1966

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FEDERAL PUBLIC-ACCOMMODATIONS LAW: A DISSENT

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Discrimination in public accommodations presents the most appealing case for compulsory civil-rights legislation. As Roy Wilkins testified before the Senate Commerce Committee in 1963:

> For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va. to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S. C., or from Jacksonville, Fla., to Tyler, Texas.
>
> How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white? . . .
>
> Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know somebody or they know somebody who knows somebody who can take care of you.
>
> This is the way you plan it.
>
> Some of them don't go.[1]

In practical terms, the Civil Rights Act of 1964 has eliminated much of the existing segregation in public accommodations, and, with continued enforcement, the job should be soon completed even in the most hostile areas of the South.[2] The public-accommodations problem, therefore, is no longer a live issue. It is useful, however, to touch upon it, for those who would restrain federal power are often challenged by the taunt, "What would you do about public accommodations? Would you leave it up to the states? How would you feel if you were a Negro?" The fact is that there is, or rather was, a constructive alternative on this issue. That alternative was not only

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1. *Hearings on Civil Rights—Public Accommodations Before the Senate Committee on Commerce,* 88th Cong., 1st Sess., pt. 1, at 656-57 (1963).
2. See New York Times, June 27, 1965, p. 37, col. 1-3; see also President Johnson's report on the first year of the 1964 Civil Rights Act, New York Herald-Tribune, July 12, 1965.

rejected, but it was done so in disregard of the clear intent of the Constitution. A short explanation will serve to illustrate the operation in this area of the impatience generally characteristic of the liberal approach to racial matters.

In 1875, the Congress enacted a public-accommodations law, based solely upon the fourteenth amendment, which was similar in its effect to the law of 1964. The 1875 law did not require for its application that there be any state governmental participation in the discrimination. The Supreme Court held the law unconstitutional in the *Civil Rights Cases*[3] in 1883. Justice John Marshall Harlan, the grandfather of the justice of the same name now on the Supreme Court, dissented, as he did in *Plessy v. Ferguson*,[4] the 1896 case which approved "separate but equal" public facilities. The Court majority in the *Civil Rights Cases* concluded that the amendment, when it said "No State" shall deprive any person of the equal protection of the laws, meant just that and did not authorize congressional legislation forbidding discrimination by individuals. The fourteenth amendment, said the Court, "does not authorize Congress to create a code of municipal law for the regulation of private rights but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[5] Mr. Justice Bradley, for the majority of the Court, argued: "If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property?"[6]

The primary impact of the *Civil Rights Cases* arises from the holding that the fourteenth amendment does not limit individual or private action, but instead limits only the actions of a state. This requirement of state action has survived to the present day in its essential elements, although more peripheral types of state activity have been brought within the definition[7] and more categories of persons have become susceptible, owing to their status or activity, to treatment as agents of the state whose action thereby becomes "state action."[8] The Civil Rights Act of 1964, therefore, could not, insofar as it is based upon the fourteenth amendment, reach the private proprietors of restaurants and other public accommodations without deferring to the state-action requirement of the fourteenth amendment. And the law as

3. Civil Rights Cases, 109 U.S. 3 (1883).
4. 163 U.S. 537 (1896).
5. *Supra* n. 3, at 11.
6. *Id.* at 14.
7. See Shelley v. Kraemer, 334 U.S. 1 (1948) holding that enforcement by a state court of a restrictive covenant, barring the sale of real property to Negroes, is state action within the meaning of the fourteenth amendment.
8. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) holding that a lessee of state-owned property is bound by the fourteenth amendment in the conduct of a restaurant on that property.

enacted did so defer. It provided in section 201 (b) that, in certain named types of public accommodations, "discrimination or segregation on the ground of race, color, religion or national origin" is prohibited if it is "supported by State action. . . ."[9] Such discrimination or segregation is supported by state action if it:

> (1) is carried on under color of any law, statute, ordinance or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.[10]

In contrast to its restricting reliance upon the state-action requirement of the fourteenth amendment, in which respect it appears to be technically constitutional, title II relies also and primarily upon the commerce clause in article I, section 8 of the Constitution.[11] The invocation of the commerce clause was necessary in order to reach those public accomodations where there might not be sufficient "state action" within the meaning of the fourteenth amendment and the civil-rights law's own broad definition of that concept. Congressional regulations under the commerce clause, unlike the fourteenth amendment, can operate directly upon individuals, whether or not there is any state participation or state support involved in the regulated actions of those individuals.

