americans keep talking of their economy as a free-market economy, having at the same time an antiracist agenda, is questionable.

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Prone Restraint

Derek Chauvin must have had an extremely incompetent lawyer, as he's been found guilty even though his innocence is self-evident according to so many right-wingers. I'm urging the latter to be lawyers if they aren't already. Let me tell you what the defense of Derek Chauvin should be, of which I haven't heard a word among the vocal right-wingers taking Chauvin's fate at heart.

Chauvin used, according to his training, a technique called *prone restraint* which is banned in several cities in the states and several countries in the world for being haphazardly deadly. Therefore, as he conformed to his training, Chauvin is not to be held responsible for the death of George Floyd, but the authorities that allow the use by police of a haphazardly deadly technique are. Derek Chauvin obviously could not be convicted for intentional murder. He has been convicted for, in a nutshell, manslaughter or depraved-heart murder, that is, the jury found he applied the prone restraint technique that he is trained to apply, in an unsuitable manner. Yet the ban on the technique in several cities of the states and several countries in the world is proof enough that the technique is hazardous in itself, or at least difficult to handle without lethal risk for the persons subjected to it. Therefore, Chauvin must be cleared and the administration that keeps training police officers to apply prone restraint must compensate George Floyd's relatives for their loss, which was predictable and thus avoidable through the banning of the technique.

That Floyd said he couldn't breathe is no proof of Chauvin's neglect, as the latter might have perceived that Floyd was simulating in order to escape (even if Floyd was already handcuffed, because being handcuffed never was an obstacle to running except for those who run on their hands).

A few months before Floyd's death a similar affair had occurred in France, with the death of Rémi Chouviat on the occasion of a routine traffic control which degenerated in an altercation between Chouviat and the police and in Chouviat's death after a prone restraint. It is known that trivial altercations are a significant source of homicide, and it is an even sorrier state of affairs when it is trivial altercations with the police that cause the termination of innocent citizens.

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How to curtail crime

To reduce crime, numbers of police officers must be cut.

37 percent of homicides result from trivial altercations (Kenrick & Griskevicius, *The Rational Animal*, 2013). Merely pushing someone away, if he stumbles and falls on his head, he may die from skull injuries. That will be counted as homicide in statistics, and this is what homicide statistics are: 37 percent of trivial altercations turning bad. We don't need cops to fight "crime" like this. We need cops to fight *criminal organizations*, but you never hear of criminal organizations being terminated. Here prevails a philosophy of fatalism: "Suppress one organization, another will take its place; besides they aren't bad for the economy when you think about it, and Epstein committed suicide in his cell when the camera wasn't working." Corruption is rampant. The less cops the less state protection criminals will receive.

ii

Government protectionism of the black market goes far beyond police. And less cops on inner city streets equates to more dead blacks. L.A. riots were due, in part, to LACK of policing. And look at what's happening now with that same return to lack of policing: violence in black communities. But it's ok, it's not the cops hurting them, now it's their "own kind"... right? Faux libertarian circular logic. (D.B.S.)

My interlocutor obviously is for a police state. He made a mistake no true libertarian could make by conflating on the one hand "policing" and on the other hand "police" meant as police forces paid on taxpayer money. Saying more policing is needed, he wants us to hear more *police bureaucracy*, which is precisely the stance a libertarian is trained to dismiss from the outset.

That policing and police bureaucracy are not conflatable is what the history of the states tells us: "One defining element in American criminal law had not yet emerged by the opening of the nineteenth century: the idea that localities, states, and eventually the federal government should supply professional police forces to enforce criminal laws and protect the public from criminal behavior. Eventually, members of police forces would emerge as the primary enforcers of the criminal law, but for much of the nineteenth century those forces were nonexistent. Instead, private citizens would be summoned to respond to antisocial behavior, as when a 'hue and cry' would go up when someone had been accused of theft or an assault against a citizen." (G. Edward White, *American Legal History*, 2014)

Now the change on this point is no more "defining" than any other characteristic of American criminal law, even though non-libertarians believe there can be no turning back from bureaucracy's cancerous growth. For sure I am for defunding the police as much as I am for the suppression of standing armies and for the citizens' right to bear arms, of which right it is my

deep-seated belief the police bureaucracy is the foremost opponent, although it says nothing about it for a bureaucracy isn't supposed to have an agenda of its own and yet it is what all bureaucracies have.

