What is a Place of "Public" Accommodation?

Alfred Avins

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Alfred Avins, What is a Place of "Public" Accommodation?, 52 Marq. L. Rev. 1 (1968).
Available at: http://scholarship.law.marquette.edu/mulr/vol52/iss1/2

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
WHAT IS A PLACE OF "PUBLIC" ACCOMMODATION?

ALFRED AVINS*

Title II of the Civil Rights Act of 1964 on the federal level, and the laws of 35 states and the District of Columbia, prohibit discrimination in places of public accommodation. In spite of the widespread coverage of this type of legislation, there is surprisingly little in the recent periodical literature which attempts to analyze what types of businesses are and ought to be considered as "public" accommodations. The purpose of this article is to analyze and attempt to rationalize the considerations which ought to govern in determining what a place of "public" accommodation means, and how it should differ from a place of "private" accommodation.

1. THE CIVIL RIGHTS CASES AND THEIR COMMON LAW BACKGROUND.

A. The Common Law of Public Utilities.

Because almost all "public accommodation" statutes were passed after the Civil Rights Cases, and, as will be noted later on, the earliest northern state laws were mostly a response to this decision, it is desirable to start by analyzing this decision in light of its common-law back-

---

* B.A. 1954, Hunter College; LL.B. 1956, Columbia Univ.; LL.M. 1957, New York Univ.; M.L. 1961, J.S.D. 1962, University of Chicago; Ph.D. 1965, University of Cambridge (England); Member of the New York, Florida, District of Columbia, Illinois, and United States Supreme Court Bars. Formerly Assistant District Attorney, New York County; former Professor of Law, Memphis State University; former Special Counsel to the Attorney-General of Louisiana; former Special Deputy Attorney-General of New York.


3 Caldwell, State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs, 40 WASH. L. REV. 841 (1965) gives a good general survey of a descriptive kind. For earlier surveys, see Comment, Race Equality by Statute, 84 U. PA. L. REV. 75, 81 (1935) and Stephenson, Separation of the Races in Public Conveyances, 3 AM. Pol. SCI. REV. 180 (1909). There are a large number of bland and quite superficial reviews. See, e.g., Comment, 19 U. MIAMI L. REV. 456 (1965). There are also a considerable number of surveys of the law of one state only. See, e.g., Note, 34 U. CIN. L. REV. 368 (1965).

4 109 U.S. 3 (1883).
ground. To do so, the status of certain public utilities must first be examined.

Under English common law, it was the duty of a common carrier to serve all persons without imposing unreasonable conditions. The English courts considered that "a person [who] holds himself out to carry goods for everyone as a business...is a common carrier," and that any member of the public may create a contract with the carrier by accepting its general offer. The rule remains the same today.

Wherever English common law was exported, the rule that carriers had to serve the public without unreasonable discrimination went with it. The rule is therefore found in cases from Australia, Burma, Canada, India, Ireland, and New Zealand. An early South African case held that since a public utility must serve the whole public, an electric tramway could not refuse to carry non-Europeans, although a later case held that race was a reasonable ground for refusal to carry passengers.

From its earliest days, American law followed the English rule that railroads and other common carriers were legally bound to carry all persons and could not unreasonably exclude anybody, but they had power to make reasonable regulations and discriminations, and exclude

---

18 Hamilton, Unjust Discrimination in Railways, 22 Am. L. Reg. (n.s.) 733 (1883).
passengers on reasonable grounds. Even before the Civil War the Illinois Supreme Court had pointed out that ferrymen were common carriers because "he enjoys a franchise—a special privilege, which is granted to him in consequence of his superior qualifications to fill a public trust." That court also pointed out that "railroads are ... common highways ... in the sense of being compelled to accept of each and all, and take and carry to the extent of their ability." The rule remains unchanged to the present time. Thus it has been held that because of the special privilege of a monopoly franchise given to a common carrier to perform a service for the public, the carrier, like other public utilities, cannot abandon its service without permission of the authorized governmental commission. Thus, a recent case has noted: "This duty of a common carrier to meet the needs of the public arises from its acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained." A distinguishing hallmark of common carriers is the obligation to carry all persons without unreasonable discrimination. Conversely, a carrier


21 Central Military Tract. R.R. Co. v. Rockafellow, 17 Ill. 541, 551 (1856).

22 In Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960), the court said:

"It is, of course, fundamental that the justification for the grant by a state to a private corporation of a right or franchise to perform such a public utility service as furnishing transportation, gas, electricity, or the like, on the public streets, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience. This is what differentiates the public utility which holds what may be called a 'special franchise,' from an ordinary business corporation which in common with all others is granted the privilege of operating in corporate form but does not have that special franchise of using state property for private gain to perform a public function."

23 See Michigan Consol. Gas Co. v. Federal Power Comm., 283 F.2d 204, 214 (C.A.D.C. 1960) where the court observed: "The fact that abandonment of public service requires Government approval symbolizes the special legal status and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service. When Panhandle sought and obtained a certificate of public convenience and necessity to serve the Detroit market, it became the exclusive supplier for that market. . . . Abandonment may be allowed only if the 'public convenience or necessity permit.'"


25 See Semon v. Royal Indem. Co., 179 F. Supp. 403, 405-6 (W.D. La. 1959), quoting 13 C.J.S. Carriers, §§ 530, 538 as follows:

"Public or common carriers of passengers, like common carriers of goods, are engaged in a public calling which imposes on them a duty to serve all without discrimination. . . . The distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage, so long as there is room and no legal excuse for refusing, while such duty does not rest on the latter; . . . a common carrier of passengers is bound to receive for carriage
which reserves the right to pick and choose its passengers is not a common carrier. Thus, common carriers of passengers could not engage in racial discrimination merely by virtue of common law or statutory rules prohibiting unreasonable discrimination, entirely aside from any special statute banning racial discrimination.

Under English common law, a similar rule applied to innkeepers, who were likewise bound to accommodate all travelers, unless they had reasonable cause to refuse. The rule was similar in Scotland, although there hotels could pick the class of guests they chose to accommodate. Cases to the same effect are found in Australia, Canada, Ireland, and South Africa. Thus, when a Negro sued a London hotel for refusing him accommodations, he was allowed to recover on the theory that such discrimination was simply one of the many types of unreasonable discrimination, and no special consideration was paid to the fact that racial discrimination was involved. The Lord Justice-Clerk of the Scottish Court of Session observed in a similar case:

It is obvious that the defenders are not entitled to exclude the pursuer from their hotel because he is a Jew; and it would have made no difference, in my opinion, had it been proved that he is a Jew of German origin. An individual is not responsible, and ought not to be made responsible, for his ancestry.

without discrimination all proper persons who desire and properly offer to become passengers, if the accommodations are sufficient, unless some special reason or excuse exists for refusing them; ... See also Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Calif. 1961).

26 Hunt v. Clifford, 152 Conn. 540 209 A.2d 182, 183 (1965) held: “A common carrier of passengers undertakes to carry for hire, indiscriminately, all persons who may apply for passage, provided there is sufficient space or room available and no legal excuse exists for refusing to accept them. Since passengers were not accepted on this school bus indiscriminately but were restricted to pupils embraced in the contract of transportation, the bus was not being operated as a common carrier of passengers.”


The American authorities have likewise held that inns and hotels have a common law duty to serve all travelers, since they are public servants. Although several cases have based this duty on the theory that innkeepers hold themselves out to the public to accept all guests, thus enticing travelers to come there, this reasoning hardly seems to constitute a persuasive distinction from other businesses. Other businesses also advertise for customers, yet they are not charged with the same duty to serve all persons indiscriminately. The true reason seems to be that innkeepers possessed, in many localities, a government monopoly. The duty to serve people without racial discrimination is simply one facet of the duty to serve everybody without unreasonable distinctions, although one court has indicated that if accepting Negro business would drive other trade away, an innkeeper need not admit them.

However, at an early date it was held that a coffee house is not an


38 Jackson v. Virginia Hot Springs Co., 213 F. 969 (4th Cir. 1914). In De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527, 529 (1908), it was observed: "For centuries it has been settled in all jurisdictions where the common law prevails that the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities."

39 In State v. Steele, 106 N.C. 766, 11 S.E. 478, 482 (1890), the court observed: "It was formerly held by the courts of England that where an innkeeper allured travelers to his tavern by holding himself out to the public as ready to entertain them, and then refused to receive them into his house when he had room to accommodate them, and after they had tendered the money to pay their bills, he was liable to indictment." Similarly, Alpaugh v. Wolverton, 184 Va. 943, 36 S.E.2d 906, 907-8 (1946) held: "An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travelers, he cannot arbitrarily prohibit persons who come under that character . . . . from entering . . . ."


"3. That no person shall be licensed to keep an inn or tavern, unless the freeholders who shall recommend him or her, shall also certify that such an inn or tavern is necessary, and will conduce to the public good.

"13. That it shall be the duty of, and it is hereby expressly enjoined upon, the said courts, to license no more inns and taverns, in their respective counties, than shall be necessary to accommodate and entertain travelers and strangers, to serve the public occasions of the said counties, and for the convenience of men's meeting together to transact business . . . ."

41 In State v. Steele, 106 N.C. 766, 11 S.E. 478, 484 (1890), the court said:

"Guests of an hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in put out . . . . unless they be persons . . . . so objectionable to the patrons of the house on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, . . . ."
Likewise, under English and Commonwealth law, a tavern, bar, restaurant, refreshment stand, licensed public-house where liquor is sold by the drink, or other shop selling food or drink for consumption on the premises is not an inn, and the owner has the legal right to refuse service to anyone and ask them to leave. The same rule is true in American law.

Places of amusement have a peculiar history in English law. Until 1843 theatres in England had Crown patents or licenses giving them monopolies. Ireland had a similar system. Licenses were also required for public dance-halls, music halls, and skating rinks. But places of amusement which were limited to subscribers, and to which the public was not admitted indiscriminately, did not have to have a license. The licensing or patent system was enforced by a statute punishing unlicensed actors as rogues-and vagabonds. The American regulation and licensing requirements for places of public entertainment were very similar to the English rules.

At an early date, the English courts declined to impose upon theater monopolies the same duties as were imposed upon common carriers and inns, such as the obligation to charge reasonable rates, on the ground that theaters were not a necessity of life. Places of amusement were allowed to exclude patrons at will. While this English authority was both known and, as far as can be ascertained, followed, in American law, authority as a whole on the duty of monopoly theaters and places of amusement was scanty. It could reasonably be believed that theater monopolies had the same duty to serve the public as franchised carriers and inns. This was the theory of Senator Charles Sumner, the

---

46 For an example of an early theatre monopoly in Ireland, which by royal patent had only one theatre in Dublin, see Calcraft v. West, 2 Jo. & Lat. 123, 8 Irish R. Eq. 74 (1845).
47 See Brown v. Nugent, L. R. 6 Q.B. 693 (1871).
51 Stat. 10 Geo. II, c. 28 (1737).
52 See Avins, supra note 40, at 880 n. 33.
equalitarian Radical who introduced the Civil Rights Act of 1875. Sumner had spent two years in England and Europe and had studied law, read widely, and talked to many famous English lawyers. He was considered one of the most erudite lawyers of his time, and can hardly have been unaware of English theater law.

At for other businesses, the rule was well settled that a business owner could bar whomever he pleased from his premises. As the Vermont Supreme Court remarked: "It is a well settled principle, that the occupant of any house, store or other building, has a legal right to control it, and to admit whom he pleases to enter and remain there.

B. The Civil Rights Cases.

The Civil Rights Cases, which held unconstitutional the first section of the Civil Rights Act of 1875, has been one of the most commented on decisions of the United States Supreme Court. Nevertheless, this case, and the statute which gave rise to it, has engendered a remarkable amount of erroneous comment. One recent writer has become so confused that he has postulated the theory that the framers of the 1875 act believed that the Fourteenth Amendment directly prohibited discrimination by owners of "public accommodations," and further asserted that the expectation of being served in such a place was deemed to be the legal equivalent of a right to be served, thus making a private business a place of "public accommodation." This confusion of the practice of admitting white persons with the legal right to be admitted was compounded by a failure to recognize the fact that the theory of the framers originated from a belief that the businesses covered were public utilities which had a common law duty to admit the public.

The first section of the statute gives certain rights to "all persons within the jurisdiction of the United States." This includes aliens, and must therefore be intended to enforce the Equal Protection Clause of the Fourteenth Amendment, since the Privileges and Immunities Clause extends only to citizens. The fact that the law operates only "within

56 Avins, supra note 40, at 880.
57 18 D ICTIONARY OF AMERICAN BIOGRAPHY 208 (1943); 25 ENCYCLOPAEDIA BRITAN-
nica 81 (11th ed. 1911).
60 109 U.S. 3 (1883).
61 18 Stat. 335 (1875).
63 See the following erroneous theory of the law in Pingrey, Racial Discrimina-
tion, 30 AM. L. REG. (n.s.) 69, 77 (1891): "The negro is now, by the Con-
stitution of the United States, given full citizenship with the white man, and
the jurisdiction of the United States" also shows that it was intended to be co-extensive with the Equal Protection Clause. The statute gives these persons "the full and equal enjoyment of . . . inns, public conveyances on land or water, theatres, and other places of public amusement." Reading up to this point, the plain wording of the law is that all persons are entitled to use the facilities named. In other words, the statute up to that point re-enacted the common law as it was believed to be.64

The statute then qualified the foregoing right, making it "subject only to the conditions and limitations established by law." The phrase "established by law" means established by state law, whether statutory or judge-made, since there was no federal law conditioning the right to use inns, carriers, or places of amusement. Moreover, only law could establish the conditions or limitations. Conditions or limitations established by the proprietor could not prevail over the obligations of the federal statute. A California court has so far forgotten the meaning of this phrase that in a recent case construing a similar statute it has read the words "by law" out of the statute and held that the proprietor could establish his own conditions.65 However, the original meaning seems clear, and underscores the fact that the federal statute was intended to deal with businesses governed by statute law, namely, public utilities.

The conditions and limitations had to be applicable "alike to citizens of every race and color, regardless of any previous condition of servitude." The conditions had to be applicable, not to "persons of every race," but to "citizens of every race," thus precluding discrimination against aliens. And, of course, along with other types of discrimination, discrimination against Negroes was forbidden.

The second section, penalizing discrimination, is somewhat narrower. It inflict penalties for denying these facilities "to any citizen." Aliens are not therein protected. An exception is made "for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." A proprietor of a utility may not

---

64 See Pingrey, supra note 63, at 76: "The Civil Rights Act seems to have been framed to correspond with the law applicable to innkeepers and common carriers."

65 See Orloff v. Hollywood Turf Club, 110 Cal. App. 2d 340, 242 P.2d 660, 662 (1952), which declared: "It is the privilege of an inn, railroad, or a race track to demand, in advance, pay for the accommodation, facility or the privilege to be rendered. Hence, a failure of a person to comply therewith is not a refusal of any equal accommodation, facility or privilege accorded to those who do comply. The statute expressly provides that the equality called for by the statute is subject 'to the conditions and limitations established by law, and applicable alike to all citizens.' Among such conditions and limitations applicable to all citizens is that they shall pay the charges imposed, equally and without discrimination, upon all citizens."
himself establish conditions or limitations on the right to use his facility, but the law may do so, either by positive statute or by judicial decision declaring a particular discrimination to be reasonable. These laws, however, cannot make racial grounds a ground for discrimination.

The statute imposed civil and criminal penalties, but saved to every person discriminated against the right "to proceed under their rights at common law and by State statutes," making one proceeding a bar to the other. This assumed that there was a common law or statutory right to use the facility in question, which would only exist in the case of a public utility.

The failure to make a more direct reference to state law in the statute, although this is what was intended to be affected, resulted in the invalidation of the statute by the Supreme Court. This ambiguity was not so surprising since, as a contemporary writer who attacked the constitutionality of the law noted: "There is no state law which makes any discrimination in favor of any person which can by possibility be construed to be embraced in the Civil Rights Bill."  

In opening his analysis of the law, Mr. Justice Bradley, for the majority, made his first major error. He said:

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color. . . .

As previously noted, this is the exact opposite of the legislative intent, which was not merely to abolish racial discrimination, but to reinforce the common law; the reference to racial discrimination was merely to emphasize that states could not abolish the common law in this particular. But, this was not the first time that the Supreme Court had erroneously assumed that because Negroes were most in need of a provision, that it was for their particular benefit.

---


67 Cocke, Constitutionality of the Civil Rights Law, 1 Southern L. Rev. (n.s.) 193, 205 (1875).


69 Of the dictum on this point penned by Mr. Justice Miller in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873), Senator Timothy O. Howe,
Mr. Justice Bradley then proceeded to quite correctly point out that the first section of the Fourteenth Amendment inhibited only state legislation or other state action, and that the objects of his section limited the scope of the fifth section. The core of his argument was that the law "does not profess to be corrective of any constitutional wrong committed by the States," but that "it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." He concluded that since the legislation punished individuals without reference to whether they were acting under color of state law, it was invalid.

The legislative history shows clearly that this was not the intent of Congress. The Radicals believed that Congress could punish individuals who were acting pursuant to state laws which the Fourteenth Amendment invalidated, a position which Mr. Justice Bradley, himself a Radical Republican, did not dispute. What they intended to do was to punish proprietors of inns, carriers, and places of amusement who discriminated against Negroes pursuant to a state statute or common law rule exempting Negroes from the general coverage of state public utility laws or common law decisions. Poor legislative drafting obscured this theory.

Finally, Mr. Justice Bradley rebutted the argument that discrimination in inns, carriers, and places of amusement were badges of slavery by pointing out that many free Negroes in ante-bellum days were subject to such discrimination, but yet were not slaves. He said that such discrimination was essentially different from discrimination in the right to sue, hold property, and make contracts, which had been forbidden to slaves and which the Thirty-Ninth Congress abolished pursuant, in part, to the Thirteenth Amendment.

---

a Radical former state supreme court justice from Wisconsin who had helped frame the Fourteenth Amendment, said: "I am going to say that in that case the court did undertake to assert a principle of constitutional law which I do not believe will ever be accepted by the profession or the people of the United States . . . . [The Statute] made, I think, broad discrimination between the rights of white men—a discrimination which upon my soul I believe the fourteenth amendment condemns . . . ." 3 Cong. Rec. 4148 (1874).

70 Civil Rights Cases, 109 U.S. 3, 11-14 (1883).
71 Id. at 14.
72 Id. at 14-19.
73 Avins, supra note 40, passim.
75 Civil Rights Cases, 109 U.S. 3, 16-17 (1883).
76 See Avins, supra note 66, at 16-17.
Mr. Justice Harlan agreed with the majority that the only intent of Congress was to prevent racial discrimination.\textsuperscript{79} However, he argued that the Thirteenth Amendment, although it did not give Congress power to abolish discrimination in respect to all civil rights, "necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to free men of other races."\textsuperscript{80} He relied heavily on the precedent created by the Civil Rights Act of 1866.\textsuperscript{81} The unsoundness of this reliance is immediately apparent. Not only were the Thirteenth Amendment and the 1866 act not limited to racial discrimination, but the latter statute related only to peculiar forms of discrimination imposed only on slaves and not on Negroes generally.\textsuperscript{82} As the majority pointed out, discriminations in public places were made against free Negroes also.

Mr. Justice Harlan was on sounder ground when he noted that the federal law covered only public utilities with special franchises, and therefore with public duties.\textsuperscript{83} His application of \textit{Munn v. Illinois},\textsuperscript{84} upholding state regulation of monopoly transportation facilities, to places of amusement licensed by the state, is especially significant.

