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Market Causes of Constitutional Values

Christopher T. Wonnell

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ARTICLES

MARKET CAUSES OF
CONSTITUTIONAL VALUES

Christopher T. Wonnell†

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I. INTRODUCTION: MARKETS AND CONSTITUTIONAL TASTES

A. *The Question to be Explored*

The role of a free market economy in our system of constitutional values is a perennial subject of debate. In some places, of course, the Constitution seems to supply direct support to the institutions of the free market, for example, in the takings¹ and contracts clauses.² In this sense, the market is one of many constitutional values, related to the others only in that it is derived from the same source.

Some commentators have discussed the causal role of the free market in helping or thwarting the pursuit of other constitutional values.³ For example, Milton Friedman has argued that the free

1. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

2. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

3. See *infra* notes 4-5 and accompanying text.

market is necessary to preserve freedom of speech: in a system of socialized property a dissident would have difficulty obtaining access to the necessary means of production to publish books or newspapers critical of the state.⁴ At the same university, but a considerable distance away on the political spectrum, Cass Sunstein has argued that private property and freedom of contract are threats to constitutional values, since they distort the structure of resources and tastes necessary for full political participation.⁵

Others have considered the analytical links between free markets and constitutional values.⁶ Some have contrasted "property rights" and "personal rights," noting the inherently exclusionary character of the former,⁷ while others have argued that property rights are an integral part of personal rights, supplying the necessary space for their autonomous exercise.⁸

In this Article, I will consider a different interchange between the free market and constitutional values. The Article explores whether the existence of our free market institutions causes us to embrace certain constitutional values.⁹ In other words, would we place such a preeminent value on racial and religious tolerance, personal privacy, and the freedoms of speech and press if we had not long lived under predominantly free market institutions? Moreover, if we were to substantially abolish the free market, would we continue to place preeminent importance on the constitutional values that we currently cherish?

These are large questions, and a fully satisfactory answer would require a rather extensive historical and comparative analysis of various cultures. Max Weber's work on the empirical linkages

4. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 16-21 (1962).

5. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1552-58 (1988). See also JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 1 (1990) ("The Framers' preoccupation with property generated a shallow conception of democracy and a system of institutions that allocates political power unequally and fails to foster political participation.").

6. See *infra* notes 7-8 and accompanying text.

7. See KARL MARX, *GRUNDRISSE* 131 (M. Nicholas trans., 1973) ("This kind of [capitalist] individual liberty is . . . at the same time the most complete suppression of all individual liberty and total subjugation of individuality to social conditions which take the form of material forces—and even of all-powerful objects that are independent of the individuals creating them.").

8. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 181 (1980) ("Liberties are not always neatly separable but are often linked and intertwined.").

9. See Friedrich Hayek, *The Causes and Consequences of Our Values: A Problem for Science*, reprinted in *THE ESSENCE OF HAYEK* 318-30 (Chiaki Nishiyama & Kurt Leube eds., 1984) (discussing the broader question of the source of our morals).

between market economic systems and various systems of religious and social belief are clearly an important point of reference.¹⁰ This Article, however, pursues a different methodology. It explores whether market incentives have systematic effects on the values of market actors, strengthening certain values and weakening others. The argument is that contemporary constitutional values reflect in large part the values which market institutions tend to generate in their participants. The next section discusses the various ways in which economic incentives are likely to impact upon the tastes and values of the citizens subject to the institutions creating those incentives.

B. Mechanisms for the Influence of Economic Incentives on Values

1. Economic Mechanisms

In economic analysis, values may be regarded as a kind of exogenously determined taste,¹¹ but this attitude seems rather artificial.¹² If particular institutions make a given taste more expensive, one would of course tend to see that taste less frequently placated by the actor's behavior. However, one would also expect to see pressure placed upon the taste itself. There need not be any conscious act of self redefinition. Rather, the mechanism of change may simply be the slow process of cultural evolution, in which tastes that are too expensive are downplayed and forgotten in favor of others with which they compete. People who persist in holding

10. See generally Max Rheinstein, *Introduction* to MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* [MAX WEBER ON LAW IN ECONOMY AND SOCIETY] xxvi (Max Rheinstein ed. & Edward Shills & Max Rheinstein trans., 1954) ("[Max Weber's] ambitious plan was to investigate, upon the broadest possible scale, the interrelationships between economic institutions and relationships, and all other phenomena and relationships of society, of the present and the past.").

11. See MAURICE LEVI, *THINKING ECONOMICALLY* 33 (1985) (noting that tastes are regarded as exogenous). The theories predict behavior based upon existing tastes, technologies, resource availability, and prices. See, e.g., BRUNO S. FREY, *ECONOMICS AS A SCIENCE OF HUMAN BEHAVIOR* 5-9 (1992) (discussing the various incentives affecting human behavior as seen by economists). With uncharacteristic humility, economists have usually regarded tastes as matters outside their scope of competence, to be explained, if at all, by psychology or other disciplines. See, e.g., *id.* at 21 ("The total neglect of psychological elements in the economic conception of man is deplored and it is demanded that more insights of psychology be introduced into economics. The psychological model of human behavior is taken to be vastly superior to the economic view.").

12. See *supra* note 11.

tastes that are very expensive to satisfy will not be as happy as those able to modify their tastes. To the extent that people demand happiness and imitate those who seem to have obtained it, less expensive tastes are more likely to survive than more expensive ones, *ceteris paribus*.

At this point, a counter-tendency should be noted. The more expensive a taste becomes to satisfy, the more its satisfaction can serve as a status symbol distinguishing wealthier individuals from others.¹³ If it does become a status symbol, the taste for that item may be greatly increased, even on the part of people who cannot at present afford it, as the quest for social standing is surely a powerful human motivation.¹⁴ Moreover, the dominant culture may disfavor any attempt by the less fortunate to reject the values that others cherish on the grounds that they cannot obtain them; consider the attitude reflected in the story about the fox who felt that the grapes he could not reach must have been sour anyway.¹⁵

Therefore, the values that a market society will generate are those that market institutions will make not only costly to reject, but particularly costly for those most fully assimilated and successful in that society to reject. In such cases, "sour grapes" (or, to put a more favorable label on it, "character planning")¹⁶ and status seeking, far from working at cross purposes, will reinforce each other. Because of the great cost of rejecting such values among the elite, others who are inclined to emulate the successful will be led to embrace the values even more rapidly than they would based only on the more immediate cost of rejecting them.

2. Psychological Mechanisms

While economists may hesitate to explain tastes, the discipline of cognitive psychology has developed an appreciable literature addressing the question of attitude change.¹⁷ To a considerable extent, this literature simply extends the essential logic of the

13. Richard H. McAdams, *Competitive Preferences*, 102 YALE L.J. 40-41 (1992); see generally *id.* at 1.

14. See *id.* at 37 (discussing psychological studies on the importance of the search for relative status).

15. See generally JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983) (discussing the "sour grapes" theory behind why individuals make certain decisions and hold specific attitudes).

16. See Luc Bovens, *Sour Grapes and Character Planning*, 89 J. PHIL. 57 (1992) (discussing the difference between these two concepts).

17. See *infra* notes 18-31 and accompanying text.

economist's model into the realm of tastes, suggesting that beliefs and tastes, or more generally, "attitudes," will change based upon the psychological cost of continuing to hold those attitudes in the face of other beliefs one takes pleasure in holding.¹⁸

For example, suppose that a person was predisposed to have a taste for a good brawl with co-workers on minor provocation. Suppose also that this became an expensive taste to hold, bringing on the ire of supervisors and threats of termination. Standard economic theory would predict that fighting *behavior*, having been made more expensive, would decrease.¹⁹ However, would the person, as she observed her own behavior over time, continue to think of herself as a hot-tempered fighter and of fighting as a desirable activity?

The cognitive psychologist Daryl Bem introduced the idea of "self-perception theory." Under this theory, beliefs and attitudes are often not fully known to the individual. Therefore, the individual seeks to discover what those attitudes are, using her own behavior in undertaking that investigation.²⁰ According to this theory, a system that discourages fighting behavior could, over time, also discourage the accompanying attitudes, as people try to explain their own behavior to themselves in a way that makes their own personalities and beliefs comfortably coherent with their behavior.²¹

Again, a countertendency needs to be noted. Psychological studies have found that behavior inconsistent with a prior attitude is less likely to change that attitude if one can find a readily available external motivation for the behavior.²² In those studies, a person who was paid \$1 to give a speech contrary to her own attitude was more likely to change her beliefs than a person paid \$20.²³ The former person found it more difficult to rationalize her

18. This theory generally goes under the heading of cognitive dissonance, which holds that the psychological tension between incompatible cognitions is a source of attitude change. See PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 107-24 (1991) (discussing dissonance theory).

19. See, e.g., LEVI, *supra* note 11 at 29-48 (discussing the basic effects of price on supply and demand).

20. Daryl J. Bem, *Self-Perception Theory*, 6 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 4-8 (1972).

21. *Id.* at 1-62 (discussing how and why individuals define and change their own perceptions of themselves).

22. See Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 *J. ABNORMAL & SOC. PSYCH.* 203 (1959) (detailing an experiment which proved such results).

23. *Id.* at 205-06.

own behavior by reference to the external incentive, and therefore felt greater pressure to describe her own attitudes as different from what they had previously been.²⁴ According to this theory, a supervisor discouraging fights by making explicit threats of economic sanctions will provide an easy way for workers to explain their own nonfighting behavior to themselves without invoking a nonfighting attitude.

There are, however, two problems with this objection. One problem is that it is harder to rationalize an entire course of conduct than a single instance of it. It is one thing to say that I will give a speech for a cause in which I do not believe if I am paid well for doing so; it is far less flattering to the ego to believe that I will continue to act contrary to my own values for long periods of time because of the wishes of another person.²⁵ A pacifist could retain her beliefs after being paid to give a pro-war speech, but would she be likely to remain a pacifist after working for the missile division of General Dynamics for five years?²⁶

A second difficulty with this argument relates back to the incentive structures for the market's most assimilated and successful participants.²⁷ Persons at the top of corporate hierarchies presumably take fewer direct orders from others, but their profits will often be connected with the economic successes of their ventures. If fighting is bad for business, the manager who refrains from fighting will not have the lower-level employee's rationalization that some direct superior compelled her to act in that way. Persons with a direct stake in the residual income of firms are probably the most likely to embrace personally whatever values contribute to profitability because the external pressures operating upon them are rather distant and abstract.²⁸

24. *Id.* at 209-10.

25. See Roger A. Elkin & Michael R. Leippe, *Physiological Arousal, Dissonance, and Attitude Change: Evidence for a Dissonance-Arousal Link and a "Don't Remind Me" Effect*, 51 *J. PERSONALITY & SOC. PSYCH.* 55 (1986) (discussing an experiment which showed that the writing of a counterattitudinal essay has been found to change attitudes).

26. This would be especially true if the job called upon the worker to publicly justify the activities of the firm on a frequent basis.

27. See *supra* notes 13-16 and accompanying text.

28. Of course, one could say that corporate managers are continuously taking orders from consumers. However true as a matter of economics, such orders seem to be different psychologically from orders received directly from a hierarchical superior. It would seem to be much harder to explain one's acquiescence in consumers' orders as a product of external pressure. See *supra* notes 20-26 and accompanying text (discussing power of external influences).

An additional mechanism of attitudinal change is the cost of feigning attitudes, or of consistently behaving in a manner incompatible with one's attitudes. The easiest way to stay out of fights is not to want to fight; it is psychologically costly to constantly check one's urge to engage in fighting. In a sense, this brings one back to economic theory proper, which predicts changes in *behavior* from changes in relative prices.²⁹ Changing one's attitude is presumably a mental process with a corresponding physical component to it; it is a form of behavior. If employers only cared about the absence of fighting behavior and if feigning a no-fighting attitude was costless, the incentive would be to retain one's attitude but drop the behavior. However, if feigning behavior was costly and occasionally ineffective, the high price put on fighting should, on the margin, encourage people to engage in taste-changing behavior.

Another mechanism of attitude change is the simple imitation of the conduct of others, whether those others are perceived as higher in status or not. Studies confirm that most people have a strong desire to conform, and are likely to entertain approving attitudes toward the normal behavior of those they observe.³⁰ If fighting behavior becomes less common (by virtue of the standard economic tendency of high prices to discourage the priced behaviors), it will come to seem less normal and therefore less acceptable to those whose values are shaped by instincts of social conformity.³¹

3. Cultural Mechanisms

Even if one of these mechanisms is ineffective for a given individual—major attitude change of any kind is apparently not very frequent in adults³²—other mechanisms could operate on the culture as a whole. For example, one goal of child-rearing is to discourage a child from developing those tastes that will prove prohibitively costly to satisfy in the future. This involves more than refraining from “spoiling” a child with an extravagant lifestyle; it

29. See LEVI, *supra* note 11, at 7-8 (describing how changes in the price of cars will alter consumer demand for those cars).

30. JOHN LAMBERTH, *SOCIAL PSYCHOLOGY* 11-13, 268-78 (1980).

31. See *id.* at 268-69 (“Conformity is an incredibly common occurrence People do conform, even though they might have to go to extremes to do it.”).

32. See MARY JOHN SMITH, *PERSUASION AND HUMAN ACTION* 16 (1982) (“In general, over 30 years of research confirms that the major persuasive effect of mass media advertising and programming is not the alteration, but the creation of new and the reaffirmation of existing attitudes, norms, and values.”) (citations omitted).

also includes teaching those values, such as hard work and respectful manners, that will make one's life infinitely easier if they come naturally than if they have to be feigned or maintained grudgingly. Accordingly, if institutions systematically make particular tastes more costly, one would expect that children would increasingly be taught not to cultivate such tastes in the first place, so that they would not need to undergo difficult attitude changes later in life.

4. Summary

In any event, for the remainder of the Article the conclusion of this section will be assumed: institutions which raise the price of a particular behavior, and especially institutions which impose a particularly high cost for that behavior on the most imitated and envied segments of society, will tend to discourage not only that behavior but also the tastes which produce that behavior. Over time, the values of the members of a society will change in the direction of values rewarded by the prevailing institutions.

