Rights, Dignity, and Public Accommodations

CHRISTOPHER W. SCHMIDT

The struggle for equal access to public accommodations was a core issue of Reconstruction, it was among the most dramatic battlegrounds of the civil rights movement in the 1960s and the women's movement of the 1970s, and it remains a point of sharp contention today. Debates in the United States over who lawfully can be excluded from privately operated businesses that serve the general public have been notable for the righteous passion with which each side has staked out its position and for the striking continuity across time of the terms of debate. The recurring nature of these debates reflects not only persistent societal ambivalence toward imposing equality norms in a realm of activity where commitments to public rights and private rights collide, but also the limitations of the law.

Debates over access to public accommodations—which have taken place in legislatures, courts, and administrative agencies at all levels of government, and in corporate boardrooms, in the press, and on the streets—have tended to revolve around the same basic question: How to prohibit socially disfavored forms of discrimination while preserving the liberty of private individuals to choose with whom they associate? As social norms about what constitutes discrimination and about what is public and what is private change, this question demands re-evaluation. The challenge of balancing competing principles of equality and liberty is at the heart of Rebecca Scott's exploration of the struggle over equal "public rights" in Louisiana during Reconstruction.[1] It is the issue at the center my own work on the

1. Rebecca J. Scott, "Discerning a Dignitary Offense: The Concept of Equal 'Public Rights' during Reconstruction," *Law and History Review* 38 (2020): 519–53; and Rebecca J. Scott, "Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge," *Michigan Law Review* 106 (2008): 777–804.

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1960 lunch counter sit-in protests.[2] And it is a contested issue today, as is illustrated most prominently in efforts of business owners to claim exemption from public accommodations laws based on their religious objections to homosexuality.[3]

In this article, I consider why debates over applying antidiscrimination norms to public accommodations have long been, and remain today, such a resilient presence in the history of the United States. I use as my starting point the most famous iteration of this phenomenon, the national debate sparked by the 1960 sit-in movement and culminating in the passage of the Civil Rights Act of 1964, which banned racial discrimination in public accommodations across the nation. The battle over racial discrimination and public accommodations in the early 1960s illuminates the moral issue at the heart of the issue, the lines of argument that characterize the debate over how to define legal rights in this area, and the ways in which different legal institutions have resolved, or failed to resolve, the issue. I then move backward in time, highlighting the continuities between this episode and the struggle over race and public accommodations during Reconstruction. The history of the civil rights era provides a useful framework for analyzing the terms of debate from a century earlier, and it provides particular insights into the significance of the concept of public rights that Rebecca Scott has so effectively brought to our attention.

I use this exercise in historical comparative analysis to help explain the resilience and constancy of the debate over public accommodations. There is, I argue, an unavoidable tension between the rights-based framework that dominates debates over the application of antidiscrimination norms in the sphere of public accommodations, and the complex and often contradictory array of intuitions and commitments that constitute social norms about what is private and what is not. The legal tools available for navigating the public–private boundary in the realm of public accommodations have often frustrated efforts to craft regulatory schemes that are sensible and just. The courts, from Reconstruction through today, have struggled to craft legal principles to navigate the public–private divide, whereas legislatures, less concerned with coherence and more responsive to political pressure, have generally been more effective at translating social norms into law. Disputes over access to public accommodations tend to attain resolution through a process of imperfect, pragmatic compromises and the

2. Christopher W. Schmidt, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* (Chicago: University of Chicago Press, 2018); and Christopher W. Schmidt, "Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement," *Law and History Review* 33 (2015): 93–149.

3. See, for example, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. __, 138 S. Ct. 1719 (2017).

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development of social practices that may be hard to justify in principle but that balance intuitions about dignity in public life in ways that are impossible to capture in the language of legal rights.

The Sit-Ins

One of the most significant protest campaigns of the civil rights era, the lunch counter sit-in movement, began on February 1, 1960, when four young African American men sat down at the whites-only lunch counter of the Woolworth store in Greensboro, North Carolina. Refused service, the four college students sat quietly until the store closed. They continued their protest on the following days, each day joined by more fellow students. In other Southern cities, students learned what was happening and started their own demonstrations, and soon lunch counter sit-ins were taking place across the South. By the end of the spring, tens of thousands of black college and high school students, joined in some cases by sympathetic white students, had become part of the sit-in movement. Several thousand went to jail for their efforts, arrested on charges of trespass, disorderly conduct, or whatever other laws Southern police officers believed they could use against the protesters.[4]

The sit-in movement energized and transformed the struggle for racial equality, moving the leading edge of the movement from the courtrooms and legislative halls to the streets, and putting a new, younger generation of activists on the front lines. It directed the nation's attention to the problem of racial discrimination in private businesses that served the public, pressured business owners in scores of Southern cities to open their lunch counters to African American customers, produced a series of litigation challenges that fractured the Warren Court, and set in motion a chain of events that would culminate in the 1964 Civil Rights Act.[5]

Among the most notable aspects of the legal debate over public accommodations in the early 1960s was the difficulty that courts had in dealing

4. On the history of the sit-in movement, see Schmidt, *Sit-Ins*, ch. 1; Christopher W. Schmidt, "The Sit-In Movement," in *The Oxford Research Encyclopedia of American History* (2018), http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-445 (accessed July 27, 2020); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011), ch. 6–7; William H. Chafe, *Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom* (New York: Oxford University Press, 1980), 79–101; and Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: Free Press, 1984), 188–215.

