Rand Paul, Civil Rights, and Libertarianism

Posted by KATHY KATTENBURG in Media, Politics, Society.
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Sometimes, a straight news story about some outrageous thing a politician said or did sparks a larger conversation about underlying issues. That is what is happening with the news item about a contentious interview Rand Paul had with Rachel Maddow, in which he refused to back down from previous statements he had made opposing Title II of the Civil Rights Act of 1964, which bans discrimination in private accommodations on the basis of race, skin color, religion, or national origin. The original argument about whether Dr. Paul's stance is right or wrong, principled or racist, mainstream or extremist, substantive or irrelevant, is evolving into a broader discussion about libertarianism and its relevance to de facto segregation in the pre-civil rights South.

Some of these points have already been raised in other TMV comment threads on this subject, but I found the articles highlighted here particularly apt, well-written, and substantive on these ideas.

Randy Barnett has some advice for Rand Paul regarding the Civil Rights Act of 1964. In a nutshell, Barnett's point is that the issue is not whether, as a general principle, private businesses should be free to choose with whom they do business. The issue is whether this concept, of private individuals and businesses operating without government interference and making their own choices in a free market, even reached the reality of Jim Crow segregation at all (emphasis is mine):

> (1) The problem of Jim Crow in the South was a direct product of slavery–indeed it was a deliberate and concerted effort by Southerners to reimpose slavery in everything but name. Slavery was a private as well as a public institution, which is why the Thirteenth Amendment was not limited

> to state action. As such, even private conduct that amounted to "badges and incidents" of slavery should have been reachable by Section 2 of the Thirteenth Amendment, which empowered Congress to make laws to put that provision into effect. …
>
> (2) … [The] South systematically denied free blacks, and whites who wished to deal with them on an equal footing, the (equal) protection of the law. During Reconstruction, Republicans in Congress tried to respond to this with a series of civil rights measures–including measures reaching public accommodations–that were struck down by the Supreme Court. Thereafter, "private" discrimination that existed in public accommodations **was enforced by private terrorism from which no one was safe**–most particularly no one who owned a business with a fixed location. …
>
> (3) For these reasons (and others) … the prohibition on racial discrimination in public accommodations was amply justified by the original meaning of the Thirteenth and Fourteenth Amendments. But *if that is not the case*, in light of the fact that slavery was held to be sanctioned by the original Constitution for 80 years (over the objection of abolitionist constitutionalists), and the subordination of blacks continued for another 100 years after the formal abolition of slavery, if any deviation from original meaning is ever justified, it would be justified in interpreting Section 2 of the Thirteenth Amendment, and Section 5 of the Fourteenth Amendment, to reach the racial discrimination banned by the Civil Rights Act of 1964.

AOL News asked three well-known libertarians for their thoughts on Rand Paul's views on the private accommodations section of the Civil Rights Act of 1964. All three agreed that the key to an intelligent analysis of this issue is **historical context**:

> "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.
> …
>
> "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.
> [...]
> "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.
> [...]
> "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.

Although the libertarian philosophy may have its merits, the uninformed way in which Dr. Paul applies it is what's gotten him into trouble. His disparaging remarks about the Americans With Disabilities Act provide another illustration of this, as Steve Benen points out:

> When Wolf Blitzer asked Rand about his ADA opposition, he tried to make his concerns sound reasonable. "[L]et's say you have a local office and you have a two-story office, and one of your workers is handicapped," the Republican said. "Should you not be allowed maybe to offer them an office on the first floor or should you be forced to put in a $100,000 elevator? … [M]y understanding is that small business owners were often forced to put in elevators, and I think you ought to at least be given a choice. Can you provide an opportunity without maybe having to pay for an elevator?"
>
> At first blush, that may not sound ridiculous. The problem, as Yahoo News' John Cook discovered, is that Rand Paul has no idea what he's talking about, complaining publicly about the ADA without knowing what's in it.
>
> > The legislation specifically exempts the vast majority of buildings three stories and under from any requirement to install elevators. In other words, if you are a small business owner and you have a two-story office and one of your workers is handicapped, *no one can force you to build an elevator*. It's true that the exemption doesn't apply to health care facilities or shopping malls or buildings four stories and up — and Paul, who has an ophthalmology practice, may have been thinking of those provisions when he insisted that businesses are "often forced to put in elevators."
> >
> > Trouble is, we searched far and wide for a single instance in which a private employer was successfully sued under the ADA for failing to provide an elevator, or was compelled by a lawsuit to do so, and we came up empty. We searched the case law, contacted ADA experts — both proponents and opponents of the law — the Justice Department, and the Equal Employment Opportunity Commission. Not one of them knew of any case involving the government-ordered installation of an elevator. It looks like Rand Paul is either peddling a myth or spinning some vanishingly small number of elevator installations we've yet to hear of into an epidemic big-government overreach.
> >
> > That's because, while the ADA does impose a burden on employers and business owners to make their facilities accessible, it also contains reasonable restrictions on what owners and operators of existing buildings can be forced to do.

When Cook asked the Paul campaign to substantiate the candidate's concerns, it did not respond.

At The Reality-Based Community, Andrew Sabl observes that even in overwhelmingly white Kentucky, Dr. Paul is likely to find the purity of his libertarian views creating problems for him:

> I think that Rand Paul's real problems in 90-percent-white Kentucky will stem from the implications of his radical libertarianism for working-class whites, not African-Americans.Jonathan Singer at mydd.com asks four questions that Paul couldn't answer in a way that would make him both truthful and electable:
>
> 1. Do you believe the federal minimum wage is constitutional?
> 2. Do you believe federal overtime laws are constitutional?
> 3. Do you believe the federal government has the power to enact work safety laws and regulations?
> 4. Do you believe that federal child labor laws are constitutional?
>
> Here's where the Tea Partiers have made their mistake, and fallen into thinking they're more popular than they are. Americans are "anti-government," but not in the way that extreme libertarians are. You can scare them with talk of pork, corruption, Big Government, welfare or debt. You can't win them over by taking aim at everything that protects them from being slaves of their bosses (namely, well, government—unless one prefers unions). The position that private action, however deplorable, is not a fit subject for government action puts libertarians in the position of repeating simultaneously all the things that are wrong with the world and their resolute determination to do nothing about them. …

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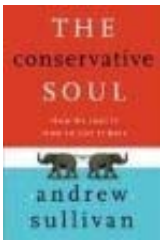

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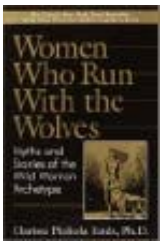

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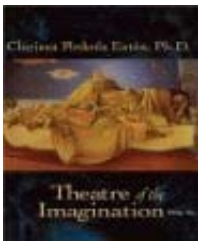

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