C. *The Internal Criticism Problem*

Before proceeding to show how market institutions support specific values, an important obstacle to the demonstration must be explored. For reasons explained below, I will call this obstacle the "Internal Criticism Problem."³³

Institutions frequently subject themselves to criticism from within.³⁴ The values that permeate a particular institution are likely to manifest themselves not only in the operation of the institution but also in the aspirations which that institution holds for future changes. Military officials frequently criticize their units for insubordination and sloppy behavior.³⁵ College faculties criticize their internal governance structures for maintaining insufficiently democratic and participatory processes.³⁶ Corporate executives and business schools criticize the serious inefficiencies of contemporary corporations.³⁷

33. See *infra* notes 34-37 and accompanying text.

34. See *infra* notes 35-37 and accompanying text.

35. See, e.g., Michael Hill, *Integration of New South African Army Jeopardized*, THE BALTIMORE SUN, Oct. 13, 1994, at 6A (discussing criticism of certain soldiers by officers for lacking discipline).

36. See, e.g., Sarah Suiter, *Jobs are Job #1 for Zeiss*, BUS. J.-CHARLOTTE, Aug. 22, 1994, at 3 (describing faculty complaints about effective and popular college president's top-down management style, disregard of their opinions, and insensitive remarks).

37. See, e.g., Tom Redburn & James Flanigan, *The Remanufacturing of America: U.S.*

The Internal Criticism Problem is the tendency to assume an institution is in fact defective vis-à-vis other institutions along the lines that its own internal criticism suggests. One might conclude the following: that corporations are strikingly inefficient institutions; that military units are exceptionally disobedient; and that college faculties are quite obedient and efficient. The fallacy in these examples is evident, mistaking the internal criticism of an institution already under the heavy sway of the values animating that criticism for an external appraisal of that institution.

Similarly, market societies, it will be argued, develop certain tastes, including a taste for racial and religious tolerance and for privacy of thought and action.³⁸ One result of these tastes would be an endless torrent of internal criticism from those inside market societies that the societies are insufficiently tolerant and respectful of privacy. A critic who was unaware of the Internal Criticism Problem and who did not engage in extensive comparative analysis might conclude that market societies must be worse along these dimensions than non-market societies, where such criticism is less apparent.³⁹

Specifically, one needs to look at contemporary societies that have substantially undermined free market systems, such as North Korea, Cuba, Iraq, and Syria, or at past anti-market societies such as Maoist China and the former Soviet Union. How well did different ethnic groups get along in these societies?⁴⁰ How effectively could women compete with men for substantial positions in the

Firms Regain Competitive Edge, L.A. TIMES, Aug. 2, 1987, at 1, 23 (“[Many analysts] are not yet convinced that most U.S. business leaders have discarded the inefficient ways of the past and embraced the principles of flexible manufacturing.”).

38. See *infra* notes 75-241 and accompanying text.

39. Indeed, the theory might alter the extent of these vices that one observes, as it is widely agreed that observations are themselves often theory-laden. In KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 173-74 (2d ed. 1965) Popper stated:

[T]here is no pure appearance or pure observation: what Berkeley had in mind when he spoke of these things was always the result of interpretation, and . . . it had therefore a theoretical or hypothetical admixture New theories, moreover, may lead to re-interpretation of old appearances, and in this way change the world of appearances.

40. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 79 (1991) (“The basic difficulty is that, by and large, non-Western cultures have no developed tradition of racial equality. Not only do they violate equality in practice, but the very principle is alien to them, regarded by many with suspicion and contempt.”).

society?⁴¹ Were the freedoms of belief and expression admired and respected?⁴² How tolerant are such societies of homosexuality and other practices perceived as deviant?⁴³ It is only by comparing these societies to market societies that we can determine whether the market does do better along these dimensions.

D. Values Encouraged by the Market

Given that market institutions can change our tastes and values, and mindful of the Internal Criticism Problem, the next question is which values the market will encourage. The values that the market will encourage might broadly be called "transactional virtues" in that they will tend to serve a person well in the bulk of the exchange transactions in which she engages. These values will be encouraged, not only because market actors have to engage in many transactions, but because the most fully assimilated members of the market society generally will be those who have engaged in those transactions with greatest frequency and success. The markets will encourage constitutional values such as racial and religious tolerance, freedom of speech, and nonhegemonic human relations only if those values can be shown to be transactional virtues in this sense. Part II of the Article is devoted to demonstrating this connection.⁴⁴

41. See MICHAEL LEVIN, *FEMINISM AND FREEDOM* 91 (1987) (noting the token character of female appointments to political positions in the former Communist regimes).

42. See ROY A. MEDVEDEV, *ON SOCIALIST DEMOCRACY* 172-96 (1975) (discussing the attitudes of Soviet censors).

43. See D'SOUZA, *supra* note 40, at 80:

It is perhaps pointless even to bring up the issue of non-Western attitudes toward homosexuality or other "alternative lifestyles," which in various societies are enough to warrant segregation, imprisonment, even capital punishment. In Cuba, homosexuals are often thrown in jail and in China, they are sometimes subjected to shock treatment which is credited with a high "cure rate."

44. Before showing the linkage between these values and market institutions, however, I wish to acknowledge certain limitations on the scope of this project. While this Article will seek to present some empirical evidence showing the correlations between the market and certain values, the empirical task is so vast that these observations are only suggestive. My goal is merely to present a plausible link between market institutions and certain value systems.

II. MARKETS AND SPECIFIC CONSTITUTIONAL VALUES

A. *Free Expression*

The First Amendment values of freedom of speech and of the press serve many functions.⁴⁵ They effectuate individual self-expression, check governmental abuse, and assist in the process of democratic self-government.⁴⁶ However, one of the traditional values of freedom of speech has been its alleged role in promoting the search for truth, often captured by the metaphor of an open "marketplace of ideas."⁴⁷

It is possible—indeed, it seems likely—that there is a relationship between market institutions and our tastes for autonomous self-expression and freedom from political tyranny.⁴⁸ In this section, however, I would like to concentrate on the more subtle link between market institutions and the pursuit of truth.⁴⁹ Ultimately, the truth value may be the most important, since truth is the most common justification for censorship.⁵⁰ By showing how free expression serves truth better than censorship, we avoid the need to identify some value sufficiently weighty to categorically outweigh truth in all circumstances. The question is why market institutions cause us to place such a high value on truth, and why they cause

45. See *infra* notes 46-47 and accompanying text.

46. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 23 (1982) (addressing the functions served by freedom of speech and of the press). See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (discussing the relationship between free speech and self-government); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978) (discussing the relationship between free speech and autonomy); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521 (discussing the relationship between free speech and checks on governmental abuse).

47. This phrase is generally traced to Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (commenting that since "time has upset many fighting faiths" we should learn that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

48. An instinctive sense of this relationship may have deterred market reforms in the Soviet Union. See ROBERT G. KAISER, *RUSSIA: THE PEOPLE & THE POWER* 386 (1976) ("The Soviet leaders may feel that fundamental economic reform would have unwelcome political consequences.").

49. See *infra* notes 50-76 and accompanying text.

50. See, e.g., *Points & Puntis*, *THE PRINCETON TORY*, Oct. 1987, at 32 (discussing Sandinista leader Nelba Blandon, who stated that "[La Prensa] accused us of suppressing freedom of expression. This was a lie and we could not let them publish it.").

us to downplay the harms that will result if error is allowed to compete freely with truth in the marketplace of ideas.⁵¹

In exploring markets and the value of truth, a conceptual problem must be considered at the outset. It might be argued that there is no single thing called "Truth," but rather a variety of different truths pertaining to specific questions. Therefore, there is no common denominator along which one can compare market and nonmarket societies.⁵² Arguably, market societies place a high value on certain truths, such as how best to forecast trends in the stock market, while nonmarket societies place a high value on other truths, such as how best to promote social equity or to advance oneself in a state bureaucracy.

The objection that societies seek their own truths seems overdrawn, however, because of the large number of concerns common to both types of societies. In particular, the core technological and economic problems of finding ways to use scarce resources to advance human welfare are likely to be pertinent to any developed society.⁵³ For this reason, it does not seem conceptually incoherent to inquire into the passion with which different societies are likely to treat the quest for truth in answering these common questions.

Market societies are likely to place a considerable premium on the pursuit of truthful conclusions about the potential of resources. Individuals and firms who can recognize defects in the received or customary wisdom of their community can derive personal profit from their skepticism and independent rational inquiry.⁵⁴ There are two mechanisms of change: one operating at the individual level and the other at the systemic level.⁵⁵ At the individual level, each market actor has an incentive to learn new truths about the potential use of resources that competitors have failed to perceive.⁵⁶ At

51. See *Red Lion Broadcasting Co. v. Federal Comm. Comm'n*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail").

52. See Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1349 (1983) (suggesting that inquiries into which system promotes "Truth" are meaningless because there is no one thing called "Truth").

53. See RICHARD G. LIPSEY ET AL., *ECONOMICS 6-8* (7th ed. 1984) (discussing scarcity and choice in the context of production possibilities).

54. See Christopher T. Wonnell, *Contract Law and the Austrian School of Economics*, 54 *FORDHAM L. REV.* 507, 518-23 (1986) (explaining how markets provide incentives to acquire new knowledge pertinent to resource use).

55. See *infra* notes 56-57 and accompanying text.

56. See generally LIPSEY ET AL., *supra* note 53, at 206-09 (discussing invention and innovation in the context of productivity).

the systemic level, those market actors who do learn such truths will expand and obtain a disproportionately large influence upon the social environment from which constitutional values grow.⁵⁷

Of course, a nonmarket society could choose to reward entrepreneurial insight, but it has often been the case that such societies choose instead to create an atmosphere in which too much free thinking is actively discouraged.⁵⁸ Seeking the truth may be regarded as a desirable goal in the abstract, but most important truths are likely to disrupt established habits, practices, and routines in many painful or inconvenient ways. Without a powerful systemwide profit-and-loss incentive structure for rewarding those who break with traditional understandings, people who seek the truth too aggressively are likely to be regarded as trouble-makers.⁵⁹

The value of truth alone, however, is not enough to explain a market society's attitude toward the institution of free expression and the marketplace of ideas. To the contrary, it might be thought that truth is so important that error must be suppressed by censorship techniques. What needs to be explained is not simply the respect that market societies show for truth, but the tolerance they are inclined to show toward error.

Of course, any real censorship regime is likely to block many true ideas from being fully developed and aired. Like all cultural phenomena, truths are the product of a rather unpredictable process of people building upon the previous efforts of others. Thus, even a social planner who is determined to promote what appear to be the most promising ideas will make many mistakes.⁶⁰ Perhaps, then, one could reach a conclusion that many errors must be tolerated if the marketplace of ideas is to arrive at the truth. Thus, the market society's respect for truth alone is enough to explain its hostility to censorship.

In fact, however, it appears to take more than a respect for truth to produce a principled defense of free speech. The same

57. See ROBERT J. HEILBRONNER & JAMES K. GALBRAITH, *THE ECONOMIC PROBLEM* 588-90 (rev. 8th ed. 1987) (discussing the power and social responsibility of large businesses).

58. See KAISER, *supra* note 48, at 331 ("[In Russia,] sticking by the old products and production methods is the safe, easy way to get along. Innovation invites problems.").

59. See *id.* at 330-32 (emphasizing that following old production methods is the best way to avoid trouble).

60. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 33 (1960) (describing how developments flow from the process of adapting the tools or thoughts of others).

marketplace of ideas that accelerates the discovery of truth is also likely to accelerate other social processes, including the perfection of believable myths of various kinds. The marketplace of ideas will not only be cluttered with falsities; it will lead to the progressive increase in the seductive power of those falsities, as various authors who share common wishful thoughts work to remove the most obvious problems with their theories.⁶¹ Something more is needed to explain why a market society which reveres truth confidently embraces a system that is capable of making falsity look so inviting.

The primary factor in accounting for the spirit of tolerance is the difference between the informational incentive structures of private and collective decision making.⁶² It is a fundamental tenet of public choice theory that collective actors have a rational incentive to be strikingly uninformed.⁶³ The likelihood that the collective decision will be different if any one person undertakes the effort to become better informed is slight, while the benefits of a wise collective decision (or the costs of an unwise one) are largely externalized to persons other than the individual deciding whether to become well informed.⁶⁴ Private action, by contrast, involves more of a one to one correspondence between individual action and final choice; costs are largely internalized (if market entitlements are sensibly defined) to the actor deciding whether to become informed.⁶⁵

The dynamics of private markets greatly reduce the harm that can be done by belief in some seductive falsehood. For example, in a private market economy, it does not matter whether ninety percent of the population believes that the best way to turn iron ore into steel involves consulting an astrological chart. As long as the proper techniques for doing so are available in the marketplace of ideas, the decision makers, with their fortunes on the line, will

61. Wishful thinking has strong psychological roots. See SMITH, *supra* note 32, at 30 (1982) (stating that an individual's cognitive schemata often "reflect an idealized view of how things ought to relate" rather than a faithful interpretation of reality).

62. See *infra* notes 63-70 and accompanying text.

63. See George J. Stigler, *The Theory of Economic Regulation*, 1971 BELL J. ECON. & MGMT. SCI. 3, 11 (1971) (explaining that it is rational for voters to remain uninformed on issues which have little or no direct effect on them personally).

64. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 38-39 (1962) (discussing why an individual voter may rationally choose to stay uninformed).

65. *Id.*

seek out that information and ignore the teachings of the astrologers and alchemists.

In a society where important decisions about resource use are made collectively by actors with little incentive to fight their way through attractive falsehoods, however, it becomes much more important to assure that the marketplace of ideas is not allowed to create and disseminate those falsehoods. In particular, people have a frightful tendency to deny that some "X" which they favor on other grounds is an obstacle to some "Y" which they also favor.⁶⁶ Although tradeoffs between genuine goods are widespread, people would much prefer to believe in the truth of the proposition that "X is a cause of Y."⁶⁷ (Keynesian and supply-side promises that higher spending and lower taxes will only stimulate and not squeeze out private investment are good examples of this phenomenon).⁶⁸ Private actors have a personal incentive to penetrate through attractive myths and face painful tradeoffs; collective actors are a much easier mark for the wishful thinkers in the marketplace of ideas.