The congressional power to regulate commerce under the commerce clause has received an increasingly expansionist construction in Supreme Court decisions, especially since 1937.[12] As long as the activity regulated affects commerce, regardless of whether that effect is considered direct or indirect,[13] and regardless of whether the impact upon commerce is substantial or comparatively minute,[14] the power of Congress to regulate that activity will be upheld by the courts. In *Wickard v. Filburn*,[15] in 1942, a farmer raising twenty-three acres of wheat, all of which was to be consumed on his own farm, was held to have such an effect on interstate commerce as to be liable to marketing quotas fixed under the Agricultural Adjustment Act of

9. 78 Stat. 243 (1964), 42 U.S.C. §2000a (1964).
10. *Ibid.*
11. "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
12. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), upholding the Wagner Act as applied to labor relations in manufacturing enterprises affecting interstate commerce. Earlier in the thirties, the Court had invalidated some New Deal legislation as violative of the commerce clause. See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935); United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act of 1933); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act of 1933).
13. See NLRB v. Jones & Laughlin Steel Corp., *supra* n. 12, at 38, 41-42; Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946) (Federal Fair Labor Standards Act applies to employees of window-cleaning company which does the greater part of its work on the windows of factories producing goods for interstate commerce).
14. See Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (the publisher of a daily newspaper, one half of one percent of the circulation of which is outside the state of publication, is not by that fact exempt from federal Fair Labor Standards Act).
15. 317 U.S. 111 (1942).

1938; the Court's theory was that his growing and consuming of the grain affected the interstate market by diminishing his purchases of grain raised in other states. In effect, today, the only meaningful limitation upon the power of Congress to decide what is interstate commerce and thus within its regulatory power is the self-restraint of Congress itself.

In the public accommodations title (title II) of the 1964 Civil Rights Act, Congress extended its interstate commerce power beyond the confines not only of constitutional purpose but of the English language as well. One example will suffice. Title II provides that racial discrimination is prohibited in public accommodations (hotels, restaurants, gasoline stations, theatres, etc.) which "affect commerce." "Commerce," in this context, means commerce among the states, that is, interstate commerce. The operations of such an establishment "affect commerce" if "it serves or offers to serve interstate travelers or *a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce.*"[16] In December 1964, the Supreme Court upheld title II in two cases. In one, *Heart of Atlanta Motel, Inc. v. United States*,[17] the Court sustained the act as applied to a motel which drew 75% of its guests from out of state. But in *Katzenbach v. McClung*,[18] the establishment involved was Ollie's Barbecue, a family-owned restaurant in Birmingham with no connection with interstate travelers or interestate commerce other than the fact that 46% (about $70,000 worth) of the $150,000 worth of food which the restaurant purchased locally each year was "bought from a local supplier who had procured it from outside the State." The Supreme Court held that when Ollie McClung served to his patrons meat which had been transported interstate to the supplier from whom he bought it, Ollie's operations sufficiently affected interstate commerce to bring him within the range of congressional power.

Now think hard, and try to think of a single retail establishment of any kind which could not be regulated by Congress under this sort of construction. The closest I can come is a roadside stand at a farm selling apples grown by the seller on his own farm. But what about the baskets? And the insecticide? For the requirement in title II that a "substantial" portion of the product sold shall have moved interstate is hardly a restraint upon future congressional action in view of Court decisions which have recognized congressional power where there is only a slight interstate involvement.[19] Indeed, the Solicitor General of the United States was questioned on the reach of this power in his argument of the *Heart of Atlanta* and *McClung* cases before the Supreme Court:

> Mr. Justice Harlan asked if the Solicitor General thought that Congress could make it unlawful for a man to beat his wife if he smoked

16. (Emphasis added.)
17. 379 U.S. 241 (1964).
18. 379 U.S. 294 (1964).
19. See Mabee v. White Plains Publishing Co., *supra* n. 14; Wickard v. Filburn, *supra* n. 15.

> cigarettes imported from another state. But, to Mr. Justice Stewart, the question was: Could Congress "make it a federal offense for a man to beat his wife with a baseball bat imported from another state?"
>
> The Solicitor General thought U. S. v. Sullivan, 332 U. S. 689, might well permit Congress to so act under the Commerce Clause. The Court there held, without dissent, that Congress has the power to forbid a small retail druggist from selling drugs without the form of label required by the Federal Food, Drug, and Cosmetics Act even though the drugs were imported in properly labeled bottles from which they were not removed until put on the shelves of the local retailer. However, the Solicitor General did not think the government need go that far in this case. More appropriate, according to the Solicitor General, are the many Fair Labor Standards cases.[20]

It is important to distinguish what the commerce clause ought to be from the reality of what it has become under the post-1937 Supreme Court. It is accurate to say that the commerce clause is a nullity today as a meaningful restraint upon congressional power. This is true at least in the sense that one cannot imagine any established commercial enterprise which would be held not to "affect commerce" to a sufficient degree to warrant congressional regulation by legislation, otherwise properly drawn, designed to attain what the Congress and the Supreme Court consider a desirable social objective. The only significant curb upon the federal commerce power today must be found, if at all, in the self-restraint of the Congress. Not only is this a departure from the meaning of the Constitution, but it is a development which is, on its merits, destructive of the federal principle underlying that Constitution.

