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Cato Scholar Scolds Rand Paul, Gives OK to Soup Nazi

WASHINGTON (May 20) — Politico reporter Shira Toeplitz tweeted it well: "You know it's a rough day on campaign trail when you have to issue a statement that says you will not repeal Civil Rights Act of '64."

She was referring, of course, to proud tea party member and newly minted GOP Senate nominee Rand Paul, who followed up his win in Kentucky with a controversy-reaping appearance on "The Rachel Maddow Show." During the interview, he voiced a position on the 1964 law (a position he's since sought to clarify with the aforementioned statement) that brought him grief from many corners of the blogosphere.

What's more, even some of the libertarian faithful found his view extreme.

AOL News contacted several prominent libertarian scholars Tuesday. Rather than come to Paul's defense, the three who were willing to be quoted came down as supporters of the law.

"I think Rand Paul is wrong about the Civil Rights Act," libertarian Cato Institute scholar Brink Lindsey wrote in an e-mail. "As a general matter, people should be free to deal or not deal with others as they choose. And that means we discriminate against those we choose not to deal with. In marrying one person, we discriminate against all others. Businesses can discriminate against potential employees who don't meet hiring qualifications, and they can discriminate against potential customers who don't observe a dress code (no shirt, no shoes, no service). Rand Paul is appealing to the general principle of freedom of association, and that general principle is a good one.

"But it has exceptions. In particular, after three-plus centuries of slavery and another century of institutionalized, state-sponsored racism (which included state toleration of private racist violence), the exclusion of blacks from public accommodations wasn't just a series of uncoordinated private decisions by individuals exercising their freedom of association. It was part and parcel of an overall social system of racial oppression," Lindsey said.

"Paul's grievous error is to ignore the larger context in which individual private decisions to exclude blacks were made. In my view, at least, truly individual, idiosyncratic discrimination ought to be legally permitted; for example, the "Soup Nazi" from Seinfeld ought to be free to deny soup to anybody no matter how crazy his reasons (they didn't ask nicely,

they mispronounced the soup, etc.). But the exclusion of blacks from public accommodations wasn't like that — not even close."

"To be against Title II in 1964 would be to be brain-dead to the underlying realities of how this world works," said professor Richard Epstein of the University of Chicago. "In 1964, every major public accommodation that operated a nationwide business was in favor of being forced to admit minorities." National chains, he explained, feared desegregating in the South without the backing of the federal government because they feared boycotts, retribution and outright violence.

The problem with the Civil Rights Act, Epstein explained, is "when you say, this is such a wonderful idea, let's carry it over to disability. At this point, you create nightmares of the first order" in terms of problematic government bureaucracies and baseless lawsuits.

"We have to start with some historical context," e-mailed George Mason Law professor David Bernstein, who is also a blogger at The Volokh Conspiracy. "If segregation and discrimination in the Jim Crow South was simply a matter of law, federal legislation that would have overturned Jim Crow laws would have sufficed. But, in fact, it involved the equivalent of a white supremacist cartel, enforced not just by overt government regulation like segregation laws, but also by the implicit threat of private violence and harassment of anyone who challenged the racist status quo."

"Therefore, to break the Jim Crow cartel, there were only two options: (1) a federal law invalidating Jim Crow laws, along with a massive federal takeover of local government by the federal government to prevent violence and extralegal harassment of those who chose to integrate; or (2) a federal law banning discrimination by private parties, so that violence and harassment would generally be pointless. If, like me, you believe that it was morally essential to break the Jim Crow cartel, option 2 was the lesser of two evils. I therefore would have voted for the 1964 Civil Rights Act," Bernstein concluded.

Even magicians-cum-libertarian activists Penn & Teller refused to wade into the controversy.

"I am not sure the guys are aware of the situation you are speaking of," a spokesperson said.

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