The Long Arc of the Accommodation Debate

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Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 **Stanford L. Rev.** 1205 (2014).

Two frequent questions arise about the *Jotwell* project. Should we focus more on deserving articles that haven't received much attention? And does liking an article "lots" preclude selecting articles one disagrees with? Today's contribution does not do much to address the first concern. The article discussed here is by a well-known author, was well-published, and has already garnered attention—although less than it deserves, in my opinion. But this Jot does more or less meet the second criterion.

Samuel Bagenstos's excellent article, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, has troubled me for a year now. Anyone seeking to elaborate, and in some cases defend and expand, the developments it describes and, I think, implicitly criticizes, must reckon with it. As this Jot argues, however, so must supporters of Title II, who may find that their arguments defending it, and their reassurances about its scope and limits, are equally subject to the undermining logic of Bagenstos's own critical—or Critical, if you like—argument. As he concludes, the conflict over just "how deeply the antidiscrimination norm may properly penetrate into previously 'social' spheres" is a real one, and unlikely to go away, for reasons that apply to both sides in the debate.

Bagenstos's article is one of the first, and still possibly the best, of what has become a cottage industry of articles, first anticipating and then following in the wake of the Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc. Call it the "neo-*Lochner*ism" line of scholarship, in keeping with alarums about neo-liberalism, neo-conservatism, and other "neos."

This scholarship warns of a looming, or perhaps burgeoning, revivalism of libertarian arguments, echoing the libertarianism conventionally associated with Lochner v. New York and its sequelae. Various examples are offered, with *Hobby Lobby* and other challenges to the Affordable Care Act figuring prominently and sometimes linked to cases like Citizens United. The authors of the movements are also variously identified: is it a case of the "theorists lead[ing]" and "opinion leaders" and judges "eventually follow[ing]," or one of close cooperation between a "vocal group of American legal scholars" and "well-funded conservative foundations?" But its threats to "liberal democratic constitutionalism," as Jean Cohen puts it, are clear and it "should be resisted wherever it arises."

Often enough, the project is mostly normative; indeed, in a constitutional culture in which history is much more influential than theory, the description *is* the resistance. Calling something the "new *Lochner*" is like naming your firstborn—or, better yet, someone else's—"Loser"; it places a heavy thumb on the scales of affective, not intellectual, evaluation of the merits. The analogy may be sincerely offered, but the rhetorical strategy is baked in.

That said, Bagenstos states early on, "My main goal in this Essay is analytic and descriptive," and I take him at his word. He helpfully narrows his focus to a particular area: the law regulating discrimination in public accommodations. He does not allow affective, and thus potentially judgment-distorting, analogies to usurp the place of reasoned argument. Although his article is, in my view, a progenitor of much of the neo-*Lochner*ism literature that has followed it, it references *Lochner* without using it as a cudgel. And Bagenstos's broad theory is not, as some of the neo-*Lochner*ism literature sometimes is, redolent with implicit accusations of some vast right-wing or libertarian conspiracy, overt or covert.

Nevertheless, his central thesis is important: that there has been a notable continuity in the resistance to public accommodations laws. The language and concepts, and the legal framework to the challenges, have changed. But "the law of public accommodations discrimination remains preoccupied by the same sorts of questions that it once confronted. . . . Today's controversy regarding public accommodations is a controversy about whether the civil rights category should cede back some of the territory it once conquered from the category of social rights." (P. 1209.) At least at a certain level of abstraction, Bagenstos makes a strong case for that continuity.

The controversy starts with a tension, dating "from the moment the American civil rights project began," over "how broadly and deeply equality principles should extend into civil, economic, and social relations." (P. 1209.) At the outset, these debates conformed to a "tripartite theory" of civil, political, and social rights, with fierce disagreement over whether particular conduct and laws fit properly within a given category, and especially whether it fell under the more unregulable "private" or "social" sphere. The connection between the two terms is important: As Bagenstos notes, "For many during the Reconstruction era, the civil-rights/social-rights distinction served a function like the one that the structurally similar public-private distinction would later be understood to serve—to preserve a sphere of private, individual choice." (P. 1212.) It is thus "hardly surprising," as he observes, that the distinction, like the public-private distinction, "proved to be unstable and continually contested." (P. 1212.)

By the time the civil rights era of the mid-twentieth century began, "people no longer spoke in terms of civil rights versus social rights." (P. 1213.) The Supreme Court's powerful statement in *Brown v. Board of Education*, whatever its actual underpinnings, "came to be understood as embracing a generic principle of equality." (P. 1214.) Although the language of resistance changed, however, "the substantive *concerns* that underlay [the old] theory continued to play a major role in political and legal debates"—in particular, the debate over Title II of the Civil Rights Act and its strictures against discrimination in public accommodations. (P. 1214.) But the arguments were now framed primarily (although not exclusively; Bagenstos has an interesting excursus on the use of Thirteen Amendment arguments) "in the libertarian terms of freedom of association." (P. 1215.) However framed, "these libertarian objections invoked the same notions of preserving private choice that underlay the civil-rights/social-rights distinction." (P. 1217.)

Those arguments failed in the political and legal arenas. Bagenstos writes: "This history might lead us to conclude that the civil-rights/social-rights distinction no longer matters in the law." (P. 1218.) Not so, in his view. Contests over these categories' boundaries continue—indeed, are proliferating—today: "[W]e are edging closer to reengaging precisely the same fights that occurred in the years surrounding the passage of Title II of the Civil Rights Act." (P. 1219.) And the libertarian arguments for a robustly private sphere, if "taken seriously, threaten the core of Title II." (P. 1219.) (If Bagenstos is clear on the perceived danger, however, he is careful to note that the libertarian agenda he describes is *not* the same as "an agenda to *promote* private-sector discrimination." (P. 1219.))