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White Plakkers in South Africa: A Libertarian Issue

We all have heard of the phenomenon of white slum dwellers (aka squatters or, in Afrikaans, *plakkers*) since the end of apartheid in South Africa. These new white poor are obviously from two categories of people: 1/ private sector employees who were dismissed because of affirmative action policies and 2/ public sector employees, dismissed for the same reason.

Considering (a) the apartheid economy as bureaucratic and (b) any government's room for affirmative action to be larger in the public sector, a majority of current white plakkers must be the result of dismissals from the public sector, as the new South African economy remains bureaucratic, with new colored staff. It's not farmers who became plakkers (farmers have trouble of their own with targeted killings meant as intimidation to have them leave the land and make room for land reform) nor entrepreneurs nor highly qualified employees (for a time shielded by their qualifications). Low-qualification jobs in the public sector that were the preserve of white (and preferentially, in the context of Afrikaner nationalism, Afrikaans-speaking) South Africans shifted to blacks.

Expelled from protected niches where their productivity was not, in fact, an issue, these white functionaries had no qualification to market. They were like those people in European countries doing menial jobs in administrations like bringing sparkling water to the director or taking the coat of the minister on his arrival, and in poorer countries opening doors or saluting militarily anybody walking down the corridors. They were trapped while thinking they had made it in life. Even when their position made sense, like cops, when the figures are in excess because of the bureaucratic, subsidized nature of the sector, they cannot all convert to the private security sector; and yesterday's cop is today's squatter.

From this I expect racism to be highest, in every country, among low-qualification *protected* jobs, not because of a lack of education (in fact culture is likely to make one's racism more articulate if anything) but because of the at the same time coveted and exposed nature of said positions, at the government's discretion. Governments are pressed to make societies that are more diverse also more equal, which basically requires that more jobs at the government's hand be reserved for minorities. This is the statistics you need to know in order to assess state racism: Are the people working *for the government* as diverse as the society? The government may tell you anything about how to fight racism and how it fights it (with hate speech laws etc.), as long as it keeps *its jobs* disproportionately white, it is racist, make no mistake about it[2].

[2] The reader understands I do not know the particulars about plakkers' past – and perhaps such a survey has not even been carried out – but I laid down my assumptions and believe they are plausible, perhaps with some tilting toward the public sector. Another phenomenon to consider is the massive white qualified workers' flight from South Africa at the end of apartheid, called *chicken run* by some, which no doubt caused a slump.

Kinders van die plakkerskamp.
Flaxen blond, shoeless, hygieneless kids of South African white slum.
Picture: safprsa.org (South Africa Family Relief Project)

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Homosexualization

If the government has the right to want to discourage drugs consumption, then it has the right to want to discourage homosexual conduct, and the discourse vindicating equal rights for homosexuals is an attempt to silence those who hold the view that homosexuality is *a choice* except for a miniscule minority, and that equal rights would therefore cause a risk of homosexualization of the society (like pagan societies of old) – same as the prohibition of drugs which intends to prevent a generalization of drugs consumption, whether this generalization would take place or not. Remember that pornography was first legalized in 1969 in Denmark, with the Danish national church (Church of Denmark) approving on the ground that pornography owed its attraction to the prohibition itself – yet people have not turned their back on pornography in spite of its legalization, quite the contrary.

When the discourse of equal rights is adopted by the government, then it is a state-sponsored ideology acting with the aim of prevailing against other ideologies, a breach of state neutrality.

The previous paragraph is a reply to the claim that granting equal rights would put an end to a current breach of state neutrality (in the U.S.). It would not, as it would be a breach of neutrality. (This is not to say the state must remain neutral on the issue, as my thought is that it cannot.)

When the government adopts the equal rights discourse, it is buying one ideology, namely that people engaging in homosexual conduct are not free agents making a choice, as if homosexuality, therefore, were like one's race. Thus, the government dismisses and actually opposes another ideology according to which those engaging in homosexual conduct thereby make a choice and it is at best a small part of them, resulting from genetic drift, who simply cannot have intercourse with a person of the other sex as a result of their genetic makeup. As we find such conclusions in medical books, I guess it could be possible for medical authorities to issue permits for these, let's call them genetic-drift homosexuals, so that they would not be discriminated against. But as far as the others are concerned, who in reality are bisexuals, the government deals not with something like race but with a practice which it has the right to want to discourage.

