Public Rights

JOSEPH WILLIAM SINGER

> The term public rights should be made to mean something. . . [E]verywhere a white man can go or travel the colored man should go.[1]
>
> Edward Tinchant

Rebecca J. Scott has unearthed an instructive episode in post-Civil War history that posed a question that we are still confronting today. Do places open to the public have an obligation to serve the public or are the owners free to refuse service as they wish? Or do the owners have a legal right to refuse service only if they have a good reason for doing so, and, if that is the case, does religious commitment count as a good reason to deny service or to provide it in a segregated manner? Scott focuses on the conflicts in the state of Louisiana over a provision in the post-Civil War Louisiana Constitution of 1868 that guaranteed "public rights" to all regardless of race. Although we still live with shockingly high levels of racial discrimination in public accommodations, claims that the Constitution's guarantee of religious liberty requires exemptions from state laws that prohibit discrimination on the basis of sexual orientation or gender identity are front and center today.[2] To understand the historical context within which we confront this issue today, it will help to understand how public accommodations law has changed over time through the course of United States history.[3]

1. Edward Trinchant, quoted in Rebecca J. Scott, "Discerning a Dignitary Offense: The Concept of Equal "Public Rights" during Reconstruction," *Law and History Review* 38 (2020): 519–53.

2. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. __ 138 S. Ct. 1719 (2017).

3. This history is based on my research and analysis of historical treatment of public accommodations in the American legal system. See Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property," *Northewestern University Law* 90 (1996): 1283–497. See also Isaac Saidel-Goley and Joseph William Singer, "Things Invisible to See: State Action & Private Property," *Texas A&M Law Review* 5 (2018):

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Common Callings

Examining the English common law, William Blackstone characterized any business that was open to the public as a "common calling" with a moral obligation to serve anyone who came in requesting its goods or services.[4] Those common callings included inns and common carriers as well as blacksmiths and tailors. Indeed, a common calling referred to anyone who offered to provide goods or services to the general public.[5] Blackstone explained:

> There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but, in order to charge him with damages, a special agreement is required. Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.[6]

Blackstone rests the obligation to serve the public on (1) "hang[ing] out a sign," (2) "open[ing] his house for travelers" and (3) engaging in a "common profession and business."[7]

From the beginning of the Republic, Blackstone was the main source that American lawyers used to discover what the common law was. Blackstone's view was largely adopted by American commentators and courts. Chancellor James Kent domesticated Blackstone in his own *Commentaries on American Law* published in the 1820s.[8] Kent defined

439–504; and Joseph William Singer "We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom," *Boston University Law Review* 95 (2015): 929–50.

4. William Blackstone, *Commentaries on the Laws of England* (Abingdon, Oxon [Oxfordshirre]: Professional Books Ltd., 1982) (reprint of Edward Christian ed., 15th ed. 1809), 3:165–66.

5. Ibid.

6. Ibid.

7. Ibid.

8. James Kent, *Commentaries on American Law* (1826–30) (photo reprint; New York: Da Capo Press, 1971), 2:464–65.

common carriers as "those persons who undertake to carry goods generally, and for all people indifferently, for hire." He noted that "[t]are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action."[9] Joseph Story agreed that innkeepers and common carriers have obligations to serve those who seek service because they are engaged in "public employment"[10] providing "common"[11] service to the public.[12] A common carrier, for example, is one who "undertake[s] to carry goods for persons generally. . .to transport the goods of such, as choose to employ him, from place to place."[13]

Early American cases found obligations to serve the public when someone engaged in a "common calling" by operating a business that "holds out a general invitation" to the public to enter to seek services.[14] Holding oneself out as ready to provide services created a legally enforceable moral obligation to provide those services to anyone seeking them. Judges in the United States adopted this common law rule in the context of cases involving inns and common carriers, but none of the opinions limited service to those types of establishments.[15] And although racial segregation and discrimination were common in the North before the Civil War, the common law did not formally approve of such discrimination that existed by custom rather than formal law.

9. Ibid.

10. Joseph Story, *Commentaries on the Law of Bailments, with Illustrations from the Civil and the Foreign Law* (1832), §508, p. 328.