When the dissent of Mr. Justice Harlan turned to the Fourteenth Amendment, it declared that Negroes were entitled to the privileges of state citizenship under the Fourteenth Amendment (a manifest error), one of which he believed was freedom from racial discrimination by the state or any agency thereof. The dissenting justice then argued that under the doctrine of \textit{Prigg v. Pennsylvania},\textsuperscript{85} Congress could directly intervene to protect such asserted right: This was a second error, since the redraft of the Fourteenth Amendment in 1866 had eliminated the analogy to that case.\textsuperscript{86} Mr. Justice Harlan then urged that Congress could legislate respecting "individuals and corporations exercising public functions" which denied Negroes their civil rights.\textsuperscript{87} He found state action under the Fourteenth Amendment because "railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to government regulation."\textsuperscript{88} He drew an analogy between

\textsuperscript{79} Civil Rights Cases, 109 U.S. 3, 26-27 (1883).
\textsuperscript{80} Id. at 36.
\textsuperscript{81} Id. at 35-37. \textit{See} Avins, \textit{supra} note 78.
\textsuperscript{82} Ibid.
\textsuperscript{83} Civil Rights Cases, 109 U.S. 3, 37-42 (1883).
\textsuperscript{84} 94 U.S. 113 (1876).
\textsuperscript{85} 41 U.S. (16 Pet.) 539 (1842).
\textsuperscript{87} Civil Rights Cases, 109 U.S. 3, 43-53 (1883).
\textsuperscript{88} Id. at 58-59.
the right to use a public utility and the right to use a public building or highway, which it would be a denial of civil rights to withhold.99

The conclusion that the Civil Rights Act of 1875 was only intended to operate on state statute and decisional law in respect to public utilities is strongly reinforced by examination of a hitherto unpublished bill introduced by Senator George F. Edmunds, a Radical Republican lawyer from Vermont who had voted for the Fourteenth Amendment and who was a prime exponent of the 1875 law.90 In 1883, when the Supreme Court held this law unconstitutional, Edmunds was Chairman of the Senate Judiciary Committee, and when Congress met on December 4th, right after the opinion was handed down, he introduced a bill "to provide for the further protection of citizens of the United States and others against the violation of certain rights secured to them by the Constitution of the United States."91 This bill, which is printed in full in the appendix of this article, provided for removal to federal court of any suit in state court where any issue, defense, or decision turned on race, color, or previous condition of servitude,92 and for review by the United States Supreme Court of any adverse state judgment which turned on these grounds. The last section of the bill declared that any state law or decision which discriminated on racial grounds in personal or property rights was invalid. In introducing this bill, which was never to become law, Edmunds said: "it undertakes, and I believe successfully, to accomplish the security for the protection of the colored citizens of the United States against the inhuman, and, as I believe, wicked and cruel and prejudicial, distinctions that in some of the States are still made against them in respect of their civil rights, and to protect them consistently with the late decision of the Supreme Court of the United States upon that subject."93

A careful reading of the speech of Senator James F. Wilson, the Iowa Republican lawyer who in 1866 was Chairman of the House Judiciary Committee, supports this view.94 Wilson, in criticizing the decision of the United States Supreme Court, took the classical Radical view. This involved three major elements. The first one was that the failure of the state to enact laws to enforce common-law or statutory rights in public utilities or to execute them amounted to a denial of equal protection of the laws. Accordingly, he pointed out:

A failure to enact laws for the equal protection of citizens is a denial of it. A neglect to enforce laws enacted to assure such equal

99 Id. at 59-60.
90 See 3 Cong. Rec. 1869-70 (1875).
92 This, no doubt, followed United States v. Rhodes, 27 Fed. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866).
93 15 Cong. Rec. 12 (1883). The same bill was reported from the Judiciary Committee in the House of Representatives by Representative Hoar. Id. at 517.
94 Id. at 133-7.
protection is a denial of it. Toleration of a custom or practice which asserts inequality in the enjoyment of the common rights of citizenship is a denial of equal protection.\textsuperscript{95}

He added:

But if courts . . . conclude that because a citizen may bring a suit at his own expense in a State court for the recovery of damages the full measure of the Government's duty is discharged and protection, ample and complete, is assured, it will not be well for us to accept these errors as proper rules of action. . . .\textsuperscript{96}

All of this was exactly the same as Representative Lawrence's theory.\textsuperscript{97}

The second Radical proposition was that state denial of equal protection could not be cured by enforcement of the Fourteenth Amendment against the states. He said: "A State cannot be punished for withholding the equal protection of the laws."\textsuperscript{98} This was also traditional Republican theory.\textsuperscript{99}

The third proposition was that Congress, as a substitute for state protection, could step in to grant federal protection. For this Wilson cited \textit{Prigg v. Pennsylvania}.\textsuperscript{100} This carried Wilson back to his own views expressed in 1866.\textsuperscript{101} What Wilson forgot was that the authority of this case as a guide to the interpretation of the Fourteenth Amendment was eliminated by the redraft of the first section of this amendment by Representative Bingham.\textsuperscript{102} It is highly significant that Wilson's proposed constitutional amendment to cure the Supreme Court's decision is essentially a copy of Bingham's first proposal.\textsuperscript{103}

\textsuperscript{95} \textit{Id.} at 135. \textit{See}Senator Edmunds' contention: "But when a State either by action or by denial, either by commission or omission, either by law or want of law, either by administration of its executive or judicial departments or the want of administration, does deny, does fail to give in the language of Magna Charta from which this was drawn the equal protection of its laws to everybody within its borders, then . . . as the Constitution itself says in express and specific terms, Congress shall by law have the right to enforce that equality of protection against all comers and everywhere." 8 CONG. REC. 959 (1879).

Edmunds added that "the failure to perform a duty is a denial to those who are entitled to demand the performance of that duty." \textit{Ibid.} He said that the clause "imports an affirmative duty to see to it that an equal and a real protection to every citizen within these borders is accorded and vindicated." \textit{Id.} at 960. Senator George F. Hoar, a Massachusetts Republican, said the same thing in the context of the Ku Klux Klan activities. \textit{Id.} at 1024; S. Rep. No. 512, 46th Cong., 1st Sess. xiv-xv (1884). \textit{See also} United States v. Blackburn, 24 Fed. Cas. 1158, 1159 (No. 14,603) (W.D. Mo. 1874).

\textsuperscript{96} 15 CONG. REC. 136 (1883).

\textsuperscript{97} \textit{See} Avins, \textit{supra} note 40, at 899-900.

\textsuperscript{98} 15 CONG. REC. 135 (1883). Edmunds made the same point. 8 CONG. REC. 960 (1879). For the general discussion of ratification and enforcement of the 13th, 14th, and 15th Amendments, \textit{see} 8 CONG. REC. 342, 567, 885-893, 954-962, 997-1030 (1879).

\textsuperscript{99} Edmunds made the same point. 8 CONG. REC. 960 (1879).

\textsuperscript{100} Supra, n. 101.

\textsuperscript{101} 41 U.S. (16 Pet.) 539 (1842).


\textsuperscript{103} \textit{Supra}, n. 101.
The final proposition is that the Fourteenth Amendment prohibits all kinds of discrimination, not only racial discrimination. He said:

My purpose is . . . to put the power of Congress in this regard beyond dispute, and to do this without any reference to class or race. It is better, in my judgment, in whatsoever we may do in the matter of the organization and exercise of the power to protect citizens of the United States in the equal enjoyment of their rights, that we proceed without reference to the distinctions of race, color, or previous condition of servitude.104

2. STATE LAWS COPYING THE FEDERAL STATUTE.

A. In General.

Some state laws ante-dated the federal statute. Massachusetts had the earliest law forbidding discrimination in public accommodations.105 The highest court of that state construed the law to apply only to places which received a license to operate, and as to those the statute clearly forbade all unreasonable discriminations.106 An early Washington ordinance forbade racial discrimination in licensed places of amusement;107 a few years later service to all persons was required, thus banning all discrimination.108

A number of the southern reconstruction legislatures passed similar laws.109 The Mississippi Supreme Court declared that its state law was merely designed to reaffirm the common law as to public businesses, where everybody already had the privilege to enter.110 The Louisiana Supreme Court believed that all persons had the same right to enter licensed places of amusement,111 and while the court's belief that the statute was only following common law may, in some instances, have been erroneous,112 this was the accepted theory. In one case the court remarked: "In truth the right of the plaintiff to sue the defendant for

104 Id. at 136.
105 For a complete history of the Massachusetts statute, see Bryant v. Rich's Grill, 216 Mass. 344, 103 N.E. 925 (1914).
110 Donnell v. State, 48 Miss. 661 (1873).
111 Joseph v. Bidwell, 28 La. Ann. 382 (1876). Wyly, J., dissenting on another point, said: "Under article thirteen of the constitution and act No. 38 of the acts of 1869, an act to enforce the same, plaintiff had the same right to enter the theatre as any other citizen, but he had no greater right. The fact that he was a colored man ought not to give plaintiff the right to recover a larger amount of damages against defendant than if he were a white man." Id. at 384.
damages would be the same, whether act No. 38 existed or not; ..." It appears clear that racial discrimination was not the only discrimination banned by these laws.\(^{113}\)

While the federal bill was pending in 1873, New York State enacted a similar statute.\(^{115}\) A contemporary commentator declared that although the civil rights bill "was regarded, popularly, as a great concession to the colored classes," this bill "had made no real change in the liabilities of the keepers of places of amusement," and that "the statute has not changed the common-law rule with reference to the rights of colored persons at the places and under the circumstances enumerated."\(^{116}\) This writer observed: "A statute could not well have been framed which should make a greater appearance of conferring new rights and privileges upon the colored classes, but which should really affect so little in what it should pretend to do."\(^{117}\) In fact, it was asserted that since the New York law only re-enacted the common-law rule as to places of amusement, Negroes were just as liable to discrimination after the law was passed as before.\(^{118}\)

The theory that the early anti-discrimination laws merely re-enacted the common law has persisted until quite recently.\(^{119}\) The view has been that the statutes provided a more efficient remedy but no new right.\(^{120}\)

---

\(^{113}\) De Cuir v. Benson, 27 La. Ann. 1, 5 (1875) rev'd on other grounds sub. nom. Hall v. De Cuir, 95 U.S. 485 (1878). The Louisiana Supreme Court also said: "The position that because one's property cannot be taken without due process of law, therefore a common carrier can conduct his business as he chooses, without reference to the rights of the public, is so illogical that it is only necessary to state it to expose its fallacy: ... If he be a common carrier of passengers he must receive all who offer, carry them over the whole route, ... and treat all alike, unless there be actual or sufficient reason for the distinction, ..." Ibid.

\(^{114}\) But see Vogel v. Saenger Theatres, 17 So. 2d 467 (La. App. 1944), rev'd on other grounds 207 La. 835, 22 So. 2d 189 (1945), where the Court of Appeals divided on this point.

\(^{115}\) New York Act of April 9, 1873. For the history of the New York law, see Gibbs v. Arras Bros., 222 N.Y. 332, 118 N.E. 857, 858 (1918).

\(^{116}\) Note, The New York Civil Rights Bill, 8 AM. L.J. 3 (1873).

\(^{117}\) Ibid.

\(^{118}\) See Note, The New York Civil Rights Bill and Places of Amusement, 7 ALB. L.J. 355 (1873):

"But we must interpret the statute as a simple declaration of the equality of all ticket holders at places of amusements—an equality which they had before, as much as now. And as a ticket is but a mere license, liable to be revoked at any time by the keeper of the 'theatre or other place of amusement,' he may revoke the license of the colored ticket holder at any time; ... the keeper of a place of amusement may exclude a ticket holder, whether he be white or colored, from the premises; and we do not understand that the New York statute alters this rule in the least."

\(^{119}\) Thomas v. Pick Hotels Corp., 224 F.2d 664 (10th Cir. 1955).


"The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the law of this state, was entitled to
The federal and state laws merely provided that Negroes would get the same legal rights that white persons had. Tennessee therefore performed its duty under the federal statute and Fourteenth Amendment by promptly repealing the common law duties of utilities, thereby giving nobody any rights at all.121

The consequence of construing the state anti-discrimination laws as mere reaffirmations of the common law is well illustrated by the decision of the Iowa Supreme Court in Bowlin v. Lyon.122 In this case a Negro who sued to recover damages for refusal of an unlicensed skating rink to admit him lost. The court first declared that the legal rights of a Negro were the same as that of a white person, and if a white person similarly situated could be refused admission, the plaintiff was in no better a position.123

The court then observed that the skating rink was an unlicensed and purely private business, and "as a general rule, that the law does not undertake to govern or regulate the citizen in the conduct of his private business", and that "he is left free to deal with whom he pleases."124

The opinion noted that innkeepers and common carriers were excep-

---

121 Tenn. Act of March 24, 1875, ch. 130; State v. Lasater, 68 Tenn. (9 Baxt.) 584 (1877). Delaware partially abrogated the common law rule. Del. Act of March 25, 1875, ch. 194.

122 67 Iowa 536, 25 N.W. 766 (1885).

123 The court said (id. at 767): "The single question presented by the record is whether the refusal by defendants on the occasions mentioned in the petition to permit plaintiff to enter their skating rink was a denial to him of a privilege which he had the right, under the law, to enjoy; and, in the outset, we deem it proper to say that the question whether plaintiff had the right to demand admission to the place is in no manner affected by the fact that he is a colored man. His legal right in the premises is not different from that of white men whose character and conduct are not different from his own. And if a white man of unobjectionable character and conduct could have demanded admission as a legal right on the occasions in question, the refusal of defendants to admit him operated as a denial to him of a legal right; for the law is no respecter of persons, and it guarantees no rights or privileges to one class of citizens which may not be enjoyed by every other class upon the same terms, and under like circumstances. If, then, the defendants had the right to deny plaintiff admission to their skating rink, this right must be based upon some consideration upon which they might have denied any other man of like character admission to it."

124 Ibid. See the comment in Pingrey, Racial Discrimination, 30 Am. L. Reg. (n.s.) 69, 78 (1891), approving this case: "It must be presumed to have been conducted as a private business merely, and that no person, black or white, had a right to enter against the will of the proprietor of the skating rink. When members of the public entered the building, they did so by permission of the proprietor, or under a contract with him, and there was no reason why the owner of the skating rink might not have limited his invitations to certain individuals or classes. This was so because the business was private. The proprietor had the right, at any time, to withdraw the invitation, either as to the general public or as to particular individuals."
tional businesses. They could not engage in unreasonable discrimination because they “are in some sense servants of the public, and in conducting their business they exercise a privilege conferred upon them by the public, and they have secured to them by the law certain privileges and rights which are not enjoyed by the members of the public generally.”

The court thought that a licensed place of amusement would stand on the same footing, but that this rink was a private business, since “Any citizen of the state has the right to establish himself in it at his own election, and no license or authority from the public is required therefor.” The court concluded:

As the place belonged to them, and was under their exclusive control, and the business was a private business, it cannot be said, we think, that any person had the right to demand admission to it. They had the right, at any time, to withdraw the invitation, either as to the general public, or as to particular individuals.

The act complained of by plaintiff was the withdrawal by defendants as to him of the offers which they had made to admit him, or to contract with him, for admission. They had the right to do this as to him, or any other members of the public. This right, as we have seen, is not based upon the fact that he belongs to a particular race, but arises from the consideration that neither he, nor any other person, could demand, as a right under the law, that the privilege of entering the place be accorded to them. The legal rights of the parties would not have been different from what they are if defendant had excluded plaintiff on account of the cut of his coat or the color of his hair instead of the color of his skin; or if they had excluded him without assigning any reason for their action in the premises.

The foregoing case treats racial discrimination as no different from any other arbitrary discrimination. This was the theory of the original state civil rights laws. When the Supreme Court declared the federal statute to be unconstitutional in 1883, a number of northern states passed local statutes which were virtual carbon copies of the federal act and which were designed to fill the gap left by the Supreme Court’s decision. Indeed, Colorado even listed churches as places of public accommodation, ignoring the fact that although it was in the original

125 Bowlin v. Lyon, 67 Iowa 536, 25 N.W. 766, 768 (1885).

126 Ibid.

127 Ibid. See a similar contention in Hargo v. Meyers, 4 Ohio C.C.R. 275, 2 Ohio C.C. Dec. 543 (1889).


Sumner bill, the church provision was stricken therefrom as an unconstitutional interference with freedom of religion.\textsuperscript{130}

One recent commentator has been baffled by the fact that the original Ohio statute, although designed to forbid a variety of irrelevant discriminations, appeared to him to encompass only racial discrimination in its coverage.\textsuperscript{131} It seems clear that this is a misconstruction. The early version of the law did not even mention race,\textsuperscript{132} and the law apparently was designed to forbid, among others, political discrimination.\textsuperscript{133} The Colorado statute to this very day is general in scope and gives all persons a right to use the places enumerated without mentioning race or color at all.\textsuperscript{134} The Iowa law, which continues to use the language of the 1875 federal act,\textsuperscript{135} originally was designed to forbid all unreasonable discrimination, and did not mention racial discrimination in particular, nor was discrimination against Negroes the only type of discrimination forbidden. Thus, an indictment against a barber was dismissed because “There should have been an averment that there was no good reason, and it should have been averred that at the time and immediately after the alleged refusal he proceeded to shave others.”\textsuperscript{136}

The idea that anti-discrimination laws banned more than merely racial discrimination persisted for a considerable period of time.\textsuperscript{137} The Washington Supreme Court declared:

\textsuperscript{130} Avins, \textit{supra} note 40, at 876 and 890.

\textsuperscript{131} Van Alstyne, \textit{A Critique of the Ohio Public Accommodations Law}, 22 \textsc{Ohio St. L.J.} 201, 205-6 (1961) discussing 81 \textsc{Ohio Laws} 15 (1884), a copy of the 1875 federal act, says:

"The statute is apparently limited to discrimination based on 'color or race,' and thus ignores discrimination in places of public accommodation with respect to religion, ancestry, and national origin. The omission is especially puzzling since there would seem to be no sound argument to support the law forbidding the indulgence of prejudice based on the adventitious difference of race or color, and tolerating the indulgence of prejudice based on equivalently irrelevant differences of religion, ancestry, or national origin. The explanation is not to be found in the fact that the original law of 1884 responded principally to the state's concern for fair treatment of Negroes. Because the preamble to the original public accommodations law expressed the state's determination to eliminate discrimination based upon 'nativity' and 'religion or political persuasion,' as well as discrimination based on race or color. Since the state has regarded discrimination on account of religious, ancestral, or ethnological differences just as repugnant to its policy on fair employment practices as discrimination on account of race or color, consistency would require that the public accommodations law be expanded commensurately."

\textsuperscript{132} Hargo \textit{v.} Meyers, 4 \textsc{Ohio C.C.R.} 275, 2 \textsc{Ohio C.C. Dec.} 543 (1889) reprints the original first section of the statute.

\textsuperscript{133} See Johnson \textit{v.} Humphrey Pop Corn Co., 24 \textsc{Ohio C.C.R.} 135 (1902) aff'd 70 \textsc{Ohio St.} 478, 72 \textsc{N.E.} 1160 (1904).

\textsuperscript{134} \textsc{Colo. Rev. Stat.} § 25-1-1 (1963).

\textsuperscript{135} See \textit{State v. Katz}, 241 \textsc{Iowa} 115, 40 \textsc{N.W.2d} 41 (1949).

\textsuperscript{136} \textit{State v. Hall}, 72 \textsc{Iowa} 525, 34 \textsc{N.W.} 315 (1887). \textit{See also} \textit{Messenger v. State}, 25 \textsc{Neb.} 674, 41 \textsc{N.W.} 638, 639 (1889), where the court said: "A barber, by opening a shop, and putting out this sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours."

\textsuperscript{137} See Valle \textit{v.} Stengel, 176 \textsc{F. 2d} 697 (3rd Cir. 1949), holding that the New Jersey civil rights statute gave any citizen the right to use a swimming pool
Every person not belonging to a proscribed class, has a right to
go to any public place, or visit a resort where the public generally
are invited, and to remain there, during all proper hours, free
from molestation by any one, so long as he conducts himself in a
decorous and orderly manner.\textsuperscript{138}

The opinion of the New York Appellate Division in Grannan \textit{v.}
Westchester Racing Ass'n.,\textsuperscript{139} is also quite instructive. In this case, de-
defendant race track excluded the plaintiff, a ticket holder, from being a
spectator at the track, and plaintiff sued to enjoin this exclusion.