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Immunity for Botch

South v. Maryland (1855) and the *public duty doctrine* say "there is no tort liability to an injured party resulting from the non-malicious failure of a law enforcement officer to enforce the law," but also "It is a public duty for neglect of which an officer is amenable to the public, and punishable by indictment only." Thus, the absence of tort liability does not rule out all form of responsibility.

You can charge an officer for failure to protect if you are feeling foolish, but the case will almost certainly get rejected by the judge, and even if it isn't the appeal will side with the officer. … I don't think threats of a frivolous indictment by an overzealous prosecutor can be interpreted as a duty for an officer to endanger their life. It is just legal politics and rhetoric designed to win the court of public opinion (the mob). (MrM)

ii

For the sake of learning, I quote the definitions.

"*Public duty rule*: a doctrine in tort law: a government entity (as a state or municipality) cannot be held liable for the injuries of an individual resulting from a public officer's or employee's breach of a duty owed to the public as a whole as distinguished from a duty owed to the particular individual called also public duty rule. See also special duty doctrine."

"*Special duty doctrine*: an exception to the public duty doctrine that imposes liability for injury on a government entity when there is a special duty owed to the plaintiff but not to the public at large called also special duty exception. NOTE: The special duty doctrine applies when the duty owed to the plaintiff arises by statute or when the plaintiff has justifiably come to rely on the government's assumption of that duty." (*findlaw*)

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Town of Castle Rock v. Gonzalez (SCOTUS 2005)[3] is a confirmation of *DeShaney v. Winnebago County Department of Social Services* (1989). It may be worth stressing that both involve children being victims of their father's violence, so these rulings may be found to run into the *parens patriae doctrine*, actually. Parens patriae "refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the parent of any child, individual or animal who is in need of protection. For example, some children, incapacitated individuals, and disabled individuals lack parents who are able and willing to render adequate care, thus requiring state intervention." You will note the phrasing "requiring state intervention." The conclusion "We are all responsible for our own personal safety, whether we like it or not" (Barnes Law) sounds odd when applied to the situation of a little child vis-à-vis his father, especially when the state knows the child's helplessness, so much so that the state adopted a parens patriae doctrine.

So, I can't agree with *DeShaney v. Winnebago Social Services*. The mother was let down by the social services. In the books I find "this clause [the due process clause] was designed 'to protect the people from the State, not to ensure that the State protected them from each other.'" This is not true as far as the parens patriae doctrine and the situation of a helpless child is concerned, but I fear to understand that it is no constitutional guarantee and instead a castle in the air. People demanded foster homes, same as they demanded a 911 line for help, and states provided the services, as it was not found unconstitutional, but only for the people to be told then that whether the services are provided in a satisfactory or botched fashion is none of the courts' business. In other words, the Supreme Court is telling people they rely on the state *at their own risk*, and in reality they cannot rely on it at all.

"The fact that the state at times took temporary custody of Joshua [DeShaney] did not make the state his personal guardian after it released him." No but the fact that it released him

[3] "*Castle Rock v. Gonzales*, 545 U.S. 748 (2005), is a United States Supreme Court case in which the Court ruled, 7–2, that a town and its police department could not be sued under 42 U.S.C. §1983 for failing to enforce a restraining order, which had led to the murder of a woman's three children by her estranged husband." (Wikipedia)

to an abusive father several times shows a clear misunderstanding of the situation, all the while the mother was thinking the child was in good, prudent hands.

"If the state has a financial obligation to Joshua, it must be democratically ascertained through protection of state tort (personal injury) law rather than through the due process clause." Not true with regard to the public duty doctrine. Thus, while *South v. Maryland* barred a tort suit leaving indictment open, *DeShaney v. Winnebago Social Services* bars a due process clause suit claiming to leave open a tort suit that is not open. Of course, in both cases the courts felt the need to leave some recourse open, as otherwise the notion arises of *duty without responsibility*, which is, to say the least, hard to chew.

iv

"Justice Sonia Sotomayor has noted a 'disturbing trend' of siding with police officers using excessive force with qualified immunity, describing it as 'sanctioning a 'shoot first, think later' approach to policing.' She stated: 'We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force...But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" (Wikipedia page *Qualified Immunity*) This is the topic of qualified immunity, with which I wish I were more familiar because I guess that's part of what is knowing one's rights...

v
Taxes and irresponsible police

"Defund the police" is the logical sequel to *Town of Castle Rock v. Gonzales*. No one needs (as no one should rely on) irresponsible police. To pay taxes for this is madness plain and simple.