5. See generally Schmidt, *Sit-Ins*.

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with an issue that resonated so clearly and powerfully in the realm of public contestation. To a far greater extent than most other major issues of the civil rights era—such as the struggles over school desegregation, equal employment opportunity, or open housing—the campaign to end racial discrimination in public accommodations united the American people. Although the sit-in tactic was always controversial, the principle behind the protests gained widespread support in the aftermath of the sit-in movement.[6] By 1963, an overwhelming majority of Americans supported equal access to eating facilities.[7] Two thirds of the American people supported passage of the 1964 Civil Rights Act, and by the time of its passage, most of the nation lived under state or local laws requiring nondiscriminatory access to public accommodations.[8] After passage of the Civil Rights Act, despite pockets of resistance, the white South largely accepted the federal law's public accommodations mandate. In contrast to desegregation of the schools, there were few concerted acts of defiance, and compliance was the norm.[9] Despite this transformation of social norms and practices, the Supreme Court struggled to define the rights at issue in the sit-in cases. These cases involved appeals of criminal convictions of students arrested for taking part in sit-in protests in which the students' lawyers urged the court to effectively strike down as unconstitutional racial segregation in public accommodations.[10] Whereas the battle over desegregating the schools pulled the nation apart even as it united the Supreme Court, the

6. Although I have been unable to find any relevant opinion polling conducted during the sit-in movement, a national poll taken in June 1961, directly following the Freedom Rides, found that a majority of respondents believed "'sit-ins' at lunch counters, 'Freedom Buses' and other demonstrations by Negroes will hurt . . . the Negro's chance of being integrated in the South." Hazel Gaudet Erskine, "The Polls: Race Relations," *Public Opinion Quarterly* 26 (1962): 137–48, at 145. I consider in detail the scope and nature of outside support for the students' cause in Schmidt, *Sit-Ins*, ch. 3.

7. "How Whites Feel about Negroes: A Painful American Dilemma," *Newsweek*, October 21, 1963, 45 (finding 79% white support for equal access to restaurants).

8. Charles Whalen and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Cabin John, MD/Washington, DC: Seven Locks Press, 1985), 155; Louis Harris, "South Joins Opposition To Rights Bill Filibuster," *Wall Street Journal*, April 27, 1964, A1; *Bell v. Maryland,* 378 U.S. 226, 284 (1964) (opinion of Douglas, J.) (appendix listing state public accommodations laws); and "Survey Shows Rights Laws Now Cover 65% of Nation," *Washington Post,* December 26, 1963, A17.

9. Schmidt, *Sit-Ins*, 175–78.

10. See, for example, *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Shuttlesworth v. Birmingham,* 373 U.S. 262 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); and *Bell v. Maryland*, 379 U.S. 226 (1964).

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battle over desegregating lunch counters pulled the nation together but fractured the Court.

On the question of segregated schools, the Warren Court spoke as one, issuing a string of unanimous opinions, beginning with its landmark *Brown v. Board of Education* decision in 1954. When faced with the sit-in cases, the justices were divided from the start, and these divisions only widened as they faced waves of new cases between 1961 and 1964.[11] Longtime allies on the bench William Douglas and Hugo Black became bitter antagonists. Douglas insisted that the court should issue a sweeping constitutional ruling in favor of the right to nondiscriminatory access to public accommodations. Black argued that to recognize the students' constitutional claim "would overturn the whole history of this country" because it would "take away a man's property" without compensation.[12] When he believed that Black had a majority of the court with him, Douglas drafted a scathing dissent in which he compared Black's position to the pro-slavery *Dred Scott* decision of 1857 in the way it "exalted" property in order to suppress individual rights.[13] Debate over the sit-in cases came to a head during the court's 1963–64 term, as the justices had heated exchanges in their private conferences and exchanged angry memoranda and draft opinions. Alliances between the justices and formed and fractured. The eventual outcome did little to resolve these disagreements. In *Bell v. Maryland*, its major sit-in ruling of the term, three justices voted to recognize the student's constitutional claim, three justices voted to reject it, and three justices found a way to overturn the convictions while avoiding the constitutional question altogether.[14] The justices would then use Congress's national prohibition on discrimination in public accommodations in the 1964 Civil Rights Act, passed just weeks after *Bell*, as a justification for clearing the Court's docket of all remaining sit-in cases.[15]

Why did the justices have such difficulty with the sit-in cases? Much of the challenge related to the area of constitutional doctrine that was at the heart of the sit-in cases, the "state action" requirement of the Fourteenth

11. See generally Schmidt, *Sit-Ins*, ch. 5; and Christopher W. Schmidt, "The Sit-In Cases: Explaining the Great Aberration of the Warren Court," *Journal of Supreme Court History* 43 (2018): 294–320.

12. Black draft opinion for the Court, No. 12: *Bell v. Maryland*, March 12, 1964, reprinted in Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985), 149–63, quotation at 160–61.

13. Douglas, draft dissent, No. 60: *Robinson v. Florida*, 1, 6, March 11, 1964, William O. Douglas Papers, Washington, DC, Library of Congress, Manuscript Division, Box 1314, Folder: "No. 12 – *Bell v. Maryland*: Galley Proofs-2."

14. *Bell v. Maryland,* 378 U.S. 226 (1964).

15. *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964).

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Amendment. The state action doctrine revolves around the idea, grounded in the text of the Fourteenth Amendment and reinforced through a long line of Supreme Court precedent, that the Fourteenth Amendment restricts government, not private individuals.[16] Applied to the sit-in cases, the question for the justices was whether an individual who ran a business designed to serve the public, and licensed by the state to do so, should be constrained by the requirements of the Fourteenth Amendment's equal protection clause (which, after *Brown*, the Supreme Court interpreted to prohibit state-mandated racial segregation). Even if the justices did not want to recognize public accommodations as "state actors" under the Fourteenth Amendment, they still had to confront the question of whether the state's enforcement of race-neutral policies to protect the "private" discriminatory policies of the businesses—through, for example, the prosecution of sit-in protesters for violating trespass laws—made the state responsible for those policies. Under this line of reasoning, the constitutional violation was not the discriminatory policy itself, but government involvement in that policy. Delimiting the contours of the state action doctrine was, and still is, a notoriously hard question, implicating overlapping concerns of federalism, judicial competence, and liberty interests.[17] Because the sit-in cases centered on this confused and confusing area of constitutional law, it is no surprise that the courts struggled to resolve the cases.

