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Why Rand Paul Is Right … and Wrong

The new GOP Senate candidate in Kentucky would be wrong to oppose the 1964 civil-rights law, but his underlying concern was legitimate.

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You'd expect a man who'd just won his party's primary in Kentucky's race for the U.S. Senate to be beaming. But on Rachel Maddow's MSNBC program Wednesday evening, Rand Paul looked like someone had slipped sour milk in his tea, as the progressive host slow-roasted him over his numerousstatements supporting the right of private businesses to discriminate, and expressing qualms about the provision of the 1964 Civil Rights Act that bars segregation in privately owned places of "public accommodation."

Paul took pains to stress his personal revulsion for racism and his support for a ban on institutional, government-supported segregation. But in a scene from a campaign adviser's nightmare, he queasily stuck to the view that due respect for the rights of property—whether that property is a home or a business—means letting bigoted owners exclude whom they please. He would soon tell conservative talker Laura Ingraham what he conspicuously avoided saying during that long, uncomfortable Maddow interview: that he would in fact have voted for the '64 Civil Rights Act, and had no wish to change it now.

Still, it's worth considering what's right and wrong with version 1.0 of Paul's view, which John Stossel endorsed on Fox News on Thursday. Is it racist, as intimated by so many of the bloggers and Twitterati who've made the Maddow clip viral? Is it wrong? And if it's wrong, what's wrong with it?

There's no doubt the libertarian argument, springing from the sanctity of private property, was adopted by bigots looking for respectable cover—and the line between them has not always been as sharp as this libertarian writer would like. Rand's father, libertarian icon Rep. Ron Paul (R-Texas), caught his share of flak over racially incendiary statements that appeared for years in his newsletter. Ron Paul didn't pen such gems as the suggestion that a group of black protesters hold their demonstration "at a food stamp bureau or a crack house" rather than the Statue of Liberty. But he had unwisely lent his name to a clique of libertarian writers whose misbegotten strategy was to rally the white working class against "big government" by exploiting resentment of the "parasitic Underclass."

Yet there's nothing intrinsically racist in the argument in favor of property rights—and indeed, any real liberal ought to at least have some sympathy for it. Strong property rights have often been the friend of unpopular minorities: Jim Crow laws were imposed precisely because racists feared the South's rigid caste

system would collapse if business owners were free to integrate, as historian Charles Wynes noted in his 1961 study *Race Relations in Virginia*. After that long apartheid imposed on consumer preferences, it might have been too sanguine to hope market forces alone would have ushered in desegregation as rapidly as the Civil Rights Act did. But history is littered with tribal boundaries shattered by commerce, and formal law yielded no instant solution either. (A ban on formal segregation could only do so much in practice where majorities were determined to exclude blacks by means less explicit but barely more subtle than signs announcing "whites only.")

Anyone who values freedom of association should also recognize the real tradeoff that antidiscrimination law involves. In a free society, Americans have long believed, even people with repulsive views have a right to express them, and to join with like-minded bigots in private clubs and informal gatherings. It is not crazy to imagine that in a more just world, an ideally just world, respect for that freedom would lead us to countenance—legally, if not personally—the few cranks who sought to congregate in their monochrome cafés and diners.

Yet that's precisely why Paul's 1.0 argument breaks down on its own terms: at the scene of a four-century crime against humanity—the kidnap, torture, enslavement, and legal oppression of African-Americans—ideal theory fails. We libertarians, never burdened with an excess of governing power, have always had a utopian streak, a penchant for imagining what rich organic order would bubble up from the choices of free and equal citizens governed by a lean state enforcing a few simple rules. We tend to envision societies that, if not perfect, are at least consistently libertarian.

Unfortunately, history happened. Rules for utopia can deal with individual crimes—the mugger and the killer and the vandal—but they stumble in the face of societywide injustice. They tell us the state shouldn't sanction the brutal enslavement or humiliating legal subordination of a people; they have less to say about what to do once we have. They tell us to respect the sanctity of the property rights that would arise as free people tamed the wilderness in John Locke's state of nature. They have less to say about the sanctity of property built on generations of slave sweat and blood.

Libertarians need to think harder about how our principles should degrade elegantly, how they can guide us through a fallen world where the live political options seldom afford a full escape from injustice. Rand Paul's 2.0 view (which came out during his interview with Ingraham) suggests a shift toward just this sort of approach. How far it could be extended to other forms of discrimination—against the disabled, the elderly, women, gays—should be determined not by a blanket assumption that government can always restrict associational rights in the name of equality, but by a fact-intensive, case-by-case inquiry that factors in both the state's past complicity in depriving groups of their rights and the extent to which those groups would in practice be systematically denied equal participation in society absent state correction. And in each case, the ultimate goal of regulation should be to render itself unnecessary.

Liberals and progressives, for their part, should also reconsider whether the civil-rights era's expansion of federal power ought to be seen as a norm or an exception. Faced with the enormities of history, a unanimous Supreme Court stretched the constitutional power of Congress over interstate commerce to permit an attempt at a remedy. But if we recognize the circumstances of the time as exceptional—as the exigencies of war are exceptional when we consider the scope of executive power—we should be less eager to make it the basis of a general federal license to pursue any attractive end through the commerce power. At the dawn of the 20th century, we assumed that federal prohibition of alcohol could only be accomplished by

constitutional amendment. With the exception of *U.S. v. Lopez*, a 1990s hiccup where the court failed to find a sufficient nexus between interstate commerce and carrying handguns near schools—we now take for granted that the interstate-commerce power constitutes a blank check, not just when Congress seeks to rectify gross historical iniquity, but for such purposes as overriding state decisions to permit local cultivation of medical marijuana.

The central fact obscured by our polarized political discourse is that Rachel Maddow and Rand Paul don't inhabit completely alien moral worlds. The value of free association, in commercial as well as private life, is and ought to be a liberal value. The call for justice from victims of a criminal state should ring in libertarian ears. Both should hope to see a better world, where bigots' desire to gather together in their own sterile haunts could be not only tolerated but positively welcomed as a favor to the rest of us.

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