11. Ibid., § 475, p. 310 (discussing "common inns"); § 495, p. 322 (discussing "common carriers").

12. Ibid., §476, p. 311, §508, p. 328.

13. Ibid., § 495, p. 322.

14. *Clute v. Wiggins*, 14 Johns. 175, 176 (N.Y. Sup. Ct. 1817). *Accord*, *Pinkerton v. Woodward*, 33 Cal. 557, 597 (1867) ("Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper . . . and a traveler relying on such representations goes to the house to receive such entertainment as he has occasion for, . . . the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper."); *Markham v. Brown*, 8 N.H. 523, 528 (1837) ("Holding it out as a place of accommodation for travelers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.")

15. Singer, *No Right to Exclude*, 1315–1317. The sole exception involved a case where a customer beat up the shopkeeper, and exclusion from the bookstore might well have been justified on grounds other than a lack of a duty to serve the public, such as the fact that he "abuse[d] the privilege which [had] been. . .given him." *Watrous v. Steel*, 4 Vt. 629, 632 (1829).

Retrenchment, Free Exclusion, and Segregation

The "common calling" model came under pressure when the issue of racial segregation needed to be resolved by courts and legislatures. In 1858, the Supreme Judicial Court of the Commonwealth of Massachusetts was the first state supreme court to hold that only some businesses open to the public have a duty to serve the public. It held in the case of *McCrea v. Marsh* that, unlike common carriers and innkeepers, places of entertainment are free to deny service as they wish.[16] It is striking—and not a coincidence—that it adopted this rule to allow a library to refuse to seat an African American at a lecture despite the fact that he had already bought a ticket.

After the Civil War, all the Southern states, as well as Massachusetts, New York, and Pennsylvania adopted public accommodation laws that prohibited racial discrimination or segregation.[17] The federal public accommodations law of 1875 followed suit. For a time, the common calling model was extended in the South to give all persons, regardless of race, a right to equal access to public accommodations. Although some courts found racially segregated service to constitute a reasonable regulation, others found racial segregation to violate the right to equal service.[18]

After Reconstruction ended, however, the Southern states began to repeal their public accommodation laws, giving owners the freedom to exclude customers on the basis of race (or for any other reason).[19] That legal regime suggested that owners should be free to choose their customers at will without any obligation to serve the public. By striking down the federal public accommodations law of 1875 in the *Civil Rights Cases* decided in 1883, the Supreme Court paved the way for repeal of state public accommodation laws.[20] Soon after that, laws began to be passed denying discretion; laws began to *require* racial discrimination and segregation.[21] Those laws were not based on the idea that owners should be free from meddlesome regulation; instead those laws were mandatory regulations designed to require racial segregation in public accommodations. This Jim Crow model was not designed to protect the freedom of property owners to decide whom to serve and how to run their businesses, but rather was a regulatory regime designed to impose, reinforce, and perpetuate racial hierarchy.

16. *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858).
17. Singer, *No Right to Exclude*, 1354.
18. Ibid., 1352–53.
19. Ibid., 1354.
20. *Civil Rights Cases,* 109 U.S. 3 (1883).
21. Singer, *No Right to Exclude,* 1387.

The Revival of the Civil Rights Model

Ten years after the 1954 decision in *Brown v. Board of Education,* Title II of the 1964 Civil Rights Act recreated the 1875 public accommodations law but ensured its constitutionality by resting the statute on the commerce clause rather than on the Fourteenth Amendment.[22] Many states also passed public accommodation laws to prohibit race discrimination or segregation. The 1964 public accommodations statute, along with Title VII (on employment) and the Fair Housing Act of 1968, installed the fundamental principle that access to the marketplace should not be denied on account of race, and that racial segregation or discrimination in public accommodations, housing, and employment was illegal. The Supreme Court also held that laws prohibiting racial discrimination in access to the marketplace could be premised on the Thirteenth Amendment, because they remove "badge or incident of slavery,"[23] effectively overruling the contrary holding of the *Civil Right Cases* in 1883. The Supreme Court explained this remarkable shift by arguing that the Thirteenth Amendment would be meaningless if Congress did not have the power to ensure that ""a dollar in the hands of [an African-American] will purchase the same thing as a dollar in the hands of a [white person]."[24]

