Forbes.com

The Libertarian

Rand Paul's Wrong Answer

Richard A. Epstein, 05.24.10, 12:48 PM ET

As Rand Paul captures the republican senatorial nomination in Kentucky, libertarian theory takes its lumps in the popular press. Paul's difficulties begin with his first name, Rand, which was given to him by his father in honor of Ayn Rand, one of the patron saints of the libertarian movement in the mid 20th century. Knowing that he wears his libertarian credentials on his sleeve, Rachel Maddow, the adept liberal talk show host, asked him this simple but fair question: Does the libertarian affection for private property and freedom of contract mean that the Civil Rights Act of 1964 was wrong to deny the white owner of a luncheonette the right to exclude a black customer from his premises solely on the ground of race?

Paul answered yes, based on a rote application of the Randian approach. The correct answer to that question was no, for reasons that place normative libertarian theory in its proper social and historical context, to which Paul was blind. That context of course is Jim Crow segregation that dominated the South and also exerted its baleful influence in the North. State-imposed segregation is the antithesis of what every libertarian theory requires, by imposing legal barriers that make it virtually impossible for individuals to enter freely into voluntary transitions with trading partners of their own choice, white or black.

With Jim Crow in the South, this set of insidious practices was not accomplished by explicit laws mandating racial segregation. Rather, those inflexible social and economic patterns were supported by four interlocking strategies. First, illicit control of the electoral franchise, which in turn translated into control of the police and the courts. Second, corrupt use over the infrastructure translated into an ability to deny water and electrical hookups to firms that did not toe the segregationist line. Third, private violence to which southern police forces turned a blind eye when they did not actively support it. Fourth, social ostracism to those who spoke up against the system. Sensible people either left, stayed away or remained silent.

This authoritarian system rested on three Supreme Court decision that gutted the key protections of the 14th Amendment. Adopted in 1868, the Amendment provided that no state shall make or enforce any law that abridges the privileges or immunities of the citizens of the U.S., nor deprive any person life, liberty or property, without due process or law or deny them equal protection of the laws. To counter the risk of inept state enforcement, Congress had the power to enforce these hefty guarantees by appropriate action.

The Amendment is small-government-libertarian to its core because it imposes far reaching limitations on how states can act toward both citizens and aliens. It proved, however, remarkably vulnerability to judicial nullification. The first blow occurred in the well-known *Slaughter-House* cases of 1873, which held that the Privileges or Immunities Clause only protected uniquely federal rights, such as the ability to cross state lines to petition Congress. That decision spelled for the time being the federal protection of economic liberties for whites and blacks alike.

Worse still, it was followed three years later by the devastating decision in *United States v. Cruikshank*, which barred federal prosecution of white citizens who had conspired to murder about 100 black persons in the so-called Colfax Massacre, which arose out of a struggle for political power in Louisiana. Only the state officials who had benefited from the massacre were allowed to prosecute their allies. Don't ask how that went.

Last, in 1896 in *Plessy v. Ferguson,* another profoundly antilibertarian decision, the Supreme Court held over the lonely dissent of John Marshall Harlan, that the broad police power of southern states could allow them to force segregation in public transportation and public schools, and impose antimiscegenation laws.

Libertarian theory requires the state to enforce property rights and contracts. These decisions flew in the face of those principles. At its best, and in its original form, the Civil Rights Act of 1964 sought to break the control of the local segregationist forces over their political institutions. First on the list was Title I, which attacked exclusion from voting. Next was Title II, which dealt with the question of public accommodations. Title II did not create any elaborate federal agency. In the aftermath of the sit-ins, it was intended to counteract the manifest abuse of state power that fostered segregated institutions. It was welcomed by virtually every national company that did business in the South, for at long last it put federal power in opposition to corrupt state power. The

instantaneous levels of compliance with its mandate were well-nigh universal. The South was a freer place after its passage than before.

Today, we do not need to worry about sit-in strikes at Woolworth counters. Litigation under Title II has been moribund for years. Title II has no controversial affirmative action component. So what would happen if it were repealed? The implicit subtext of the Rachel Maddow question is that some firms would revert back to the kind of segregationist behavior that Title II banned.

That is pure poppycock. Repeal would produce quite a stir. Every company from McDonald's and Wal-Mart on down that wants to keep its customer base, its employees and its own sanity, would announce in no uncertain terms that it intended to operate its business for the benefit of all its customers exactly as it did when Title II was in effect. Some companies might create hot lines to report incidents; others would impose sanctions on deviant employees. The expense to recreate the current legal environment by private means would lead to a mad scramble. To avoid that nightmarish prospect these same companies would fiercely oppose the repeal of Title II. The tragedy of the Rand Paul fiasco is that it opens a scar in the body politic.

Title II is a unique provision of the Civil Rights Act of 1964. Its symbolic importance is enormous. Its practical inconvenience is zero. Its administrative expense is minuscule. What's not to like? There are lots of statutes that libertarians should want to repeal. This is one that they, and Rand Paul, should firmly and unconditionally support.

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