Yet the doctrinal challenges of the state action doctrine cannot fully explain the explosive effects of the sit-in cases at the Supreme Court. When confronted with state action questions in the context of voting rights, racially restrictive covenants, and the First Amendment, the justices forged solid majorities to push past the doctrinal obstacles and issue decisions that squarely aligned Fourteenth Amendment doctrine with the struggle for racial justice.[18] This was not so when it came to the battle over public accommodations. The divisions in the sit-in cases were passionate and fundamental. These divisions centered on the justices' divergent views about how to map the public–private distinction onto the world of private

16. Section One of the Fourteenth Amendment reads in relevant part: "*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). The seminal articulation of the state action doctrine in the Supreme Court is found in the *Civil Rights Cases*, 109 U.S. 3 (1883).

17. See generally Christopher W. Schmidt, "On Doctrinal Confusion: The Case of the State Action Doctrine," *BYU Law Review* (2016): 575–628.

18. *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Terry v. Adams*, 345 U.S. 461 (1953); *Barrows v. Jackson*, 346 U.S. 249 (1953); and *New York Times v. Sullivan*, 376 U.S. 254 (1964).

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businesses that serve the public. The state action doctrine provided the terms of debate in the court's struggle with the sit-in cases, but the underlying issue on which the justices divided was the challenge of defining and delimiting rights claims in the realm of public accommodations.

Three Approaches to Navigating the Public–Private Divide

In their search for the legal principles to justify the boundaries of rights claims in the area of public accommodations, the lawyers who argued the sit-in cases and the justices who struggled to resolve them tacked back and forth among three categories of justifications for why a racial nondiscrimination norm should extend into this particular sphere of activity. One focused on the public character of the discriminating business operation, another on the relationship of the government to the business operation, and a third on the impact of discriminatory policy on those denied equal access. The justices' disagreements on where to locate the line between a public realm where equality norms applied and a private realm where they did not stemmed in large part from disagreement on the factors relevant to answering this question.

Common-Callings

When faced in the sit-in cases with the question of why the Fourteenth Amendment should be read as prohibiting discrimination at privately owned and operated lunch counters but not, for example, with regard to private club membership or the choice of dinner guests in one's home, lawyers for student protesters insisted that the answer lay in the nature of a public accommodation. In framing this argument, they were picking up on a common-sense line-drawing approach to the issue of public accommodations that featured in the words and actions of the student protesters themselves. At the first Greensboro sit-in, for example, one of the four African American college students asked the waitress why they were being denied service. "This is a public place, isn't it? If it isn't, then why don't you sell membership cards? If you do that, then I'll understand that this is a private concern."[19] Certain spaces in society were private, others public, and different rules applied in one versus the other. Almost everyone could understand and accept this basic point.

The students' lawyers translated this intuitively resonant approach into a legal argument. When a business had certain characteristics or when it did

19. Albert L. Rozier, Jr., "Students Hit Woolworth's for Lunch Service," *Register* (North Carolina A&T), February 5, 1960, reprinted in *Reporting Civil Rights: American Journalism, 1941-1963*, vol. 1 (New York: Library of America, 2003), 431.

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certain things, they argued, that business brought upon itself responsibilities to the public: including, potentially, nondiscrimination norms. This approach was the basis for the long-standing common-law requirement that certain innkeepers and common carriers serve without discrimination: what Joseph Singer calls the "common-calling" model of public accommodations law.[20] "Individuals could choose whether to establish a common calling," explains Singer, "but once they did so, they voluntarily assumed obligations that were coercively imposed by the state."[21] In the context of the state action doctrine, this approach is encapsulated in the "public function" exception, by which private actors that assume the roles and responsibilities of the state are treated as state actors and held to the constraints of the Fourteenth Amendment.[22] The key characteristic of the common-calling model is that the focus of analysis is on the business operation.

On the Supreme Court, the most consistent proponent of this line of argument was Justice William O. Douglas. As he wrote in his concurring opinion in one of the early sit-in cases, when it came to applying the Equal Protection Clause of the Fourteenth Amendment, restaurants should be distinguished from other private enterprises because they have a distinctive responsibility in American society. "Restaurants, though a species of private property, are in the public domain"; they have a "public consequence"; they are "affected with a public interest." Like state-operated public facilities, they should be required to adhere to the requirements of the Fourteenth Amendment.[23]

20. Joseph William Singer, "Public Rights," *Law and History Review* 38 (2020): xx–xx. See also Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property," *Northwestern University Law Review* 90 (1996): 1283–1497; Joseph William Singer "We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom," *Boston University Law Review* 95 (2015): 929–50; Kate Masur, *An Example for All the Land: Emancipation and the Struggle over Equality in Washington, D.C.* (Chapel Hill: University of North Carolina Press, 2010); and A.K. Sandoval-Strausz, "Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America," *Law and History Review* 23 (2005): 53–94.

21. Singer, "No Right to Exclude," 1345–46.

22. The seminal case in this area of law is *Marsh v. Alabama*, 326 U.S. 501 (1946). In his opinion for the court, Justice Hugo Black wrote: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Ibid., 506.