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The botched law of racially restrictive covenants

In what is perhaps an unprecedented instance in the history of American legislation, a statute, the Fair Housing Act of 1968, was needed twenty years after the Supreme Court intended the same as the Act, in its notorious decision *Shelley v. Kraemer* of 1948, which eviscerated the enforcement by courts of private restrictive covenants barring blacks from buying real estate.

In the 6-0 decision Chief Justice Vinson explained that "restrictive covenants drawn up by private individuals do not in themselves violate the Fourteenth Amendment. As long as they are completely private and voluntary, they are within the law. Here, however, there was more. Through their courts, the states aided in the enforcement of the covenants. Indeed, if it were not for the courts, the purpose of the agreements would not be fulfilled." (J. R. Vile, *Essential Supreme Court Decisions*, 2018)

Thus, we were to learn from the Supreme Court that covenants whose purpose would not be fulfilled by courts are a legal object – a legal UFO to this very day. Commentator Vile adds, for those who could not believe what they had just been reading: "*Shelley* did not invalidate private restrictive covenants but only state enforcement." State enforcement rings a bell to those familiar with constitutional law: one reads *state action*. That judicial action is state

action is perhaps not to be denied but then, as courts, one or the other, are competent about everything, the decision means that state action is everywhere (and everybody could be sued for "discrimination": you could be sued for failing to invite blacks at your wedding, for instance) – and at the same time whites who refused to sell estate to blacks through restrictive covenants would maintain the practice undisturbed, as long, that is, as blacks did not trick them and acquired the estate anyway, or perhaps as long as black squatters did not occupy the premises, and if a black (or, for that matter, any) squatter occupied a house belonging to a white owner to which house a restrictive covenant was attached, perhaps the owner had no legal recourse against the squatter? Such niceties and others resulting from the unanimous decision were so strange that eventually the legislator, twenty years later, passed the Fair Housing Act that prohibits racially restrictive covenants.

To this day no court dared link state action to the possibility of judicial litigation again, Shelley was dead on arrival, and discriminatory private ventures that are not specifically covered by antidiscrimination legislative acts are permissible. A club's restaurant[4] can cater to whites only, for instance – in the United States of America, that is, since other countries have bogus notions of freedom.

ii

But restrictive covenants *run with the land*: "Just because these old covenants are now unenforceable, they never simply disappeared. Many continue to be passed on from owner to owner through property deeds to this day, and though real estate professionals and lawmakers alike have made efforts toward having them removed, bureaucratic red tape and legal expenses often hinder progress. Some argue that it would be too cost-prohibitive to remove the racist language from every real estate deed in the country today." (*Homelight*, Sep 14, 2020)

To have made covenants which pre-existed the Fair Housing Act unenforceable was *ex post facto lawmaking*: "An ex post facto law is a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law." Ex post facto laws are prohibited by the American Constitution (clause 3 of Article I, Section 9). In its purity the principle holds in criminal law only, but such a construction may be argued to be unconstitutional: "Thomas Jefferson described them [ex post facto laws] as 'equally unjust in civil as in criminal cases.' Over the years, however, when deciding ex post facto cases, the United States Supreme Court has referred repeatedly to its ruling in *Calder v. Bull*, in which Justice Samuel Chase held that the prohibition applied only to criminal matters, not civil matters." (Wikipedia) Like Jefferson I see no reason why the principle should be limited to criminal law, because 1/ the letter of the Constitution makes no such distinction as that introduced by Justice Chase (the clause reads: "No bill of attainder or ex post facto law shall be passed") and 2/ even if ignoring the principle must be particularly dramatic in criminal law such neglect is not benign either in other legal domains.

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[4] The true situation, re discrimination, of a restaurant that is not also a private club or a religious organization is unascertainable in the states. See pp. 11-12 below.

Feudalism and Liberty

Since when can anyone not to mention employers, punish anyone for stating their thoughts and opinions? My employer is not my "daddy" and I am not their property so whatever I say or do as long as it is not at work is none of their concern, ever. (Dr Z.)

The situation Dr Z. describes resembles feudalism. However, if we take the problem as one of freedom maximizing, we probably should leave employers some room to dismiss *at will*, which remains the default rule in most of the United States (De Geest, *American Law: A Comparative Primer*, 2020).

To begin with, the UK Equality Act, which excludes opinion as a *just cause* for dismissal (except "discrimination" – read: content that is not politically correct, and you can count on British courts to make the exception as broad – or rather as discriminatory – as they can, and "harassment"), is of 2010, that is, it is a recent creation. Before that, British employers could fire workers based on their opinions and that would be construed most of the time as fitting the employer's discretion.