The court first noted that horse racing was illegal except pursuant
to the statute under which the defendant track was incorporated, and
that this statute gave the track "quasi public functions," with the state
regulating it by a commission. The court quoted from Judge Cooley that
a business is affected with a public interest if it engages in a "public
employment, with special privileges, which only the state can confer
upon him," and where it "is not of right, but is permitted by the state
as a privilege or franchise." The court observed that were it not for the
"special privilege and franchise from the state," it would be criminal
to run a race track. This distinguished horse racing from private busi-
nesses which did not require legislative sanction.\textsuperscript{140} The court therefore
concluded that the race track had a "quasi public function" and had the
same obligations as common carriers to admit all persons, unless there
were reasonable grounds for exclusion.\textsuperscript{141}

Turning to the New York Civil Rights Law, the court declared:

By the provisions of chapter 1042, Laws 1895, it is provided that
all persons within the jurisdiction of the state shall be entitled to
full and equal privileges in all places of public amusement, sub-
ject only to the conditions and limitations established by law, and
applicable alike to all citizens. It is plain that the racing of horses
is in the nature of an amusement. As we have seen, the property
and place where such races are conducted have become clothed
with a public interest, and the association, by reason of its fran-
chise from the state, is under the public obligation to conduct its
business for the benefit of the public, in pursuance of the obliga-
tion thereby created to fulfill the purpose of its existence. This
implies that its gates shall be open to all citizens, and its property
subject to use by all who desire to go thereon, and who comply

\textsuperscript{138} Davis \textit{v.} Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209, 211 (1904).
\textsuperscript{139} See also Anderson \textit{v.} Pantages Theatre Co.; 114 Wash. 24, 194 P. 813, 815
(1921). "It confers upon all persons, regardless of their race, creed, or color,
the right to be admitted to the places enumerated on equal terms with all
others."

\textsuperscript{140} 16 App. Div. 8, 44 N.Y.S. 790 (1897), rev'd 153 N.Y. 449, 47 N.E. 896 (1897).

\textsuperscript{141} Id. at 793-4.
with its reasonable rules and regulations. The first section of the
civil rights act is absolute in its declaration of right, and is not
qualified by anything contained in its subsequent sections. Its
declaration is that all persons shall be entitled to the privilege,
subject only to the conditions and limitations established by law.
The second section provides a penalty for denial of any of the
provisions of the first section. It does not aim, in any respect, to
qualify the declaration contained in the first section. By the law
of the land, as we have seen, it is the absolute right of any citizen
who conducts himself properly, and who complies with the rea-
sable rules of the public corporation, to enjoy the benefits se-
cured to him thereby; and it is beyond the power of such an as-
sociation to provide by any rule for the permanent exclusion of
any citizen from such place, or exclude him from participation in
its benefits. The argument of the learned counsel for the defend-
ants, that the corporation has the right to exclude by a rule which
operates upon all citizens alike, cannot be sustained, as, if fol-
lowed out to its logical result, it might be made to operate to the
exclusion of all citizens. But, as we have seen, this is beyond the
power of the corporation; it would be destructive of its public
obligation, and defeat the very purpose for which its franchise
was granted. We have already considered the law and its limita-
tions. It requires corporations of this character to admit all per-
sons who present themselves in fit condition, demean themselves
properly, and who comply with the reasonable rules and regula-
tions.\textsuperscript{142}

The New York Court of Appeals reversed the Appellate Division
on the ground that the exclusion was reasonable. In dictum it indicated
that the rules relating to common carriers did not apply because of
statutory regulation even if racing were a franchised business. It indi-
cated that a race track probably could not exclude spectators arbitrarily,
but only pursuant to reasonable rules, although no firm opinion was
expressed on this point. The Court of Appeals also held the New York
Civil Rights Law inapplicable. Even though the first section of the
statute nowhere even mentioned race, creed, or color (which was only
in the penalty section) the court relied on Mr. Justice Bradley's opinion
in the \textit{Civil Rights Cases}\textsuperscript{143} to hold that as long as discrimination was
not based on race, creed, or color, the statute was inapplicable.\textsuperscript{144}

\textsuperscript{142} \textit{Id.} at 797-8.
\textsuperscript{143} Note 68 \textit{supra}.
\textsuperscript{144} Grannan v. Westchester Racing Assn., 153 N.Y. 449, 47 N.E. 896, 901 (1897)
where the court said:
"In those cases, the court, in substance, said that the purpose of that law
was not to declare that all persons should be entitled to the full and equal
enjoyment of the advantages mentioned in the statute, but that such enjoy-
ment should not be subject to any conditions which were applicable only to
citizens of a particular race or color. We think the purpose of the statute
now under consideration was to declare that no person should be deprived
of any of the advantages enumerated upon the ground of race, creed, or
color, and that its prohibition was intended to apply to cases of that character,
and to none other. It is plain that the legislature did not intend to confer
upon every person all the rights, advantages, and privileges in places of
B. The California Law.

The California statute had a curious history which is worthy of passing note. Although it was copied from the federal law in 1893, the courts of that state interpreted it as not being limited to racial discrimination alone.\textsuperscript{146} Until 1959, California law equated racial or ethnic discrimination with unreasonable discrimination generally, and did not put ethnic discrimination in a special category. All such unreasonable discrimination could not be engaged in by places of public accommodation.\textsuperscript{146} In 1959 the law was broadened to include all businesses and narrowed to ban only racial and other ethnic discrimination.\textsuperscript{147}

Under the pre-1959 law all persons had a legal right to be admitted to theatres and other places of public amusement.\textsuperscript{148} Thus, all adults who paid admission and conducted themselves properly were entitled to be admitted to race tracks.\textsuperscript{149} This statute was deemed to be an exercise of the police power to impose common carrier duties on other public places.\textsuperscript{150}

The judges in California were divided on the question of whether the state civil rights statute changed or merely reaffirmed the common law. As to hotels, of course, the statute made no change.\textsuperscript{151} But it would seem that a change was made as to places of amusement.\textsuperscript{152} Some California judges so held.\textsuperscript{153} But a majority of the California Supreme Court said:

\begin{quote}

amusement or accommodation which might be enjoyed by another. Any discrimination not based upon race, creed, or color does not fall within the condemnation of the statute.\textsuperscript{1445}
\end{quote}


\textsuperscript{1448} Tarbox v. Bd. of Sup’rs, 163 Cal. App. 2d 373, 329 P.2d 553 (1958).


\textsuperscript{1450} Greenberg v. Western Turf Assn., 140 Cal. 357, 73 P. 1050 (1903), 148 Cal. 126, 82 P. 684 (1905), \textit{aff’d} 204 U.S. 359 (1907). In Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969, 971 (1951) the court said: "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron "except for good cause," and if he does so without good cause he is liable in damages. See CIV. CODE, §§ 51, 52."


\textsuperscript{1452} Discussing a New York statute which gave any orderly person over the age of 21 the right to go to the theater, Christie v. 46th Street Theatre Corp., 265 App. Div. 255, 39 N.Y.S.2d 454, 456-7 (1942), \textit{aff’d} 292 N.Y. 520, 54 N.E.2d 206 (1944), \textit{cert. denied} 323 U.S. 710 (1944), observed: "Under the common law, these appellants would have the right to control their theatre to the same extent as any other private business; they would have the right to decide whom to admit."

\textsuperscript{1453} In Orloff v. Los Angeles Turf Club, 208 P.2d 987, 990 (Cal. App. 1949), \textit{rev’d} 36 Cal. 2d 734, 227 P.2d 449 (1951), the intermediate appellate court declared: “This section [civil rights] was enacted under the police power of
The so called civil rights statutes, sections 51-54 Civil Code, do not necessarily grant theretofore non-existent rights or freedoms. The enactments are declaratory of existing equal rights and provide the means for their preservation by placing restrictions upon the power of proprietors to deny the exercise of the right and by providing penalties for violation.\footnote{154}

3. The Right to Refuse Service

A. Businesses in General.

Before going further into the development of the anti-discrimination laws as they affect places of public accommodation, it would be desirable to pause in order to further note the common law development that had occurred since 1883 in respect to the duty of businesses to serve the public without discrimination. As to businesses generally, the rule seems clear; no such duty exists, and a business may sell to whomever it pleases\footnote{155} and eject from its premises any unwanted customer at any time.\footnote{156} The common law has therefore differentiated between public utilities and businesses generally, for the latter do not have the duty to refrain from arbitrary discrimination.\footnote{157} Moreover, the motive for such

the State and creates rights which did not exist at common law." In the Supreme Court, Spence, J., dissenting, declared: "It must be remembered that, contrary to the implications in the majority opinion, the source of plaintiff's right, or the right of any person, to be admitted to a place of public amusement rests solely in the statutes under consideration. No such right is accorded by the Constitution, and no such right existed at common law." 227 P.2d at 455.

\footnote{154} 227 P.2d at 453.


\footnote{155} 227 P.2d at 453.


\footnote{157} Annot., 9 A.L.R. 379 (1920). \textit{See also} City of Greenville v. Peterson, 239 S.C. 296, 122 S.E.2d 826, 828 (1961), where the court said:

Although the general public has an implied license to enter any retail store the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so, . . . and may lawfully forbid any and all persons, regardless of reason, race, or religion, to enter or remain upon any part of his premises which are not devoted to public use."
discrimination, whether on racial grounds or otherwise, is deemed legally irrelevant. Non-profit organizations or charities are also free to pick those who benefit from their services, as are individual professionals or other workers.

A particularly large body of law has grown up in respect to restaurants. Repeated attempts to impose on them the duties of innkeepers have been rebuffed by the courts, and the law appears to be settled that they may discriminate in choosing their customers in whatever way they desire. In particular, in the absence of a statute to the contrary, a restaurant owner may select his customers on purely personal

---

158 See Henderson v. Trailway Bus Co., 194 F. Supp. 423, 426 (E.D. Va. 1961), where the court observed: "the occupant may lawfully forbid any and all persons, regardless of their reason, or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use." Likewise, in State v. Fox, 254 N.C. 97, 118 S.E.2d 58, 59 (1961), the court declared:

"Defendants contend a merchant who sells his wares to one must serve all, and a refusal to do so is a violation of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The contention lacks merit. The operator of a private mercantile establishment has a right to select his customers, to serve those he selects, and refuse to serve others. The reasons which prompt him to choose do not circumscribe his right."


160 Coleman v. Middletown, 147 Cal. App. 2d 833, 305 P.2d 1020, 1022 (1957), where the court said: "In the absence of statute, a physician or surgeon is under no legal obligation to render professional services to everyone who applies to him or seeks to engage him. Physicians are not public servants like innkeepers, common carriers, and the like.


"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter... His rights and responsibilities are more like those of a shopkeeper... He is under no common-law duty to serve everyone who applies to him. In the absence of statute he may accept some customers and reject others on purely personal grounds."

162 Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949); Briggs v. State, 236 Ark. 596, 367 S.W.2d 750 (1963), vacated 379 U.S. 306 (1964); Mayor, etc. of Wilmington v. Smentkowski, 198 A.2d 685 (Del. 1964); State v. Brown, 195 A.2d 379, 382 (Del. 1963) ("it is clear that at common law the owner of a restaurant or other place of public refreshment, amusement, or entertainment was free to select patrons upon any basis deemed satisfactory to him"); Wilmington Parking Auth'y v. Burton, 39 Del. Ch. 10, 157 A.2d 894, 902 (1960) rev'd on other grounds 365 U.S. 715 (1961) ("It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more that the owner of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law..."); Tynes v. Gogos, 144 A.2d 412 (D.C. App. 1958); Walker v. State, 220 Ga. 415, 139 S.E.2d 278, 283 (1964) ("At common law the proprietor of a private business such as this restaurant was free to serve only whom he pleased and could exclude others with or without reason, according to his own personal wishes"); Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N.E.2d 574, 578 (1946) ("There is no common law duty of a... restaurant operating house to serve all patrons without discrimination."); Nance v. Mayflower Tavern, Inc., 105 Utah 517, 150 P.2d 773, 776 (1944).
grounds,\textsuperscript{163} and this includes the race or color of the person seeking to be served in his establishment.\textsuperscript{164} The right of the owner to thus discriminate has been placed on the theory that this is a property right incidental to his ownership of the business.\textsuperscript{165}

The fact that the restaurant may be licensed for health inspection or tax purposes does not alter its right to select its own patrons.\textsuperscript{166}

\textsuperscript{163}In Williams v. Howard Johnson's Inc., 210 F. Supp. 295, 297 (E.D. Va. 1962) the court said:

"A restaurant keeper may accept some customers and reject others on purely personal grounds. A restaurant keeper may select his clientele or discriminate against prospective customers solely on a racial basis, without liability, and he may revoke the license of any invitee and eject him from the premises at any time for any reason."

Likewise, in City of Charleston v. Mitchell, 239 S.C. 376, 123 S.E.2d 512, 518 (1961), the court declared:

"In the absence of a statute forbidding discrimination based on race or color, the rule is well established that an operator of a privately owned restaurant, privately owned in a privately owned building, has the right to select the clientele he will serve and to make such selection based on color or race if he so desires. . . . [T]he absence of statute the operator of a privately owned business may accept some customers and reject others on purely personal grounds."

\textsuperscript{164}Williams v. Hot Shoppes, Inc., 293 F.2d 835 (C.A.D.C. 1961); Williams v. Owen, 179 F. Supp. 268 (E.D. Ill. 1959). In Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124, 128 (D. Md. 1960), aff'd 284 F.2d 746 (4th Cir. 1960), the district court declared: "In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper charged with a duty to serve everyone who applies." In State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295, 299 (1958), it was observed: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation." Similarly, in State v. Avent, 253 N.C. 580, 118 S.E.2d 47, 51 (1961), vacated 373 U.S. 375 (1963), the court observed: "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or white people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law."

\textsuperscript{165}In Durham v. State, 219 Ga. 830, 136 S.E.2d 322, 326-7 (1964), the court declared:

"Any intelligent court must hold that his liberty stops precisely where to extend it would trespass upon another's property. If one is granted the liberty to invade another's private property over the objection of the owner for any period of time, that same liberty would continue for all time, and the result is destruction of property without due process in direct violation of the Constitution. Therefore, one could find no constitutional process that would entitle him to commit the trespass forbidden by this statute, hence it denies him none. . . . The opinion is a restatement of the first tenet of civilized society, that the rights of the individual extend to and end at the boundary of the rights of others."

"The proprietor of Morrison's Cafeteria had a legal right to choose his patrons and no law, State or Federal, denied him, the owner of a privately owned establishment, operated upon private property, from confining the services of the restaurant to members of a particular class or race."

\textsuperscript{166}In Williams v. Howard Johnson's Restaurant, 268 F.2d 845, 847-8 (4th Cir. 1959) the court held:

"The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust
Such a license does not make the restaurant a public instrumentality or public utility which must serve all who apply. A federal court recently declared:

The license laws of the State of Maryland applicable to restaurants are not regulatory... Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of a restaurant or to dictate what persons shall be served.

Even in the cases of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment.167

B. Places of Entertainment.

As has been previously noted, theaters and other places of amusement were originally licensed monopolies, and were therefore treated by the framers of the Civil Rights Act of 1875 as being in the same class with other public utilities, such as common carriers and inns. The law at that time had not been fully developed, and the members of Congress assumed that since these places of amusement were monopolies, the states would impose common law duties on them similar to the duties imposed on other public utilities.168 But the common law in the several states turned out differently, and it is important to understand how this law ultimately developed in order to fully appreciate the odd turn which many "public accommodation" statutes took. Thus, by 1911 it had been held in New York that "there is a distinction between common carriers

discrimination in the use and enjoyment of the facilities. This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice... The license laws of Virginia do not fill the void... The Code of Virginia... makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served."


"We are constrained to say that the sweeping opinion... that all licensees are state instrumentalities subject to the Fourteenth Amendment would erode and emasculate any distinction between private and public action. It has uniformly been held that the mere fact that a state licenses a business does not clothe the business with the public character required to render the Fourteenth Amendment applicable... Some language from the Mitchell decision can be construed as postulating a distinction between licenses granted to certain 'privileged' businesses, such as those selling alcoholic beverages, and those licenses granted to more 'general' businesses. Such a distinction has been rejected for purposes of implying the presence or absence of state action..."

"Accordingly, we are of the opinion that, with the exceptions noted above, the owner or manager of a privately owned place of public accommodation, entertainment, or refreshment may constitutionally refuse service to patrons because of discrimination predicated upon a racial classification."

168 Note 56, supra.
and innkeepers, who are obliged to serve all persons who seek accommodation from them, and the keepers of public places of amusement or resort, ... and, in the absence of legislation, the keeper of such an establishment may discriminate and serve whom he pleases.\textsuperscript{109} Five years later, in the celebrated case of \textit{Woollcott v. Shubert},\textsuperscript{170} the New York Court of Appeals declared:

At the common law a theater, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. It is not governed by the rules which relate to common carriers or other public utilities. The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.\textsuperscript{171}

Accordingly, it has been held that there is no duty to serve the public, and that discrimination is legally permissible, in amusement parks,\textsuperscript{172}

\textsuperscript{109} Aaron v. Ward, 203 N.Y. 351, 355, 96 N.E. 736, 737 (1911). In \textit{Horney v. Nixon}, 213 Pa. 20, 61 A. 1088, 1089 (1905), the Pennsylvania Supreme Court said: “But the difference between the duty of a common carrier and that of a theater proprietor has been wholly overlooked. That of the former is absolute to carry whoever may wish to be carried. It is a duty growing out of no contract, but rests at all times on the common carrier in return for the franchises and privileges conferred by the state. ... The proprietor of a theatre is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public.”

More recently, in \textit{Drews v. State}, 224 Md. 186, 167 A.2d 341, 343 (1961), the Maryland Supreme Court declared:

“Early in the common law the duty to serve the public without discrimination apparently was imposed on many callings. Later this duty was confined to exceptional callings as to which an urgent public need called for its continuance, such as innkeepers and common carriers. Operators of most enterprises, including places of amusement, did not and do not have any such common law obligation, and in the absence of a statute forbidding discrimination, can pick and choose their patrons for any reason they decide upon, including the color of their skin.”

\textsuperscript{170} 217 N.Y. 212, 111 N.E. 829 (1916).

\textsuperscript{171} Id. at 830. In \textit{Marrone v. Washington Jockey Club}, 35 App. D.C. 82, 87-88 (1910) aff’d 227 U.S. 633 (1913) the court likewise said:

“The rule as to places of amusement is entirely different from that of utilities chartered and created by law for the accommodation and benefit of the public. For example, it is undoubtedly true that anyone presenting himself for transportation on a railway train is entitled, upon paying his fare, to be carried, unless there is something in his conduct when he presents himself, which justifies his exclusion. On the other hand, theaters, race tracks, circuses, private parks, and places of amusement and entertainment, in the absence of some statutory regulation or restriction as to the manner in which such private enterprises shall be conducted, are entirely under the control of the proprietor or manager, and he may exclude or admit whomsoever he chooses.”

\textsuperscript{172} See \textit{Griffin v. Collins}, 187 F. Supp. 149, 153 (D. Md. 1960), holding that an amusement park has the right “to serve or refuse to serve whomever they
baseball stadiums, \textsuperscript{173} dance halls,\textsuperscript{174} private parks,\textsuperscript{175} and race tracks,\textsuperscript{176} none of which are deemed to be public callings.\textsuperscript{177}

The common law as it developed in respect to theaters is particularly abundant. The uniform rule now is that a theater owner may arbitrarily admit or exclude whomever he pleases for any reason he desires.\textsuperscript{178} A person who is refused admission to a theater has no common law right to recover damages from the owner on account of such refusal, because "there is no vested civil right in a person intending to visit a theater to have admission given him, and no tort is committed at common law by refusing or cancelling such admission."\textsuperscript{179}

\textsuperscript{173} Finnesey v. Seattle Baseball Club, 122 Wash. 276, 210 P. 679 (1922).

\textsuperscript{174} Tyner v. Gogos, 144 A.2d 412 (D.C. App. 1958).


\textsuperscript{176} Marrone v. Washington Jockey Club, 227 U.S. 633 (1913). In Griffin v. Southland Racing Corp., 236 Ark. 872, 370 S.W.2d 429, 430-1 (1963) it was held: "The proprietor of a privately owned place of amusement, such as a race track or a theater, is not under a common carrier's duty to render service to everybody who seeks it. It is uniformly held that the proprietor may refuse to admit . . . persons he thinks to be undesirable . . . owing to the management's right to exclude anyone it pleases, the patron cannot obtain the aid of the courts, in seeking to compel his admission to the premises."

Similarly, in Flores v. Los Angeles Turf Club, Inc., 55 Cal. 2d 736, Cal. Rept. 201, 361 P.2d 921, 924 (1961); the court observed: "It appears to be the almost universal rule in the United States that in the absence of statute there exists no constitutional or common law right of access to race tracks or other places of public amusement comparable to the right to accommodation at inns. On the contrary, the common law right appears to have been one of exclusion on the part of the race track proprietor."

\textsuperscript{177} See Annot., 1 A.L.R.2d 1165 (1948), where the commentator notes: "Although at common law a person engaged in a public calling, such as an innkeeper or common carrier, was under an obligation to serve, without discrimination, all who sought service, it appears that proprietors of privately operated places of public amusement and entertainment were under no such obligation and could deny admission to whomever they pleased."