23. *Garner v. Louisiana*, 368 U.S. 157, 183 (1961) (Douglas, J., concurring). See also *Bell v. Maryland*, 378 U.S. 226, 247 (Douglas, J., concurring) ("We deal here with public accommodations—with the right of people to eat and travel as they like and to use facilities whose only claim to existence is serving the public"); ibid., 312 (Goldberg, J., concurring) ("The restaurant involved in this case is concededly open to a large segment of the public. Restaurants such as this daily open their doors to millions of Americans. These

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For advocates of racial nondiscrimination in public accommodations in the early 1960s, emphasizing the public character of privately operated businesses that opened their doors to the general public served to counter arguments by opponents of public accommodations laws that these laws violated the rights of the business owners, claims typically framed as property rights or rights to association. A lawyer defending Louisiana's prosecution of sit-in protesters gave a typical articulation of this claim in his argument before the Supreme Court in 1961. The "basic fundamental issue" at stake, he said, was "whether or not in our country, a private property owner still has the right to admit or deny access to his property or to restrict in some fashion the use of that property for any reason that he may choose."[24] He warned against taking away from the people their "right to privately discriminate or, to state it correctly, … the right to associate, and the corresponding right not to associate, with whomsoever they please for whatever reason they please, that is guaranteed to *them* by the Constitution."[25] Some even argued that this "right to discriminate" could be grounded in the Thirteenth Amendment, on the theory that being required to serve someone was a form of involuntary servitude.[26]

The counter-argument to this rights claim was to insist that racial nondiscrimination requirements only applied in places that were truly public. "No moral rights of private property are transgressed," wrote the law professor and Catholic priest William J. Kenealy in a defense of the sit-in protesters. "The sit-ins … are not concerned with purely private property, or with securing the observance of charity in private homes, private clubs, private activities. Their concern is with justice in public life, public businesses, and public accommodations."[27] As the lawyers representing arrested protesters put it in their brief in a group of sit-in cases out of Louisiana, "These establishments—a busy drug store, a large department store, a bus terminal restaurant—are a part of the public life of Baton

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establishments provide a public service as necessary today as the inns and carriers of Blackstone's time").

24. Oral Arguments, *Garner v. Louisiana,* 368 U.S. 157 (1961), October 18-19, 1961, https://www.oyez.org/cases/1961/26.

25. Brief on Behalf of Respondent State of Louisiana (October 4, 1961), *Garner v. Louisiana*, 368 U.S. 157 (1961) (October Term 1961, Nos. 26–28), 50.

26. On this creative, perverse, and ultimately unsuccessful use of the Thirteenth Amendment, see Schmidt, *Sit-Ins*, 172–73. For a historical analysis of "right to discriminate" claims, see Christopher W. Schmidt, "Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement," in *Signposts: New Directions in Southern Legal History*, ed. Sally Hadden and Patricia Minter (Athens: University of Georgia Press, 2013), 417–46.

27. William J. Kenealy, "The Legality of the Sit-Ins," in *The New Negro*, ed. Mathew H. Ahmann (Notre Dame, IN: Fides, 1961), 63–86, at 85.

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Rouge. The subjection of their policies to constitutional control raises no real issues of individual privacy or freedom of association."[28]

The common-calling framework thus served two overlapping purposes for those who argued that the constitutional nondiscrimination requirement applied to public accommodations. First, it highlighted the public nature of the business operation and the choice of the business operator to engage in a public service activity. And second, it provided a counter-argument to the kinds of right-to-discriminate claims that defenders of segregation used to challenge nondiscrimination requirements in public accommodations.

Government Licensing

Another justification for applying equality norms to public accommodations focused not on the business operation itself but on the government. The public–private boundary under this approach centered on what government had done in relation to the business. This might be called the licensing justification for public accommodations law. It is embodied in the state action doctrine's "entanglement" exception, by which the quantum of government involvement in a private operation is the primary factor in determining whether the state should be held responsible for the actions of the private actor. The focus of this analysis is on government and what state actors have done to encourage or empower discrimination by private actors.[29]

In their struggle with the sit-in cases, the members of the Supreme Court searched, often with desperate creativity, for sufficient state involvement in discriminatory practices by public accommodations. As a formal legal matter, they did so because this was what they believed the Fourteenth Amendment required; this was the requirement of the state action doctrine. But once we push past the surface debate, once we recognize that the justices could have found the state action requirement satisfied in any number of ways—by the existence of operating licenses, by the role of the state in enforcing criminal sanctions against sit-in protesters, by the inaction of the state to protect against private discrimination—we can see that the search for state involvement was less a formal doctrinal obstacle than a way that the justices felt they could justify, as a matter of basic principle, crossing the public–private divide to apply a constitutional nondiscrimination norm to these particular private businesses.

Justice Douglas offered the most straightforward articulation of this position in the sit-in cases. Restaurants require state licenses to operate,

28. Brief for Petitioners, August 25, 1961, *Garner v. Louisiana*, 368 U.S. 157 (1961) (October Term 1961, Nos. 26–28).

29. See Schmidt, "On Doctrinal Confusion," 589–93.

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he wrote in a concurring opinion, and such a license "necessarily imports, in law, equality of use for all members of the public."[30] The logic of this analysis was that the reach of the state into the affairs of private actors, when of a certain character and frequency, effectively makes the state responsible for the actions of these private actors.

Dignity

The third perspective centered on the dignity of the victim of discrimination. The focal point of this analysis was the patron of a public accommodation who was denied equal service. This was the perspective that moved a generation of young Americans to join the sit-in movement and rallied allies to their cause. It was also the perspective that produced the most resonant explanations for why racial discrimination in public accommodations was so wrong. Translated into a question of law, the logic of this approach was that the more serious the stigmatic burden the excluded individuals bore, the stronger the case for applying nondiscrimination norms to the private business.