I do not mean to imply that censorship (or government propaganda) would necessarily be desirable in a heavily collectivized society. Censorship may be motivated not by a desire to keep the populace from embracing seductive myths but rather to alter the nature of the myths in which they believe. It might even be motivated by a desire to keep the truth away from the public, especially if that truth concerned misdeeds by public officials.⁶⁹ Apart from motivation, the clumsiness of government planning might suggest that a censorship regime which tried to "fine-tune" the

66. See THOMAS SOWELL, KNOWLEDGE AND DECISIONS 150-53 (1980) [hereinafter SOWELL, KNOWLEDGE AND DECISIONS] (investigating the impact of institutional incentives on social rationality).

67. See *id.* at 150-52 (discussing political proclivity to deny inherent tradeoffs between goods).

68. According to Keynesian theory, investment spending could be stimulated only by general prosperity, so that government deficits, far from crowding out private investment, would coax consumers into investing rather than hoarding their savings. See HEILBRONNER & GALBRAITH, *supra* note 57, at 296-302 (discussing the use of deficits as a tool for growth). The supply side theory claimed that lower taxes would generate so much more productive effort that the deficit would actually be smaller, as the lower tax rate would be applied to a larger tax base. See LIPSEY ET AL., *supra* note 53, at 600-04 (examining the paradox of thrift and the fiscal policies pursued by various administrations since 1968).

69. See Blasi, *supra* note 46, at 527 (explaining the importance of this motivation for Constitutional theory).

marketplace of ideas by excluding seductive falsehoods would do more harm than good.⁷⁰ However, the important point is that there would be much more on the pro-censorship side of the balance in a heavily collectivized society, making the most assimilated members of such a society nervous about constitutionalizing any free speech counterprinciple.

Empirically, there has indeed been a close correlation between market institutions and political liberties such as freedom of speech and democracy.⁷¹ In the developed world, we are familiar with the centrally-planned regimes and their extensive systems of censorship. Charles Lindblom's study showed a high correlation between market economies and traditional political freedoms.⁷² A broader empirical perspective has recently been offered by Abbas Pourgerami in *Development and Democracy in the Third World*.⁷³ Professor Pourgerami evaluated statistical associations among social, economic, and political performance variables in 104 Third World countries.⁷⁴ He found a statistically significant correlation between market orientation and political liberty.⁷⁵ For example, seventeen of nineteen centrally-planned, Third World economies had politically repressive regimes denying basic human rights.⁷⁶ The correlation between market institutions and toleration of free speech has indeed been quite strong as an empirical as well as a theoretical manner.

B. Sanctity of Private Conscience

In addition to protecting freedom of speech, the First Amendment to the Constitution protects the free exercise of religion and

70. R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 354, 384-85 (1974) (drawing analogies between planning in the market for goods and planning in the market for ideas); see also Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 10-11 (1964) (discussing unpredictable effects when governments attempt to infringe upon personal liberties).

71. See *infra* notes 72-76 and accompanying text.

72. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 162 (1977) ("The polyarchies are not only without exception market systems but specifically are private enterprise systems.").

73. ABBAS POURGERAMI, *DEVELOPMENT AND DEMOCRACY IN THE THIRD WORLD* (1991).

74. *Id.* at xiii.

75. *Id.* at 79. As Pourgerami explains, "[t]he political indicators are indices of democracy, freedom, humans [sic] rights, and liberty as developed and analyzed in previous chapters. The MOEs [Market Oriented Economies] record the highest mean values of political development with respect to all four indicators." *Id.* at 91.

76. *Id.* at 78-79.

precludes Congress from establishing a religion.⁷⁷ Together these prohibitions seem to point to the principle that religion is a matter of private conscience and that the state should not be in the business of promoting a particular religion or preventing people from believing in it.⁷⁸

Of course, civil society requires that there be limits on the extent to which people can *act* for reasons of religious conscience.⁷⁹ For example, the state cannot tolerate the murder of other human beings on the purported command of a particular religious teaching. However, actions do receive a certain amount of constitutional protection: for example, the Supreme Court recently held that the state could not target the religious practice of animal sacrifice for prohibition.⁸⁰

Similarly, constitutional protection often has been extended under the banner of privacy to actions that are objectionable, if at all, primarily because of the teachings of particular religions.⁸¹ This includes the use of contraceptives⁸² and, for a minority of the Court, the practice of homosexuality between consenting adults.⁸³ More controversially, constitutional protection has been

77. U.S. CONST. amend. I.

78. See GERALD GUNTHER, CONSTITUTIONAL LAW 1463 (11th ed. 1985):

Some commentators have suggested that the two religion clauses can be harmonized by recognizing that "establishment" and "free exercise" serve a single value—protecting the individual's freedom of religious belief and practices, with "free exercise" barring the curbing of that freedom through penalties and "establishment" barring inhibitions on individual choice that arise from governmental aids and rewards to religion.

79. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use).

80. *Church of Lukumi Babalu Aye v. Hialeah*, 113 S. Ct. 2217 (1993). This is not to say, however, that religious institutions would enjoy an immunity against general legislation designed to prevent cruelty to animals. *Id.* at 2226-28.

81. See *infra* notes 82-84 and accompanying text.

82. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

83. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute does not violate any fundamental rights of homosexuals). Professor Van Alstyne asks the following question:

If "sodomy" is criminalized "because it is an abomination in the sight of God" (according to the tenets of the religion dominantly of influence with the particular legislature criminalizing it), does not its criminalization thereby enact the compulsory observance of the religious tenets of the dominant faith? Is this not to establish a religion (i.e., its tenets) under secular auspices, enacting a theo-

extended to abortion, where the secular argument for the protection of young life is mixed with religious views about the existence of the soul at the moment of conception.⁸⁴

It is this complex of values, which I have called the sanctity of private conscience, that I would like to explore. How is it that making religious belief and practice a private rather than a state matter has come to seem natural to us? In particular, is there a relationship between the institutions of a private market and our tendency to embrace this value of private religious conscience?⁸⁵

Some empirical support for the idea that markets and religious freedom are correlated derives from the nineteenth century, which of course was the peak period of market economics. The historian Theodore Hamerow has written:

Until the nineteenth century, it was still taken for granted that those who did not share the religious convictions of the majority could not share its civic aspirations. Only after 1815 did Catholics in Protestant countries, Protestants in Catholic countries, and Jews begin to achieve legal equality. In France, to be sure, Jewish emancipation had been introduced as early as 1781, but elsewhere it came much later: 1814 in the Netherlands, 1830 in Belgium, 1845 in Norway, 1848 in Sweden, 1849 in Denmark, 1858 in England, 1864 in Portugal, 1867 in Austria and Hungary, 1868 in Spain, 1869 in the North German Confederation, 1870 in Italy, and 1874 in Switzerland.⁸⁶

In exploring whether markets cause individuals to conceive of religion as a private affair, it is helpful to focus upon the essential strangeness, from the perspective of a religious believer, of the theory that religion is a matter of private conscience.⁸⁷ Suppose that one has come to the firm conclusion that God has spoken to

racy on the installment plan?

WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 873 n.45 (1991).

84. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that Texas' criminal abortion statutes that prohibit abortion except to save the life of the mother are unconstitutional).

85. See Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 175-91 (1993) (exploring this very question).

86. THEODORE S. HAMEROW, *THE BIRTH OF A NEW EUROPE* 418 (1983).

87. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion As A Hobby*, 1987 DUKE L.J. 977, 978 (1987) (suggesting that liberalism prefers secular to religious method, regarding religious belief as analagous to a private hobby).

the world, that He prohibits certain actions and demands others, and that He will save those who acknowledge Him and follow His Commandments, while damning those who scorn His teaching.

The temptation for such a believer to use the weapons of the state to inculcate this religious teaching would surely be very strong. Indeed, it might be thought to be the height of selfishness to leave one's fellow man free to walk into Hell when one is privy to the teaching that will prevent this.⁸⁸ Moreover, the religion itself might prohibit such a posture of selfishness and demand that one do what one can to save others.⁸⁹ Of course, a religion could take the view that no one can be saved at the point of a gun. Still, one might at least want to enlist the state to put enough resources into the true religion to ensure that everyone had a thorough understanding of its tenets, so that he or she could make an informed choice about whether to accept it.

Since the belief that religion is a private matter does not seem to come about as a logical extension of an actual religious belief, from where does it come? Once again, it is suggested that the institution of a market economy, and the values it forms over years and generations, make this seem to be a much more natural view than logic itself would indicate.

An important dynamic is the incentive which markets provide for all people, regardless of their religious beliefs, to evolve a certain kind of *public* persona.⁹⁰ If my religion teaches me to wage Holy War against infidels, or to be honest only with members of the true faith, I am likely to have a very difficult time finding firms of any size to voluntarily hire and retain me. Of course, one might say that a true believer should accept this fate and remain unemployed, but few people are saints who can entirely resist secular counterincentives. Giving up one's religion may be too high a price to pay for secular success, but moving that religion to a "private" part of one's self (indeed, creating the very idea of a private part of one's self) may be a much more reasonable price.

88. See generally LIBERALISM AND THE GOOD (R. Bruce Douglass et. al. eds., 1990) (discussing, inter alia, whether liberalism can be reconciled with substantive visions of the good).

89. See, e.g., *Matthew* 9:35 to 10:15 (charging the apostles to spread the word of Christ).

90. See Heriot, *supra* note 85., at 185-88 (arguing that private property and liberalism discourage the use of private beliefs and tastes as proxies for quality of goods and services because such use invades private spaces and disrupts the social fabric).

As with different races,⁹¹ it may be that people from different religions, when tossed together into the market system, begin with quite different personal characters. Stereotypes about Jews, Muslims, Catholics, Atheists, and Protestants, when those groups have evolved in radically different environments, may have a certain amount of factual basis, at least at the level of rough correlations.⁹² If these stereotypes impact upon productivity, the markets will ruthlessly make the necessary religious discriminations.⁹³

However, over time one will observe these real distinctions diminishing, as each group responds to the pressure to evolve the generic market persona.⁹⁴ This assumes, of course, that the markets are permitted to operate, and that there is no attempt to force associations against the wishes of one party.⁹⁵ As certain members of each group assimilate, it will become more costly to engage in proxy discrimination, i.e., assuming that people of a particular religion will exhibit certain productivity-related traits.⁹⁶

Indeed, one will come to know, respect, and economically count on people of many religious persuasions. One will also come to know, respect, and economically count on people who in private pursue practices one believes to be religiously forbidden, such as homosexual relations. Of course, it is possible for one to have great respect and need for a person in one's public life and secretly entertain a hatred for her and a conviction that she is headed for eternal damnation, but the dissonance is evident.

91. See *infra* notes 171-83 and accompanying text (developing this idea more fully).

92. See THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE* 156-59 (1983) [hereinafter SOWELL, *ECONOMICS AND POLITICS*] (arguing that certain cultural characteristics persist despite effects of assimilation).

93. See *infra* notes 175-83 and accompanying text (discussing similar discrimination in the racial context).

94. See SOWELL, *ECONOMICS AND POLITICS*, *supra* note 92, at 157 ("With the passing of sufficient numbers of generations, substantial assimilation has nevertheless proceeded, even among the overseas Chinese in Asia and the Jews in Europe.").

95. Forced associations could delay the assimilation process, as people come to realize that they could obtain their desired economic positions by force rather than by pleasing other transacting parties.

96. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1641 (1991) (noting that if the assumptions upon which the discrimination is based are false, then employers will abandon the assumptions). This is especially true if market actors are protected against huge consequences from failing to look at these proxy variables, as they are when relationships are at will. See Heriot, *supra* note 85, at 191-203 (noting that employment at will allows employers to hire based on "gut reaction" rather than looking into employees' personal preferences and opinions because they know that if the employees do not work out they can be fired).

That dissonance is made more severe by the pressures on market actors not to *display* their hatreds. As discussed below, intolerant managers and employees, unless they can somehow hold together a cartel, eventually will be forced to pay for the effects on owners of that intolerance from their own pockets.⁹⁷ The money-making strategy of management is to treat religious convictions and sacrilegious practices that do not interfere with productivity as personal idiosyncracies that should not lead to any disrespect. One can, of course, feign respect all day long and go home and vent one's hatred, but a less taxing way of coping with the dissonance might simply be to embrace religious tolerance as a personal value.⁹⁸

An additional dynamic concerns the myth-breaking tendencies of markets noted in the earlier discussion of free expression.⁹⁹ Market actors have a demand for truth, and thus a demand for valid methods of accessing truth, in their competitive endeavors. Traditional religious methods of obtaining knowledge such as faith, revelation, and authority are unlikely to be actively relied upon by persons whose financial future depends upon their knowing the factual world better than competitors do. Again, this pressure may not result in market actors giving up their religious faiths, especially given the many important functions that those faiths serve for them.¹⁰⁰ However, it is likely to create a view that religious teaching is appropriate for the private sphere and that secular methods of obtaining knowledge should be used in the public sphere.

Over time, markets oversee the creation and deepening of the public-private distinction. As people's religious beliefs and practices (or lack of religious belief and sacrilegious practices) become less probative indicators of productivity, they come to be seen as "private" matters. It also becomes regarded as bad business, and ultimately as bad taste, to take an aggressive interest in the private behavior of others. Moreover, the public sphere becomes a sphere of secular methods, even if one is in the business of producing religious materials. Market actors simply lose the habit of carrying

97. See *infra* notes 164-70 and accompanying text.

98. See *supra* notes 18-31 and accompanying text (discussing dissonance and resulting change in values).

99. See *supra* notes 62-70 and accompanying text.

100. These functions would include providing consolation to people about their own death or suffering and that of their loved ones, as well as the social function of encouraging people to behave decently toward each other.

out religious teaching in the manner that a consistent and logical application of doctrine might indicate would be warranted.¹⁰¹

An interesting feature of this dynamic is that market societies rarely offer an explanation of religion's role that is in keeping with the actual effect of markets upon religion. Markets privatize religion; they do not eliminate it (or at least they do not eliminate it nearly as rapidly as they privatize it). As a result, the ideologies of market societies must continue to appeal to people who accept, at one level of their being, the teachings of religion. The idea that religion might be a functional myth that promotes personal welfare but that it is still a myth which must not be permitted to interfere with public matters is hardly an ideology likely to appeal to the religious believer. It is extremely unlikely to appear in Supreme Court opinions discussing the role of the religion clauses of the Constitution; indeed, it might reasonably be thought that for judges to invoke such premises in an argument would itself violate the religion clauses.