\textsuperscript{179} Commonwealth v. George, 61 Pa. Super. 412, 418 (1915). In De la Ysly v. Publix Theatres Corp., 82 Utah 596, 26 P.2d 818, 820 (1933), the court declared: "The carrying on of a theater or other place of public amusement is a private business which is not governed by rules governing common carriers or other kind of business affected with a public duty, and, in the absence of statutory regulations of the business or of a statute, the proprietors are not, as in the case of common carriers, obliged to admit any one who may apply and be willing to pay for a ticket, but may admit or exclude persons
The right of a place of amusement to discriminate arbitrarily in its admission policies extends to racial grounds.\footnote{152} For example, it was held that a private swimming pool could refuse to admit a person because he was of Mexican descent.\footnote{151} Similarly, in a private preshewing of a film, the owner may exclude people on racial grounds even in states with anti-discrimination laws.\footnote{152}

The whole subject is ably summarized in State v. Cobb.\footnote{153} In that case, the court declared:

\ldots the proprietor of a private business has the right to select the clientele he will serve and, if he so desires, he may arbitrarily exclude from his premises any individual or group of individuals. Therefore, he may select his customers or patrons upon the basis of sex, color, creed or caprice. This power of selection and exclusion is a right which is protected by law and one which has always been regarded as basic to the institution of private property. \ldots The law does not look to the motive of the proprietor, but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession.\footnote{154}

The court also added:

However, it is equally well settled that in the control of his own business, the proprietor of a privately owned place of amusement may admit or exclude any person for any reason satisfactory to himself or for no reason whatever. In the absence of civil rights

\footnote{150}In Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 134 N.E.2d 371, 373 (1956) the court said:  
"It will thus be observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them."

\footnote{151}In Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824, 825 (Tex. Civ. App. 1944) the court said that "the proprietor of a place of amusement which is privately operated can refuse to sell a ticket to and may thereby exclude any person he desires from the use of his facilities for any reason sufficient to him, or for no reason whatever."

\footnote{152}In MacLeod v. Fox West Coast Theatres Corp., 10 Cal. 2d 383, 74 P.2d 276, 278 (1937), the court observed:  
"Fox West Coast Theatres was the owner of the theatre and that at any showing of a motion picture therein to which the public was not invited, in the absence of any release or qualification of its rights in that regard, the said defendant alone had the exclusive right to determine who should be permitted to attend \ldots For example, if \ldots the parties \ldots had stipulated that members of the white race only were to be admitted to the 'preshowing' it would seem unlikely that any one would contend that Charles Chaplin Film Corporation properly might disregard that element of the contract and as a result legally fill the theater with persons who were members of a race other than the white race."

\footnote{153}262 N.C. 262, 136 S.E.2d 674 (1964).

\footnote{154}Id. 136 S.E.2d at 676.
legislation, and North Carolina has none, the law imposes no 
obligation upon the owner or proprietor of a theater or other 
public amusement with respect to whom he shall admit or ex-
clude. Unlike a public utility, his business is not affected with a 
public interest, and he is under no legal obligation to admit every 
person who applies and is ready to pay the price of admission. . . . 
His license to operate is not a franchise for "with the possible ex-
ception of ancient Rome—amusement of the populace has never 
been regarded as a function or purpose of government." 185

4. THE COVERAGE OF THE TERM "PUBLIC ACCOMMODATION."

A. The Influence of People v. King.

As the first northern case to discuss and uphold the constitutionality 
of anti-discrimination legislation, and as the first case in the country 
to discuss it extensively in relation to the Due Process Clause of the 
Fourteenth Amendment, the influence of the decision of the New York 
Court of Appeals in People v. King 186 has been very extensive through-
out the country in the field of state anti-discrimination laws in places of 
"public accommodation." For this reason, the opinion in this case 
warrants close attention.

In this case, the defendant was convicted of discrimination by re-
fu.sal to sell a Negro a ticket to a skating rink. Counsel for the defend-
ant contended that the statute constituted a deprivation of property 
without due process of law because it restricted the owner in respect 
to his use of his own property. The court conceded that this constitu-
tional provision protected property "not only in a strict and technical 
sense, against unlawful invasion by the government in the exertion of 
governmental power in any of its departments, but also protects every 
essential incident to the enjoyment of those rights." 187 Thus, if the 
legislative restriction on the owner's liberty to admit whomever he 
wanted on to his property was unjustified, the statute would be un-
constitutional. The court, however, observed that the use of property 
may be limited by statutes passed under the state's police power to 
secure public peace, good order, health, morals, and general welfare. 
The court noted that this power was broad but not unlimited.

Next the court said that the statute was passed primarily to prevent 
discrimination against Negroes. It added that under the Fourteenth 
Amendment, no state could pass a law preventing Negroes from using 
places of amusement, which was true but irrelevant. 188 (For example, 
a statute excluding poor people from places of amusement would be 
equally unconstitutional if the owner cared to admit them, yet the owner 
obviously could refuse to let them in.) 189 The court added that in view

185 Id. 136 S.E.2d at 677.
186 110 N.Y. 418, 18 N.E. 245 (1888).
187 Id. 18 N.E. at 246.
188 Id. 18 N.E. at 246-7.
189 During the debate on the Civil Rights Act of 1875, Senator Thomas F. Bayard,
of the Civil Rights Act of 1875 "in the opinion of Congress the amendments had a much broader scope, and prevented, not only discriminating legislation of this character by the states, but also such discrimination by individuals, since the jurisdiction of Congress to pass a law forbidding the exclusion of persons of color from places of public amusement and annexing a penalty for its violation must be derived, if it exists, from the thirteenth, fourteenth, and fifteenth amendments." This analysis is manifestly erroneous. As previously noted, Congress intended only to abolish state statutes or common law rules which allegedly discriminated against Negroes. No member of Congress asserted that the Fourteenth Amendment prevented discrimination by individuals, and the New York Court of Appeals was mistaken in believing the contrary.

The court went on to declare that the law was designed to uplift Negroes, and was therefore a legitimate exercise of the police power for the public good. It at length turned to the question of whether the statute was an unconstitutional invasion of property rights. The court noted that the legislature did not interfere with the right of a person giving a private entertainment to restrict admission thereto, and further asserted that the law did not "seek to compel social equality." The court concluded:

It is not claimed that that part of the statute giving to colored people equal rights at the hands of innkeepers and common carriers is an infraction of the constitution. But the business of an innkeeper or a common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the state. By the common law, innkeepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them so to do. The business of conducting a theater or place of public amusement is also a pri-

a Democrat from Delaware who opposed the bill, jokingly suggested that funds be appropriated to pay the theater and railway tickets of paupers, "for impecuniosity is as much a condition under the fourteenth amendment as race and color, and entitled to the same protection," 3 Cong. Rec app. 105 (1875). Cf. Avins, The Civil Rights Act of 1866, the Civil Rights Bill of 1866, and the Right to Buy Property, 40 S. Cal. L. Rev. 274 (1967).

190 Id. 18 N.E. at 248.
18 N.E. at 248.
191 Note 76 supra.
192 18 N.E. at 248, where the court said:
"The members of the African race, born or naturalized in this country, are citizens of the states where they reside and of the United States. Both justice and the public interest concur in a policy which shall elevate them as individuals, and relieve them from oppression or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented, and loyal citizens, and give them a fair chance in the struggle of life, weighted, as they are at best, with so many disadvantages. It is evident that to exclude colored people from places of public resort on account of their race, is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is of course impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, and to equal enjoyment of privileges of a quasi public
vate business, in which anyone may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theaters and shows, and to enforce restrictions relating to such places, in the public interest; and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the constitution. The statute in question assumes to regulate the conduct of owners or managers of places of public resort in respect to the exclusion therefrom of any person by reason of race, color, or previous condition of servitude. The principle stated by Waite, C.J., in Munn v. Illinois, supra, which received the assent of a majority of the court, applies in this case: "Where," says the chief justice, "one devotes his property to a use in which the public have an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." In the judgment of the legislature, the public had an interest to prevent race discrimination between citizens on the part of persons maintaining places of public amusement; and the quasi public use to which the owner of such a place devoted his property gives the legislature a right to interfere.193

By this opinion, the New York Court of Appeals compounded the error of Mr. Justice Bradley in the Civil Rights Cases” that the anti-discrimination laws were only meant to abolish racial discrimination. The court failed to realize that it was only franchised public utilities which the statute was designed to govern. The court was manifestly wrong in saying that common carriers had no special privileges,195 and at least partially wrong in respect to inns.196 The assertion that places of amusement stood on the same footing as any other private business was correct as the common law had developed, but was contrary to the assumption of the legislators.197 Having ignored the public utility basis of the statute, the court was forced to use the far vaguer and more imprecise test that the legislature could forbid discrimination in any business affected by a public interest or devoted to a public use. As a means for determining what businesses can be covered and what businesses the legislature cannot cover, these tests are utterly meaning-

character. The law in question cannot be set aside, then, because it has no basis in the public interest; and the promotion of the public good is the main purpose for which the police power may be exerted.”

193 Id. 18 N.E. at 248-9.
194 Note 68, supra.
196 Id. at n. 81.
197 See Pingrey, Racial Discrimination, 30 Am. L. Rev. (n.s.) 69, 82-83 (1891): "A public skating rink comes under the same provision of law as other places of public amusement. The law gives every person certain rights. These rights thus given, include the equal enjoyment of privileges furnished by managers of public skating rinks, and any other place of public amusement."
less, since the concepts of public interest and public use are liable to indefinite expansion and furnish no ascertainable guidelines for the legislature.\(^{198}\) Thus, denuded of the two guiding principles that the legislature could forbid racial discrimination only when it forbade other arbitrary discrimination, and that it could forbid arbitrary discrimination only in return for granting a public utility an economic monopoly or quasi-monopoly, the law in respect to “public accommodations” drifted out into a sea of uncertainty without either rudder or compass to guide it.

B. The Search for a Rationale as to Public Accommodations

By restricting anti-discrimination laws to places of “public accommodation,” the legislatures of the various states obviously did not intend to include all businesses\(^{199}\) since otherwise the statutes would have said so, as does the law of California now.\(^{200}\) Without any significant guidelines to distinguish one business from another, for the last 80 years the courts have struggled to make some meaningful sense out of the phrase “place of public accommodation.” The result has been an incomparable crazy-quilt, without rhyme or reason.\(^{201}\)

Some early decisions attempt to adhere to the public utility concept. Two in particular are worth noting. In *Faulkner v. Solazzi*,\(^ {202}\) the court held that a barber shop was not a “place of public accommodation.” It declared that “places of public accommodation” were similar to businesses “affected with a public interest,” so as to permit state regulation. The court stated that such interest arose either “from their enjoyment of some franchise or special privilege granted by the state to be exercised by them for the public convenience, as in the case, for example, of all those so-called quasi public utilities upon which the power of


\(^{199}\) As the court observed in *Brown v. J.H. Bell Co.*, 146 Iowa 89, 123 N.W. 231, 233-4 (1909):

“As applied to business of a public or quasi public character conducted for the accommodation, refreshment, amusement, or instruction of the public, these statutes have been held to be a valid exercise of the police power. . . . It has also been held that, as applied to carriers and innkeepers, these statutes are merely declaratory of the common law. . . . Manifestly, the statute under consideration was not made to, nor does it apply to every private business. . . . These civil rights acts do not confer equality of social rights or privileges, nor could they enforce social intercourse, and it is doubtful, to say the least, if they could be made to apply to purely private business. It is the right of a trader whose business is purely of private character to trade with whom he pleases. This thought was evidently in the mind of the Legislature, for it did not attempt to cover all kinds of business, and, except at to barber shops, the business referred to in the act has always been regarded as being semi or quasi public.”

\(^{200}\) Note 147, supra.


\(^{202}\) 79 Conn. 541, 65 A. 947 (1907).
eminent domain is properly conferrable," or from using the property in a business which "affects the community at large, and especially if a natural or virtual monopoly is enjoyed, as in the case of railroads, telegraph and telephone companies, theaters and places of public amusement, gas and water companies, public warehouses, grain elevators, etc." The court classed carriers and inns in this group as "a public employment involving a public service for the public accommodation."

The court then rejected the argument that because a barber is licensed to assure that he is competent and will not spread disease or injure his customers, this makes his shop a place of public accommodation. The court reasoned that this license was not in the nature of a franchise possessed by public utilities. This view seems clearly correct since a public utility franchise is designed to limit competition, while a license to secure the safety of a business or the competency of its workmen is not designed to reduce the number of competitors; all who meet the required standard in the latter case will be licensed. Nevertheless, two more recent cases have held the contrary on virtually identical facts.

---

203 Ibid.
204 Id. at 65 A. 948.
205 The court said at 65 A. 948:

"The plaintiff has sought to array barber shops with the class of business agencies first above referred to, to wit, those operating under a franchise or privilege bestowed by the state, and therefore exercising a power not open to all. The reason for this claim is found in the fact that a barber cannot ply his trade without a license and that all barber shops are under sanitary regulation, and subject to sanitary inspection by a state board. Pub. Acts 1903, p. 91, c. 130. The object thus sought is not, as we understand, to demonstrate that the state possesses the power of regulation, for it is not denied by the defendant that legislation such as is contained in the act in question could be lawfully aimed at barber shops, but to affect the defendant's employment with the public interest, and thus give it a public color as introductory to a claim that its accommodations therefore properly fall within the descriptive term of the statute, 'public accommodations.' It will be observed, however, that no license is required to conduct a barber shop. Any one can do that. The only license is required is of the individual who practices his trade therein. The law thus seeks to secure competent and proper workmen in the interest of public safety and health. The proprietor may be unlicensed. If he has qualified as a barber by obtaining authority to ply that trade, he is still in a class with lawyers, physicians, dentists, and permissibly plumbers. The sanitary provisions prescribed are only an exercise of the power which the state has to so regulate and investigate the conduct of any business as may be reasonably necessary to conserve the public health and safety. Whether the state is licensing workmen or inspecting premises, it is only in the exercise of its power of regulation. It is not conferring franchises or privileges."

206 In Sellers v. Philip's Barber Shop, 46 N.J. 340, 217 A.2d 124 (1966), the New Jersey Supreme Court noted that to become a barber, an applicant had to take certain training and apprenticeship and pass an examination, and that barber shops were regulated for sanitation and operations to preserve the health and safety of patrons. The court therefore concluded that a barber shop was a "place of public accommodation," saying: "As we have indicated the license and registration of the barber and his shop, with the accompanying monopoly of the practice of barbering have brought him into the public domain and given him a special status. So long as he holds that status he cannot discriminate against a prospective patron who seeks his service, he he
Finally, the court considered the question of whether the fact that a barber advertises for business and serves customers who come in makes his shop a place of public accommodation. The court concluded that it did not. It said:

Wherein in all this does his service or place of service differ from either the service or place of service of every other man who keeps an office, shop, or other place where personal attention in any line is given to patrons who desire the ministrations afforded? Is he in any different position from the physician, the dentist, the manicurist, the chiropodist, the massage giver, the turkish bath proprietor, etc.? Wherein, to go a step further, does his business differ in essence from that of every shopkeeper or tradesman, unless it be in the personal feature of the service rendered, and that would seem rather to suggest a reason why such an employment should not, both for the sake of the service giver and receiver, be among the first selected to be deprived of the right of selection of patrons? In a sense, every business which has a promise of success within it is one which appeals to a public need, and in the sense that it supplies a need it is for the public accommodation. But the term "public accommodation," as descriptive of places within the purview of the act, clearly was not chosen as one to be interpreted in any such all-embracing sense. The statute plainly embodies an attempt to discriminate between different forms of business and to select certain only for the operation of the statute. No basis for that discrimination can be found in the descriptive language employed except the well-understood one which the common law recognizes, and which is aptly indicated by the language.

Another case adopting this same point of view is People v. Forest

---

Negro or of any other race, any more than a lawyer or other professional person may discriminate for that reason.”

Id. at 217 A.2d 125.

In Gegner v. Graham, 1 Ohio App. 2d 442, 205 N.E.2d 69, 71 (1964), appeal dismissed 1 Ohio St. 2d 108, 205 N.E.2d 72 (1965), the court said:

“Ordinarily, the law does not undertake to govern or regulate a citizen in the conduct of his strictly private business. In matters of mere private concern, he is free to deal with whom he pleases. However, there are certain classes of business in the management and conduct of which the general public also has an interest. The plaintiff carries on his business under a license granted him by the state. He has secured to him by the law certain privileges and rights which are not enjoyed by members of the public generally. The power which granted the license represented each member of the public in making the grant, and each member, with reference to those privileges which accrue to the public under it, must be on an equality with every other member . . . when he accepts the privileges afforded by a public license, he must also accept the obligation to treat all members of the granting authority alike. Thereafter, he may not refuse to serve any citizen for any reason which is not applicable alike to all citizens.

“The Legislature has heretofore provided careful supervision over barbers in the interests of public health, safety and welfare. . . . The Board of Barber Examiners is required to prescribe sanitary requirements subject to the approval of the Department of Health. This is a valid exercise of police power in the interest of public health, safety and welfare.


---

207 79 Conn. 541, 65 A. 947, 948-9 (1907)
In this case the court held that a cemetery was not a place of public accommodation. It first declared that public utilities must serve all applicants on reasonable terms because they have a monopoly and if they discriminate those who are refused service cannot go elsewhere. In the case of the cemetery under consideration, the court noted that it had no monopoly, nor did it have the right to condemn property for public use. Therefore the court concluded that it was not a “place of public accommodation.”

Many statutes did not fit the public utility concept, because the legislature had included places which were clearly not public utilities. Foremost among them were a variety of places of amusement. By 1900, places of amusement had long since ceased to possess a franchise or monopoly. Some statutes included places such as restaurants, which also had no state-granted monopoly franchise. How to rationalize the inclusion of such businesses without including all businesses taxed judicial ingenuity to the utmost.

One test developed by a group of cases may be termed the “haggling test.” This test consisted of an inquiry as to whether the proprietor of the business offered admission on a take-it-or-leave-it basis, or whether the court expected that the buyer and seller would engage in “horse-trading” to determine the terms and conditions of the contract. The court said at 101 N.E. at 220-1:

“If they are created for the purpose of performing a service for the public, or invested with powers concerning which the public at large have a direct and substantial interest, they cannot arbitrarily select the persons for whom they will perform the service or exercise their powers, contrary to the public policy of the state. A corporation formed to serve the public must serve all who apply, on equal terms, and if the corporation devotes its property to a use in which the public have an interest, the owner must submit to be controlled and regulated by the public to the extent of the interest created. Corporations organized to serve the public generally, such as those which furnish water, gas, or electric lights in cities, cannot select their patrons, but must furnish accommodations to all who apply, on equal terms and at reasonable rates. . . . As to such corporations there is the additional reason that they have exclusive control of the supply, and those whom they refuse to serve cannot be served at all, which impresses the property with a public interest. One reason for determining that the property of the corporation is affected with a public interest and devoted to a public use is that the corporation may exercise the sovereign power of eminent domain, which can only be granted to a corporation for a public use.”

See Goff v. Savage, 122 Wash. 194, 210 P. 374, 375 (1922), where the court said:

“In our opinion there is a further distinction between the position of one who buys an admission ticket or pays a fixed entrance price into a place commonly accepted as public, and one who enters a place of trade to which the public generally are invited but whose subsequent treatment is dependent upon the mutual agreement between the proprietor or the one conducting the place and the customer. In the latter case the extent of the dealings and the nature of the same, whether upon credit or for cash, or whether in fact any dealing is to be had or not, are a matter of subsequent agreement in the same sense that a prospective patient visits a doctor’s office or a client the office of an attorney. The element of discretion on the part of the one who is to part with his goods or his professional services is reserved until a contract is entered into.”
theory of the courts which enunciated this test apparently was that Negroes, like everybody else, should have to go through the haggling gauntlet, or otherwise the proprietor's liberty of contract would be restricted.\(^{211}\)

For example, one case held that a roller skating rink was a place of public accommodation, and differed from a shop, because the public was admitted upon payment of a fixed charge.\(^{212}\) Another case held that a restaurant was a place of public accommodation if meals were served without prior reservation at the same price to everybody; otherwise the place was private.\(^{213}\)

These tests are of little practical value. Aside from the sale of automobiles, it is difficult to think of any business which merchandises its products like an oriental bazaar. It is a rarity to find food and clothing sold at a price, or on other terms, which are negotiable. The average person would no more think of offering a supermarket manager \(27c\) for a \(29c\) can of peas, or tendering a five-and-dime store \$3.42\) for a broom priced at \$3.98, than he would offering a movie theater \$1.12

\(^{211}\) *Id.* 210 P. at 374, where the court said: "it is only upon the theory of the public character of the places regulated that these statutes have been sustained as constitutional, for the right of private contract is one of those guaranteed by the same Fourteenth Amendment which is so frequently appealed to for the protection of colored people."