When the sit-in protesters gave voice to their frustrations and motivations, one of their most common themes was the importance of human dignity. Diane Nash, a college student in Nashville who became a leader in the sit-in movement, wrote that the purpose of the protests was "to bring about a climate in which all men are respected as men, in which there is appreciation of the dignity of man and in which each individual is free to grow and produce to his fullest capacity."[31] "Every normal human being wants to walk the earth with dignity and abhors any and all proscriptions placed upon him because of race or color," read a statement prepared by student activists in Atlanta. "In essence, this is the meaning of the sit-down protests that are sweeping the nation today."[32]

Closely related to dignitary claims were claims based on a sense of pride or a demand for the recognition of one's humanity. "I will not accept a back seat," announced one student leader following his first sit-in. "I will not accept being cast aside. I will not accept being ignored because I am a Negro."[33] As Martin Luther King Jr. put it, "the 'sit-ins' represent

30. *Garner v. Louisiana*, 368 U.S. 157, 184 (1961) (Douglas, J., concurring).

31. Diane Nash, "Inside the Sit-ins and Freedom Rides: Testimony of a Southern Student," in *The New Negro*, ed. Mathew H. Ahmann (Notre Dame, IN: Fides, 1961), 43–60, at 57.

32. "An Appeal for Human Rights," *Atlanta Constitution*, March 9, 1960, 13.

33. Clarence H. Patrick, Lunch Counter Desegregation in Winston-Salem, North Carolina (Southern Regional Council Pamphlet, 1960), 5.

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more than a demand for service; they represent a demand for respect."[34] By arguing that segregation in privately owned lunch counters raised fundamental concerns about dignity and respect, the students were making a case to the larger society that the nation's commitment to equality entailed a government responsibility to stand on the side of those combating the most egregious manifestations of Jim Crow, regardless of whether existing constitutional doctrine delineated these acts as "private" or not.

In the realms of protest mobilization and public debate, this dignity-centered perspective resonated. At the Supreme Court, however, the justices struggled over its implications for constitutional doctrine. As a formal matter, the court's state action analysis gave no weight to the dignitary costs of a discriminatory practice. Delineating the boundary between public and private was hard enough when it required a determination of whether a business was serving a distinctively public role in society or whether government relations with the business were "significant." What to do then with an argument that turned on the felt effects of nongovernmental discrimination on its victims? If a victim of discrimination suffered a more substantial dignitary harm in one kind of public accommodation than in another, did that mean, as a matter of Fourteenth Amendment doctrine, that the Equal Protection Clause prohibited racial discrimination in one but not the other? And how would a court measure dignitary harm in this context? The justices had stumbled through these questions just a few years earlier, in *Brown v. Board of Education*, when Chief Justice Earl Warren referenced stigmatic harm on African American children as a reason why segregated schools could never meet the Fourteenth Amendment's equality requirement.[35] They quickly and quietly abandoned this justification, which faced criticism from many quarters and proved unduly limiting when the Court extended the *Brown* holding beyond schools.[36] In the sit-in cases, the lawyers challenging criminal convictions of sit-in protesters tended to focus on the public nature of lunch counters

34. Martin Luther King, Jr., "The Burning Truth in the South," *Progressive* 24 (1960): 8, reprinted in Clayborne Carson, ed., *The Papers of Martin Luther King, Jr.*, vol. 5 (Berkeley: University of California Press, 1992), 449.

35. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

36. Prominent criticisms include Edmond Cahn, "Jurisprudence," *New York University Law Review* 30 (1955): 150–69, at 157–68; and Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 1–35, at 32–33. In a series of terse, unsigned "per curiam" decisions following *Brown*, the court extended the constitutional prohibition of segregation from schools to public parks (*New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 [1958]), buses (*Gayle v. Browder*, 352 U.S. 903 [1956]), golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879 [1955]), and beaches (*Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 [1955]), without ever mentioning whether *Brown*'s psychological harm rationale applied in these contexts.

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and the government involvement in encouraging and enforcing "private" discrimination far more than on the dignity claims of the protesters. And the justices generally resisted directly confronting the students' dignity-based challenge to traditional, legalistic definitions of public and private space.

When the victim-based argument did feature in the judicial realm, it was for purposes more rhetorical than doctrinal. "When one looks at the matter from the side of petitioners [i.e., the sit-in protesters], it is evident that the state's duty of minimal protection has been grossly breached," read one brief on behalf of the students. "The refusal of service in places of public accommodation is physically a nagging inconvenience and morally a humiliation; no *de minimis* considerations shield the state from the imputation here of failure to maintain a regime of law that does not flagrantly 'deny … equal protection' to petitioners."[37] In the midst of the court's internal war over the sit-in cases, when tensions heightened and divisions widened among the justices, Chief Justice Warren channeled the rhetorically powerful dignity-based perspective into a scathing condemnation of the practice of racial segregation in public accommodations. In an unpublished dissent, Warren described a Southern department store policy of serving African American customers everywhere but when seated at the lunch counter:

> The store might as well have offered to feed only Negroes who would crawl in on their hands and knees, or, as in other caste systems, who would purchase food under conditions that would not cause their shadow to fall on the food of whites. It saddens me deeply to think that this Court, which has so far advanced the notion of equal dignity of all men before the law, would sanction the right so publicly first to shame and then to punish one who merely seeks that which any white man takes for granted.

The Fourteenth Amendment, he wrote, protects "that little bit of humanity" that is lost "each time a state-sanctioned inferior status is publicly thrust upon" a person.[38] Warren's opinion stayed in his desk, however, as he ultimately joined Justice Brennan's opinion that allowed the court to side-step, once again, the looming constitutional question in the sit-in case.[39]

37. Brief for Petitioners, August 26, 1963, *Barr v .Columbia* 378 U.S. 146 (1964) (October Term, 1963: Nos. 9, 10, 12), 40.