Instead, market societies have evolved the idea of the priority of the Right over the Good; i.e., that the resources of the community are to be distributed so as to give each person a fair chance to pursue his or her own vision, and that the fair entitlements of others constrain what any one person can properly do to promote the good or pious society.¹⁰² The skeptic can buy into the liberal compromise for the kinds of utilitarian reasons given above. Whether a religious believer should logically be willing to place the Good in a subordinate position to the Right has often been doubted.¹⁰³ As a factual matter, however, many religious believers in market societies do indeed seem to be willing to embrace such a

101. One counter-tendency should be noted here. In many circumstances, religion has served as a conservative force, preaching traditional restraints upon activism that might upset an established social order. This tendency was strong in the 19th century, and was largely responsible for the upper classes retaining at least a surface devotion to religious teaching. See HAMEROW, *supra* note 86, at 255 (noting that belief in the church reinforced a distrust in the proletariat in Europe). On the other hand, the general secularization of the masses under the market economy was probably accelerated by such religious conservatism. European Church attendance "diminished steadily as industrialization began to nurture new attitudes and beliefs among the urban proletariat." *Id.* Indeed, it appeared to one historian that over the course of that century, "a society that was essentially indifferent to religion began to emerge in Europe." *Id.*

102. See JOHN RAWLS, *A THEORY OF JUSTICE* 446-52 (1971) (contrasting the concepts of the Right and the Good).

103. See Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 767-70 (1993) (discussing how religious beliefs affect policy decisions).

view, or at least to live peacefully within a society that embraces it. Whether logical or not, such a view appears to fit quite well with the incentives of market actors.

C. *Nonhegemonic Personal Relations*

1. Introduction

A constitutional value with many apparent faces is the distaste for "hegemonic personal relations." By this phrase, I mean relationships in which one person can, at her discretion, choose to impose great harm upon another, with the result that the other must act with great deference toward the party empowered to impose that targeted harm. The most direct manifestation of the taste for nonhegemonic human relations is probably the Thirteenth Amendment to the Constitution, outlawing slavery and involuntary servitude, except as punishment for crimes.¹⁰⁴ This Amendment has been held to prohibit certain practices even if maintained without benefit of state action.¹⁰⁵

The taste for nonhegemonic human relations also appears in numerous constitutional provisions designed to protect the individual citizen against the targeted actions of state officials. The prohibition on bills of attainder is a clear example.¹⁰⁶ While takings of property and impairments of contract rights theoretically could take the form of broad and general legislative language, the courts have shown special solicitude when the statutes appeared to have a targeted focus against one individual or narrow group.¹⁰⁷ Distrust of state actions against individuals is also manifest in the protections accorded the criminal accused, many of which are de-

104. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.").

105. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (holding that Congress has authority from the enabling clause to enforce the Thirteenth Amendment by "appropriate legislation" including the power to eliminate all racial barriers to the acquisition of property).

106. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

107. See *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) (stating that in assessing the fairness of a zoning ordinance the court will look to whether the burden is placed on property owners as a whole or on one individual); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (holding that a state-mandated pension funding change violated the contract clause of the Constitution).

signed to ensure that objective evidence supports the state administrator's assertion of criminal guilt.¹⁰⁸ Similar values appear to be behind procedural due process rights such as the right to a hearing before important interests are administratively terminated.¹⁰⁹

2. Market Protection From Oppression: Theoretical Correlations

a. Markets and Individualized Harmings

The question, once again, is where the values implicit in the Constitution come from, and more specifically, whether market institutions work to create an environment which makes those values appear natural and reasonable. It is important to investigate the source of the value of avoiding individualized harm because there is a sense in which the value is quite illogical. In a world of economic scarcity, whatever one individual consumes is necessarily removed from the grasp of another individual. The idea that one individual should rarely be placed in a position to harm another individual seems rather illogical in that setting.

There are, of course, numerous harmings that occur in market activity. Each consumer harms other consumers by buying the product and thus bidding up the price. Similarly, each producer harms competing producers by purchasing inputs and bidding up their price, and by supplying outputs and bidding down their price. The most notable feature of these harms, however, is the relative scarcity of *human relations* attached to the harms.¹¹⁰ The consumers who harm each other with their purchases are not tied together in ongoing human relations; the effects are indirect and remote.

To a lesser extent, business firms also are cut off from ongoing personal relations with competitors; their ongoing relations are more likely to be with creditors, customers, employees, and others in contractual privity with them. The common law refusal to enforce direct restraints of trade between competitors, and the anti-

108. See U.S. CONST. amend. V & VI.

109. See *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) (holding that due process rights require a hearing before termination of welfare benefits).

110. See Christopher T. Wonnell, *The Primacy of Cooperation, Rational Bargaining, and an Economic Theory of Part of the Common Law*, 15 HARV. J.L. & PUB. POL'Y 771, 777-78 (1992) (commenting that a contract benefits the parties but harms the competitors of those parties).

trust prohibitions against collusive behavior, further weaken the human ties between competitors.¹¹¹

It is true that certain market settings can create distasteful human relations among competitors. For example, within a firm, people who compete for promotions must work together on an ongoing basis until the promotion decision is made; this can create bitterness and dysfunctional strategic behavior. In an oligopolistic industry, firms may target each other with predatory actions and industrial espionage.¹¹² Although not really a market phenomenon (since market entitlements against force are not being respected), the violence of union members against "scab" replacements is another example of personalized oppression of one competitor by another.¹¹³

In general, however, the striking thing about market harmings is how divorced they are from ongoing, hostile human relationships. If the number of firms is large enough, there may not even be much dislike of any one competitor by any other. Individual consumers rarely hate each other for bidding up prices; individual farmers rarely hate each other for bidding down prices. In more concentrated industries, the dislike of individual competitors is more evident, but the market provides few tools for actually interacting with those competitors. Daily life in a concentrated industry may be spent thinking about and metaphorically warring with competitors; unlike real war, however, one is generally not engaged in continuing physical interactions with the persons with whom one competes.

b. The Employment Relationship

There are, of course, numerous market interactions with persons whose interests conflict with one's own. Some of these relations, such as employer and employee, take the form of rather hierarchical relations of command and obedience. There is no ten-

111. See generally *Karlin v. Weinberg*, 390 A.2d 1161 (N.J. 1978) (discussing the common law tradition in employment contracts).

112. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 373-84 (1985) (analyzing the rationality of predatory conduct against competitors).

113. See generally Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 GEO. L.J. 39 (1992) [hereinafter Wonnell, *The Influential Myth*] (concluding that such anti-competitive behavior is individually rational for the actors involved, but not collectively rational for the working class as a whole).

dency for markets to minimize the amount of hierarchy in this sense because such hierarchy often produces a surplus in the form of additional product that can inure to the benefit of both transacting parties.¹¹⁴

What the market does tend to minimize is the degree of gratuitous oppression that often accompanies hierarchical relationships.¹¹⁵ Petty slights and power plays greatly decrease the subjective utility of the relationship to the victimized party; to secure her voluntary consent, it would be necessary to offer additional compensation to endure such behavior.¹¹⁶ A certain amount of unpleasantness is, of course, inherent in hierarchy, so the maintenance of hierarchy itself would constitute gratuitous oppression in any case where the physical product was *not* enhanced by hierarchical structures.¹¹⁷

The market affects hierarchical structures by punishing those who oppress others gratuitously. Many managers undoubtedly derive subjective utility from asserting their own power; it is one of the least attractive aspects of human nature. However, these power plays are costly to owners, since they make the working environment more hostile and reduce the number of quality employees willing to work at any given salary level.¹¹⁸ If the managers are themselves the owners, their financial self-interest will directly discipline their oppressive tendencies. If the managers are not owners, the owners will have an incentive to monitor managerial misconduct and to bond managers to owners by their compensation package. Owners who are unable to discipline their managers will lose competitively to those who are able to do so. Surviving firms will tend to have managers who confine their gratuitous oppression.

Managers could resist this dynamic only if they could hold together an effective cartel.¹¹⁹ As long as some managers are

114. See WILLIAMSON, *supra* note 112, at 206-15 (discussing attempts by more radical economists to deny the link between hierarchy and productivity).

115. See *infra* notes 116-20 and accompanying text.

116. RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 251-52 (3d ed. 1988) (discussing how employers with worse working conditions will have to pay more to retain employees).

117. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AMER. ECON. REV.* 777-95 (1972) (noting that it is a delusion to believe that firms settle issues by authority superior to that of the environmental market; rather, firms are distinguished from the conventional market by the use of a centralized contractual agent in a team production process).

118. See EHRENBURG & SMITH, *supra* note 116, at 251-52.

119. See *infra* notes 167-68 and accompanying text (discussing necessity of cartels in

willing to confine their oppressive behavior, however, it will become increasingly costly to retain one's habits and the attitudes that support them.¹²⁰ Over time, the ethic of markets is that a good manager is a good "people person," not in the sense of altruistic self-denial, but in the sense of sensitivity to readily avoidable pain of those with whom one works.¹²¹

c. Other Market Relations

The point can be generalized beyond employment to all market relations. In a market society, one has an incentive to learn what kinds of pain are being inflicted by one's conduct on others, and to minimize those forms of pain which are not essential for the promotion of one's purposes. Sales people are taught to say "have a nice day" to customers, even if they cannot stand to look at them. One can, of course, feign a concern for the welfare of consumers. As anyone who has purchased products can attest, however, it is often possible to tell when an employee has no genuine concern for the customer's inconveniences. Especially if the sales person is an owner or is closely monitored by owners, the most reliable way to appear concerned is often to become concerned.

3. Market Protection From Oppression: Empirical Evidence

As always, one is tempted to accept the logic but to argue that these conclusions are contradicted by experience. Employers do engage in petty acts of oppression; sales clerks are indifferent to the inconveniences of customers and patently insincere in their flattery. There are two problems with this argument. The first has been noted earlier, i.e., its narrowness of empirical vision.¹²² It ignores the basic human proclivity for personal indifference toward

the race context).

120. See George J. Stigler, *A Theory of Oligopoly*, in *THE ORGANIZATION OF INDUSTRY* 39 (1968) (noting the instability of cartels); John S. McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 *U. CHI. L. REV.* 191, 196-204 (1960) (discussing the difficulty of maintaining an effective cartel with reference to the Ocean Freight Rate Conferences).

121. See Gerald Graham, *Keeping in Touch Means Listening to Employees As Well as Customers*, *ORLANDO SENTINAL-TRIB.*, Nov. 14, 1981, at B1 (arguing that successful managing requires that respectful attention be paid to employee concerns).

122. See *supra* notes 33-43 and accompanying text (discussing the Internal Criticism Problem).

the welfare of others, and fails to look at human relations outside the civilizing ambit of market pressures.

Human beings are almost certainly biologically predisposed to a significant degree of self-preference. Each person is both a survivor and the descendant of a very long line of survivors. Altruism for kin is one thing; a generalized concern for the welfare of each person with whom one interacts is quite another.¹²³ Given this biological reality, one would expect many human interactions among strangers to be rather cold and opportunistic. One need only travel in nonmarket societies such as Russia to realize how unpleasantly bureaucratic, gray, and uncaring human relations between strangers can be when they are not disciplined by market incentives to behave decently.¹²⁴ As always, the market is faulted by internal critics for failing to fully match the tastes it inspires; the Internal Criticism Problem arises when one uses that fact to assume that market societies must present more oppressive personal relations than others.¹²⁵

The second problem with the argument that hegemonic or oppressive personal relations empirically continue or increase under capitalism is that relevant tradeoffs are being neglected. It is true that some non-market institutions such as public bureaus and public universities can be pleasant places to work, in part because there is no irritating superior constantly cracking the whip to increase productivity.¹²⁶ If such superiors do attempt to assert themselves, a civil servant or tenured professor can feel a certain confidence in her ability to talk back without being fired if she is confronted with arrogance or overbearing behavior.¹²⁷ Because capitalist firms are usually hierarchies and take their hierarchies seriously, and

123. See Dennis Krebs, *The Challenge of Altruism in Biology and Psychology*, in *SOCIOBIOLOGY AND PSYCHOLOGY* 81, 92 (Charles Crawford et al. eds., 1987) (noting that since individuals share genes with their relatives, individuals can get their genes into subsequent generations by helping relatives).

124. See, e.g., Howard Witt, *The Big Mac Revolution*, CHI. TRIB., July 25, 1993 (Magazine), at 10 (noting how the Moscow McDonald's creates a high quality of service in contrast to other Moscow restaurants which have indifferent waiters).

125. See *supra* notes 33-43 and accompanying text (discussing the Internal Criticism Problem).

126. See *CHANGING JOBS: A HANDBOOK FOR LAWYERS IN THE 1990'S* 295 (Heidi L. McNeill ed. 1994) (noting the relaxed environment in which law professors work because there is little supervision).

127. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 260 (1989) (discussing the elaborate payment procedures required to dismiss tenured faculty).

because a certain amount of power politics is inevitable with hierarchies, those firms are experienced as more oppressive than many other work settings.

The flaw in this reasoning is quite evident. Government bureaus and public universities are subsidized institutions.¹²⁸ They can afford to run with considerable slack, failing to take advantage of physical productivity considerations, because they are siphoning resources from other sectors of the economy.¹²⁹ The fallacy is to assume that what is possible for a dependent sector must be possible more generally.