In the U.S. there is no federal Equality Act statute and, as I said, the *at-will doctrine* remains the default rule. How they blend this with fair employment clauses of the civil rights statutes is beyond my knowledge. Be that as it may, one's opinion is not one of the protected classes covered by the civil rights acts, so if an employee displeases his boss because of his opinions and the boss fires him, probably there is not much the employee can do about it. An employer might argue his collaborator is undermining his business (which has a public relations dimension) by making his opinions known, and sometimes that could well be the case, so I cannot agree 100% with Dr Z. because it is a business owner's freedom against that of his employee, and both must retain some degree of freedom. Yet we all perceive that employers will bend to outside pressures to dismiss any employee who expresses views unpleasant to this or that community or lobby so long as they cannot reply to such *cancel mobs* (heckler's veto) that the law bars them from dismissing the employee based on his or her opinions. So, yes, probably some statute is needed to shield employees, because that would even shield the employer. The latter would then face boycott campaigns (boycott is protected speech) but – who knows? – he might survive it. However, I don't expect business organizations to support such a policy.

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Coloradans Not Wanted

Many Companies Want Remote Workers—Except From Colorado. After a new state law that requires employers to disclose salaries for open positions, some are advertising jobs available anywhere in the U.S. but Colorado. (Wall Street Journal, June 17, 2021)

Companies must reveal salary information in job ads if Coloradans are eligible, so they now advertise their job positions in this way: "This position may be done in NYC or Remote (but not in CO due to local CO job posting requirements" (DigitalOcean's online post).

Yet seven states (unnamed in my source below) have laws that prohibit advertising discrimination based on "race, color, or creed": "Jews were denied welcome at hotels, resorts, public accommodations, and schools. In 1907 a hotel in Atlantic City, New Jersey, declined accommodations to an American Jewish woman. She complained to Louis Marshall, a lawyer

and president of the American Jewish Committee. Marshall drafted a law that barred the printed advertising of discrimination in public accommodations on the basis of race, color, or creed. Enacted in 1913, this statute did not require hoteliers to rent rooms to all comers but prohibited the publication and dissemination of statements that advocated discriminatory exclusion. By 1930 seven states had adopted versions of the New York statute, making group rights a nascent category [nascent or rather stillborn!] in First Amendment law." (mtsu.edu First Amendment Encyclopedia: Group Libel [nonexistent]) This means in all other states you could advertise your business's discriminatory choices legally.

What about the constitutionality of these laws? Here the author is quite obscure. She says: "Throughout the 1930s the laws remained untested in the courts. Marshall apparently preferred to field inquiries from resort owners about the legalities of their advertisements than to file lawsuits." In her first sentence "throughout the 1930s" seems to be saying that the laws were tested by courts but later, otherwise why limit the talk to the thirties? However, the author says nothing about results of later constitutional challenges. The second sentence seems to be saying, correct me if I'm wrong, that there never was any lawsuit based on one of these 7 (or 8, actually, the New York state law plus seven copycats, I'm not sure how to read "By 1930 seven states had adopted versions of the New York statute," whether that means 7 or 8 in total) and notwithstanding the fact there was not a single challenge in courts this man managed to have all such advertisements removed forever. Quite a feat indeed.

At that time commercial speech was not protected by the First Amendment, so constitutional challenges were bound to fail, the laws would have stood the test. This could explain why the hoteliers etc. did not care to go to courts to defend their advertising and instead complied with the "inquiries" fielded by said lawyer. Today it is different: commercial speech is protected speech (at least it receives partial protection, not as broad as political speech but still) so, assuming these laws are still around, challenging their constitutionality is more open-ended today.

ii

Since the Civil Rights Act of 1964 hotels are *public accommodations* and "Under U.S. federal law, public accommodations must be accessible to the disabled and may not discriminate on the basis of 'race, color, religion, or national origin.' Private clubs were specifically exempted under federal law as well as religious organizations." Therefore, the laws we discussed are superseded as far as hotels, motels and "other establishments which provides lodging to transient guests" are concerned. However, if you're a hotelier and declare your hotel to be a *religious organization* or a *private club*, you still can discriminate and, at least provided your business is not located in one of the 7 or 8 above-mentioned states, advertise your discriminatory choices.