\(^{212}\) *Jones v. Broadway Roller Rink Co.*, 136 Wis. 595, 118 N.W. 170, 172 (1908), where the court declared:

"We find ourselves unable, however, to conceive any class of places of public accommodation or amusement which would not include a roller skating rink to which the public were generally invited upon no condition but the payment of a fixed charge—public, in as broad a sense as the common carrier or the innkeeper, the exclusion from which of an individual or a class must infer discrimination and denial of privileges which all other persons enjoy by virtue merely of their membership in the public or general community. Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender or accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites every one to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has often been noted."

\(^{213}\) *See* Humburd v. Crawford, 128 Iowa 743, 105 N.W. 330, 330-1 (1905):

"If then, the object and practice of defendants was to serve meals to whomsoever applied, at prices charged to all, their place was an eating house within the meaning of this statute. If meals were served only in pursuance of previous arrangements, and therefore to particular individuals, rather than to any who might apply, it was a private boarding house only. . . . "If . . . the defendants conducted a place where those who came were received as guests and served with meals without any previous agreement as to the duration of their stay or the terms of their entertainment, then . . . the defendants kept a public eating house.' . . . Not from advertisements or signs alone was the true character of the establishment to be ascertained, but from the manner of conducting the business as well, and, if meals were served by defendants to whomsoever came, at a uniform price, as the evidence tended to show, this was a sufficient holding out to the world to constitute it a public eating house."
for tickets priced at $1.50. A federal court has more recently noted how illusory this distinction is.214

As a slight variation of the foregoing theme, two courts have offered what may be described as the “socialist” test, namely, does the business serve society as a whole or does it serve each individually as an individual? One court reasoned that a soda fountain is not a place of public accommodation because it serves individuals, one at a time, and not the masses.215 An innkeeper, however, at least in serving food, serves each person individually. A barber certainly does individual work.

A majority of the New York Court of Appeals hold that the only businesses included as public accommodations were those “created and operated for the common advantage, aid, and benefit of the people, the denial of which to any person would be a discriminatory obstruction


“In Goff v. Savage the court stressed the requirement of the statute that the establishment must be a ‘public’ one, and reasoned that since one operating a soda fountain has the right to contract or refuse to contract with prospective customers as he sees fit, the business is private, even though the general public is invited to enter the place where the business is carried on. The court endeavored to distinguish that kind of place from one such as a theatre where the customer buys an admission ticket. I do not see any sound basis for the distinction. A theatre owner, as well as a soda fountain operator, has the right to select his patrons on a proper individual basis and may decline to serve those who are personally objectionable because of uncleanliness, disorderly conduct and the like. The only difference is that as to the theatre the selection is made at the entrance to the establishment whereas in the case of the soda fountain it is exercised after the patron has entered. The civil rights statute does not curtail the right to reject patrons on an individual basis since it applies only where the refusal to serve is because of race, creed or color....”

“According to the foregoing dictionary definitions, ‘public accommodation’ clearly includes a restaurant open to the general public. ... If the statute were to be construed to exclude any business establishment where at common law and in the absence of statutory restrictions the proprietor has the right to govern the terms of his dealings with patrons by private contract, then no privately owned and operated place of business would be included, and the civil rights statute would be a farce and a sham. Manifestly, the legislature did not intend to limit the reach of the act to government owned and operated establishments.”

215 Deuwell v. Foerster, 12 Ohio N.P. (n.s.) 329, 331 (C.P. 1912), where the court stated:

“In the discussion by the court it was reasoned that if the word ‘accommodation’ as defined in the dictionaries was to be used in the interpretation of the statute, this would include every article of property that is a subject of sale, but that it was not understood that places where dry goods, groceries, hardware or other like articles of accommodation, are places of public accommodation. The proprietor in running his soda fountain dealt not with masses as such, but with individuals, one at a time, just as merchants do—generally. All the accommodation sought or furnished was a glass of drink; that which accommodated one never accommodated another. The place maintained by the defendants was not public or common, but private, exclusive and individual.

“It is not the public character of accommodation that makes the place a public place, because if it was, then every place in which any article is sold to individuals generally is within the statute, and no merchant in any line of trade could lawfully decline to sell to any citizen for any reason not applicable alike to all.”
or deprivation in achieving prosperity, health, development, or happiness."\textsuperscript{216} That sounds quite broad and all-inclusive at first reading, but the court then proceeded to assert that a sharp distinction exists between a restaurant or barber shop, named in the law, and ordinary stores.\textsuperscript{217} It is difficult for this author to follow the distinction in light of the test which the court itself laid down. Moreover, the court declared that a liquor saloon where drinks were sold for consumption on the premises was more like a store than a restaurant or other business specifically named in the law. In fact, the court declared that a saloon was very much like a tobacco or cigar shop. It reasoned that a saloon was not within the statute because:

\begin{quote}
All successful occupations and every kind of business satisfies wants or needs of citizens; but the Legislature clearly had in mind in enacting this statute that it should apply only to those it selected and named and to such others, if any, devoted to the general advantage, comfort or benefit, and essential or directly auxiliary to the prosperity, health, development, or happiness of the citizen.\textsuperscript{218}
\end{quote}

Unless the court meant to say that tobacco and liquor were equally deleterious to health,\textsuperscript{219} the foregoing test is thoroughly incomprehensible.

Still another test is the "necessity" doctrine. One court noted that the legislature had extended the common law duty of public utilities not to discriminate "to carefully limited places of public accommodations which, while not public utilities, like them, are open to the general public for the supplying of necessities."\textsuperscript{220} Another court made the test one of whether all persons would, at some time or other, have to use the facility. Thus, the court said that a hotel or carrier would have to be used by all, but a soda fountain was not a place of public accommodation since not everybody drank soda water.\textsuperscript{221} This distinction is not very

\textsuperscript{216} Gibbs v. Arras Bros., 222 N.Y. 332, 118 N.E. 857 (1918).
\textsuperscript{217} Id. 118 N.E. at 858, where the court declared:

\begin{quote}
"The existing legislative classification is not based upon the existence of a license or franchise from the state to the proprietor of the place or to the place itself; nor is it based upon the accessibility of the place for the public. The places of business of lawyers, physicians, dentists, embalmers and of many other occupations are operated under licenses and are accessible for the public. Stores, shops, the studios or galleries of artists or photographers, and very many other places are accessible for the public. It has never been, and could not be, claimed that civil rights in behalf of the citizen attach to those places under the existing or any prior civil rights act. Having in view the common advantage and benefit, the distinction between a restaurant or barber shop and the ordinary shop or store is not broad and conspicuous, but is real and indestructive. On the other hand, many of the places specifically named in the statute are neither licensed nor operated under a license."
\end{quote}

\textsuperscript{218} Ibid.
\textsuperscript{219} This was the reasoning in Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898).
\textsuperscript{220} Barnes v. State, 236 Md. 568, 204 A. 2d 787, 794 (1964).
\textsuperscript{221} Deuwell v. Foerster, 12 Ohio N.P. (n.s.) 329, 329-30 (C.P. 1912), where the court asserted:

\begin{quote}
"The civil rights statute had its origin in the common law principle that inns,
helpful. Theaters and other places of amusement, entertainment, and culture, while included as places of public accommodation among the earliest laws, are not necessities of life, and are not used by everybody. Indeed, such places as opera houses, symphony halls, and similar cultural activities, have not attracted the masses in the United States even when freely open to them. If the concept of a "place of public accommodation" is to be limited to facilities which every member of the public needs, many specialized facilities will necessarily be excluded.

When businesses failed to meet these nebulous tests, they were deemed to be merely private businesses. The proprietor was at liberty to discriminate based on racial prejudice or in any other way which in his view promoted his business.

See Meisner v. Detroit, B.I. & W. Ferry Co., 154 Mich. 545, 118 N.W. 14, 15 (1908): "It appears to be settled by the authorities that these [theaters, circuses, race tracks, private parks] are private enterprises, under the control of private parties, and that they may license whomever they will to enter and refuse admission to whomever they will. . . . Pleasure grounds of this character are not necessaries of life, anymore than are theaters and race tracks; and, unless restrained by some provisions of their charters, their owners can impose any terms of admission they choose."

See, e.g. Gardner v. Vic Tanny Compton, 182 Cal. App. 2d 506, 6 Cal. Reptr. 490 (1960): "... it was not a place of public accommodation or amusement. Membership in defendant's facility was not open to the public in general. It was limited to those granted membership after an application, an interview, and satisfaction of the manager. There is nothing in the statutes which has the effect of preventing defendant from maintaining a gymnasium for such persons as it saw proper to accommodate, and from excluding such persons as it saw proper to exclude."

See Aaron v. Ward, 203 N.Y. 351, 16 N.E. 736, 738 (1911): "... if the Legislature can forbid discrimination by the owners of such resorts on the ground of race, creed, or color, it may equally forbid discrimination on any other ground. . . . On the other hand, no one will contend that the Legislature could forbid discrimination in the private business affairs of life—prevent an employer from refusing to employ colored servants, or a servant from refusing to work for a white or for a colored master. So it has been held that a bootblack may refuse to black a colored man's shoes. . . . Such conduct may be the result of prejudice entirely, but a man's prejudices may be part of his most cherished possessions, which cannot be invaded except when displayed in the conduct of public affairs or quasi public enterprises. That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In Meisner v. Detroit, B.I. & W. Ferry Co., 154 Mich. 545, 118 N.W. 14, 15 (1908) the court said: "The sole business in which the defendant is engaged with these two boats is carrying passengers to and from its private pleasure grounds. It caters to a particular class of people. It desires to keep out those whom, for reasons of its own, it deems objectionable. Unless it did this, it would not secure the class of patrons it desires. If it secures the better class of people, which
C. The Conflict and Confusion in the Cases

The lack of any ascertainable rationale in the law as to what constitutes a place of public accommodation has resulted in no end of conflict and confusion in the cases. More recent decisions have recognized that anti-discrimination legislation in business creates rights unknown to the common law, and the fact that such legislation is deemed penal in nature has led some courts to hold that if an employee of the business is disobeying the proprietor's instruction in discriminating, the normal rule of respondeat superior cannot be used to hold the proprietor liable.

The decisions are not even in harmony as to who the beneficiaries of these laws are. One case has held that only a citizen, and not an alien, may recover under these laws, while another court declared that any person within the jurisdiction of the state, even if he were not a citizen, was covered. Still a third case from California has decided that the term "citizen" in the law includes an alien, a result which surely would have startled the framers of the Fourteenth Amendment who expended so much energy in making Negroes into citizens. One is relieved to find that California does not count her corpses among her citizenry also.

There is also a considerable conflict among the cases as to what types of places are covered by the public accommodation laws. The cases have split regarding coverage of a bar or tavern, barbershop.

its managers probably believe would make the enterprise a success, beneficial financially to themselves and attractive to respectable people, it must exclude the rough, boisterous, and rowdyish element from its boats and grounds. It is not engaged in the general carriage of passengers for business and pleasure. It invokes such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a race track."


228 Fuller v. McDermott, 37 N.Y.S. 536 (1904).
231 Long v. Mountain View Cemetery Ass'n, 130 Cal. App. 2d 328, 278 P.2d 945, 946 (1955) (Kaufman, J.) ("I also agree with the view that Sections 51 and 52 of our Civil Code only apply to living citizens of this state").
bootblacking stand, cemetery, coffee or lunch counter or restaurant, ice cream parlor, reducing salon or beauty parlor, retail clothing store, saloon, and soda fountain. Trailer parks are in the doubtful category.

Some of the more recent cases have given the concept of "place of public accommodation" a broader meaning. Included in this definition


have been a bathhouse, bowling alley, dance hall or pavilion, elevator, golf course, night club, skating rink, and theater. It has been held that a swimming pool is a place of public accommodation; one case decided that the statute covered pools even though the law enumerated over forty specific places without mentioning them.

The federal Civil Rights Act of 1964 creates a new and fertile field for litigation over what is included thereunder. Restaurants are covered, especially if they are on public facilities, and drive-in places to eat are also included. But it has been held that neither bars nor taverns are included. It has been held that a barbershop located in a hotel is covered by the federal law although 95 percent of its patrons are local. Likewise, a federal court enjoined a gas station from posting a sign saying: "we serve white customers only." Movie theaters

244 Norman v. City Island Beach Co., 126 Misc. 335, 213 N.Y.S. 379 (1926).
259 Cuevas v. Sdrales, 344 F.2d 1019 (10th Cir. 1965); Dupre v. Young's Service Station & Lounge, 12 RACE REL. L. REP. 993 (U.S.D.C., W.D. La. 1967); Tyson v. Cazes, 238 F. Supp. 937 (E.D. La. 1965) vacated on other grounds 363 F.2d 742 (5th Cir. 1966).
also come under the Civil Rights Act of 1964. But neither an amusement park nor an outdoor dance ground and picnic area are covered under the federal law. If there is any logical pattern to the foregoing examples of inclusion and exclusion it has escaped the attention of this author, at least.

One federal district court held that the 1964 federal statute did not cover a bowling alley, while another federal judge enjoined a bowling alley from staging a tournament which was not open to Negroes. In still a third case, a federal district judge held that a lunch counter on a golf course brings the whole course within the scope of the federal law. This is certainly a case of the tail wagging the dog. The principal facility is clearly the golf course. The lunch counter is there for the convenience of the golfers; the golf course is not there so that people who came to have lunch can play 18 holes while waiting to be served. Service at some restaurants may be deplorably slow, but it could hardly be that poor anywhere. In the alternative, the court held that a golf course is a place of exhibition and entertainment moving in interstate commerce because once a year an out-of-state team plays there. The court ruled that Negroes were not limited to watching this out-of-state team play, but were entitled to play on the course themselves, even though a private social organization conducts the team matches on the course. This is quite a load for so slender a legal connection with interstate commerce to carry.

Some of the broadest language to be found in the cases which construe what constitutes a place of "public accommodation" is contained in several New Jersey decisions. It has even been held in that state that a camp for blind men offering a two-week free vacation, which is operated by a charity, is a place of public accommodation and cannot discriminate. Thus, not even the gifts of donors are exempt from government coercion.

The New Jersey law has a provision which exempts any "place of accommodation which is in its nature distinctly private." It is not entirely clear what this exemption means, but from two quite recent decisions in that state, as applied to business, it seems that this proviso means nothing at all. In Evans v. Ross, the defendant owned a public

---

dining room, which it was conceded that the statute covered, and several banquet or meeting rooms adjacent thereto. These rooms were rented by a variety of private organizations for either meetings without food or for organization banquets. Although the rooms as well as the restaurant were advertised, no fixed price was set, and the rooms could only be rented by private contract, the terms of which varied according to the organization. Nevertheless, it was held that these rooms were places of public accommodation. The trial court based its reasoning on the fact that the rooms could be hired by others who made contracts with the owner.\textsuperscript{270} The Appellate Division, however, reasoned as follows:

\begin{quote}
[A]n establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their race, creed, color, national origin or ancestry. The law is designed to insure that all citizens of this State shall have equal rights as members of the public and not be subjected to the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them. Once a proprietor extends his invitation to the public he must treat all members of the public alike. The present case is just such a one as the law was expressly designed to cover.

The Holly House banquet or meeting rooms are “private”—to use appellant’s word—only in the sense that they can be hired for the exclusive use of a particular group or organization. They are still public accommodations, just as any private hotel room or private hospital room would be within the meaning of the law.\textsuperscript{271}

This line of reasoning was approved by the New Jersey Supreme Court in \textit{Fraser v. Robin Dee Day Camp},\textsuperscript{272} wherein that court held that a combination day camp, private school and nursery was a place of public accommodation because it advertised in the newspapers, telling the public what facilities it had available. The court rejected the argument that the camp was exempt from the law because in its advertisement it stated: “Submission of a personal application is only considered an offer to enroll and is subject to acceptance.” The court declared:

\begin{quote}
\textsuperscript{270} 150 A.2d at 515, where the court said:
Appellant concedes his place of business is available to all types of individuals, groups and organizations. Query: Is it appellant's reasoning that his facilities are available to all types of people or groups of people who make specific reservations for a specific room with or without food provided they are not of the colored race? This interpretation would render the law against discrimination in New Jersey futile and abortive. Adequate services must be available to all citizens regardless of race, color, creed or national origin. The refusal of such equality of opportunity to any individual citizen or group of citizens by reason of race, color, creed or national origin is discrimination.”

\textsuperscript{271} 154 A.2d at 445.

\textsuperscript{272} 44 N.J. 480, 210 A.2d 208 (1965).\end{quote}
"No device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination."\(^\text{273}\)

This reasoning is entirely circular. The business cannot discriminate only because it is a "place of public accommodation" under the law. The court says that it is a place of public accommodation because it invites the general public. The court also says that it cannot refuse to invite the general public because it is a place of public accommodation. The business cannot restrict its advertising because it falls under the statute, and it falls under the statute because it cannot restrict its advertising. This is clearly a "bootstraps operation."\(^\text{274}\)

If an independent statutory basis exists for deeming a place one of "public accommodation," then it can justifiably be said that advertising it as restricted will not exempt it from the law.\(^\text{275}\) But if the sole basis for the law is an unrestricted invitation to the public to enter, it is difficult to understand why a restricted invitation will not remove that single connection with the statute. If the object is to spare Negroes the inconvenience of being lured to a place only to be rejected when they get there, that object can be accomplished just as effectively by telling them in advance that the facilities are restricted as it can by opening the facilities when they arrive to them.

Since the court has held that if a place is advertised, it thereby becomes a place of public accommodation, and that no restriction in the advertising will suffice to exempt it from the law, it is difficult to imagine any business in New Jersey which will be considered private in nature. All businesses have to advertise, and all will therefore be covered. The only enterprises exempt from the law will be secret activities, like speakeasies of the 1920's, where advertising was by word-of-mouth.

Once it is found that a business is a place of public accommodation, the restrictions on the proprietor are considerable. Even if he himself is not white he must serve Negroes.\(^\text{276}\) A Negro refused service may

\(^{273}\) Id. 210 A.2d at 213.

\(^{274}\) For another such example of circular reasoning, see Lambert v. Mandel's of Calif., 156 Cal. App. 2d 855, 319 P.2d 469, 470 (1957): "A retail shoe store is a place of public accommodation that is essentially like a place where ice cream and soft drinks are sold; each is open to the public generally for the purchase of goods. It cannot be argued that either is not a place of public accommodation because the proprietor undertakes to limit his patrons to those of the white race, for it is this discrimination that the law condemns. The fact that the defendant, in this case, sells shoes and neither ice cream nor soft drinks, does not serve to distinguish its services, at the point of importance, from those of the vendor of refreshments."

\(^{275}\) See, e.g., Amos v. Prom, Inc., 117 F. Supp. 615, 629 (N.D. Iowa, 1954): "It would seem that an establishment which has the attributes of a place of public amusement cannot, by adding to the rules generally and properly followed by establishments or business within the Act the rule of exclusion because of color, change its character from a place of public amusement upon the theory of 'social acceptability.'"

recover under the statute even if he was not a bona fide customer and only applied for service to create the opportunity for litigation.\textsuperscript{277} In one case a tavern owner was enjoined to serve a Negro even though the owner claimed that the man was intoxicated and that service would render the owner liable under the state Dram Shop Act to anybody injured as a result of his condition.\textsuperscript{278} Orders against places of public accommodation are enforced by fine and imprisonment.\textsuperscript{279}

Considering the restrictions which these statutes forbidding discrimination in places of "public accommodation" place on owners of private businesses, it is not surprising to find occasional judicial protests being raised. One Ohio court criticized the local "civil rights" law for violating freedom to sell to whomever the proprietor chose.\textsuperscript{280} Another Ohio court naively predicted that Negroes would not force themselves into places where the proprietor did not want to serve them.\textsuperscript{281} A dissenting judge from Washington protested:

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise. \ldots{} The statute refers to "place[s] of public resort." (Italics mine.) This phrase is without constitutional or legal significance. It has no magic to convert a private business into a governmental institution. If one man a week comes to a tailor shop, it is a place of public resort, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so.\textsuperscript{282}

\textsuperscript{277} Young v. Pratt, 11 Ohio App. 346 (1919).
\textsuperscript{278} People v. Grabner, 8 RACE REL. L. REP. 1148 (Ill. Cir. Ct. 1963).
\textsuperscript{280} Harvey, Inc. v. Sissle, 53 Ohio App. 405, 5 N.E.2d 410 (1936).
\textsuperscript{281} See Fowler v. Benner, 13 Ohio N.P. (n.s.) 313, 320 (C.P. 1912), where the court said:

"It is true that the civil rights statutes are, to some extent, in derogation of private rights, and restrictive of the liberty which a citizen ordinarily enjoys to deal only with those persons with whom he chooses to hold business relations \ldots{} we believe that, as a general rule, a gentleman, whether white or colored, will never obtrude himself into a place where he knows his presence may be embarrassing or objectionable to the proprietor or his customers."