If the market economy were superseded, public enterprises would have no place from which to obtain resources; they would be forced to produce whatever value they sought to disseminate to their employees. As long as hierarchy leads to physical efficiencies, these public institutions would be compelled to choose between reinstating serious hierarchies or impoverishing the workers by their absence. Most nonmarket societies have in fact needed to do a combination of these two things, so that the proletariat is both impoverished and oppressed by arrogant superiors.¹³⁰ Such serious hierarchies without market discipline to civilize them can be ugly institutions indeed.¹³¹

Of course, there are many historical examples of truly oppressive relationships in predominantly market societies. Indentured servants voluntarily opted to bind themselves to service for periods from four to seven years as a way of financing their ocean passage to the United States.¹³² Those relations were quite cruel, involving seventy-two hour weeks of backbreaking labor, threats of whippings to discipline the disobedient, and conditions that were often disease-infested and life-threatening for the servants.¹³³

128. See, e.g., Alan D. Miller, *Colleges Push for Funding*, COLUMBUS DISPATCH, June 15, 1993, at 1A (noting that Ohio State University received \$331.1 million from the state in 1992).

129. See, e.g., *Summary of Report on the State U*, N.Y. TIMES, Jan. 7, 1985, at B6 (discussing the State University of New York's waste of tax dollars because of inefficient organization).

130. See PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 466-505 (1983) (recounting the tragic history of postwar socialist regimes in the Third World).

131. See *id.*

132. See ABBOT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607-1776* (1947) (discussing the motivations of those who entered into indentured servitude).

133. See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 180-82

While the decision to become an indentured servant may have been a rational one for many of the servants, who faced neither a present nor a future in a Malthusian Europe,¹³⁴ the oppressive character of the relation was evident. Not only was it immensely painful to be treated like property; it was also difficult for the master to obtain the willing cooperation of the servant to do more than was directly ordered and monitored.¹³⁵ The transaction costs of such servitude made it ill-suited to most purposes, and markets would accordingly have an incentive to replace it with at-will relationships where serious oppression could be met by exiting the relation. This was indeed done, long before the Thirteenth Amendment's formal ban on involuntary servitude.¹³⁶

Slaves were of course brought to the United States and treated as property without having given their consent to the relationship. Unlike indentured servitude, slavery can be characterized as anti-thetical to market institutions because it violates the entitlement of self-ownership. However, it is also true that markets have an incentive to liquidate the institution of slavery (and of feudal serfdom and peonage), even if one begins with evil entitlements to obtain the work of others. Under slavery, punishment can make people perform a routine and readily observable task. In a changing world, however, the productivity of an individual will tend to be higher if that individual is entrepreneurial, i.e., alert to new opportunities for productive labor in her environment and willing to take initiative to bring those opportunities to fruition.¹³⁷ Since self-owned individu-

(1975) (discussing the high incidence of disease in 17th century Virginia); A. Roger Ekirch, *Bound for America: A Profile of British Convicts Transported to the Colonies*, 42 WM. & MARY Q. 184 (1985) (discussing the transportation of British convicts to America, most of whom were sold as servants).

134. See ANTHONY BIMBA, *THE HISTORY OF THE AMERICAN WORKING CLASS* 11 (1927) (discussing the grim conditions in 18th century Europe); Farley Grubb, *Fatherless and Friendless: Factors Influencing the Flow of English Emigrant Servants*, 52 J. ECON. HIST. 85, 95 (1992).

135. See THOMAS SOWELL, *RACE AND ECONOMICS* 11-15 (1975) [hereinafter SOWELL, *RACE AND ECONOMICS*] (noting that slaves were more productive when allowed to exercise individual initiative and that there were limits on the economic benefits that could be derived from the punishment of slaves).

136. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR* 164-70 (1991) (noting that for indentured servitude to be successful, there had to be a consensus among employers that it was legitimate, and that by the 1820s this consensus had eroded with respect to white workers in the United States).

137. See ISRAEL M. KIRZNER, *COMPETITION AND ENTREPRENEURSHIP* 35 (1973) ("It is this entrepreneurial element that is responsible for our understanding of human action as active, creative, and human rather than as passive, automatic, and mechanical.").

als have greater entrepreneurial productivity than slaves, slaves will frequently be willing and able to purchase their own freedom with the surplus that is created.¹³⁸

The proclivity of markets to mitigate the severity and reduce the scope of slavery tends to be forgotten because of the understandable tendency to focus upon the experience of black slavery in the United States. As an indicator of the tendencies of markets, that experience is misleading because the state governments in the old South prohibited manumission by contract.¹³⁹ To look at the effect of markets uninhibited by such regulatory measures, it may be helpful to look at slavery in ancient Rome where state restrictions, although not wholly absent, were less significant.¹⁴⁰

In Rome, masters often gave skilled slaves an interest in the profits of their endeavors, and the *peculium*, which was accumulated in this way, provided the means of purchasing emancipation.¹⁴¹ A particularly common form of manumission was by testamentary means, in which a master's will would direct that on his death his slaves would be freed either immediately or subject to conditions.¹⁴² One estimate is that over eighty per cent of the population of Rome were either freedmen or descended from freedmen.¹⁴³

While the conditions of the slave class in Rome varied greatly, it has been suggested that the conditions of slaves improved over time, becoming in many cases more like serfs, not free to leave but able to work independently.¹⁴⁴ Many slaves became

138. See THOMAS SOWELL, *MARKETS AND MINORITIES* 96 (1981) [hereinafter SOWELL, *MARKETS AND MINORITIES*] (noting that in a theoretically perfect economy, a slave would be more valuable as a free man and that only that slave himself can know his value as a free man).

139. See *id.* at 96-99 (discussing societies where there were various financial processes by which slaves could purchase their freedom).

140. See *id.* at 96 ("In the ancient Greek and Roman world, it was well understood that the maximum economic gain to be made from an individual was by selling him his freedom.").

141. See SAMUEL DILL, *ROMAN SOCIETY FROM NERO TO MARCUS AURELIUS* 117-18 (1956) (describing master/slave relationships, slaves' responsibilities, and how slaves might earn their freedom).

142. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 73 (1962).

143. *Id.* at 72.

144. See THE COLUMBIA HISTORY OF THE WORLD 215 (John A. Garraty & Peter Gay eds., 1972) (noting the improvement in the position of slaves for economic and humanitarian reasons).

trusted partners of their masters and were able to retain a large portion of the profits from their efforts.¹⁴⁵

Some law and economics writers have suggested that the greater efficiency of free labor over slave labor, at least in situations involving entrepreneurial judgment, is a good public policy reason against slavery.¹⁴⁶ Since transactions would eventually bring about the liquidation of slavery, one saves transaction costs by beginning with a self-ownership entitlement.¹⁴⁷ Others have criticized this view for implying that the case against slavery is somehow dependent upon empirical notions, when the institution so patently offends the imperative of equal dignity.¹⁴⁸ The present point, however, uses the basic economic insight for descriptive and not normative purposes.

If markets are permitted to operate, they will gradually remove institutions that involve gratuitous hierarchies and abusive human relations. Especially as the rate of societal change accelerates, the number of purely repetitive tasks where the optimal level of performance given adequate human effort is well known is likely to decline. Over time, institutions such as slavery, servitude, and vassalage would then be more rare, and their continued existence and manifest cruelty in certain places would seem increasingly anomalous and unnatural. It can hardly be coincidence that the greatest of all market societies, nineteenth century Britain, played such an instrumental role in the removal of slavery from the earth; it is a logical role for a people whose values had become attuned to the institutions that had survived in open markets.¹⁴⁹ Nor is it coincidental that twentieth century regimes which turned against the free market, such as Cambodia, Nazi Germany, the Soviet Union, and the People's Republic of China, have reintroduced forced labor on a grand scale.¹⁵⁰

145. See DILL, *supra* note 141, at 118-19.

146. See, e.g., Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 246-47 (1980) (arguing that transaction costs are minimized by making workers free and assigning them the right to their labor in the first place, rather than making workers slaves who must earn their freedom).

147. See *id.* (explaining that there are costs associated with purchasing freedom that are not incurred if the individual is free from the beginning).

148. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 211 (1980) ("[A] theory that makes the moral value of slavery depend on transaction costs is grotesque.").

149. See Stanley L. Engerman, *Contract Labor, Sugar and Technology in the Nineteenth Century*, 43 J. ECON. HIST. 635 (1983) (discussing the end of slavery in the British colonies of the Caribbean).

150. See JOHNSON, *supra* note 130, at 274, 417-18, 549-51, 654-57 (describing specific

D. Equal Treatment

1. Markets, Race, and Gender: Theoretical Correlations

The final, and perhaps most controversial, constitutional value I will consider is that of equal treatment. The Fourteenth Amendment to the Constitution requires that no state "deny to any person . . . the equal protection of the laws."¹⁵¹ The question for this section is whether markets weaken racist and sexist tendencies and promote the idea of equal treatment.

First, we must draw a distinction between two types of preferences. One is the pure preference for avoiding market relations, or at least market relations on terms of equality or subordination, with members of a particular race or gender. The second is a preference for avoiding market relations, or at least market relations on terms of equality or subordination, with persons who exhibit certain behavioral patterns that correlate with race and gender.¹⁵² To make these two categories of preferences mutually exclusive, I will limit the second category to accurate perceptions of genuine correlations between race or gender and some behavioral trait. A person who exaggerates the extent of the correlations, or who imagines a correlation to obtain that in fact does not, is indulging in the first, purely racist or sexist, behavior.¹⁵³

Given the world's sordid history in race and gender relations,¹⁵⁴ one would expect the pure tastes for racism and sexism, including the tastes for erroneous factual beliefs that are pleasing to racial and gender vanity, to be quite pervasive.¹⁵⁵ However, it appears that market institutions will discipline and ultimately weaken these human predispositions.

First, the monetary bottom line places significant constraints upon the indulgence of objectives which fail to maximize profits.

examples of the use of forced labor under 20th century regimes which have turned against the free market).

151. U.S. CONST. amend. XIV, § 1.

152. See Larry Alexander, *What Makes Wrongful Discrimination Wrong?*, 141 U. PA. L. REV. 149 (1992) (analyzing these and related distinctions among preferences).

153. See generally Christopher T. Wonnell, *Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology*, 1989 B.Y.U. L. REV. 95, 96-102 [hereinafter Wonnell, *Circumventing Racism*] (providing a definition of racism).

154. See *infra* notes 187-89, 238-40 and accompanying text (discussing the eternal problems of race and gender discrimination).

155. See Wonnell, *Circumventing Racism*, *supra* note 153, at 102-18 (discussing racism and strategies for its circumvention).

Other things being equal, managers and employees might want the firm to discriminate, so that they would not have to supervise, work alongside, or take orders from members of the disfavored gender or ethnic group. However, managers and employees are constrained by external actors who are likely to be much less concerned with personal considerations of this kind—namely, consumers and capitalists.¹⁵⁶

In many cases, consumers will not even know the racial or gender make-up of the persons who produced the product in question. Those who produce the better product at the lowest price, because they hired the most productive employees without regard to race and gender, will thus receive rewards from unknowing (and perhaps racist and sexist) consumers.¹⁵⁷ Even when consumers do know about the racial and gender composition of the firm producing a product, the question remains whether they will be willing to pay an appreciable premium because of their prejudices; such a premium is almost a pure cost to the consumer, who derives only the thinnest of vicarious satisfactions from having indulged her racism or sexism.¹⁵⁸

Capitalist owners are also likely to exert pressure upon managers and employees who are inclined to pursue racist or sexist objectives at the expense of profitability.¹⁵⁹ Of course, in the modern public corporation managers have a certain degree of distance from the concerns of owners,¹⁶⁰ but this difference should not be exaggerated. To bond themselves to the owners, managers are routinely compensated in ways directly tied to the share prices of the firm.¹⁶¹ Moreover, the market's quasi-Darwinian survival tendencies remain at work. Firms staffed by managers who pursue their own racial or gender tastes (or those of their employees) at

156. See WALTER WILLIAMS, *THE STATE AGAINST BLACKS* 27 (1982).

157. See Strauss, *supra* note 96, at 1640 (stating that employers who do not use inaccurate generalizations about minority employees gain a competitive advantage).

158. See RICHARD EPSTEIN, *FORBIDDEN GROUNDS* 60-72 (1992) (stressing the difference between employment and other relational markets, where race consciousness might continue, and spot markets such as the market for consumer products, where it would be thoroughly weeded out by markets); see also *infra* notes 176-88 and accompanying text (discussing the problem of genuine correlations that impact upon relational markets).

159. See *infra* notes 160-65 and accompanying text.

160. See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933) (providing a classic statement of this problem).

161. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 10 (1991) (explaining the use of value-of-stock based compensation for bonding corporate officers).

the expense of profitability will find it harder to make the sales needed for internal financing and harder to raise capital needed for external financing. Over time, such firms will be less inclined to grow than others similarly situated, and indeed more inclined to find themselves unable to pay creditors and stay out of bankruptcy.¹⁶²

The same is true of false beliefs about the productivity of women and minorities. While those false beliefs might bring a certain pleasure to the vanity of managers, they will be interfering with the monetary profitability of the firm. Owners will have an incentive to install managers who see the world accurately.¹⁶³ Moreover, even if owners never monitored managers, the Darwinian process would result in the success of those firms that were managed by people who could see the world accurately.

However, racism and sexism, including racist and sexist beliefs, might not be in tension with profitability. If managers and employees hold racist or sexist tastes, the owner might lose highly valued employees if she insisted on hiring minorities or women for jobs thought unsuitable.¹⁶⁴ The gain in productivity from hiring the most productive worker, regardless of race or gender, would be counterbalanced by the loss of the talents of the bigoted.¹⁶⁵

This scenario, however, is not stable. Employees and managers are not all *equally* bigoted.¹⁶⁶ Because firms that discriminate are forgoing valuable talent, there will be an incentive for owners to seek out relatively tolerant "cartel breaking" employees and managers and offer them wage premiums.¹⁶⁷ There will be attempts to hold the cartel of bigots together by bringing social pressure to bear upon the tolerant, but if there is one thing well established in economics, it is the great instability of cartels.¹⁶⁸ If nations or re-

162. SOWELL, KNOWLEDGE AND DECISIONS, *supra* note 66, at 113.

163. *Id.* at 9.

164. See Strauss, *supra* note 96 at 1622 (arguing that the additional cost of additional wages or reduced productivity of bigoted employees forced to work with minorities must be subtracted from the productivity of the minority workers).

165. *Id.*

166. See Gary S. Becker, *An Economic Theory of Discrimination*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY 129, 136 (Walter E. Block & Michael A. Walker eds., 1982) (pointing out that African-American owners can benefit from the discriminatory policies of white firms because they can then hire highly qualified African-American laborers at sub-market rates).