The Revenge of the First Amendment

Today we still face large amounts of racial discrimination in retail stores. No one appears to be arguing for full repeal of the state or federal public accommodation laws or for a right to segregate or discriminate on the basis of race. What they are arguing for is the right to discriminate against gay and lesbian customers, as well as transgender persons. In approximately half the country, the law allows this discrimination fully; owners can exclude customers based on sexual orientation or gender identity and do not have to give any reason for doing so. In the other half of the country, laws prohibit discrimination based on sexual orientation and gender identity in public accommodation.[25] However, some owners have argued that

22. 347 U.S. 43 (1954).

23. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

24. Ibid., 443.

25. Saidel-Goley and Singer, "Things Invisible to See," 441–42.

the constitutional guarantees of freedom of religious exercise and freedom of speech entitle them to exemptions from those laws.

Although the Supreme Court failed to definitively answer these arguments in the *Masterpiece Cakeshop* case, Justice Kennedy's opinion (signed by seven of the Justices) affirms in no uncertain terms that states are empowered to prohibit discrimination based on sexual orientation and that religious conviction cannot justify an exemption from those laws.[26] It remains to be seen whether Justice Kavanaugh (and others on the court) will affirm this principle or treat that strong language as mere *dicta* that can be discarded.

Back to Public Rights

How does Scott's historical exegesis of the Louisiana "public rights" paradigm help increase our understanding of the historical origins of modern public accommodations law and current controversies over the obligations of public accommodations? The "public rights" provision of the Louisiana Constitution provides a model of the realm of the marketplace that mediates between the private sphere of "social" rights and the public sphere of "civil" or "political" rights, while providing reasons why public accommodations sit on the "public" side of the line. The social area was the area of family, friendship, and association, whereas the public area involved voting, courts, legislatures, and public officers. It was agreed that in the "social" world, one could choose one's friends and associates and that in the "political" world, equal rights had to be provided without regard to race, but where did "public accommodations" fit? Were they on the private (social) side or on the public (civil/political) side? They involved private property and commerce but in a realm (the marketplace) generally open to all.

As current debates about sexual orientation and religious liberty show, we face a contest between two ideas. On the one hand is the "private

26. *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2017) ("gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity or worth"); ibid., 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); ibid., 1727 ("[p]etitioners conceded. . .that if a baker refused to sell any goods or any cakes for gay weddings,. . .the State would have a strong case. . .that this would be a denial of goods and services that went beyond any protected [first amendment] rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.").

property/freedom of contract" model. That model is based on the idea that owners should be free to control their own property, to contract or refuse to contract with anyone they wish, and to determine those with whom they will do business. In the modern world, it includes the First Amendment claim that one should be empowered to refuse service when it would make the owner complicit in conduct that violates the owner's religious commitments or that expresses ideas with which the owner disagrees.

On the other side is the "public accommodations" model. That model is based on the idea that all persons are free and equal and cannot be excluded from the marketplace in a discriminatory or segregated manner. It places obligations on owners who open their establishments to the public for business purposes. This model sits *between* social and civil rights. Louisiana's adoption of the language of "public right" vividly expresses this idea, gives it a name, and associates it with *public* justifications. Those justifications focus not only on the right to obtain service in businesses open to the public, but also on the right to do so in an integrated manner, receiving "full and equal enjoyment" of those services, as Congress put it in 1964.[27]

The private property model suggests that all property is the same. My business is no different from my house. If I am free to refuse to invite you to dinner in my home, I should be equally free to refuse to serve you in my store. Both the home and the business are in the private sphere where social rights prevail. My apartment building is also like my home. If I am free to refuse to let you move into my empty bedroom, I am equally free to refuse to rent to you because I cannot accept your homosexuality or the fact that you are married to another woman. This model focuses on the interests of owners in controlling their property, their businesses, and their economic associations. They claim the freedom to act as they like, to control their own property, to associate or not to associate with others, to choose what and with whom they do business, to deny services to those they find offensive or troublesome. This model rests on the idea that people are free to go elsewhere and find the goods and services they need from someone else. That is why giving owners freedom to deny service will not unduly hamper the liberty or security of others. And to the extent that this leads to some amount of segregation, it is segregation that is freely chosen and that reflects liberties of association, religion, and speech.