5. The Equal Protection Problem as to Business Generally

A. The Banning of Ethnic Discrimination

The constitutionality of anti-discrimination legislation in business is typically defended on the ground that such laws are an exercise of the police power to assure access and service to the public in places which advertise for public patronage. Presumably, the theory is that the public would be inconvenienced if it were induced to come to a place only to find that it was in fact restricted. This might be likened to false and misleading advertising. It has been argued that state anti-discrimination laws merely apply the principles of the Fourteenth Amendment to private individuals.

However, over half a century ago it was noticed that the "civil rights" laws were concerned with only ethnic discrimination, particularly against Negroes, while offering no protection against other forms of discrimination. It is settled law that a business owner does not violate these "civil rights" statutes if his discrimination is not motivated by race, creed, color, or national origin. No matter how discourteous the owner is, if he is not motivated by one of the key proscriptions, his conduct is immune from judicial correction. While a person who is refused service in a hotel restaurant on purely personal grounds may recover damages from the owner, if service is refused on such grounds in an ordinary restaurant the "civil rights" statutes afford no relief. On the other hand, courts have even gone to the extent of

283 See, e.g., Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962); People v. King, 110 N.Y. 418, 18 N.E. 245 (1888). In Bolden v. Grand Rapids Operating Co., 239 Mich. 318, 214 N.W. 241, 243 (1927), the court said: "... the public safety and general welfare of our people demand that, when the public are invited to attend places of public accommodation, amusement, recreation, there shall be no discrimination among those permitted to enter because of race, creed, or color. It is bottomed upon the broad ground of the equality of all men before the law."

284 The Federal Trade Commission, on just this theory, has commenced proceedings to compel housing restricted to white persons to advertise this fact. See N.Y. Times, Dec. 9, 1967, P. 1, Col. 1.

285 People v. King, 110 N.Y. 418, 18 N.E. 245 (1888); Bryan v. Adler, 97 Wis. 124, 72 N.W. 368 (1897).

286 See Note, Right of Admission to Theatre, 9 Law Notes (N.Y.) 65, 67 (1905): "It follows, curiously enough, ... that while a colored man may not be denied admission to a theatre because of his color, he, or any other person, white, black, or yellow, may be excluded from a theatre for any reason other than that of color."


ordering proprietors to change their entire mode of admitting customers in order to protect Negroes against potential discrimination.291

When other forms of discrimination have come before the courts, the customer has been unable to obtain relief. It has been held that a restaurant may refuse to serve a person who refuses to wear a coat in hot weather,292 or who was not wearing a collar and would not put a handkerchief around his neck,293 or who was a soldier in uniform,294 or a construction worker in his work clothes.295 A public place may require whatever fee it wants for admission,296 and may impose whatever requirements it chooses by way of advance reservations.297 A theater may exclude a drama critic because the owner does not like what he writes,298 or because he is a cripple.299 Where there is a preshowing of a film, the theater may exclude anybody except film critics and employees of the producer.300

When not dealing with racial or religious discrimination the courts have been most emphatic about the rights of business owners to control

291 See, e.g., Plummer v. Brock, 9 RACE REL. L. REP. 1399, 1409 (U.S.D.C., M.D. Fla. 1964):
   "... here's a policy of not admitting local people, ... it's a discretionary matter; it's submitted to the discretion of whoever is on the desk by each of these motel owners. 'If you know him or you think he's all right or you know there's nothing wrong or if there is an emergency, if he gets married, or if he's got employment here' or anything of that sort, it would be a legitimate reason to admit a white person, a local white person.
   "... I think that sort of policy may not be used hereafter at this time and in the circumstances to say that 'We are going to exercise the same wide discretion in turning away Negroes,' because that simply doesn't lay down any recognizable standard on which to accept or reject guests, if you say go and put them under that same standard.

292 Fred Harvey v. Corporation Comm. of Oklahoma, 102 Okl. 266, 229 P. 428 (1924). See also Opinion of the Atty.-Gen. of Maryland, June 19, 1963, 8 RACE REL. L. REP. 763:
   "To illustrate our point that the trespass statute would still be functional after the passage of a public accommodations ordinance, we cite as an example the situation wherein the proprietor of a restaurant might insist, as a rule of his establishment, that no man would be served unless he wore a coat and tie. Under such a rule, if a patron sought service in his shirtsleeves, the proprietor could lawfully refuse to serve him and in the event the patron insisted on remaining in the dining area of the premises, the proprietor could have him arrested under the state trespass statute if he refused to leave after reasonable warning."

293 Brandt v. Mink, 38 Misc. 750, 78 N.Y.S. 1109 (1902).
300 MacLeod v. Fox West Coast Theatres Corp., 10 Cal. 2d 383, 74 P. 2d 276, (1937).
their own business policy. One Michigan decision held that owners of places of amusement "can impose any terms of admission they choose," and that the reason for exclusion is immaterial. It has been observed that anti-discrimination laws constitute an exception to the right of theater owners to choose their customers, and that the only purpose of the law is to prevent "membership of any particular class of citizens" from justifying exclusion from such places. Why race, creed, color, and national origin are the only classes is hard to see; one would think that people could also be classified on many other bases, such as politics, occupation, income, type of residence, and so forth. The Scottish Court of Session has held that a hotel owner has a discretion as to the class of people whom he will admit, and he may reject working class patronage. This would seem to be as much a class as race is.

Article 15 of the Constitution of India of 1949 forbids discrimination in shops, restaurants, hotels, places of entertainment, and publicly supported facilities maintained out of state funds based on race, religion, caste, sex, or place of birth. It was held that this does not prevent discrimination because of the social or political importance of the individual's family. A British statute forbids discrimination in any hotel, restaurant, cafe, tavern, place where food and drink is sold for consumption on the premises, place of public resort maintained by a public authority, public carrier, theater, cinema, dance hall, sports ground, swimming pool, or "other place of public entertainment or recreation" based on color, race, or ethnic or national origin of the person seeking to use the facility. Several of the Canadian provinces follow the American pattern, banning only discrimination based on race, creed, color, nationality, and ancestry. This would seem to indicate that different classes can be set up for the purpose of forbidding discrimination. However, British Commonwealth jurisdictions need not be concerned with the reasonableness of these classifications since legislative discrimination is not forbidden by their own constitutions.

303 Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829, 830 (1916). See also Foster v. Shubert Holding Co., 316 Mass. 212, 111 N.E.2d 772, 775 (1944): "... the [theatre] proprietor is not bound to admit everybody who presents a ticket—apart from discrimination on account of race or color. ... It has been said that witnessing a theatrical performance is not a necessity of life.
304 Strathearn Hydropathic Co. v. Inland Revenue, 4 R. 798, 801 (Scot Ct. of Sess. 1881).
306 Race Relations Act of 1965, § 1, 13 & 14 Eliz. 2, C. 73.
It is interesting to note that the statutes forbidding racial discrimination have resulted in a special, ancillary class of people, who are protected, those who, although not discriminated against because of race, are refused service because they want to associate with Negroes. Two early New York cases held that anti-discrimination laws did not protect white people who were not served because they came with Negroes.\(^3\) However, more recently it has been held that a place of public accommodation cannot exclude a person because he belongs to the NAACP or a local "civil rights" group,\(^3\) or is a white "civil rights" worker who is engaged in helping Negroes desegregate the facility which refuses to serve him.\(^3\) It has also been held that a white wife and her Negro husband may both recover damages from a hotel for refusing to serve them on account of their miscegenous marriage.\(^3\) Considering the fact that the drive for interracial association comes almost wholly from Negroes, these decisions, while in theory protecting association by members of both races, in reality protect Negroes in their right to associate with white persons. Other association, however, remains unprotected.

\(^{300}\) In Cohn v. Goldgraben, 103 Misc. 500, 170 N.Y.S. 407, 407-8 (1918), the court said: "There was no refusal to serve because of color or race. The plaintiff was white and his companion was colored. They were both refused service, so it could not have been on account of color. It was, as stated by the waiter, because the rule forbade serving 'mixed parties.' The rule that 'mixed parties' should not be served applied to white as well as colored. There was no discrimination as to one color in favor of the other. . . . The rights granted to the citizen by the statute are strictly personal, and the statute may only be invoked when the refusal is based upon the ground personal to the plaintiff. The plaintiff was not refused service solely upon his own color, but upon the fact that his companion had a different color. Had the plaintiff been alone, or had he separated himself from his companion, he would have been served." In Matthews v. Hotz, 173 N.Y.S. 234, 235 (1918), the court likewise declared: "We think it is quite plain that that act cannot be availed of by a white man because of discrimination against him that is based upon his association with colored men."

\(^{310}\) Fletcher v. Coney Island, Inc., 121 N.E.2d 574, 581 (Ohio C.P. 1954), rev'd 100 Ohio App. 259, 136 N.E.2d 344 (1955), aff'd 165 Ohio St. 150, 134 N.E.2d 371 (1956). "The blanket exclusion of all members and of all persons who associate with members of a particular group or organization, because of the misconduct of some members and without regard to the fact that a particular person who may be affected by such blanket exclusion, is without personal fault, is not a reason applicable alike to all other citizens."

\(^{311}\) Offner v. Shell's City, Inc., 376 F.2d 574 (5th Cir. 1967).

\(^{312}\) Hobson v. York Studios, 208 Misc. 888, 145 N.Y.S.2d 162, 167 (1955) : "[The statute] . . . must include protection for white persons as well as Negroes who are rejected because of race. To all but the naive, it is clear that a white woman may be the butt of a racial discrimination because she has elected to marry a Negro. I am convinced that both plaintiffs were rejected by the defendant because Mr. Hobson is a Negro and his wife is a white woman. Such a refusal, as applied to Mrs. Hobson, is a rejection of her because of her color . . . a white plaintiff must receive equal protection with her Negro husband. The law looks with favor upon marriage . . . and New York does not frown upon an interracial marriage. In effect, what the defendant's desk clerk said to Mrs. Hobson was that if she had been married to a white man, her reservation for a room would have been honored. If the rejection was based upon some private theory of 'social acceptability,' where Negroes and white are in intimate association, it is still offensive to the law."
A place of public accommodation is still free to refuse service to other groups who associate together. Once again, a special class is set up to whom protection is afforded against discrimination.

Another good example of how banning ethnic discrimination alone is in itself discriminatory is afforded by *Spencer v. Flint Memorial Park Assn.* In this case a contract with the defendant cemetery provided that it only had to bury the bodies of white people. The cemetery refused to bury a Negro. The court observed: "Obviously, under the law of contracts, we must deny the plaintiff recovery if the restriction is enforceable for aside from valid public regulation, a cemetery lot owner's rights are contractual and subject to the ordinary rules of contract law." However, the court held that to allow the cemetery to rely on its own contract was state action which violated the Fourteenth Amendment. In any other case not involving racial discrimination, a business would only be bound by its contract. If, for example, a business agreed to print pamphlets only for lawyers, who could be found to contend that under the Fourteenth Amendment it was required to print them for farmers merely because a farmer who sued for breach of contract would bring his action in a state court which would necessarily pass on the validity of the contractual limitation? Yet farmers are as much of a class as Negroes and are equally entitled to the benefits of the Fourteenth Amendment.

Moreover, the court here approved of religious discrimination in cemeteries. Religion is as much a class as race, and members of one class are entitled to as much protection as those of another. Indeed, the court rejected the theory that the cemetery was entitled to make any discrimination at all. In commenting on the cemetery's contention that "there is nothing to prevent the plaintiff from choosing a place of burial among his own kind," the court pointed out that "rights under the 14th Amendment are personal rights that are not attached to white persons or to Negroes or to Indians, etc., but to individuals." This

---

314 9 RACE REL. L. REP. at 1394.
315 Id. 9 RACE REL. L. REP. at 1398, where the court said: "In reaching the conclusion that such restrictive covenants as are here involved are unenforceable, this writer would make it absolutely clear that such conclusion in no way prevents cemeteries maintained by a particular religious faith from restricting burial rights to members of that faith. That is not the case with the defendant cemetery in this cause."
316 Id. 9 RACE REL. L. REP. at 1399, where the court declared: "How valid and significant is defendant's statement that plaintiff could 'seek burial among his own kind'? Does the defendant assume that plaintiff's own kind is restricted to skin pigmentation? May not the plaintiff select the burial place of his loved ones on the basis of location, price, esthetic appreciation or whatever personal factors an individual may want to use to select a burial plot? It is a bizarre interpretation of the equal protection of the laws clause of the 14th Amendment to conclude that this protection is to afford a white person what all white people would want—burial among whites; and to the
leads to the logical conclusion that the cemetery not only is forbidden to make any religious distinctions (which is flatly contrary to the court's own decision), but cannot discriminate in any way whatsoever, even by its own contract, a result which is both practically as well as legally absurd. Thus, to apply the rule against racial discrimination to other forms of discrimination leads to an impossible situation for a business, and to limit it to racial discrimination requires a justification which has no legal or constitutional basis. The Fourteenth Amendment neither mentions race nor was it intended to bar racial discrimination any more than any other discrimination.\(^{317}\) As one court said:

Management can arbitrarily order white persons to leave lunch counters for any reason whatever. While appellants expounded forcefully of the equal privileges and immunities provisions of the Fourteenth Amendment, we cannot escape the conclusion that they are urging this court to grant them an unequal privilege, that is the right to be served in a restaurant because they are colored, even though a corresponding right does not exist in white persons. Appellants' argument must fail because they, regardless of color, had no right or privilege to be served.\(^{318}\)

B. Monopoly Businesses

The extent to which anti-discrimination laws in so-called “places of public accommodation” in fact discriminate against those to whom the proprietor chooses to deny service on grounds other than race, creed, color, and national origin, is nowhere better illustrated than in respect to those businesses which enjoy a monopoly of service, either through government regulation or by economic factors. Of the former group, race tracks constitute an excellent example. That these tracks are places of “public resort” has even been recognized in New Zealand.\(^{319}\)

It has been uniformly held that there is no right of access to a race track comparable to the common-law right of accommodation at an inn, in spite of the fact that race tracks are so closely regulated and limited in number as to amount to substantial monopolies.\(^{320}\) The Mary-


\(^{318}\) Briggs v. State, 367 S.W.2d 750, 756 (Ark. 1963).

\(^{319}\) Champion v. Fleetwood, 26 N.Z.L.R. 983 (Sup. Ct. 1907).

land Court of Appeals rejected the argument that since a race track can only be conducted by a "public franchise" granted to it by the State, the track was a "public calling" or "public utility" and had to accept all who sought admission. The court observed: "Licensing, regulation, and taxation of a private carrier do not make it a common carrier."\[321\] The Supreme Court of New Jersey similarly held that a race track has a right to exclude anybody it desires to if racial discrimination is not involved.\[322\] It rejected the contention that the owner's "common-law right of exclusion from its race-track should be limited because as a licensee 'it has secured the advantage of a State monopoly.'"\[323\]

The New Hampshire Supreme Court has held that even though there is no common law right to operate a race track and that tracks were closely regulated and licensed because of the social problem of gambling therein, the "business is still a private enterprise since it is affected by no such public interest as to make it a public calling as is a railroad for example."\[324\] The court therefore adhered to "the overwhelming weight of authority in regard to the right of owners of private enterprises to discriminate as they choose between those seeking admission to their places of business."\[325\] The court refused to change this rule to conform to "altered social concepts" because of "certain rights of owners and taxpayers, which still exist in this state, as to their own property."\[326\] All of this language would apply as much to racial discrimination as to any other kind of discrimination.

The whole question has been thoroughly analyzed by the New York Court of Appeals in *Madden v. Queens County Jockey Club.*\[327\] In this case, the plaintiff sued as a citizen and taxpayer to establish his right to enter defendant's race track. The court held that "the operator of a race track can, without reason or sufficient excuse, exclude a person

\[321\] Greenfield v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335, 338 (1948).
\[322\] Garfine v. Monmouth Park Jockey Club, 29 N.J. 47, 148 A.2d 1, 5 (1959), where the court observed: "The statute was obviously aimed at discrimination based on color and race and left unimpaired the right of exclusion for unrelated reasons."
\[323\] Id. at 148 A.2d at 6. The court also said: "defendant's operation was not under a franchise for the performance of a public function but was under a license imposed for revenue and the regulation of a private business which, like the alcoholic beverage industry, entailed inherent dangers and was clearly affected with a public interest."
\[325\] Ibid. The court also said: "It is firmly established that at common law proprietors of private enterprises such as theaters, race tracks and the like, may admit or exclude anyone they choose." Id. 163 A.2d at 11-12.
\[326\] Id. 163 A.2d at 12.
from attending its races," because the track owner "has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin."\textsuperscript{328} The court distinguished the duty of innkeepers and common carriers at common law to serve the public without discrimination from the right of an owner of a place of amusement, who had "an absolute power to serve whom they pleased." The court declared that this common law right continued until changed by statute, and that the Civil Rights Law had barred discrimination based solely on race, creed, color, and national origin.\textsuperscript{329}

The plaintiff, however, asserted an equal protection argument. This argument, unfortunately, was not directed to the discrimination in the Civil Rights Law. Instead, the plaintiff contended that the track was either a state agency or had a franchise for a public purpose, and therefore the track was constitutionally incapable of discrimination. The court disposed of the theory that the track was a unit of state government by pointing out that the track was no more a governmental agency by paying a tax than any other business which paid a license tax for the privilege of doing business.

The court rebutted the argument that the track had a franchise by first noting that amusement was not a governmental function. It then declared:

Plaintiff's argument results from confusion between a "license," imposed for the purpose of regulation or revenue, and a "franchise." A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. . . . It creates a privilege where none existed before, its primary object being to promote the public welfare. . . . A familiar illustration is the right to use the public streets for the purpose of maintaining and operating railroads, waterworks and electric light, gas and power lines. A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public. . . .

Observing, however, that the conduct of races for stakes had long been declared illegal "except as specially authorized," plain-

\textsuperscript{328} Id. 72 N.E.2d at 698.
\textsuperscript{329} Ibid. In Castle Hill Beach Club, Inc. v. Arbury, 2 N.Y.2d 596, 162 N.Y.S.2d 1, 6, 142 N.E.2d 186 (1957), the court observed: "places of amusement and resort as distinguished from those engaged in a public calling, such as innkeeper or common carrier, enjoy an absolute power to exclude those whom they please, subject only to the legislative restriction that they not exclude one on account of race, creed, color, or national origin. In the Madden case this court upheld the right of a race track to exclude Madden even though the exclusion was without good cause.
tiff argues from that that the license was in effect a franchise, since it granted a privilege not previously enjoyed by common right. That, though, overlooks the fact that the privilege of conducting horse races for stakes does not exist at the common law, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions. . . . Consequently, the license, instead of creating a privilege, merely permits the exercise of one restricted and regulated by statute. 330

The courts have treated natural monopolies in the same way that they have treated state-created monopolies. For example, newspapers have virtually become a natural monopoly, 331 but most authorities still hold that they may refuse to sell space to whomever they choose. 332

When the foregoing policy is compared with the reasoning given to sustain the constitutionality of anti-discrimination legislation, the incongruity becomes manifest. In one case it was held that laws forbidding barbers to discriminate based on race, creed, color, or national origin are valid because the legislature has the power to regulate barbers to safeguard the health of customers. 333 The New Hampshire Supreme Court has likewise upheld the constitutionality of such laws in respect to barbers under the police power, 334 while the Maryland Court of Appeals has decided that the legislature may make non-discrimination a condition of running a restaurant even where the restaurant does not

330 72 N.E.2d at 699-700. In Madden v. Queens Co. Jockey Club, 269 App. Div. 644, 58 N.Y.S.2d 272, 274 (1945), the court declared: “We are, therefore, constrained to disagree with the dictum in Grannan v. Westchester Racing Ass'n, . . . to the effect that a race course is endowed by a State with a franchise which obliges it to serve all alike as if it were a common carrier or a public utility.”