Re restaurants, I cannot even see how they could be public accommodations in that respect, since "in *Burton v. Wilmington Parking Authority* (1961), the Supreme Court noted the 'public aspects' of a restaurant charged with racial discrimination, primarily attributable to the fact that it was a lessee in a publicly owned building. However, the ruling made it clear that not every lease of public property would be considered a sufficient entanglement to justify a finding of state action." (Kennedy & Schultz, *American Public Service*, 2011). It means there can be no charge of racial discrimination against restaurants having no "public aspect" about them (not

in the sense of public accommodation but in the sense of for instance being a lessee in a publicly owned building).

Besides, even in public accommodations there exist derogations to antidiscrimination laws, as the two following quotes show.

"*Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), was a case in the Supreme Court of the United States that dealt with whether owners of public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion, and therefore be granted an exemption from laws ensuring non-discrimination in public accommodations. … The high court held in a 7-2 ruling that artist Jack Phillips was allowed to deny his services to a homosexual couple for their wedding."

"The Arizona Supreme Court and the 8th Circuit rulings have declared the 'government cannot force creative professionals to create artistic expression that violates their religious beliefs.'" Other courts have ruled the same and freedom-loving people are "confident that the Supreme Court will eventually join those courts in affirming the constitutionally protected freedom of creative professionals to live and work consistently with their most deeply held beliefs" (*The Federalist*, July 2, 2021).

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Compulsory Love: State Rape of Consciences

Supreme Court Refuses To Decide If Floral Artist Loses Her Religious Liberty At Shop Door. (The Federalist, July 2, 2021)

Soon no one will know what to expect. "In *Burton v. Wilmington Parking Authority* (1961), the U.S. Supreme Court noted the 'public aspects' of a restaurant charged with racial discrimination, primarily attributable to the fact that it was a lessee in a publicly owned building. However, the ruling made it clear that not every lease of public property would be considered a sufficient entanglement to justify a finding of state action." (Kennedy & Schultz, *American Public Service*, 2011, already quoted above). This means there can be no charge of racial discrimination against restaurants that have no "public aspect" about them (not in the sense of public accommodation but in the sense for example of being a lessee in a publicly owned building). And this while "Under U.S. federal law, public accommodations must be accessible to the disabled and may not discriminate on the basis of 'race, color, religion, or national origin'" (since the Civil Rights Acts – the case cited above, from 1961, predates the 1964 federal act but, as you know, a federal statute does not empty out a Supreme Court's decision and, on the contrary, if it were argued that the federal statute runs into the decision, that would mean the statute is unconstitutional.)

The case discussed by *The Federalist* is about derogations to antidiscrimination laws in public accommodations such as cakeshops or flower shops. Why even talk of derogations? If a restaurant with no "public aspect" about it is immune from charges of discrimination under federal law, you bet a flower shop is immune from a whacky state law (unconstitutional to begin with).

The Supreme Court of the United States declined to hear the case because, I am sure, they know they would *have had to* uphold the florist's rights against Washington state's antidiscrimination law and... they didn't want to.

ii

The Court had the clear duty to protect the florist's right because this was expected by everyone from 1/ the Court's case law (*Masterpiece Cakeshop*, 2018) and 2/ the Court's action in the present case: "The Washington Supreme Court upheld the ban, even after SCOTUS asked the state's court to keep the landmark *Masterpiece Cakeshop* ruling into account." (*The Federalist*) 1+2=hear the case, not dismiss it!

One responsible for the declinal and contempt of an American citizen's freedom is Justice Amy Coney Barrett. It seems it always works: she was so vilified and demonized as an extremist during the hearings that she might become a liberal swamp creature from now on in everything she does as Justice, if she has freaked out.

There are enough community-friendly businesses around with the little flags, leave people alone.

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Taney

They blame Chief Justice Taney (*Scott v. Sandford*, 1857) for "seeing slavery in the Constitution" but if slavery was not in the Constitution, why did slaveowners and the Southern States ratify it? You had to convince them that slavery *was* in the Constitution to obtain their ratification, and if you turned out to be convincing then it probably is because it is true that slavery was in the Constitution, even if you did not believe it yourself and thought you were lying to slaveowners.