167. See *id.* (discussing the detrimental effects of discrimination on white owners of capital despite the beneficial effects for white laborers).

168. See SOWELL, MARKETS AND MINORITIES, *supra* note 138, at 36-39 (discussing the

gions of a particular nation differ in the extent of their tolerance or their ability to hold together racist cartels, the more tolerant regions will prosper, because they can hire the more productive employees, regardless of race and gender, without losing the talents of others. Once again, surviving firms will be disproportionately staffed with relatively tolerant individuals.

Economic theory would suggest that the only stable equilibrium will be reached when bigoted employees pay for their bigotry by accepting lower wages commensurate with the costs that their intolerance imposes upon the owner.¹⁶⁹ For the reasons noted in the introduction, however, it hardly seems likely that this "equilibrium" situation would in fact be stable, once the economist's arbitrary assumption of exogenous preferences is removed.¹⁷⁰ If bigots are forced to pay the cost of their intolerance from their own pocket, will there not be pressure on people to become more tolerant? When tolerance correlates with wealth, will it not be increasingly regarded as progressive and dignified to refrain from discrimination?

This argument only applies to the first kind of preferences, i.e., a pure racism or sexism, including a taste for inaccurate factual beliefs that are pleasing to racial or gender vanity. It is not argued that free markets would remove the problem of *valid* empirical correlations between race or gender and productivity-related traits, many of which may be the product of past discriminations and injustices.¹⁷¹ On the contrary, one would expect market actors to be quite sensitive to any such valid empirical correlations, and to resist any "politically correct" ideologies that attempted to wish such correlations away.

Having said this, however, it is not true that free markets create no incentives that would tend to eliminate this second category

instability of cartels even when the cartel members have exceptionally powerful forces on their side, as with white landowners facing black sharecroppers after the Civil War).

169. See Walter E. Block & Michael A. Walker, *Introduction to DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY*, *supra* note 166, at 9-10.

170. And, indeed, it does not appear that the "taste for discrimination" actually leads people to expend much money to indulge this taste. Walter Williams has argued that such a strong taste would be incompatible with data showing that black women college graduates earn substantially more than their white counterparts. Walter Williams, *On Discrimination, Prejudice, Racial Income Differentials, and Affirmative Action*, in *DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY*, *supra* note 166, at 72.

171. See Strauss, *supra* note 96, at 1628 (suggesting that if there is actually a correlation between race and productivity, it results at least partly from a history of discrimination as well as unequal educational opportunities).

of tastes. Suppose that Ethnic Group X has a penchant to engage in workplace brawls with co-workers. The initial effect will be for the wage rate of Group X members to be bid down relative to members of other groups, reflecting the productivity losses from fights. It is impossible to believe, however, that this would be an equilibrium state of affairs, unless the taste for fighting was indelibly burned into the genetic constitution of Group X, which is most unlikely.

First, not all Group X members will be equally given to fighting. Non-fighters will face the problem that their membership in Group X will serve as an inexpensive proxy upon which their employer may choose not to hire them.¹⁷² In a free market, however, contractual terms can be varied to signal the inapplicability of the stereotypes to a particular person. An individual could effectively bond herself against these pressures by consenting to a compensation scheme of low wages together with bonuses for proven performance or an at-will employment regime that gave employers confidence that they would not be stuck with a troublemaking employee.¹⁷³ Once in the door, the individual's track record would serve as a method of differentiating herself from the others in Group X.¹⁷⁴

It might be argued that individual employees do not have the bargaining power to change the terms of employment that employers are generally offering to employees. Such active one-on-one dickering of terms need not, however, be the engine of change. Some firms will have compensation schemes consisting of delayed compensation or at-will employment. These will be the firms at which employers and nonstereotypical members of Group X will see great potential in contracting with each other. If the device

172. Richard Epstein has argued that the use of proxies should not persist in equilibrium because the first firms that use the proxies will gradually remove from the pool the non-fighting members outside Group X, such that a new employer would obtain no information from using membership in Group X as a proxy for fighting. See EPSTEIN, *supra* note 158, at 31-41. Epstein's argument is intriguing, but does appear to depend upon the earlier use of race as a proxy.

173. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 116 (1986) (discussing use of penalty clause in contract to convince other contracting party of reliability). In many contexts, agreeing to a piecework arrangement would be another way to signal one's higher-than-average productivity.

174. See Strauss, *supra* note 96, at 1642 (noting that a major source of correct information about an individual comes from hiring him or other members of his minority group, allowing the correct information to supersede the erroneous assumptions made about the productivity of members of the minority group).

works, those firms will succeed in the competitive marketplace as against others, so that a change which did not occur by bargaining would occur by differential selection instead.

As more and more members of Group X see that they could prosper by refraining from their group's traditional predisposition toward fighting, the pressures for further change would be evident. Remaining proxy-bias would surely motivate the more assimilated members of Group X to put social pressure on the less assimilated members to change their habits.¹⁷⁵ Eventually, Group X would become less and less distinguishable along this dimension from the members of other groups. As a result, it would no longer be efficient for firms to use membership in Group X as a proxy for fighting.¹⁷⁶

The writings of Thomas Sowell on the cultural inheritance of ethnic groups are particularly pertinent here.¹⁷⁷ Each group brings with it habits of thought and behavior that served some purpose for group members in the past, but that may be quite dysfunctional in contemporary market societies.¹⁷⁸ Groups may have formed their values under conditions of rural isolation, Communist regimentation, slavery, feudal tenure arrangements, enforced paternalistic role definitions (especially pertinent to women), welfare state disincentives, itinerant wanderings, and so forth.

Speaking very broadly, these groups, when thrown together into a market setting, will face pressures to assimilate and become more like the generic market actor: cooperative and inoffensive, self-regarding and self-reliant, willing to take initiative, cosmopolitan, objective and noncredulous.¹⁷⁹ Sowell's study of the radically different cultures of the Irish, Italian, German, Jewish, and Polish immigrants provides a striking case study in such assimilation, since those groups in most discussions today are likely to be

175. See generally THOMAS SOWELL, *ETHNIC AMERICA* (1981) [hereinafter SOWELL, *ETHNIC AMERICA*] (collecting the assimilation experiences of different ethnic groups in America).

176. See Strauss, *supra* note 96, at 1640 (concluding that in the long run as the employer realizes that there are no productivity differences between the groups, it will no longer be efficient to rely on the inaccurate generalization).

177. See generally SOWELL, *ECONOMICS AND POLITICS*, *supra* note 92; SOWELL, *ETHNIC AMERICA*, *supra* note 175.

178. See SOWELL, *ETHNIC AMERICA*, *supra* note 175, at 284.

179. See *id.* at 294-96.

grouped together as "whites," and many of the old differences are long forgotten.¹⁸⁰

The pressures of change will be greater on those groups whose historical conditions were most different from the free market regime into which they are entering.¹⁸¹ On the one hand, those groups will receive more severe punishments from the system for doing what comes naturally to them than will others.¹⁸² On the other hand, those groups have the most to gain in the long run from readjusting their behavior, since the surpluses made possible by market economies are great and behavioral change will enable them for the first time to share in that surplus. The problem is that the causal link between short-run discipline and long-run progress is one that people are not predisposed to believe, and thus its denial presents an opportunity for political demagogues.¹⁸³

To summarize, the free market imposes two changes on tastes that are pertinent to race and gender relations. On the one hand, the gratuitous biases of race and gender to which human beings are probably predisposed are likely to be moderated by market pressures. On the other hand, markets will ruthlessly recognize any real correlates of race and gender, and these correlates will create pressure on members of the excluded race or gender to begin changing the tastes and behavior patterns that are implicated.

Free market institutions may never be given a full chance to prove their tendencies. There is always the threat that they will be interrupted either to reinstate, through collective action, our basic prejudices or to interrupt market processes in hopes of a quicker, Nirvana solution. If permitted, however, the long-run tendencies of the markets are to undermine any rational basis for racial or gender bias and to place increasing pressure on irrational biases. Both of these tendencies should undermine whatever natural tendencies people may have to treat others unequally because of race or gender.

180. *See id.*

181. *See id.* at 286 ("It is the groups that *lack* such skills and entrepreneurship that are dependent on others for employment and that have had to learn to speak their language and know enough of their culture to make working together reasonably comfortable.").

182. *See id.*

183. Additionally, the short-run discipline may affect the current generation disproportionately, while the long run benefits of assimilation may be realized primarily by future generations.

2. Markets, Race, and Gender: Empirical Correlations

Although the theoretical argument may seem plausible, it will, of course, be argued that racial and gender prejudice empirically persist, refuting the theoretical prediction that market pressures will result in their progressive dilution. However, the purpose of this discussion is not to argue that racism will disappear in a market society; rather, the point is to show that the most fully assimilated members of a market society will adopt values that run counter to racism and sexism.

Many scholars have argued that racism and sexism are essentially capitalistic phenomena.¹⁸⁴ If one is convinced that capitalism is a system whereby the propertied few hold down the employed many, there is a certain plausibility in tying this notion to other forms of unfair treatment of persons, such as racial and gender bias.¹⁸⁵ However, the most casual empirical glance outside the modern capitalist world shows the fundamental narrowness of vision implicit in the view that racism and sexism are essentially capitalistic phenomena.¹⁸⁶

a. Gender

The dominance of women by men has been a ubiquitous, if not universal, feature of human societies,¹⁸⁷ and it is often shockingly severe in those societies lacking developed market institu-

184. See Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96, 114 (David Kairys ed., 1982) (discussing the impact of capitalism on race relations); see generally MICHELE BARRETT, *WOMEN'S OPPRESSION TODAY: THE MARXIST/FEMINIST ENCOUNTER* (1988) (arguing that the oppression of women is historically embedded in the social relations of capitalism).

185. See LEVIN, *supra* note 41, at 302-03:

Feminism gained influence in the general culture, in part, from its natural alliance with the Left, broadly understood as that body of opinion which attributes a great and hitherto unrecognized measure of human woe to the dominance of the weak by the strong under "bourgeois liberty," woe preventable only by state intervention.

186. See *id.* at 91 (noting the token character of female appointments to political positions in the former communist regimes).

187. See *id.* at 89 ("Every society that has ever existed has associated familial authority with the male and conferred the overwhelming majority of positions of power on males."); see generally STEVEN GOLDBERG, *THE INEVITABILITY OF PATRIARCHY* (1973) (discussing the universality of patriarchy and its origins).

tions.¹⁸⁸ Indeed, the very aspiration of equality between males and females is often rejected in such societies. As D'Souza has written:

[M]any of these [non-Western] cultures have deeply ingrained ideas of male superiority. The Koran stipulates that 'men have authority over women because Allah has made the one superior to the other'. . . . In addition to non-Western practices such as dowry, purdah, and wife-burning, in countries such as Kenya, Somalia, Indonesia, and the Sudan women are routinely circumcised in a manner which deprives them of sexual pleasure for life Feminism is simply not indigenous to non-Western cultures.¹⁸⁹

The relatively greater freedoms enjoyed by women in Western societies may have their historical roots in the Roman Empire, with its rather extensive market economy.¹⁹⁰ The absolute level of personal freedom and independence accorded women during the Roman Empire has been the subject of much debate, but there can be little doubt that the inequality of status considerably diminished over time.¹⁹¹ In the early days of the Roman Republic the *pater familias*, or male elder, held virtually complete power over the family, including in many cases the powers of banishment, slavery, sale, and death.¹⁹² A young girl was instructed whom to marry, and any property that she brought with her became property of the husband.¹⁹³

The power of the father steadily decreased during the Republic, and conservative social critics persistently equated the growing freedom of women with the decline of Roman morality.¹⁹⁴ One manifestation of the growing emancipation of women from the control of their husbands was the increasing rate of divorce.¹⁹⁵

188. See generally ELISABETH BUMILLER, *MAY YOU BE THE MOTHER OF A HUNDRED SONS: A JOURNEY AMONG THE WOMEN OF INDIA* (1990) (discussing the particularly poor treatment of women in India).

189. D'SOUZA, *supra* note 40, at 79-80.

190. See *infra* notes 191-96 and accompanying text.

191. See *infra* notes 192-97 and accompanying text.

192. See ELIZABETH MILLER WALSH, *WOMEN IN WESTERN CIVILIZATION* 64-65 (1981) (discussing the complete power the eldest male held over the early Roman family).

193. See *id.* at 40 (discussing the role of guardian played by a woman's nearest male relative).

194. See *id.* at 69-70 (describing Cato's fear that the repeal of a gender-based law would speed the moral decline of the Republic).

195. See WILLIAM H. MCNEILL, *HISTORY OF WESTERN CIVILIZATION: A HANDBOOK* 152 (1986) ("Women became almost completely emancipated from the control of father

Under the legislation of Augustus, mothers of three children were granted the right to administer their property independently, and adultery laws were passed to treat male and female adultery more even-handedly.¹⁹⁶ During the reign of Marcus Aurelius, the law provided that a woman's children, rather than her husband, could inherit her property, with girls inheriting equally with boys.¹⁹⁷ One influential account of world history has argued that, perhaps under the sway of Stoic philosophy, "by the Severan period, married women had attained an independence unparalleled in antiquity. Henceforth the liberty and relatively extensive legal rights of women would be characteristic of the western world."¹⁹⁸

More recent experience with women and market institutions also supports the idea that markets limit gender discrimination.¹⁹⁹ Notwithstanding a steady drumbeat of opposition from social critics, firms in the early industrial revolution made aggressive use of female labor, finding themselves unable to pass up the potential for lower wages or higher productivity on mere social prejudice alone.²⁰⁰ Women played a major role in the industrial revolution; women, for example, were a very large percentage of the industrial labor force in France, Zurich, and Prussia.²⁰¹ Of course, gender bias was undoubtedly more significant in more prestigious career positions where technological barriers²⁰² kept the number of qualified women down to a sufficiently low level that prejudice against those who remained could be cheaply appeased.²⁰³

and husband; divorce became easy and common [in the late Roman Republic].").