331 See Uhlman v. Sherman, 31 Ohio Dec. 54 (C.P. 1919), holding that newspapers are public utilities and cannot unreasonably discriminate in selling advertising space.

332 See, generally, Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). For example, Commonwealth v. Boston Transcript, 249 Mass. 77, 144 N.E. 400, 402 (1924) held that a statute requiring a newspaper to print a government advertisement was an unconstitutional violation of freedom of contract. The court declared: “It cannot be said on this record that newspapers are affected with a public interest so as to stand on a less favorable ground with respect to legislative regulation like the present than the ordinary person. . . . The legislative power as to price fixing and as to regulation, which recently was discussed and upheld with reference to theaters . . . clearly does not reach to the facts here disclosed. That opinion rested chiefly on historical grounds.”

333 Gegner v. Graham, 1 Ohio App. 2d 442, 205 N.E.2d 69, 72 (1964), appeal dismissed 1 Ohio St. 2d 108, 205 N.E.2d 72 (1965) where the Court of Appeals argued: “If barbers were free to turn away Negroes because of their race, then this group would be denied the safeguards to health provided by law and be denied on their part the equal protection of the laws. . . . Barbers and customers will continue to deal together on the basis of personal preference. But the right of any member of the public not to be discriminated against because of race must be upheld.”

have a monopoly. The Supreme Court of New Jersey has justified anti-discrimination laws in respect to barbers and classification of barber shops as "places of public accommodation" on the ground that it was necessary to license barbers to protect the public health. The court declared that "the practice of barbering and the operation of barber shops have a sufficiently intimate relationship with the public interest and welfare to justify licensing and regulation of barbers and their shops." The court added that "once licensed or registered the barbers have a lawful monopoly of the practice of barbering."

Considering the fact that the Supreme Court of New Jersey approved anti-discrimination legislation on the ground that licensed barbers have a monopoly in that state, it is relevant to examine the amount of competition which actually exists. New Jersey is a relatively small state and it is possible to drive the entire length of the state on the New Jersey Turnpike in slightly over two hours. As of 1968 there were 10,056 licensed barbers, 629 apprentices, and 4,668 barber shops in New Jersey. Assuming that a man got a haircut once a week, which is certainly enough for good grooming, and used a different barber each week, it would take him about 200 years to exhaust the list of barbers in the state. By that time he would not need to concern himself with getting haircuts.

The same is true in other states. In 1963 a survey showed that there were 9,488 barber shops in New York State employing 8,447 employees and 10,112 proprietors. New York City alone had 5,093 barber shops in 1968.

As has been previously noted, restaurants have been deemed places of "public accommodation." In 1968, New York City alone had a total of 19,425 places for the consumption of food on the premises. This means that if a person went to a different restaurant, cafeteria, or lunch counter each day in the year it would take him over 50 years to eat in all of them. In 1963 the State of New York had a total of 35,026 such places while New Jersey had 13,781 such places. If this constitutes a monopoly business, what could competition require? Moreover, it is relevant to note that New York State had only 827 race track operations, stables for race horses, and similar businesses yet the courts have said that race tracks are not franchised public utilities required to serve everybody.

337 Letter of Frank Marchese, Secretary, New Jersey State Board of Barber Examiners, to Alfred Avins, dated Jan. 2, 1968.
338 New York State Dept. of Commerce, Business Fact Book 30 (1967-68 ed.).
339 New York City Department of Health statistics, on file in the department.
340 Ibid.
341 New York State Dept. of Commerce, Business Fact Book 26 (1967-68 ed.).
342 Id. at 30.
Another excellent illustration of the inconsistency of the judicial decisions is found in Camp-of-the-Pines v. New York Times Co. In this case, the court held that a resort camp had no right to publish an advertisement saying "selected clientele," "restricted clientele," or "restricted," on the ground that such phrases indicated that Negroes and Jews were unwanted, in violation of the state anti-discrimination law. After rejecting the right of the camp to select its own customers, the court held that the New York Times had a right to sell its product to whomever it pleased, and to refrain from selling it to those persons it did not want to deal with. The court declared: "Newspaper publishers have a legal right to deal with whom they please." The court then did an about-face, saying in reference to the camp: "Reflection causes me to wonder and observe who confers on any person the right to select those who select the 'selected clientele.'" This would seem as applicable to a newspaper as a camp. Yet the court did still another about-face, declaring:

[I]n the absence of legislative regulation . . . a publisher of a newspaper is not required to accept for publication an advertisement in proper form, where the rate which the newspaper charges for publishing is tendered to the newspaper. A newspaper in the absence of regulatory legislation is not in the same category as common carriers or inn-keepers. The newspaper business, in the absence of statutes to the contrary, is a business essentially private, just as much as that of the baker, the grocer, or the milkman.

In 1968, New York City had 690 hotels and 65 lodging houses but only three daily metropolitan newspapers, the New York Times, the New York Daily News, and the New York Post. New York State had 5,491 hotels, motels, tourist courts and camps in 1963; California had 9,246 such establishments, and other states were equally well provided. To call inns, hotels, or resort camps a monopoly is to turn this concept upside down. Nothing can be further from reality. One

---

344 Id. 53 N.Y.S.2d at 486. The court quoted a prior case as follows:
"It is the well-settled law of this state that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever; and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice, or malice. It is a part of the liberty of action which the Constitutions, state and federal, guarantee to the citizen. It is not within the power of the courts to compel an owner of property to sell or part with his title to it, without his consent and against his wishes to any particular person."
345 Id. 53 N.Y.S.2d at 487.
346 Ibid.
348 New York State Dept. of Commerce, Business Fact Book 28 (1967-68 ed.).
"It has been previously suggested that the probable reason for imposing the
American case has already questioned the whole basis for the common law as to innkeepers,\textsuperscript{350} and a half century ago the Lord Justice Clerk of the Scottish Court of Session questioned applying the common law duty of innkeepers to metropolitan hotels where competition assured every traveler some accommodation.\textsuperscript{351} With thousands of places to stay in New York when on vacation, the court imposed the duty of public utilities on a resort lodging, while leaving the tiny number of metropolitan newspapers free to discriminate capriciously in any way they desired. Hotels were treated as monopolies, while newspapers were treated as if there was plenty of competition. This flight from reality illuminates anti-discrimination laws and their rationale.

It is clear from an examination of the cases that a duty not to discriminate based on race, creed, color, and national origin has been carved out of the general right of business proprietors to choose their customers in any way they desire. When such proscribed discrimination is considered, sundry businesses in which competition may be very great are treated like public utilities with monopolies; when this discrimination is not present many monopolies are treated as if there was sufficient competition for a person who is denied service at one place to obtain it elsewhere. The "civil rights" statutes thus confer a special legal privilege on persons discriminated against because of ethnic grounds, to the disadvantage of persons discriminated against based on other grounds. The latter are not equally protected from discrimination against them, in violation of the Fourteenth Amendment.

It has been argued that such a law "it not a discrimination in favor of colored persons, as it applies to all races and all colors."\textsuperscript{352} This is

\textsuperscript{350} In Armwood v. Francis, 9 Utah 2d 147, 340 P.2d 88, 91 (1959), the court said: "Parenthetically, however, we might suggest that the world has come a long way since necessity created the innkeeper-guest relation as known at common law, with its own distinct liability. We think courts may be prone to take a second look at that relationship before applying it to the hostelries of the space age. . . ."

\textsuperscript{351} See Rothfield v. North British Ry. Co., [190] Sess. Cas. 805, 828: "But the pursuer, when he did not find accommodation at the defenders' hotel, was able to find other good hotels in close proximity, where he was readily received, he says, as a welcome guest. I do not think the same considerations apply here as in the case of the traveller at night-fall coming to an isolated and remote Highland hotel in a snow-storm. . . ."

sheer sophistry. As a practical matter, the only persons discriminated against based on race or color in the United States are Negroes. Other instances of such discrimination are negligible. Of course, many people other than Negroes are arbitrarily discriminated against, but not on the grounds of race or color. Anti-discrimination laws do not protect these people.

In addition, we may examine the actual purpose of the legislation to determine its constitutionality. As one case put it: "It cannot be doubted that it was enacted with special reference to citizens of African descent." This, of course, applies to the ban on racial and color discrimination; discrimination based on religion and national origin was added in New York and later copied in other states to establish social and cultural rights. The adjudicated cases based on religious and ancestral discrimination are so rare as to be insignificant from a practical point of view. From a practical point of view, the effect of anti-discrimination statutes in "places of public accommodation" is not to confer equal rights but to accord special privileges to Negroes not enjoyed by the rest of the population. If there is any constitutional justification for this, it has escaped the attention of this author.

6. EQUAL PROTECTION AND PERSONAL SERVICES

The typical anti-discrimination law speaks of giving people equal access to "places" of public accommodation. It does not refer to giving people access to services rendered by other persons. However, the effect of these laws is often to give people a right to the services of other people. Going through the whole category of businesses covered by these laws, it is clear that they range, from one extreme, to those in which services are non-existent or negligible, and in which use of the place is dominant, through those in which the services and place are both required, to those in which the service is dominant and the use of the facility is incidental.

People v. King, 110 N.Y. 418, 18 N.E. 245, 247 (1888). See also Amos v. Prom, Inc., 117 F. Supp. 615, 620 (N.D. Iowa 1954) ("it seems plain considering the time and the setting in which the Iowa and other state Civil Rights Acts were passed that their principal purpose was to prevent discrimination based upon color"); Brown v. J. H. Bell Co., 146 Iowa 89, 123 N.W. 231, 237 (1909) (Evans C. J. dissenting) ("It is an embodiment in statutory form of the sympathy of the dominant race for the weaker race in its struggle for the higher levels of worthy citizenship"); DeCuir v. Benson, 27 La. Ann. 1, 4 (1875), rev'd sub nom. Hall v. DeCuir, 95 U.S. 485 (1878) ("It was enacted solely to protect the newly enfranchised citizens of the United States, within the limits of Louisiana, from the effects of prejudice against them"); Bolden v. Grand Rapids Operating Co., 239 Mich. 318, 214 N.W. 241, 242 (1927) ("While it [Civil Rights Act] applies to 'all persons within the jurisdiction of this state,' it cannot be doubted that it was enacted with special reference to those of African descent"); Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898); Johnson v. Humphrey Pop Corn Co., 24 Ohio Cir. Ct. R. 135, 139, 4 Ohio C.C.D. (n.s.) 49 (1902), aff'd 70 Ohio St. 478, 72 N.E. 1160 (1904).

For example, an automobile parking lot in which numbered places are rented by the month is clearly a facility in which the car owner wants the place only. He need never see the owner, and may send his rent in by mail. The use of a private park or lake is a similar facility. Even if anti-discrimination legislation constitutes a taking of property without due process of law, as it appears to do, it does not compel the rendition of personal services. In seeking access to a restaurant, however, the patron wants both the facility and the service. At the other end of the scale are purely service occupations, such as those rendered by professional men. Nobody goes into a physician's office or a lawyer's office to use the office as such. The office is simply the place in which services are to be rendered. If the physician or lawyer left, the full use of the office would be valueless to the patient or client. To speak of access to a "place of public accommodation" when referring to service occupations is itself misleading. Access is not sought to the place; what is sought is the right to be served by another person.

Certain non-professional personal service occupations have been covered by anti-discrimination laws for a considerable period of time, such as barbers and shoe-shine men. More recently, these laws have been held to cover certain business occupations, such as advertising and travel agencies and real estate brokers. But until quite recently, professional services were generally considered exempt. Now, however, they have also been held to be covered.


357 Note 234-5, supra. See Darius v. Apostolos, 68 Colo. 323, 190 P. 510, 511 (1919): "the principal business of barber shops and bootblacking stands is the furnishing of personal service."


"Whether or not we refer to a real estate salesman as a professional person is not too important here. I do not believe that the Act would apply to truly professional people—physicians, lawyers, and others who must, of necessity, have a right to restrict the nature of their practice and their clientele."

In prior articles, this author has pointed out that such statutes, as applied to personal service occupations, constitute involuntary servitude and hence violate the Thirteenth Amendment. This article is not concerned with that amendment. Instead, an examination of antidiscrimination laws in personal service occupations in light of general common law rights and duties shows that such laws also take liberty without due process of law and deny the equal protection of the laws.

The uniform rule at common law is that the "relation of master and servant cannot be imposed upon a person without his consent, express or implied." Thus, a federal court recently noted:

Like every other contract, the relation of employer and employee arises out of a meeting of minds, with an offer on the part of one

v. Elias, 11 Race Rel. L. Rep. 2186, 2189 (Pa. Human Rel. Comm. 1965), where it was held:

"Professional offices such as the respondent's dental office in Wilkinsburg, Professional offices such as the respondent's dental office in Wilkinsburg, Pennsylvania, are clearly places which are 'open to the patronage of the general public.' The respondent admitted in his testimony that his Wilkinsburg dental office was open to the general public. It is therefore a place of public accommodation and persons seeking professional services therein may not be discriminated against because of their race, color, religious creed, ancestry or national origin. In the opinion of the Hearing Commissioners, it is as important, if not more important, that professional services be rendered by doctors, dentists and lawyers without racial or religious discrimination, than non-professional services in such places as theatres, restaurants, swimming pools and amusement parks."


In addition to the articles mentioned in note 362, supra, and the authorities therein, the following additional authorities are relevant: Poultry Producers v. Barlow, 189 Cal. 278, 208 P. 93, 97 (1922): "Some courts have based the rule upon the fact that it would be an invasion of one's statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction." Willingham v. Hooven, 74 Ga. 233, 247 (1884): "We are not aware of any power possessed by a court of equity, or any other court, to compel a party to perform personal service for another, which he had contracted to perform, but was unwilling to render; this would reduce him to involuntary servitude, not as a punishment for crime, but for an alleged breach of contract and would be directly in the teeth of the constitution." Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639, 642 (1939): "for it would result in a species of peonage on the part of the servant, or, an enforced association with an obnoxious employee on the part of the master which would be intolerable." Beatty v. Chicago, B & Q. R. Co., 49 Wyo. 22, 52 P.2d 404, 406 (1936) : "the correlative right of injunction, will not be granted to enforce such contract . . . [for personal services]. It is believed that an award of that character against an employee would trench too closely in involuntary servitude ..."

Corbin v. George, 308 Pa. 201, 662 A. 459, 460 (1932). In Copp v. Paradis, 130 Me. 464, 157 A. 228, 229 (1931) it was held: "The relation of master and servant arises out of contract, and the assent of both parties is essential. Every person has a legal right to work for whom he pleases. . . . The relation of master and servant cannot be imposed upon a person without his consent."
and an acceptance on the part of the other. No person can be
caused, against his will, to enter into an employment contract
... consent to the relationship being imperative.\textsuperscript{365}

Since under common law the employment relationship is purely
voluntary, "every man may engage to work for or deal with, or refuse
to work for or deal with, any man or class of men as he sees fit—what-
ever his motive or the resulting injury—without being held in any way
accountable therefor."\textsuperscript{366} As the Pennsylvania Supreme Court declared:
"The right of a workman to freely use his hands and to use them for
just whom he pleases, upon just such terms as he pleases, is prop-
crty. ..."\textsuperscript{367}

The fact that an employee is willing to work in his trade for one
employer does not give any other employer the privilege of commanding
his services. As one court observed:

The relation of master and servant is a contractual one ... there must be a contract in order to create the relationship.
A new master cannot be foisted upon a servant unwittingly. The
right to select one’s employer is implicit in freedom from involun-
tary servitude.\textsuperscript{368}

Even where an employer has a contract with an employee, he cannot
obtain the aid of the courts to force the employee to do what the latter
has promised.\textsuperscript{369} The United States Supreme Court has declared that

\textsuperscript{365} N.L.R.B. v. Knoxville Pub. Co., 124 F.2d 875, 882 (6th Cir. 1942). In People
v. Chicago, M. & St. P. Ry. Co., 306 Ill. 480, 138 N.E. 155, 158 (1923), the
court observed: "The relation of employer and employee is purely voluntary,
resting upon the contract of the parties. Every man has a natural right to
hire his services to any one he pleases, or refrain from such hiring. ..."

\textsuperscript{366} Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810,
825 (1944), \textit{cert denied} 325 U.S. 450 (1945). See also Reinforce, Inc. v.
Birney, 308 N.Y. 164, 124 N.E.2d 104, 106 (1954): "so may a worker or a
group of workers refuse, or quit employment for any reason or no reason."

\textsuperscript{367} Purvis v. Local No. 500, United Bro. of Carpenters & Joiners, 214 Pa. 348,
63 A. 585, 588 (1906).

\textsuperscript{368} Gonyea v. Duluth, M. & I.R. Ry. Co., 220 Minn. 225, 19 N.W.2d 384, 387
(Alaska 1960): "The relationship of employer-employee can only be created by a contract,
which may be express or implied. Once created, the relationship cannot be
changed to substitute another employer without the employee's consent. The
employee must have understood and agreed before there can be any transfer
to another employer."

\textsuperscript{369} See Henderson v. Fisher, 236 Cal. App.2d 468, 46 Cal. Rptr. 173, 179 (1965): In
contracts involving the performance of personal services by one of the
contracting parties, it is clear that at the inception of the contract specific
performance cannot be decreed against this party because of the rule of long
standing that a person cannot be compelled to perform personal services. See
also Bunns v. Walkem Development Co., 53 Tenn. App. 680, 385 S.W.2d
917, 922 (1965): "The operation of a recreation center ... requires constant expert care and
supervision by highly qualified personnel, and the operators of such recrea-
tional center must constantly exercise judgment in making decisions about
the operation involved. Specific performance, either in whole or in part,
would, therefore, require personal services of considerable magnitude and
much detail. The general rule is that specific performance may not be granted
in cases of that character."
in the “case of a contract of hiring and service, it is well settled that a court of equity cannot compel the performance of the service.”\textsuperscript{370} Another federal court has noted that the right of a person “to refuse to serve, even though under a binding contract to do so, is a part of the constitutional personal liberty of the land” and that “no court will enforce the service.”\textsuperscript{372} Still a third federal court has said:

“It would be intolerable if a man could be compelled by a court of equity to serve another against his will; . . . courts of equity exercise no such power and grant no such relief.”\textsuperscript{372}

For these reasons, it is only those service contracts which do not require the personal labor of the defendant which can be specifically enforced by the courts.\textsuperscript{373} The uniform rule in the United States is that personal service contracts requiring the defendant himself to work cannot be specifically enforced against him.\textsuperscript{374} The same rule, that the only

\textsuperscript{370} Karrick v. Hannaman, 168 U.S. 328, 336 (1897).
remedy for breach of a contract for personal services is recovery of damages, is followed in English law, which likewise denies specific performance of personal service contracts.375 Thus, the Supreme Court of Canada has observed that an employee cannot be forced to remain in the employ of the employer because "in such a case there is involved a question of human will and liberty against which direct execution is powerless."376 This rule was known prior to the enactment of the Thirteenth and Fourteenth Amendments,377 and can be presumed to have been in the minds of the framers thereof, who specifically protected the right to work as liberty and a property right.378

From the foregoing analysis, it is clear that classification of a personal service as a "place of public accommodation" places a person who is denied the service based on race, creed, color or national origin, and who has no contractual right to be served, in a much better position than a person who has such a contract which is broken for other reasons. For example, let us assume that a real estate broker is under a binding contract to search for a house for a white client, but subsequently to the making of this contract the client makes a speech of which the broker disapproves. Let us also assume that the broker also refuses to search for a house for a Negro because of race, the broker being under no contractual duty to the Negro. A state anti-discrimination commission at state expense, can get an order from a court of equity compelling the broker to work for the Negro and find a house for him. The client


375 Johnson v. Shrewsbury & B.R. Co. 3 DeG. M. & G. 914, 927, 43 Eng. Rep. 358, 363 (1853): "It is clear in the present case that, had the Defendants been minded to compel the Plaintiff to perform their duties against their will, it could not have been done."