However, it is not the purpose of this article to contest again a lost cause. Title II is worthy of discussion here, not with any hope that the commerce power will soon be restored to its proper dimensions, but rather because the story illustrates the impatient temper of the liberal mind. For title II is vulnerable also to the charge that its enactment was a precipitate rejection of a promising, and hardly noticed, alternative in favor of a more dramatic and hasty prohibition, the enactment of which, for all its short-term good effects, has accelerated the disintegration of our republican form of government.

The neglected alternative to title II is found in the 1963 case of *Lombard v. Louisiana*[21] which involved a sit-in demonstration protesting segregation at a lunch counter in the McCrory store in New Orleans. Neither New Orleans nor Louisiana had any ordinance or statute requiring segregated eating facilities. The proprietor of the lunch counter, therefore, contended that his decision to segregate was a purely private affair, in which no governmental action or support was involved. Therefore, he claimed, there was no

20. 33 U.S.L. WEEK 3113 (1964).
21. 373 U.S. 267 (1963).

state action to activate the strictures of the fourteenth amendment. The Supreme Court, however, speaking through Chief Justice Warren, found sufficient state action in public announcements by the Mayor and the Superintendent of Police of New Orleans which directed the demonstrations to be halted and which, in the eyes of the Court, went beyond the nondiscriminatory exhortations to preserve the peace which would have been permissible. The Court found that the officials' statements, while ostensibly directed merely toward the maintenance of peace, actually directed the continuance of segregated service as such. Mr. Justice Harlan dissented, finding instead that the statements did not counsel a maintenance of segregation, but rather "are more properly read as an effort by these two officials to preserve the peace in what they might reasonably have regarded as a highly charged atmosphere."[22] Although, on the facts of the case, Mr. Justice Harlan appears to have been correct in his interpretation of the statements, nevertheless the basic principle underlying the *Lombard* decision is sound and offered a satisfactory solution to the public-accommodations problem. This is so, even though the *Lombard* ruling carried to its outermost limits the trend to find state action in less direct and even incidental involvements of state or local government officials. For a state can act in ways more subtle than the enactment of a statute or an ordinance. When a state official throws the prestige of his office onto the scales in an endorsement of otherwise private segregation, the result will usually be a predictable reinforcement of the private party's determination to segregate. At the point where that public official's encouragement becomes a substantial factor in the proprietor's decision to segregate, the fourteenth amendment should be interposed to bar the discrimination.

The principle of *Lombard* is not really novel. It is clear that a state cannot escape its burden under the fourteenth amendment by cloaking its action in a fictitious private character. Just as it violates the amendment for a state to abolish its primary-election laws, but then encourage white "private" primaries by according to the victor a place on the general-election ballot,[23] so it should be equally wrong for a state or city, having abolished all statutes and ordinances promoting segregation, to encourage segregation by public pronouncements of government officials. Nor does the relative informality of a state's promotion of segregation insulate that promotion from fourteenth amendment attack if a public official is actually involved.[24] The *Lombard* approach, however, requires careful limitation. It should not be carried so far as to bar genuinely private discrimination in areas where the state has no legitimate interest, such as social discrimination in a home or private club, merely because that discrimination has been encouraged by

22. 373 U.S. at 254.
23. See Terry v. Adams, 345 U.S. 461 (1953); Rice v. Elmore 333 U.S. 875 (1948).
24. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) holding that a system of informal censorship of obscene literature, carried on by the Rhode Island Commission to Encourage Morality in Youth, violated the freedom of the press protected by the fourteenth amendment.

public statements of public officials. The crucial factor in finding a sufficient state interest ought to be the holding out of the premises as open to the public.[25] If there are public statements by government officials encouraging segregation in such a facility, and if they constitute a substantial factor in the proprietor's decision to segregate, "state action" ought to be considered present. But even in establishments holding themselves open to the public, a truly private decision to segregate, not substantially influenced by official action, ought to be beyond the federal power.

And, of course, mere official enforcement of a neutral trespass or breach-of-the-peace statute ought not to be of itself sufficient official action to activate the *Lombard* rule, even if the presence of such a statute, and the prospect of its enforcement, is a source of encouragement to racially biased proprietors. The inquiry should rather be directed toward official encouragements of segregation as such. It is conceivable that official pronouncements reminding the populace of the presence of trespass or breach-of-the-peace statutes may in fact be covert devices to encourage segregation as such. State action would seem to be present in such a case, not because of the existence or enforcement of the statute, but rather on account of the official, though devious, promotion of segregation as such. However, even where a proprietor's decision to segregate is in keeping with a genuinely private local custom favoring segregation in such establishments, there ought not to be a finding of state action as long as the custom is not substantially influenced by any formal or informal sanction on the part of public officials.