196. WALSH, *supra* note 192, at 71-72. Full equality on the law of adultery was not attained until the reign of Emperor Constantine in 310 A.D. MARJORIE WALL BINGHAM & SUSAN HILL GROSS, *WOMEN IN ANCIENT GREECE AND ROME* 61 (1983).

197. See WALSH, *supra* note 197, at 72. On the other hand, this may have been decreed as much for the protection of the mother's father as for her, as the mother's father would generally prefer that her property go to the grandchildren rather than the stepson. *Id.*

198. *THE COLUMBIA HISTORY OF THE WORLD*, *supra* note 144, at 215.

199. See *infra* notes 200-18 and accompanying text.

200. See HAMEROW, *supra* note 86, at 135 ("To many observers this composition of the labor force in industry seemed a serious social evil. It made fathers dependent on the earnings of those whom they should have been supporting. It took mothers away from their duties of child rearing and housekeeping.").

201. *Id.* at 135 (56-70% in France, depending upon the department).

202. See *infra* notes 209-12 and accompanying text.

203. This analysis has been applied to the race context in SOWELL, *MARKETS AND MINORITIES*, *supra* note 138, at 37:

The crucial element in destroying economic coalitions are the opportunities for profit by individual members who violate the solidarity of the coalition. In

While the number of women employed in industry declined significantly in the later decades of the nineteenth century, employment was still substantial. On the eve of the First World War, women constituted 22.6 percent of the labor force in Belgium, 33.1 percent in France, 23.0 percent in Great Britain, and 18.7 percent in Germany.²⁰⁴ Despite these considerable numbers, an important question remains as to whether the decline in female labor force participation in the late nineteenth century, in addition to the well-documented increase in segregation of women's employment in that century,²⁰⁵ constitutes evidence that market economies encouraged sexist values.²⁰⁶

Contemporary commentators are inclined to view a female taste to avoid the labor force, or to stay away from employment in close competition with men, as a kind of false consciousness, or a subconscious attempt to reconcile oneself to the reality of discrimination.²⁰⁷ It is particularly important not to project these sentiments back into nineteenth century technological conditions where they frequently did not apply—where the female taste to be able to stay out of the workforce, supported by the labor of men, was not only strong but often authentically grounded in fundamental realities of the time.²⁰⁸

In particular, an analysis of nineteenth century trends must consider some basic technological and demographic conditions which had a disproportionate impact upon the working lives of women.²⁰⁹ Contraceptives and alternatives to breastfeeding were either nonexistent or highly imperfect, and accordingly many wom-

situations where there are few opportunities for profit, the collusion may be successful even when there are only minor sanctions available, perhaps no more than social pressures. Exclusions against black violinists could be maintained much more cheaply than discrimination against black sharecroppers in the past or black basketball players today.

204. HAMEROW, *supra* note 86, at 144.

205. See Jane Humphries, ". . . *The Most Free From Objection . . .*": *The Sexual Division of Labor and Women's Work in Nineteenth Century England*, 47 J. ECON. HIST. 929, 932-35 (1987) (demonstrating and exploring this increase in gender segregation of the workforce).

206. By "sexist" values here, I mean values that are hostile to the authentic, informed aspirations of females in the society.

207. See, e.g., SUSAN FALUDI, BACKLASH 126-32 (describing how the movie industry pressures women to stay home and out of the workforce).

208. See *infra* notes 209-17 and accompanying text.

209. See *infra* notes 210-17 and accompanying text.

en spent the bulk of their working lives either pregnant or nursing.²¹⁰ At the same time, the rapidly growing population could no longer be supported by traditional industries run directly out of or close to the home.²¹¹ Within the home, of course, modern labor-saving devices such as refrigeration were primitive or absent.²¹² In such a world, the life of a working woman was exceptionally difficult, and the decline in the labor force participation of women—occurring as it did against a backdrop of steadily improving standards of living—cannot be assumed to have been in general opposition to women's authentic preferences.²¹³

Jane Humphries has recently noted that the increasing segregation of the workforce by gender was also explainable by these background conditions.²¹⁴ Her empirical study shows that English counties in which the sexes were highly integrated in the workforce had high rates of illegitimate births, and that such children had very little chance in life, partly because their mothers had no way to feed them and earn a living at the same time.²¹⁵ As wages and living standards rose throughout the century,²¹⁶ women and girls who could afford to stay out of the workplace increasingly did so, while those who could not afford to do so gravitated toward segregated workforces where the prospects for unwanted pregnancies were smaller.²¹⁷

210. See Humphries, *supra* note 205, at 935 (stating that until relatively recently there were few substitutes for breast milk).

211. See *id.* at 930.

212. See J.M. ROBERTS, *THE PELICAN HISTORY OF THE WORLD* 811 (rev. ed. 1984) (discussing technology as a liberating force for women).

213. It might be argued that the overall societal structure was to blame for putting women in this bind. Presumably one could have had governmental transfer payments for child care that would have enabled women to work. Again, however, apart from the problem of feeding the child, the overall level of wealth must be considered. Per capita income was far lower in the nineteenth century than it is today, so it is unclear where the surplus could come from to cover these payments. See HAMEROW, *supra* note 86, at 136 (noting that the bulk of the population in Europe during the early stages of the industrial revolution lived at a subsistence level).

214. See generally Humphries, *supra* note 205.

215. See *id.* at 942-46.

216. See HAMEROW, *supra* note 86, at 141-47 (documenting this improvement in living standards, which was astonishing by historical standards).

217. See Humphries, *supra* note 205, at 930 ("My hypothesis (hereafter called the social-control hypothesis) is that segregation in employment enabled almost all members of working families to continue to work, as was essential for their survival, but in a framework which discouraged heterosexual intimacy with its implicit threat to familial controls over sexuality and mating.").

In short, it may very well be true that the technological conditions of the industrial revolution reinforced the value that women should entertain different kinds of employment aspirations from men. However, the idea that a market economy encouraged arbitrary discriminations between men and women does not follow; employers were generally aggressive in hiring those women who were willing within the severe constraints of available technology to offer their labor. It is true that a certain distrust of the judgment of young girls and women by their families is suggested by the growing segregation of the workforce, and these assumptions and sexual double standards might be regarded as sexist. On the other hand, given the technological realities of the time, it is understandable how "Victorian" values could come to be at least as enthusiastically defended by women as by men.²¹⁸

Other evidence simply will not support the idea that the nineteenth century market economy weakened the value of women's equality.²¹⁹ The growth of basic educational opportunities for women would belie that conclusion: it has been estimated that in England the percentage of women unable to sign their name fell from about 45 percent in 1850 to 1 percent in 1911.²²⁰ The feminist movement itself primarily dates from this era, with Mary Wollstonecraft's *A Vindication of the Rights of Women*²²¹ published in 1792 and John Stuart Mill and Harriett Taylor's *On the Subjection of Women* published in 1869.²²² In Britain, the 1839 custody of infants act expanded the custodial rights of women over their children,²²³ and many historic female disempowerments were reversed by the passage of the Married Women's Property Act in 1870.²²⁴ Political enfranchisement was slower in coming, but the British women's suffrage movements from the nineteenth century ultimately culminated in women receiving the right to run for Parliament in 1919 and the right to vote in 1928.²²⁵

218. See Irving Kristol, *Men, Women, and Sex*, WALL ST. J., May 12, 1992, at A24 (arguing that Victorian morality was a phenomenon of women's liberation).

219. See *infra* notes 220-26 and accompanying text.

220. HAMEROW, *supra* note 86, at 168 (the comparable figures for men were 30 percent in 1850 and 1 percent in 1911).

221. See *Women's Liberation Movement*, 12 ENCYCLOPEDIA BRITANNICA 733 (1987).

222. See WALSH, *supra* note 192, at 226-27 (discussing the essential co-authorship of this book).

223. See *id.* at 212.

224. See *Women's Liberation Movement*, *supra* note 221, at 733.

225. See *id.* at 733. Admittedly, these political developments were the product of many

Once again, the point is not that this progress in actual gender relations was exceptionally fast, or that there was not a good deal for feminists to be critical of in the condition of women throughout the nineteenth century. However, there was a steady development and internalization of the *value* of women's equality, a value that could then generate discontent and calls for social change. As J.M. Roberts has written:

[W]omen's rights to education, to employment, to control of their own property, to moral independence, even to wear more comfortable clothes, had increasingly been in debate in the nineteenth century. Ibsen's play *A Doll House* was interpreted as a trumpet-call for the liberation of women instead of, as the author intended, a plea for the individual. The bringing forward of such issues implied a real revolution. The claims of women in Europe and North America threatened assumptions and attitudes which had not merely centuries, but even millenia, of institutionalization behind them.²²⁶

b. Race

The nineteenth century record regarding race relations also should be considered. The most dramatic development was the widespread attack on slavery. The slave trade was prohibited by Denmark in 1792, England in 1807, Sweden in 1813, the Netherlands in 1814, France in 1818, Spain in 1820, and Portugal in 1830.²²⁷ These prohibitions were aggressively enforced by the British navy, which freed approximately 117,000 slaves intercepted on the high seas.²²⁸

The target then became the existence of slavery itself. The British colonies took emancipation measures in 1833, the French colonies in 1848, the Portuguese colonies in 1858, India after 1858, the Dutch East Indies after 1859, the Spanish colonies in 1870, and, of course, the United States as a result of the Civil

factors apart from 19th century market dynamics, including especially the participation of women in the First World War. However, many past wars had been fought without generating such social progress; the issue of female suffrage had to be on the political plate to be influenced in this way.

226. ROBERTS, *supra* note 212, at 810.

227. HAMEROW, *supra* note 86, at 419.

228. *Id.* (noting that these enforcement figures covered the period 1815-1846).

War.²²⁹ Looking backward, the progress seems inevitable, but from the perspective of thousands of years of history in which slavery or serfdom had been widely tolerated, the change must have appeared revolutionary to the people whose new values made them willing to bring it about.

Of course, racist sentiment was not eliminated with the abolition of slavery, but it had to have been somewhat softened for that abolition even to have been considered. After the Reconstruction period, much brutal repression against blacks in the Southern United States took place.²³⁰ On the other hand, competitive forces continuously broke down attempts by white landowners to cartelize the market for laborers or sharecroppers, with the result that the wages and share percentages of black farmers continued to rise.²³¹ As for race relations, a general deterioration at the end of the century in the South was juxtaposed against a widely perceived improvement in those relations in the North, where considerable integration took place.²³² Thomas Sowell has written that this brief and hopeful period in Northern race relations was upset when Southern racism and Northern industrial jobs combined to produce a mass exodus of relatively unassimilated, rural black migrants to Northern cities, producing new demands for segregation on the part of Northern whites.²³³

It is true that racism was a major force in nineteenth century market societies and remains a major force in the market societies of the twentieth century. The idea that markets will wholly stamp out racism cannot be substantiated by the historical record.²³⁴ On the other hand, it should be noted that the human report card on race relations generally is one of repeated and massive failure, not excluding genocide, enslavement, and war. Despite the predictions

229. *Id.* ("The abolition of slavery thus came at about the same time as the abolition of serfdom, for essentially the same reasons.").

230. See Benno C. Schmidt Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650 (1982) (discussing the system of peonage, which was one of the worst manifestations of discrimination).

231. See SOWELL, *MARKETS AND MINORITIES*, *supra* note 138, at 36-37 (citing comparisons between the standard of living of sharecroppers who were illiterate and those who could read).

232. See *id.* at 70-71 (identifying temporary but growing acceptance of blacks in Northern states).

233. See *id.* at 71-73.

234. See PIERRE L. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* at xi (1981) (noting the disappointment of liberal expectations that racism could be eradicated over time).

of academics, socialist societies have been notably hostile to their ethnic minorities.²³⁵ Moreover, many non-Western cultures have no appreciable tradition of racial equality, not only violating it in practice, but regarding the principle with suspicion.²³⁶ The progress of race relations during the period of *laissez faire* looks much better against the backdrop of the broader view of interethnic relations around the world and over time.²³⁷

Finally, even if the empirical experience of modern mixed economies does not show that such societies mitigate racism and sexism as values, it does not mean that the theory is incorrect. When an economic theory appears to be sound in its own right but incompatible with experience, the problem is often not that the predicted tendency is refuted but that it is being camouflaged by empirical considerations outside the scope of the theory.²³⁸ An economy such as ours with more than a trillion dollar federal budget is influenced by many factors other than marketplace dynamics. Collective racism is quite likely, since collective actors lack the personal incentive to see through their own racial and gender myths.²³⁹ Blacks are handicapped by innumerable actions of the government, including inadequate public schooling, occupational licensing restrictions, minimum wage laws, exclusionary zoning, and the perverse incentive structures of the welfare system and the drug laws.²⁴⁰ As a result, the tendencies of the market to reduce

235. *See id.*:

[I]n the socialist tradition, these phenomena [racism and ethnocentrism] are seen as the product of the capitalist mode of production and as misguided forms of "false consciousness" destined to wither away after the advent of socialism. Both ideological traditions [liberalism and socialism] have been equally at a loss to explain the persistence, indeed the resurgence, of ethnic and racial sentiments in both the advanced capitalist and socialist societies. These sentiments will not obligingly go away, as both ideologies predict.

236. *See* D'SOUZA, *supra* note 40, at 79.

237. And, of course, the nineteenth century looks far more progressive in these regards against the backdrop of subsequent developments in racial hostility, from the Nazi holocaust to persecution of Chinese "boat people" in Southeast Asia to ethnic cleansing in Bosnia.

238. *See* LUDWIG VON MISES, *HUMAN ACTION* 38-44 (2d ed. 1963); *see also* MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE* 9 (1962).

239. *See* Christopher T. Wonnell, *Was the Corruption of Civil Rights Law Inevitable?*, 31 *SAN DIEGO L. REV.* 269, 272-75 (1994) (reviewing RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992)).

240. *See* WILLIAMS, *supra* note 156, at 87.

racism and sexism may merely be camouflaged by these larger trends.