38. Earl Warren, draft dissent in *Barr v. City of Columbia*, May 7, 1964, Earl Warren Papers, Library of Congress, Manuscript Division, Washington, DC, Box 510, Folder: "Sit-in cases, O.T. 1963; No. 9 – Barr v. City of Columbia."

39. *Bell v. Maryland,* 378 U.S. 226 (1964).

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Dignity and the Civil Rights Act of 1964

In a development that few would have predicted in 1960 when the sit-in movement swept across the South, the institution that squarely confronted the public accommodations issue ended up being Congress, not the Supreme Court. The dignity-based arguments that rallied the sit-in movement and that featured prominently in public debates over the students' claims resonated more powerfully in the legislative than in the judicial forum. Congressional debate included references to the common-calling and licensing rationales for public accommodations policy.[40] Yet the kinds of arguments that resonated most powerfully in the debate in the nation and on the floor of Congress were not about the responsibilities of restaurants and hotels in society. And they were not about the significance of government involvement in business operations. They were about the indignities of racial discrimination in the public sphere.

This theme—which legal scholar Bruce Ackerman has sought to elevate to a constitutional "anti-humiliation" principle[41]—provided Martin Luther King Jr. one of his most memorable images in his "Letter from Birmingham Jail," when he wrote of the "stinging darts of segregation" and the painful discussion between a parent and a daughter about why "she can't go to the public amusement park that has just been advertised on television."[42] It was the theme that President John F. Kennedy put before the nation in his June 1963 address in which he famously pronounced desegregation a moral issue.

> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated. If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free

40. The common-calling argument featured prominently in large part because it emphasized the commercial nature of public accommodations, which was necessary to justify the public accommodations provision as an exercise of congressional authority under the Constitution's commerce clause. Similarly, the licensing argument featured prominently in large part because it helped make the case that the provision could be justified under Congress's authority under the enforcement provision of the Fourteenth Amendment, which Congress relied on as a secondary constitutional basis for the law. See Schmidt, *The Sit-Ins*, 157–63.

41. Bruce Ackerman, *The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014), ch. 7.

42. Martin Luther King, Jr., "Letter from Birmingham City Jail," in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr*., ed. James M. Washington (New York: HarperOne, 1986), 292–93.

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> life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?[43]

And it was the theme that Senator Hubert Humphrey highlighted when he spoke from the floor of the Senate on behalf of the pending civil rights bill and declared denial of service at a lunch counter an "insult" and a denial of "freedom of dignity."[44] "It is difficult for most of us to comprehend the monstrous humiliation and inconvenience that racial discrimination imposes on our Negro fellow citizen," he declared.[45] The core issue of the Civil Rights Act, wrote the editors of the *Chicago Defender*, was "the Negro's citizen status in the American society."[46]

Congress passed the bill, and the right to nondiscriminatory access to public accommodations became the law of the land. Title II of the Civil Rights Act effectively charted a line between public and private that responded to the demands of the black freedom struggle, aligned with the sentiments of most of the nation, and achieved, in relatively short order, the grudging acceptance of the white South. The justices, so divided when asked to construct a constitutional principle that captured the transformation in social norms regarding race in the public sphere, thankfully let Congress take the lead.[47]

Reconstruction

The debates of the 1960s over public accommodations in many ways reprised debates that had taken place a century earlier. Like the courtroom and legislative struggles sparked by the sit-in movement, the contest over race, equality, and public accommodations after the Civil War revolved around a foundational disagreement about the line between the public realm, where nondiscrimination norms would apply, and the private realm, where discriminatory choices were left unregulated.[48]

43. John F. Kennedy, "Radio and Television Report to the American People on Civil Rights," June 11, 1963, *The American Presidency Project,* https://www.presidency.ucsb.edu/node/236675.

44. *Congressional Record* 110 (March 24, 1964), 6091.

45. *Congressional Record* 110 (March 30, 1964), 6531.

46. Editorial, "Civil Rights," *Chicago Defender*, March 21, 1964, 8.

47. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Title II of the 1964 Civil Rights Act); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same); and *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (holding that Title II of the 1964 Civil Rights Act abated all pending convictions of sit-in protesters).

48. Kate Masur's *An Example for All the Land*, a study of racial politics in Washington, DC, during the Civil War and Reconstruction, offers a particularly insightful exploration of this theme.

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Rebecca Scott's account of the battle over public accommodations in Louisiana provides an illuminating and evocative illustration of this dynamic. She describes how anti-caste activists, in an effort to shift the terms of the debate over the boundary between public and private in the context of race and public accommodations, rallied around a claim to equal "public rights." By their linguistic choice, advocates of public rights sought to sidestep debates then roiling Louisiana and the nation about whether access to hotels and streetcars were properly considered "civil rights": a category of rights that were generally understood to include, at minimum, rights to basic necessities of life for a free person, such as a right to own property, make contracts, and access courts. Beyond agreement on this core set of rights, the question of what were also civil rights was a point of sharp dispute.[49] Replacing a debate over the meaning of civil rights with a debate over public rights seemed to provide a more solid foundation to fend off accusations that prohibitions on racial discrimination in public accommodations interfered with "social rights," an amorphous category that implicated questions of private relationships and personal taste and that almost everyone agreed should not be subject to antidiscrimination norms. The very choice of terms—*public* rights—was designed to place the issue squarely on the correct side of the public–private divide and to make clear that its claimants were not pursuing "social equality" or any other forms of interference with private rights.