The public accommodations model is exemplified by the public rights doctrine that Scott writes about. It holds that *not all property is the same.* The fact that you should be free to choose your friends and those you invite to dinner in your home in whatever way you like does not mean you are equally free to choose your *customers* as you wish when

27. 42 U.S.C. §2000a.

you open a restaurant that holds itself open to the public. The public rights doctrine distinguishes between the private world of "social" relationships, where people are free to withdraw or choose their associations, and the "public" world of property open to the public that is subject to obligations to provide access without regard to race or other factors, and that should not prevent people from contracting to acquire goods and services and property in the same manner as others.

The Louisiana public rights model was superimposed on the common distinctions among political, civil, and social rights. It effectively bifurcated "social" rights into two parts; those that are legitimately private (family relationships, churches, intimate associations) and those that are legitimately "public" (stores open to the general public, government, courts). The public rights model places privately owned stores in the "public" world of the marketplace. And it does so to ensure the freedom, not of business owners, but of the general public that needs access to the marketplace to be able to live and to obtain the goods and services needed for life.

Public rights are not contingent on the ability to find the same goods or services elsewhere. They rest on the idea that one should not have to call ahead to see if one is welcome in businesses that indicate that they are open to the public. If you hang out a sign indicating that you are a business inviting the public to come in, the old model of English and early American law placed a moral obligation on you to provide the services associated with your common calling. The public rights model is based on the notion that people should not have to face the humiliation of being turned aside in public accommodation because they are not good enough to associate with other people in the world of the market.

The public rights model is significant historically because it both promoted racial equality and reconfigured conceptions of private property. It is significant normatively because we are confronting a different version of that same debate today. Jeff Jacoby, for example, has argued that businesses should *not* be free to discriminate on the basis of race but that they *should* be free to deny service for any other reason.[28] That would mean freedom to exclude or discriminate on the basis of religion, national origin, disability, sexual orientation, gender identity, age, veteran's status, or source of income. He views race as different "because American law for so many generations mandated and entrenched racial repression, it seems

28. Jeff Jacoby, "Freedom of Association Means Red Hen Can Turn Away Sarah Sanders," *Boston Globe,* June 25, 2018, https://www.bostonglobe.com/opinion/2018/06/25/freedom-association-means-red-hen-can-turn-away-sarah-sanders/Tpc5Toex4iUOVd15cKdgPN/story.html (accessed April 11, 2020); Jeff Jacoby, "Three Reasons to Vote No on Question 3, *Boston Globe,* November 4, 2018, https://www.bostonglobe.com/opinion/2018/11/02/three-reasons-vote-question/cklF8OcjD9nfFF1mxZ60gO/story.html (accessed April 11, 2020).

to me there is a unique obligation to actively prohibit discrimination on the basis of race."[29] But, whereas he opposes discrimination in public accommodations for other reasons, he does not think the law should prohibit it. Owners should have the same freedoms as customers, he argues. This will not, he believes, inconvenience anyone, because "where markets are as unfettered as possible, bigotry and xenophobia tend to recede. After all, the majority of vendors will always welcome business from anyone with money to spend, regardless of their religion, sex, politics, or character."[30]

Since the election of Donald Trump as president, we have experienced a torrent of racial hatred, anti-immigrant sentiment, and anti-Semitic and anti-Muslim incidents and language. And way before that, we have confronted a clash between claims of religious and expressive liberty and claims of a right to equal access to the marketplace without regard to sexual orientation or gender identity. It is a factual question whether "the marketplace" or the profit motive will root out most non-racial discrimination in public accommodations or whether there will be no geographic differences on this score (among states and between urban and rural areas). It is a normative question whether the freedom to shop without fear of exclusion is more important that the freedom to refuse service. Jeff Jacoby, and others like him, deny that there is any such thing as a "public right," other than with regard to race. Whether there is such a social sphere is obviously a continuing question. Scott's story about the emergence—and the loss—of the public rights model puts these choices into both historical and normative context.

29. Jacoby, "Freedom of Association."
30. Ibid.