III. MARKET-GENERATED VALUES TURNED AGAINST MARKETS

A. *The Phenomenon Described*

One of the most interesting and paradoxical aspects of the question of market-generated values is the use of those values as justifications for superseding the market. As noted earlier, when markets generate values, they are also likely to generate forms of discontent and calls for reform that are motivated by those values.²⁴¹ However, there is no assurance that the institutions which nurtured those values will be treated with respect by the persons who have acquired the values.²⁴²

For example, consider the value of equal treatment, and its accompanying hostility to race and gender discrimination. As noted, there are reasons to believe that the market system is a powerful force both for overcoming irrational prejudices and for assimilating people to overcome rational differences between groups.²⁴³ However, racial and gender bias still make numerous appearances in the decisions of market actors. Accordingly, Congress decided that the market needed to be superseded with civil rights legislation designed to outlaw these actions.²⁴⁴

As Richard Epstein has noted, the original civil rights laws could be defended as market-friendly statutes.²⁴⁵ Individual firms in the deep South may very well have wanted to end their own discrimination (a plausible assumption, given the costs of overlooking talent) but feared selective retribution from private or union violence, or state discrimination from the racist Southern governments.²⁴⁶ The laws were simply applying force to break the log-

241. *See supra* notes 33-43 and accompanying text (discussing the Internal Criticism Problem).

242. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942) (suggesting that the market economy might generate the causes of its own destruction).

243. *See supra* notes 114-83 and accompanying text.

244. *See* H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393-94 (discussing the need for federal civil rights legislation).

245. EPSTEIN, *supra* note 158, at 126-29 (arguing that the original civil rights laws provided the necessary protection to hotels and restaurants that wanted to serve both blacks and whites, but feared retribution).

246. *Id.* at 93-94. Although Epstein does not point this out, the discrimination also may have been the product of private social pressure, especially in fields where the number of

jam, so that market institutions could evolve in the South in the way they had evolved more naturally in areas where entitlements were more secure.²⁴⁷

Whatever the original intention, however, it is now widely agreed that the civil rights laws have deviated considerably from this market-supportive function.²⁴⁸ Efficiency rationales are now considered inadequate to justify practices with disparate impact.²⁴⁹ Individuals and occupations are sometimes mismatched to satisfy administrative number counts, generating both physical and psychological costs.²⁵⁰

Predictably, as the law has moved further away from the market setting, there has been a change in *values* associated with race and gender. Through an agonizing process, the values of equal treatment and assimilation have gradually given way to the values of proportionality and diversity.²⁵¹ Race consciousness changed from a dangerous anachronism to a short-term necessary evil to a permanently desirable part of group self-definition in a remarkably short period of time.²⁵² Something similar has happened in femi-

blacks with the requisite training was sufficiently small that prejudice could be maintained relatively cheaply.

247. *See id.* at 127 ("Title VII . . . provided powerful protection to the mass of private firms that wanted to escape the clutches of local restrictions and local prejudices but could not.").

248. *See id.* at 182-201 (arguing that poor statutory construction contravened the intent of the civil rights laws by extending their protection from victims of disparate treatment to the much broader class of persons suffering from the disparate impact of legitimate employment practices).

249. *See id.* at 300-09 (describing how Pan American World Airways could not justify hiring only female flight attendants, despite offering proof that customers preferred female flight attendants and that female flight attendants were better able to meet passengers' emotional needs).

250. CLINT BOLICK, UNFINISHED BUSINESS 31-40 (1990) (detailing the theoretical flaws, practical failures, and social and economic costs of this new civil rights agenda).

251. *See* NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION 37-76 (1975) (criticizing the major legislative and judicial landmarks that have focused on statistics rather than individual cases).

252. *Compare* The Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1988):

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed

with Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (holding that preferential admissions for minorities does not violate Title VI of the Civil Rights Act of

nist literature, where the original calls for inclusion and for minimizing irrational gender stereotyping have evolved into doctrines of inherent differences between the fundamental value structures and thought processes of men and women.²⁵³

The decision to supersede the market in the area of race and gender has also led, somewhat predictably, to a decline in the other values that market institutions tend to generate. Consider, for example, the value of tolerance and the marketplace of ideas. It was argued earlier that a market society, although it placed a great emphasis on truth, would also tend to generate a tolerance of falsity, since with few collective decisions there was less to fear from the development of various seductive but false myths.²⁵⁴ The civil rights approach, however, is determined to identify *collectively* what the productivity of the two genders and various races is, what types of job tests are proper measures of that productivity, and what distribution of employment would be indicative of discrimination.²⁵⁵ With so much riding on those collective determinations, it no longer seems safe to allow certain ideas about race, gender, and productivity to circulate freely in the marketplace of ideas.

I believe that this is the root cause of the familiar trend toward insistence on a strict orthodoxy of political correctness, with broad prohibitions on hate speech and the like. In legal academia, the law reviews are increasingly filled with analyses of why various types of speech should no longer be protected by the First Amendment.²⁵⁶ There is a widespread fear, justified or not, that

1964).

253. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 6-23 (1982) (correlating differences in the comparison of male and female behavior against historical standards with the male dominance found in the development of the standards).

254. See *supra* notes 52-70 and accompanying text.

255. See generally Epstein, *supra* note 158, at 205-41, 290-91 (rejecting the costs imposed by non-market job tests, and criticizing the disparate impact basis for finding discrimination).

256. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 177-97 (1987) (criticizing First Amendment protection of pornography); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-61 (1989) (arguing for less First Amendment protection of racist speech); Cass R. Sunstein, *Administrative Substance*, 411 DUKE L.J. 607, 641-42 (1991) (advocating a fairness obligation in broadcasting of public issues and/or a subsidy system); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-17 (1986) (redefining the standards for analyzing the First Amendment protection of pornography); Robert L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 767-68 (1992) (criticizing First Amendment protection of hate speech).

people will arrive at certain "incorrect" viewpoints when making all-important collective decisions pertaining to race and gender. And there is, quite rightly, no confidence that people will be able to see through the flaws in false depictions of women and minorities, given the weak incentives that all people have to see through their own comfortable myths in any collective activity.

In short, the civil rights laws are a classic example of a predictable sequence of events: market institutions generate particular values, which (especially in keeping with the impatience produced by the Internal Criticism Problem) lead to rejection of market institutions as inadequate to advance those values with sufficient speed and certainty. In turn, the replacement of markets not only fails to vindicate the hoped-for values (equal treatment and assimilation), but eventually leads to an abandonment of those values even as ideals. The replacement of markets also leads to the steady erosion of other market-generated values such as the tolerance for error embodied in the marketplace of ideas theory of the First Amendment.

The civil rights laws are not the only example of this self-defeating cycle. The market-generated taste for nonhegemonic human relations has also been employed aggressively to undermine market institutions. Radical change in this century has often been justified on the theory that it would protect the working class from the oppression of capitalist superiors.²⁵⁷ More moderate changes, such as the doctrine of unconscionability in contract law, or such creations of the administrative state as the National Labor Relations Act, have been offered with similar justifications.²⁵⁸ Institutions of indentured labor such as apprenticeship have rapidly declined, and are of doubtful constitutionality under contemporary interpretations of the Thirteenth Amendment.²⁵⁹ Unconscionability regulation has particularly targeted contracts that provide one party with the discretion to take some action which would severely harm the other party, such as the right of a franchisor to discontinue a relationship into which the franchisee has made a significant investment.²⁶⁰

257. See Wonnell, *The Influential Myth*, *supra* note 113, at 39 (discussing and criticizing this philosophy).

258. See *id.* at 39-48 (identifying the unequal bargaining power between employer and employee as the conventional justification for legislative and judicial enforcement of labor standards).

259. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 458 n.99 (1989).

260. See *Leibel v. Raynor Mfg. Co.* 571 S.W.2d 640, 642 (Ky. Ct. App. 1978) (impos-

In some instances, these regulations will succeed at their objective of reducing hegemonic human relations. As noted earlier, market institutions have no incentive to minimize hierarchy, since hierarchical relations may generate a surplus that works to the benefit of both contracting parties. However, this success necessarily comes at the cost of sacrificing the very surplus which motivated the parties to agree to the relation in the first instance. Without the right to enforce apprenticeship contracts, for example, employers have far less incentive to finance the training of new employees.²⁶¹ And without a clear right to terminate franchises (constrained more by the franchisor's reputation than by law), franchisees have an incentive to chisel on their own investments in quality, free riding on the expected investments of others.²⁶²

On the other hand, not all regulations of this type serve to decrease hegemonic human relations. To say the least, the radical anti-market regimes such as the old Soviet Union, Maoist China, or Cambodia, became brutally hierarchical and cruel. On a smaller scale, the regulatory state has generated new hierarchies between the regulators and the regulated. Implied contract terms such as the duty of "good faith and fair dealing" are notoriously vague, and as a practical matter will mean whatever a particular judge, jury or administrative agency say they do. The sometimes arrogant or arbitrary behavior of judges and regulators, facing few of the tight competitive constraints of market actors, and the supplication of the regulated, are a far cry from the type of human relations traditionally prized by market actors.

Nor is the corruption of human relations mitigated by the tendency of the regulated to invest so heavily in courting the regulators that they sometimes seem to have coopted the regulators into their own service.²⁶³ Such private aggressiveness does make the

ing duty to give extended notice before terminating a distributor).

261. See Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 105-09, 116-20 (1993) [hereinafter Wonnell, *Contractual Disempowerment*] (noting the economic pressures that eroded a mutually beneficial relationship between employer and apprentice).

262. See Benjamin Klein, *Transaction Cost Determinants of 'Unfair' Contractual Arrangements*, in READINGS IN THE ECONOMICS OF CONTRACT LAW 139, 142-44 (Victor Goldberg ed. 1989) (explaining that short-term profits are available to franchisees who reduce quality below the franchisor's standards).

263. See generally THE MONOPOLY MAKERS 12-31 (Mark J. Green ed. 1973) (arguing that regulated industries court their regulators which, in turn, causes waste, hinders economic growth, and reduces the likelihood of public debate).

regulated firm a less sympathetic figure, but the problems of dependence are fundamentally public rather than private. A particular problem is that any sensible regulated individual or firm will refrain from exercising a theoretical right to speak out about the behavior of the regulators, however vital such information from those intimately involved in the daily battles would be to the public dialogue.²⁶⁴

Despite these evils of unfettered discretion, the taste for clear rules that might confine bureaucratic caprice has been in decline as the regulatory state has progressively superseded market ordering.²⁶⁵ As institutions regulating private behavior have evolved, the trend has been to see wisdom in legal "flexibility" and discretion, opposing arbitrary and "rigid" rules that would preclude adaptation to circumstances.²⁶⁶ Once again, the dynamic has been to use market values to undermine market institutions, and then to see the resulting institutions erode not only the practice of the market value in question but also the taste for that value.

B. *The Phenomenon Evaluated*

This Article has argued that four constitutional values—free expression, the sanctity of private conscience, nonhegemonic human relations, and equal treatment—are values that are the natural tendencies of market institutions.²⁶⁷ Markets may not create these tastes, but they surely strengthen people's beliefs in the importance of those tastes, and thus make them logical candidates for the fundamental constitutional values of the polity. Markets also operate so as to better satisfy the values, but they rarely are capable of satisfying the tastes they create so completely as to remove the incentive to try to do better by superseding markets.

When the markets are set aside in an attempt to more rapidly effectuate market values, two things usually happen. The first is that the reform fails to bring about the intended value, and the second is that people begin to lose the taste for the value itself. An important question is whether this latter phenomenon, and the former given that the latter has occurred, are changes to be regret-

264. See FRIEDMAN, *supra* note 4, at 16-21 (noting the difficulties in establishing institutions that will effectively preserve the possibility of dissent).

265. See *infra* note 266 and accompanying text.

266. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-713, 1740-51 (1987) (discussing the relation between the rules/standards debate and the debate over the justice of a market economy).

267. See *supra* notes 45-240 and accompanying text.

ted. From the perspective of our cultural ancestors and to a large extent from our own perspective, it would be a tragedy for a society to give up on the attempts to secure equal treatment or religious tolerance. If our cultural descendants have abandoned these values, however, and therefore do not count the change as regression, how can one say that anything has been lost by turning against the markets?

Some relief from such extreme relativism seems possible. Many human tastes and needs surely come relatively hard-wired into human beings, especially their basic biological needs for a minimum level of material well being and for a certain social respect.²⁶⁸ Even if not strictly determined biologically, these values are likely to outlast the more intellectualized virtues identified here. This fact raises the possibility that the more abstract virtues may be desirable not only as ends in themselves but as means of promoting these more durable ends.²⁶⁹

Most of the constitutional values serve pragmatic purposes of avoiding conflict, strife and rent seeking that will dig deeply into the social surplus from which people fulfill their basic needs. If we lose our taste for the abstract constitutional values as ends in themselves, we may find ourselves unable to satisfy even the tastes that remain. This surely has been the case with societies that have thoroughly undermined the market.²⁷⁰ The proclivity of people to leave nonmarket societies in droves is some indication that the constitutional values of market societies, even where no longer cherished as abstract ideals, have desirable properties as proxies for more enduring values.

In any event, there is no apparent reason why contemporary trends or proposals should be judged only by the values which would endure after the markets had been superceded. Those trends are being initiated by people whose values have been generated by market institutions, and who would, from their own perspective, regard it as a loss if those values were not embraced by succeeding generations. Marx apparently hoped that people would turn

268. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* at xii-xiii (1992) (concluding that the ability of a society that combines a market economy and a democratic polity to satisfy the two basic human needs of materiality and social respect has resulted in the "end of history" in a Hegelian sense).

269. See Wonnell, *Contractual Disempowerment*, *supra* note 261, at 123-30 (arguing that an "applied political philosophy" of liberal political values may indirectly promote a "pure normative philosophy" of more utilitarian norms).

270. See *supra* note 150 and accompanying text.

against accepted values if they realized that they were merely a superstructure for a capitalist base.²⁷¹ To the contrary, internal critics of the capitalist system have almost always believed that their anti-market reforms would advance these constitutional values rather than retard them or subject them to public ridicule. If the world of values is seriously relativistic, the objective of this Article becomes primarily an *ad hominem* one, of urging market critics to ask themselves whether they are indeed taking us where they want to go.

271. See KARL MARX, CAPITAL 238 (C. Kerr trans., 1919) (arguing that cultural phenomena are primarily superstructure for the economic base).