To those fighting for increased rights for African Americans in this period, the attraction of the idea of public rights is clear. The label was more descriptively transparent than civil rights. *Civil* could have so many different meanings that one never quite knew what it meant as a modifier of rights; it was a legal term of art, a term whose power was often in its vagaries of meaning.[50] *Public*, on the other hand, although not without its own definitional difficulty, had a more intuitive quality. It evoked an image: public life, a world of political and economic interactions, a world where principles of dignity required a norm of equal treatment. And this image came with an obvious contrast to private life, a

49. See, for example, Masur, *An Example for All the Land*; Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011); George Rutherglen, *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866* (New York: Oxford University Press, 2013); Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015); and G. Edward White, *Law in American History, Volume 2: From Reconstruction Through the 1920s* (New York: Oxford University Press, 2016), 6–49.

50. See Christopher W. Schmidt, *Civil Rights in America: A History* (New York: Cambridge University Press, forthcoming 2021).

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world of social relations, a world where personal taste and racial identity prevailed, where legally mandated equality did not reach.[51]

In their search for principles with which to articulate and defend their vision of the public–private divide in the context of race relations, participants in the Reconstruction-era debate, including proponents of equal public rights in Louisiana, drew on the same categories of arguments that would, years later, define the debate over public accommodations in the 1960s.

Advocates of banning racial discrimination in public accommodations insisted that businesses that served the public, regardless of whether they were publicly owned, took on a responsibility to the public that should include equal service regardless of a patron's race. They argued, that is, that businesses that engage in certain kinds of public-related activities should be held to different standards. Scott describes how proponents of a "public rights" provision in Louisiana's constitution regularly emphasized the "public character" of the businesses that were at issue. Because "hotels and saloons, railroad and steamboats are open to the public," as one advocate put it, "the proprietors thereof could make no distinctions in the regard to their guests."[52] A newspaper account of the Louisiana's constitutional provision described it as intended "to secure the impartial treatment of all men in places of public resort."[53] The language of the provision also drew on this common-calling rationale, requiring "equal rights and privileges" on "any conveyance of a public character."[54]

A less prominent but still present line of argument in the Reconstruction-era debates focused on the regulatory relationship between government and public accommodations, and the idea that this relationship pulled certain businesses out of the private realm. The most common version of this argument emphasized licensing requirements. The language of Louisiana's constitutional provision, for example, defined all businesses "for which a license is required" to be "places of public character" and therefore held to a racial nondiscrimination norm.[55]

51. Scott notes that conservatives nonetheless challenged this idea of "public rights" on the same grounds that they challenged efforts to expand the meaning of civil rights, dismissing it as a conceptually incoherent, thinly veiled demand for social rights and a violation of private property rights. Scott, "Discerning a Dignitary Offense," 521, 547; and Singer, "Public Rights," 788.

52. Scott, "Discerning a Dignitary Offense," 538.

53. Ibid.

54. Ibid., 521 n.6.

55. Louisiana Constitution of 1868, title II, article 13. Singer shows that courts sometimes rejected a common-calling framework in favor of a licensing framework as a way to limit the application of public accommodations law. Singer, "No Right to Exclude," 1392–94.

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Reconstruction-era defenders of public accommodation laws also emphasized the effects of racial discrimination on the excluded class. In the 1860s, as in the 1960s, drawing attention to the victims of racial exclusion was more rhetorically powerful than arguments about licensing relationships or the legal responsibilities of public services. Scott shows how advocates of public rights pushed its meaning beyond a common-calling and licensing rationale, infusing the concept with a commitment to human dignity. She opens her article with a quotation, attributed to an African American delegate at the Louisiana constitutional convention, that describes "the right to be treated as one of the public without distinction of color" as a "common-sense" approach to public rights.[56] Scott also explains how the enforcement mechanism of the Louisiana public accommodations statute, which allowed the victim of discrimination to bring suit against the offending business, emphasized the individual nature of the dignitary harm.[57] "Through the language of 'public rights,'" Scott concludes, Louisiana's activists "invoked an affirmative claim of public respect."[58]

Another parallel between the public accommodations debate in Reconstruction and that of the 1960s was the fact that legislatures proved, on balance, more hospitable than courts in protecting equal access to public accommodations. The most notable demonstration of this dynamic was congressional passage of the Civil Rights Act of 1875, which prohibited operators of "inns, public conveyances on land or water, theatres and other places of amusement" from discriminating on racial grounds.[59] Defenders of this legislation drew on the same repertoire of arguments that characterized the debate over public rights in Louisiana. They argued that regulation of access to these spaces were justified because of the role public accommodations played in society, because they were licensed to operate by the government, and because denial of access to these spaces was a remnant of slavery, a denial of dignity and freedom to African Americans, a refutation of their status as American citizens, and an attempt to impose a new caste system in American life.[60]

The court disagreed, and in 1883 struck down the law as being beyond the scope of congressional authority under either the Thirteenth or the

56. Scott, "Discerning a Dignitary Offense," 519.
57. Ibid., 547–8.
58. Ibid., 522.
59. 18 Stat. 335 (March 1, 1875).
60. Schmidt, *Civil Rights in America*, ch. 2; Brandwein, *Rethinking the Judicial Settlement*, 81–84; and Michael McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* 81 (1995): 947–1140, at 1014–23.