The relevance of the *Lombard* principle to title II of the 1964 Act is that in *Lombard* the Court evolved a principle which, if applied with proper restraint, could have been employed to direct the anti-discrimination effort into a more productive channel. The federal attack should be upon governmental promotion of racial discrimination, rather than directly upon the misguided discriminators. In fact, discrimination in public accommodations would disappear in an acceptably short time when no longer nourished by government patronage and encouragement. When, however, the federal offensive is launched directly against the private citizens concerned, it not only does violence to settled constitutional interpretations, but also entails an encroachment upon the heretofore concededly state and private spheres which ought not to be countenanced in the absence of a demonstrated and overpowering necessity therefor. Moreover, an uncritical resort to compulsion could retard the growing development of a free popular consensus favoring equality of opportunity. In title II, unfortunately, the Congress allowed the opportunity presented by *Lombard* to go by default, while embarking upon an approach which is wrongly conceived and could be self-defeating in terms of the ultimate end to be attained. For the principal objective of public policy in this area must be, not the seating of a Negro

25. See Marsh v. Alabama, 326 U.S. 501 (1946) treating a company-owned town as a municipality because of its open character, despite its private ownership.

at a hot-dog stand, but the promotion of a color-blind society. Title II has succeeded in desegregating the hot-dog stands and other public accommodations and it is intended to advance the goal of color blindness. But in its simplistic reliance upon coercion to achieve an appearance of integration, in its encouragement of agitators and zealots through the wide extention of its coverage, and in its implicit disparagement of the power of moral persuasion, it entails a risk of unnecessarily harmful incidental effects.

The ethical imperatives in this issue are plain. Any attempt today to justify, on its merits, racial discrimination in public accommodations is untenable. And it is understandable, too, that some are disposed to eradicate the evil through a precipitate use of federal power. One must be careful, therefore, in sketching a position of dissent from title II of the 1964 Act, to emphasize that the dissent is aimed, not at the perpetuation of discriminatory practices, but rather at their speedy elimination within the framework of a limited, constitutional government. For two things must be borne in mind. One is that, even though title II achieves a prompt elimination of discrimination in public accommodations, it still merits objection because of its tendencies to intrude the federal power too far into the arena of personal choice and to aggrandize federal power at the expense of the essential federal-state division of powers, which is a basic safeguard for the liberty of all in this republic. Secondly, apart from questions of federalism and big government, there simply is no necessary correlation between the elimination of segregation in public accommodations and the improvement of basic race relations. Thirty-five states and the District of Columbia now forbid racial discrimination in public accommodations of one sort or another.[26] Incidentally, it is settled that a state or local statute or ordinance can constitutionally forbid such discrimination, as an exercise of the reserved police power of the states.[27] The federal government, by contrast, is one of specific and limited powers, while the states possess the reservoir of general governmental power.

Such state or local laws are obviously just, on the ground that when a man opens a place of "public accommodation" to the public he ought to have the right to refuse service to a man on account of his failure to wear a coat and tie, but not on account of his race. For one cannot change his race and it is unfair for a man to be excluded for that reason from an otherwise public invitation to buy. In legal terms, state and local public-accommodations laws involve an extension of the class of businesses which are "clothed with a public interest" and therefore forbidden to discriminate.[28] As long as they are limited in their coverage to places of public accommodation,[29]

26. COMMISSION ON LAW & SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, SUMMARY OF 1964 AND 1965 STATE ANTI-DISCRIMINATION LAWS 3 (1966).
27. See Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); People v. King, 110 N.Y. 418 (1888); see also Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).
28. See Wolff v. Court of Industrial Relations, 262 U.S. 522 (1923).
29. See N.Y. CIVIL RIGHTS LAW §40.

such as restaurants, barber shops, and retail stores and do not impinge upon private clubs and confidential relations such as doctor-patient and attorney-client, such laws are a reasonable implementation of public policy. Yet a glance at the list of the states having such statutes or ordinances reveals that it includes those northern states, such as New York, New Jersey, Pennsylvania, California, Illinois and others, where racial prejudice, friction and violence are most prevalent. It may be said that things would be much worse in those states if there were no public-accommodations laws. But it is at least equally tenable to say that to eliminate segregation in public accommodations is to attack a symptom, rather than a cause. Unless such an attack is coupled with a real educational effort to harness the voluntary resources within the American people, in the critical areas of education, employment, and housing, the effort will prove to be futile or worse. In an indiscriminate quest for equality, the higher value of liberty could suffer seriously, and this not alone in an infringement upon the property rights of proprietors, but in a general undue encroachment upon that voluntarism which, while not immune to some restriction and qualification, is still the hallmark of a free society.