376 Dupree v. Williams, 42 Ky. (3 B. Mon.) 562 (1843); Burton v. Marshall, 4 Gill 487 (Md. 1846); Sanquirico v. Benedetti, 1 Barb. 315 (N.Y. 1847); Port Clinton R. Co. v. Cleveland & T.R. Co., 13 Ohio St. 544 (1862); Ford v. Jermon, 6 Phila. 6, 22 Leg. Int. 44 (Pa. 1865).

who has a valid contract cannot, even at his own expense, get a court of equity to specifically enforce his contract by ordering the broker to find the house for him. This means that the client's contractual rights are not as well protected by the law as the Negro's non-contractual, statutory rights. It is difficult to imagine a more clear-cut violation of the Fourteenth Amendment provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Moreover, as previously noted, the right to dispose of personal services is deemed both a liberty and a property right. Insofar as the state compels one person to work for another, liberty and property are taken without due process of law in violation of the Fourteenth Amendment.

7. CLUB EXEMPTION

Anti-discrimination legislation typically exempts private clubs, either expressly or by implication from the fact that only "public" accommodations are covered. Even a business subject to the law will be exempt if it turns itself into an actual, bona fide membership club. A divided New York Court of Appeals has held that a golf course run by a membership corporation and open only to members and guests is a club and not a place of public accommodation within the coverage of the law, even though signs advertised the club as "Public under club rules." In one case, a membership corporation leased a bathing and recreation park from the owner. The owner's officers con-


381 Babbert's Club of Columbus, Inc. v. Ohio Civil Rights Comm., 11 Race Rel. L. Rev. 1057 (Ohio Ct. of Common Pleas, 1965).


trolled the membership corporation, and received substantially the whole profit from the facilities. Applications of white persons were approved automatically and in unlimited numbers. The New York Court of Appeals held that the club was a sham and that the park was a place of public accommodation.384

The federal courts have also had to deal with whether a facility was a public accommodation or a club under Title II of the Civil Rights Act of 1964.385 They have held that a restaurant which is turned into a simulated private club to evade the statute, but which admits all white persons upon signing a membership blank and paying a nominal fee, is a mere facade for a facility covered by the law.386 The same result has occurred when a club operated a cafeteria in a state capitol,387 or a public fire company operated a swimming pool as a club.388 In such a case, the purpose of the exemption, which seems to be a desire to make some concession to the associational preferences of small groups, is not served.389

The Supreme Court of New Jersey has recently narrowed the club exemption quite considerably in Clover Hill Swimming Club v. Goldsboro.390 In this case, the club was operated by a stock corporation the officers of which appointed a membership committee for the club. The club was limited to 400 families, each of which had to buy a $350 debenture bond and pay an annual fee of $150. The bond was non-interest bearing and non-transferrable. The club advertised for members by a brochure lauding its facilities, which was sent to those persons who wrote for information. It advertised in local newspapers, and placed a sign

385 See 110 Cong. Rec. 13697 (1964) (remarks of Senator Humphrey):
"The test as to whether a private club is really a private club, or whether it is an establishment, really not open to the public, is a factual one. . . . It is not our intention to permit this section to be used to evade the prohibitions of the title by the creation of sham establishments which are in fact open to all the white public and not to Negroes. We intend only to protect the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis."
"When a fire department, in its official name, using taxpayers' land and taxpayers' money in small or large part, constructs, controls, and operates a tax-exempt recreation facility, in effect open to the public, it cannot exclude one third of those taxpayers for 'social' reasons."
389 See Van Alstyne, Civil Rights: A New Public Accommodations Law for Ohio, 22 Ohio St. L.J. 683, 688 (1961): "The problem is, however, to acknowledge the legitimacy of certain interests in exclusive association which renders a place distinctly private, without at the same time swallowing up the rule that there shall be no discrimination in places of public accommodation."
next to the entrance saying "a private family club with complete recrea-
tional facilities." The nature of the facilities and an address and tele-
phone number were given.

The club contended that even though a swimming pool and recrea-
tion park were generally deemed to be places of public accommodation,
this club fell into the exemption for a "bona fide club, or place of accom-
modation, which is in its nature distinctly private." In disagreeing
with this contention, the court laid heavy stress on the club's advertising,
saying:

An establishment which by advertising or otherwise extends an
invitation to the public generally is a place of public accommoda-
tion and cannot use race, creed or color as a basis for refusing
to deal with those members of the public who have accepted the
invitation. . . . Clover Hill argues that it engaged in no public
advertising, but its activities clearly indicate that it sought to at-
tract new members from the public at large.

The court rejected the limitation on the number of families as evidence
that the facility was private on the ground that even places of public
accommodation had limited facilities. Of course, it failed to note that
such businesses expand their facilities rather than limit their business.
The court likewise rejected the evidence that members are billed an-
nually and required to purchase a bond. It held that the method of pay-
ment was not controlling. However, it is certainly unusual for a public
business to require customers to buy an interest-free bond in the busi-
ness. Also, the court declared that the material referring to the
facility as a private club was self-serving. It is difficult for the club to
find any other way of expressing its nature than this.

Finally, the court declared that the club exemption did not apply
because the facility was a profit-making enterprise and not a non-profit
enterprise. The court said:

The statutory exemption for distinctly private organizations is
designed to protect the personal associational preferences of their
members. However, Clover Hill does not owe its existence to the
associational preferences of its members but to the coincidence
of their interest in the facilities offered by the owners. In other
words, Clover Hill originated not because certain residents of
Passaic Township wished to associate themselves in a swimming
club, but rather because an entrepreneur was seeking a profitable
investment.

The idea that people are uninterested in whom they will associate
with in the use of facilities is entirely unrealistic. Frequently, this is
the major factor in deciding to use a particular facility. The fact that

392 219 A.2d at 165.
1966).
the club is run for profit does not detract from this motive. The club members may be quite satisfied to have the administrative burdens taken off their hands in return for paying management a reasonable profit. The fact that management runs the club does not detract from its exclusive nature, nor from the mutual interests of the club members. If ninety percent of the club members prefer not to be bothered running the club, it might be wiser to let the management run it than to let the interested ten percent dominate its affairs. Many clubs are dominated by a small group of activists who are less sensitive to the needs of the members than professional management would be. The fact that management is professional, and is compensated by a profit rather than salaries, does not detract from the fact that club members who invest in the club are in fact bona fide members.

The fact that the club advertises for new members does not make it any less of a club. Any club which owns facilities undoubtedly desires capacity use of these facilities, since if they are idle the existing members have to pay more for upkeep. It is of much more significance that the facilities are limited and are not expanded to conform to "customer" demand, although even the most exclusive membership clubs will frequently expand their facilities when membership rises. If the club's advertising indicates that it is a private facility this should be enough. To say that such a statement is self-serving is circular reasoning. The object of "public accommodation" laws, as enunciated by the courts, is to spare the public from taking the trouble of applying to a facility advertised as public when it is not public in fact. But if it is advertised as private, the public is alerted that service may be refused, and the misleading element is absent. To say that a club invites the public when its invitation indicates that access may be restricted, and then to say that the restriction is invalid because it invites the public, is to engage in circular reasoning by which a club is lifted from private to public by its own bootstraps. Apparently, the only private clubs in New Jersey are those which do not advertise their existence, except possibly by word-of-mouth, or in other words, secret societies such as the Ku Klux Klan. But Negroes would not want to join these anyway.

8. Conclusion

The present statutes and cases thereunder which forbid discrimination in so-called "places of public accommodation" are in an unsatisfactory state. The cases are in a state of confusion because there is no underlying rationale which distinguishes private businesses from public businesses. Legislatures and courts have chosen to lump together whatever businesses they think ought to serve Negroes, without developing any clear-cut theory to justify such inclusions or exclusions. Only ethnic

394 Note 271, supra.
discrimination is forbidden, leaving all other discrimination uncovered. Personal services are compelled to be furnished without contract even where they could not be coerced to fulfill a contract. In short, the “civil rights” laws, which started as a way of giving Negroes the same rights as everybody else, have culminated in a system giving them more rights than anybody else. One judge has aptly protested:

In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all private individuals of every race to choose with whom they will deal and associate in their private affairs. No sanction for this result can be found in the recent segregation cases in the United States Supreme Court involving Negro rights in public schools and public busses.

The rights and privileges of the fourteenth amendment, supra, as treated in the segregation decisions and as understood by everybody, related to public institutions and public utilities for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his private affairs. No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a public utility with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in private personal services. Its business, like most service trades, is conducted pursuant to informal contracts. The fee is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the nondiscrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

---

396 See Deuwell v. Foerster, 12 Ohio N.P. (n.s.) 329, 330 (C.P. 1912):
"The law impressed those engaged in the business of maintaining inns, hotels and public carriers with a duty to the general public, quasi public in its nature, that they should serve the public without discrimination. When colored people were clothed with citizenship, it necessarily followed that they were entitled to the same rights as other citizens. Legislation being necessary to secure these rights, it was first directed toward those engaged in the business of furnishing public accommodation in hotels and public carriers."

The first category of "places of public accommodation" are tax-supported government facilities. These facilities may only exclude people on reasonable grounds, and hence Negroes cannot be excluded from the equal right to use such facilities. The next category of "places of public accommodation" are public utilities, which includes those businesses which have a government-granted economic monopoly. If these businesses may discriminate, people may never get the services they need, for the government granted monopoly has by its terms excluded the establishment of competing businesses.

A sharp distinction should be drawn between licenses for the purposes of insuring public health, safety, or access to competent workmen, or for revenue purposes, and publicly-granted economic monopolies. In the case of the former, the number of licensees is indefinitely expandable to meet the needs of any segment of the public which cannot obtain service elsewhere. In the case of the latter, the government prevents such expansion. Where unlimited opportunities exist for qualified individuals to enter the business, there is no legitimate reason to require any particular person to serve somebody he desires not to serve. However, where government limits competition, it may legitimately ask those who have been granted a monopoly to insure that nobody suffers because of this monopoly.

The third category may include economic or natural monopolies. Certain businesses are, for special reasons, necessarily monopoly businesses. Economic monopolies include businesses which are so expensive to operate that the existence of one such business necessarily precludes competition. Daily newspapers are rapidly falling into such a category. It is uneconomic to have competition among them, as demonstrated by the high rate of failures and mergers. Natural monopolies exist because they require special geographic locations, which are unique or exist in very small numbers. The grain elevators dealt with in *Munn v. Illinois* fall into this category. In the case of economic or natural monopolies, the state may justifiably treat them like franchised monopolies or public utilities, and require them to serve the public without arbitrary discrimination. However, ethnic discrimination alone should not be banned, for other classes will be left bereft of the service. All unreasonable discrimination should be forbidden if the business is to be treated as a "place of public accommodation."

---

399 See Note, Equal Protection and Discrimination in Public Accommodations, 32 Ford L. Rev. 327, 336 (1963): "In short, a system of 'granting' licenses can hardly be called a favor to the businessman. Its object is to place limitations on him. The same cannot be said of the granting of a franchise or lease, which involves giving one corporation or group the use of public property denied to all or most of the rest of the populace."
400 94 U.S. 113 (1877).
In particular instances, it may be difficult to determine whether a business has an economic or natural monopoly. What should be considered is not merely the number of businesses in any given locality, but the customary amount of traveling done to get to a business or facility of that kind. For example, to get to a resort hotel or beach of any size, it is customary to travel not merely outside of one's community or state, but also, even outside of the country. Therefore, the scope of competition is really international. It is by no means unusual for people in the United States to fly to Central or South America or to Europe for a vacation of a few weeks. The area of competition is therefore international, and even if only one resort hotel exists in the locality, it cannot be said to have an economic or natural monopoly. On the other hand, nobody would think of going to Europe for a tank of gasoline for his car or for a drink of whiskey. If there was only one gasoline station or bar within a reasonable driving distance it might constitute a local monopoly upon which a state could justifiably impose the duties of a public utility.

Businesses wherein there is sufficient competition to assure the use of some facility for all members of the public within a customary area of use of these facilities is not a "place of public accommodation," state-created labels to the contrary notwithstanding. Such businesses are purely private. Proprietors ought to be entitled to select their own customers. They are entitled to do this, not merely because they have a right to determine what sort of business they want to attract in order to insure the prosperity of the firm, but also to protect the interest of their customers in association with other persons of the group or class which pleases their customers.\footnote{See Johnson v. Auburn & Syracuse Elec. R. Co., 169 App. Div. 864, 156 N.Y.S.2d 93, 96-97 (1915), rev'd on other grounds 222 N.Y. 443, 119 N.E. 72 (1918): "Was it the intent of the Legislature by this statute to require the proprietor of every place where a public dance is being given to admit all persons who apply and are willing to pay the admission fee? A so-called public dance is usually a private enterprise conducted for the profit of its proprietor. It is a social meeting of the sexes for the pleasure derived from the society of those they know or whose acquaintance they there form, as well as from the dancing. Its success depends largely upon bringing together people who are mutually congenial and who are willing to associate together for the time being for the pleasure they derive from each other's society and acquaintance, as well as from dancing together or upon the same floor. "If a proprietor of such a place may not exercise his judgment as to who to admit and who to exclude, in order to secure the patronage necessary to success in such an enterprise, then it is manifest he cannot control the character of his place or its patronage. ... It would seem, therefore, that such a business could not be carried on successfully unless the proprietor is able to discriminate according to his judgment as to persons, male and female, he is to admit to such an intimate association with each other."}

It has been argued that freedom of choice in association does not extend beyond the home; specifically, that it does not extend to "public accommodations."\footnote{In Johnson v. Humphrey Pop Corn Co., 24 Ohio Cir. Ct. R. 135, 138 (1902) aff'd 70 Ohio St. 478, 72 N.E. 1160 (1904), the court said:} Such an argument begs the question at issue, which
is what the law ought to deem a "place of public accommodation." Even a private dinner party in one's home could theoretically be labeled a "place of public accommodation." The question is, should it be so labeled?

Even those who favor a broad meaning for the term "place of public accommodation" concede that freedom of choice in association is a value worth protecting. But they would subordinate this value to the right of the public to use any and every business facility—or at least the right of Negroes to use such facilities, which is even less justifiable than enforcing a broader rule applicable to public utilities. From this view, this author dissents. Freedom of choice in association is a value of importance. It has even been held that such freedom exists in respect to government-owned facilities, where no right of anybody else is infringed upon. As one federal court held:

It has not yet been held to be unconstitutional for individuals to prefer to associate with others of their own race, class, background, or, if you like, prejudices. And there is no reason for the City to interfere with such freedom of choice—or freedom of association as it is sometimes called.

An Ohio court has likewise aptly put it:

[B]ut until the passage of this [civil rights] act whether there should be discrimination or nondiscrimination fell outside the domain of positive law. It remained in that field of "free choice," in which the operator was free to deny access to his facilities,

"A man is at liberty to select for his associates whom he will, provided only that the party whom he selects is willing to be his associate. He is at liberty to invite to his home whom he will, and to exclude from his home whom he will, but this does not give to one citizen above another, under the same circumstances, the right to say who shall be admitted to the privileges of the public places enumerated in this section of the statute first referred to."


"There would seem to have been reasonable grounds, in determining what the scope of protection should be for the interests of discriminatees protected by the statutory principle, to limit that principle to non-gratuitous and relatively noncontinuous, nonpersonal, and nonsocial relationships. For to be balanced against the discriminatee's interest in not being subjected to racial discrimination is the ever present interest of the discriminator in having freedom of choice in the utilization of his property or facilities and in the selection of those persons which (sic) whom he wishes to deal. The balancing of these competing interests is a delicate one in any fact situation. The policy reasons favoring permitting a private person to discriminate on grounds of race in his relationships with other persons would be strongest where the person offered benefits or facilities to other persons gratuitously, and where the relationships with those other persons were of a continuous and closely personal and social sort."


and the prospective patron was free to withhold his patronage. This right of free choice determines the domain of liberty for every American citizen of every race and color. 406

Freedom of choice is an irresistible urge. No matter how dammed up it is by laws, it will find a way to flow out. It will flow through the creaks and crevices and the loopholes of the law, 407 until it has all seeped through. Laws limiting such freedom to aid Negroes are doomed to failure in the end. They serve only to frustrate the aspirations of Negroes and irritate the whites.

It has been correctly observed that "discrimination is but another word for free choice," and that "in dealings between men, both cannot be free unless each acts voluntarily; otherwise one is subjected to the other's will." 408 Where competition exists, the business proprietor must conform his practices to his customers' tastes; otherwise he goes out of business. He must select the class of patronage that they want. His selections therefore represent a vicarious exercise of the free choice of his customers. Such choice ought only to be overruled by government based on imperative necessity. Only a monopoly can create the necessity of extending the facility to all persons. These are "places of public accommodation." All other business is private, and should be governed, not by the laws of the state but by the competitive pressures of a free enterprise market place.

APPENDIX


A Bill To provide for the further protection of citizens of the United States and others against the violation of certain rights secured to them by the Constitution of the United States.

Whereas, in the judgment of Congress, by the true intent and meaning of the Constitution of the United States no distinction can be made in respect of the civil rights of person or rights of property by any law, custom, usage, practice, rule or decision of any department of the government of any State or of the United States, based upon race, color, or previous condition of servitude of citizens of the United States; and

Whereas such rights of all such citizens are protected by the Constitution of the United States against such cruel and unjust distinctions; and

Whereas doubts have arisen whether the laws of the United States now in force are in all respects adequate to such protection; and


407 In Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432, 440 (1955), the court noted: "The overt and even blatant discriminatory practices of the past have succumbed, in recent years, to the condemnation of an aroused and enlightened public and to the enactment of remedial legislation. However, those determined to continue such intolerant and intolerable purposes have attempted to evade the charge of discrimination by changing their methods of operation. The variety of stratagems employed seems infinite, and the ruses and dodges are limited only by the extent of the practitioners' ingenuity."

408 Browning v. Slenderella Systems, supra, n. 396 at 898.
Whereas it is the duty of Congress fully to provide for the protection of citizens of the United States against all such unjust distinctions; Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That whenever in any case now pending or which may hereafter be pending in any court of any State an issue shall exist or be made or any material question shall arise concerning any civil right of person or right of property which shall be assailed or maintained or assailed or denied in any such issue or question on the ground that such issue or question depends upon or is affected by the race or color or previous condition of servitude of any person or persons concerned in and a party to such issue on question, the person or persons against whom such issue or question shall be made, asserted or maintained, or against whom any such denial shall be made in the ground aforesaid, shall be thereupon entitled to remove such cause to the circuit court of the United States for the district within the territorial limits of which such case shall be pending, for proceedings, trial and judgment in the manner and with like proceedings, as near as may be, as are provided by section 639 of the Revised Statutes of the United States, but without regard to the sum in controversy.

Section 2. That whenever in any case now pending or which may hereafter be pending in any court in any State a ruling or decision, interlocutory or other, shall be made adversely to the civil right or claim of any person on the ground of his race or color or previous condition of servitude, or the race or color or previous condition of servitude of any witness or juror in such case, the person being a party to said cause against whom such ruling or decision shall be made shall be thereupon entitled to remove such cause to the circuit court of the United States for the district within the territorial limits of which said court shall be held, for proceedings, trial, and final judgment in the same manner and with like proceedings, as near as may be, as are provided by section 639 of the Revised Statutes of the United States, but without regard to the sum in controversy.

Section 3. That whenever in any case or matter mentioned in the preceding sections the decision or judgment of the State court in which such case shall be pending shall proceed upon or be affected by any matter or ground of the race or color or previous condition of servitude of any person being a party to or witness or juror in such case, and the decision of such court shall be adverse to such person upon any of the grounds or matters aforesaid by reason of his race or color or previous condition of servitude, the person being a party to such cause against whom any such decision shall be made shall be entitled to a review of such decision by the Supreme Court of the United States, upon his writ of error to be sued out and prosecuted in the same manner as is now provided by law for writs of error to the highest court of any State; and in every such case such writ of error may be sued out and prosecuted as of right, and without giving any new bail or other security, unless a justice of the Supreme Court of the United States allowing such writ of error, or said court itself, shall be of opinion that the public interest or safety requires it.

Section 4. That no law, usage, or custom, and no practice, decision, or rule of any department of the government of any State which may now or hereafter exist which shall in any manner discriminate between the rights of person or of property upon the grounds of race, color, or previous condition of servitude shall be deemed valid; and it shall be the duty of every court, whether of a State or of the United States, in which any such matter or ground shall be drawn in question, to proceed to determine the matter in controversy in the same manner and with the same effect as if such law, usage, custom, rule, practice, or decision did not exist.