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Fourteenth Amendment.[61] The majority opinion, written by Justice Joseph Bradley, held that the Fourteenth Amendment's constraints applied only to the actions of state and local government, not to the actions of private individuals. Operators of businesses that provide public accommodations lacked the requisite connection to the state to bring them under the coverage of the Fourteenth Amendment. Bradley also considered and rejected the enforcement provision of the Thirteenth Amendment, which had no "state action" limitation, as a basis for the law. This claim failed because the law went beyond the realm of "civil rights" and into the realm of "social rights," the regulation of which was beyond congressional power to enforce under the Thirteenth Amendment. The court constructed bright-line rules delineating the boundary between public and private by rejecting each of three the rationales used by activists in Louisiana and those who had advocated for federal legislation.[62] The amorphous mix of opportunism and compromise, of politics and principle, which had pushed the legislation to passage, confused and complicated the justices' constitutional analysis. They fell back on a narrow categorical analysis that had little room for the dignity harms of racial discrimination in public life, turning instead on a formalistic effort to protect the private sphere.

In a lengthy, angry lone dissent, Justice John Marshall Harlan warned that Bradley sacrificed the "substance and spirit" of the Thirteenth and Fourteenth Amendments by reading them in a way that was "narrow and artificial."[63] Harlan drew upon a range of arguments in explaining why these amendments gave Congress the authority to combat racial discrimination in businesses that provided public services. He emphasized the importance of services that "are charged with duties to the public," arguing that access to them was a precondition to freedom.[64] He noted that these services were already subject to government regulations and licensing requirements.[65] And he recognized the indignities experienced by those who were excluded from public accommodations, describing the denial of access to "rights of a character so necessary and supreme" as effectively branding black Americans as "inferior and infected."[66]

In response to the Supreme Court's ruling in the *Civil Rights Cases*, defenders of equal rights for African Americas turned to state legislatures. The year after the Supreme Court ruling, Connecticut, Iowa, New Jersey, and Ohio passed new public accommodations laws. The following year,

61. *Civil Rights Cases*, 109 U.S. 3 (1883).
62. Ibid., 10–25.
63. Ibid., 26.
64. Ibid. 34–43, quotation at 58–59.
65. Ibid., 37–42.
66. Ibid., 39–40.

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Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska, and Rhode Island did as well, and Massachusetts expanded its existing public accommodations law. Pennsylvania passed its own law in 1887, Washington in 1890, Wisconsin in 1895, and California in 1897. By the turn of the century, eighteen states had public accommodation laws.[67] These laws were chronically under-enforced, and when given the opportunity, judges generally interpreted them narrowly.[68] Yet in the late nineteenth and early twentieth centuries, decades when black Americans won precious few legal victories, state legislatures outside the South responded to black political pressure by expanding the coverage of their public accommodation laws.

A recurring theme in the history of struggles over access to public accommodations since Reconstruction has been that legislatures have been ahead of the courts in opening doors to the previously excluded. The Warren Court's struggle with the sit-in cases in the early 1960s and Congress's breakthrough on the public accommodations issue with the 1964 Civil Rights Act thus marked a continuation of a long-standing pattern. This pattern remains evident in current debates over access to public accommodations, as those who oppose protections against sexual orientation discrimination have turned to the courts to roll back state and local political victories for gay rights.

Conclusion

As each generation has confronted its own distinctive struggle over equality and public accommodations, the basic questions of the debate have remained largely the same. There is the matter of selecting the appropriate tools to confront the issue. Should private discrimination be countered with private nondiscrimination, through moral suasion and economic pressure? Or is this a matter that government should take out of the hands of private individuals, by statute or constitutional amendment? If so, is this a job for

67. Gilbert Thomas Stephenson, *Race Distinctions in American Law* (New York: Appleton, 1910), 121; and Milton R. Konvitz and Theodore Leskes, *A Century of Civil Rights* (New York: Columbia University Press, 1962), 157.

68. Stephenson, *Race Distinctions*, 124–38; Konvitz and Leskes, *Century of Civil Rights*, 158–68; Stephen J. Riegel, "The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate but Equal' Doctrine, 1865–1896," *American Journal of Legal History* 28 (1984): 17–40; Davidson M. Douglas, *Jim Crow Moves North: The Battle Over Northern School Segregation, 1865-1954* (New York: Cambridge University Press, 2005), 90–93; and Elizabeth Dale, "'Social Equality Does Not Exist Among Themselves, nor among Us': *Baylies vs. Curry* and Civil Rights in Chicago, 1888," *American Historical Review* 102 (1997): 311–39.

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state and local government alone, or does the federal government have a responsibility to banish certain forms of discrimination from the private sphere? What is the role of the judiciary in all this? When legislatures are slow to responds to expanding antidiscrimination norms in society, should the courts step in? Or should their role be to follow the lead of the more democratically responsive branches? When legislatures do expand antidiscrimination protections in the realm of public accommodations, how active should the courts be in ensuring that antidiscrimination policies do not go too far?

Above and beyond the question of how best to accomplish the task are a distinct set of questions as to what exactly the task is. Even if we assume that some private actors should be held to nondiscrimination norms, this cannot mean that all private actors should be so constrained. The reach of a government-imposed antidiscrimination norm should run out at some point; in the home, certainly, but probably also in private spaces short of the home. But why constrain some but not others? Is it because of the kinds of activities in which these nongovernmental actors are engaged? Does it have something to do with their relationship with governmental actors? Or is it because of the effects of their discriminatory policy, because by their actions they injure certain classes of people, humiliate them, strip them of their dignity? Over the course of American history, participants in the struggle over equal access to public accommodations have debated not only what the correct answers to these questions are, but alsowhich questions are most relevant to the issue.

The struggle to construct the conditions that protect the dignity and autonomy of individuals when they engage in public activities resists the categorical demands of a rights framework. Yet from Reconstruction through today, when Americans have engaged the issue—particularly in the judicial arena—they tend to reach for clear, sweeping principles. This yearning for a principled answer to a problem in which principles offer direction but not resolution is at the heart of America's enduring struggle over public accommodations.

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