I disagree with late (conservative failed nominee to the Supreme Court) Robert Bork: A constitutional amendment was indeed necessary to end slavery in the United States, and Taney was a correct interpret of the Constitution. (For a discussion of Bork's views, see my essay *On Original Understanding*.)

ii

To be sure, The Federalist, major advocate of the Constitution, does not endorse slavery. It adopts a pragmatic approach while expressing the wish that slavery be terminated in the future. So slaveowners were warned, one might argue; they must have understood that for the framers slavery was something about to finish and therefore could not be in the Constitution they framed. I disagree. Slaveowners must have been convinced their property was offered enough guarantee by the Constitution they ratified; therefore, they must have seen the Federalist position as the mere wish that in the future the Constitution be amended to remove slavery from it. It was not imaginable to condition one's ratification, that of slaveowners or anybody else, to the impossibility of amending the Constitution in the future. All in all, slaveowners (Southern states) cannot without more ado be understood to have ratified the Constitution on the premise that it did not forbid slavery but allowed a mere federal statute to end it. Their ratification was evidently premised on firm guarantees. – Taney is a scapegoat.

Taney statue removed from Maryland state house (Aug 2017)

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Chicanos and the Inconsistencies of U.S. Law

In *Hernandez v. State of Texas* (1954), the U.S. Supreme Court ruled that the Fourteenth Amendment of the U.S. Constitution applied not only to the concept of *races*, namely blacks as opposed to whites, but also to nationalities, i.e., *classes*, and that Mexican Americans (whom I hereafter call Chicanos as they themselves call today if I am not mistaken) are such a nationality or class.

The Texas courts had ruled that Chicanos are whites and that the Fourteenth Amendment is aimed at protecting not whites but the former slaves, blacks. (The special issue of the case was jury trial but here I will leave that aside.)

Chicanos are whites under U.S. law although most of them are mestizos in their countries of origin. Obviously, they are not blacks (most of them – but there are a few blacks in Mexico) and the Texan courts, narrowly looking at the 14th Amendment, claimed to know two races only, blacks and whites.

I believe this could also be the result of the Immigration Act of 1924 or *Johnson-Reed Act*. Notwithstanding the fact, scorned time and again by scholars of the liberal and neoconservative veins alike, that Congress made extensive use of *eugenics expertise* to create national quotas adverse to the coming of Southern and Eastern Europeans, migrants from Mexico and other Latin American countries were untouched by the law. This is evidence that private interests prevailed on said expertise. South-Western states wanted to continue using cheap agricultural labor (including children) and in the nineteen-twenties had started to set up *maquiladoras* north of the border (for instance Farah Clothing in El Paso, Texas). From a eugenicist's point of view, the very expert standpoint called by Congress, mestizos in no way could have been viewed as less detrimental to the genetic makeup of the nation than, say, Italians, whose coming was restricted by the Act. Thus, while Congress limited immigration from large parts of Europe for the good of the United States on racial grounds, it set no limitation on mestizos from south of the border. How could courts see mestizos otherwise than as whites then? (The 1924 Act remained in vigor until 1965.)

In *Hernandez v. State of Texas,* the Supreme Court found ample evidence that there existed a form of segregation of Chicanos on the ground: "They discovered a county-wide distinction between 'white' and 'Mexican' persons. At least one restaurant prominently displayed a sign that declared, 'No Mexicans Served.' Additionally, until a few years earlier, some Mexican American children attended segregated schools and were forced to drop out by fifth or sixth grade." (Oboler S., 2005, via Wkpd) Although I find the words "at least one restaurant" unsupportive of the conclusion, because if the Court had found more than one restaurant, would it not have said what number it was rather than the vague "at least one"? and on the other hand one restaurant county-wide refusing to serve Mexicans is evidence of the owner's idiosyncrasy rather than of institutionalized discrimination, I believe the Court's findings are true, because as Texas had its own Jim Crow laws I assume Texans would not make much difference between Negroes and Chicanos even though the 1924 Act said (at least *en creux* [in hollow]) the latter were whites[5] – and said so under obvious lobbying of plantation

[5] The assertion will seem overstretched to many but in the final analysis the question boils down to this: When were Hispanics first considered whites in the U.S. while a large majority of migrants from Latin America are mestizos, and most mulattoes, on the other hand, were considered blacks (so-called one-drop rule: "any person with even one ancestor of black ancestry – one drop of black blood – is considered black")? More precisely: Is it

and maquiladora owners in need of cheap labor, and in disregard of congressional expertise (eugenics).

Hernandez v. State of Texas "*was a major triumph for the 'other White' concept, the legal strategy of Mexican-American civil-rights activists from 1930 to 1970. ... It was replaced in 1971 by* Cisneros v. Corpus Christi ISD*, which recognized Hispanics as an identifiable minority group.*" (Texas State Historical Association [TSHA])

Note that Chicanos being whites was for Texan courts an argument against, in the current interpretation since *Hernandez*, full acknowledgment of their rights. As the solution of the Supreme Court in *Hernandez* and *Cisneros* is that Hispanics' rights must be specially protected because they are an identifiable minority ("the other whites"), the two combined does not bode well for non-Hispanic whites in the foreseeable future as their majority becomes thinner, for it is this majority status that is thought to call for special legal protection *of minorities* and a time may come when the majority status exists no more *de facto* while all its *de jure* consequences are maintained because that is found convenient by a new majority of protected minorities…

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Abortion Charters Ready

Mississippi Officially Asks Supreme Court To Overturn Roe v. Wade*. (Breaking911): The brief continues, "The only workable approach to accommodating the competing interests here is to return the matter to 'legislators, not judges.'... The national fever on abortion can break only when this Court returns abortion policy to the states – where agreement is more common, compromise is more possible, and disagreement can be resolved at the ballot box."*

Another scenario is to leave the matter to judges and they make abortion unconstitutional over the whole territory of the Union. – If you return abortion to the states, abortion will be a matter of two-day trips to the right state.

They think returning abortion to the states will guarantee the prohibition *in red states*. They do not even look for a federal bill, which would be repealed and then revoted and then repealed again and then voted again and then canceled, and so on; they want such legislation for red states that have remained red from time immemorial (you know what I mean). But the problem is blue states will remain open for "abortion charters" from red states year in year out unless the Supreme Court declares abortion unconstitutional.

One may say the difference between criminalization in some states and criminalization at federal level is only one of scope since charters can cross national borders same as they can make interstate flights. However, the difference is more substantial than that as it is more difficult to plan an abortion abroad, and this guarantees that the legislation will yield some results in terms of diminishing abortion figures (whereas the possibility of interstate flight would greatly hamper the legislation's purpose). Another possibility is to explore legal sanctions against people traveling to other states or countries in order to commit felonies according to state or federal legislation.

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since the adoption of the Fourteenth Amendment or since the exemption of Latin Americans from the quotas in the Johnson-Reed Act or since another date?

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Back-to-the-Future Legislation

You've got those state bills passed (Texas to name one state [perhaps the first and only so far]) that declare abortion will be banned in the state no sooner than *Roe v. Wade* is overturned. What is this? It is either mere incantation (not proper lawmaking) or something I can't believe. Imagine *Roe v. Wade* is overturned at a time when the legislative houses of Texas support abortion: I can't believe the incantatory bill can be set in motion, it's as if it never existed.

Now imagine the state legislature is for abortion and the governor is against it when *Roe v. Wade* is overturned.

As head of the executive the governor says it is his duty to implement the bill that was passed years ago, which says something like "As soon as *Roe v. Wade* is reversed, without further ado abortion is banned in Texas." He says it is his duty to implement the law like any other standing law and the fact that the present legislature did not adopt it is completely immaterial; after all, the present legislature did not adopt all currently standing laws.

But the legislature says: "The governor is bound to implement standing laws but the bill in question cannot be standing because it is a mere incantation. The past legislature had no constitutional power to bind in back-to-the-future fashion the present legislature against our will. The bill is void." It is important that the legislators do not concede the law is standing because then they would have to repeal it by a legislative act, but the governor would veto their act (the lawmakers would have to override the veto, which might be out of their reach).

The principle to bear in mind is that a legislative act must be binding for the legislature that passes it in order to bind future legislatures too (by binding I mean that the act is normative at the time the legislature passes it). Otherwise, it is an incantatory act and must remain so forever, that is, it never stands. If such a law could stand, that would mean the legislature can decide what others' will is, but actual lawmakers can only express what *their* will is. With the statutes in question the legislature says, in fact, "Were *Roe v. Wade* overturned today, we would ban abortion without further ado," but it must leave it to the actual legislature that lives a reversal to decide what it wants to do.

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To avoid any confusion, the words *present* and *actual* can be synonyms but here I use them as opposites. These laws claim present lawmakers are actual lawmakers in the future too, but this is not to be assumed in any circumstance (even if, as a historical fact, which is on an altogether different plane, Texas has been an uncontested red state). Lawmakers pass either acts that are normative, that is, binding at the time they pass it, or unbinding resolutions and declarations that cannot bind a future legislature either without an express act of the latter to that effect.

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