Bagenstos concedes that the threat is mitigated—or, perhaps, merely redirected—by the profound political strength of Title II, at least as it applies to race. When Rand Paul questioned Title II during his 2010 campaign for the Senate, the blowback was swift and the objectors included libertarians; but the libertarian objections, he suggests, were pragmatic and political, not philosophical. Meanwhile, other trends suggest renewed assaults on the Title II citadel. In particular, Bagenstos focuses on the freedom of association claim made in Boy Scouts of America v. Dale. Some defenders of that decision assert that "*Dale* poses no threat to the application of public accommodations laws to for-profit businesses." (P. 1220.) But Bagenstos argues that such a distinction is unstable, and thus offers little reassurance that the challengers' logic wouldn't eventually lead to a civil-rights/social-rights divide "in almost exactly the same place Robert Bork would have drawn it in the 1960s." (P. 1220.) That provides the foundation for his last example, one that continues today: the religious challenges to the contraception mandate and related requirements, which rely on "a theory that would collapse the expressive-commercial distinction" (P. 1220) and thus put "skeptics of public accommodations laws . . . in a position to potentially block further expansion of those laws—and even to threaten their core applications." (P. 1240)

This is a strong argument, clearly made. It is, perhaps, a fair question how much this is indeed a purely "analytic and descriptive" project, and how much it constitutes the framing of a strategy for the defense of Title II against recent

arguments for religious accommodation. One's answer to that question may depend on what credit one gives to criticisms of Bagenstos's argument, some of which may be found in Richard Epstein's piece in the same symposium issue of the *Stanford Law Review*. But much of the reason for any skepticism on that score lies elsewhere than in Bagenstos's article itself. Some of that skepticism is a product of the more visible partiality of some of the later pieces in the neo-*Lochner*ism genre. (On that, readers should consult a forthcoming article by Marc DeGirolami, which contends that this literature ends up summoning the specter of *Lochner*ism only to defend the primacy of *unenumerated* constitutional rights over *enumerated* ones. That's an odd position, to say the least.) But much of it can be laid at the feet of the frequent normative and rhetorically loaded nature of legal scholarship itself. It has long since justifiably eroded suspicion about even those works, especially in public and constitutional law, that purport to be purely disinterested acts of scholarship.

It is clearly unfair to hang all that skepticism on Bagenstos, however. No matter their priors, people interested in public accommodations laws can profit a great deal from this article. Libertarians will find much valuable history and analysis, and perhaps an invitation to display greater candor or self-awareness about the nature of their project. Those who champion religious accommodation, even in the realm of public accommodations, for non-libertarian reasons will also find cause for concern here. For reasons both strategic and sincere, few supporters of religious accommodation want to attack entirely the underlying logic of laws forbidding discrimination in public accommodation, at least where race is concerned. Much of their own project consists of efforts to draw reasonable lines between for-profit and non-profit enterprises, or between the public and private or civil and social spheres. In doing so, they will have to reckon with Bagenstos's article, which reveals the potential instability or incoherence of those efforts.

And *defenders* of an expansive reading of public accommodations laws, in the face of religious or other challengers and seekers of exemptions? They, too, ought to have reason for concern after reading Bagenstos's article. That is perhaps the best evidence of its success as legal scholarship, of its genuinely analytic and descriptive nature. This is not simply a liberal critique of the libertarian challenge, but a *critical* take, drawing on the literature of Critical Legal Studies. Like the public-private distinction, he argues, the distinction between civil and social rights turns out to be "unstable and continually"—we might even say essentially—"contested." Here, he cites Duncan Kennedy. Similarly, efforts to draw a distinction between commercial and expressive associations are "unstable." He acknowledges that multiple readings and legal options are available in response to what, quoting Jack Balkin, he calls a "pervasive welfare state."

Little wonder, then, that "[w]e continue to struggle over the proper placement of the civil-rights/social-rights line, nearly fifty years after Congress and the Supreme Court supposedly laid that distinction to rest."(P. 1220.) Little wonder, too, that more conventional liberal appeals to the distinction between commercial and expressive association or between for-profit and nonprofit businesses, offered to *defend* state power by demonstrating that there *are* discernible limits on the state's broad reach, appeal more to authority than to persuasive argument. (Witness Justice Ginsburg's dissent in *Hobby Lobby* itself.)

If there *is* a surprise in the current neo-*Lochner*ism literature, it is that so much of it relies on Critical Legal Theory's insights, yet virtually none of it cites the literature, or acknowledges the double-edged nature of those insights. A Westlaw search for articles containing the terms "Lochner" and "Hobby Lobby" since the beginning of 2012 yields 43 results; add "Duncan Kennedy" to the mix and the number plummets to two. One is mostly irrelevant, and the other is Bagenstos's article. To reveal the instabilities in another's argument is human; to fail to notice that you have also dug a hole under yourself is, well, all *too* human. It is telling, perhaps—whether of extreme certitude or great insecurity is not clear—that these efforts to entrench a new liberal settlement routinely deploy the Crits' analytical moves, but otherwise consign the Crits' names and works to the memory hole.

Therein lies the relative weakness of the new defenses of public accommodations laws against religious challengers, and the scholarly strength of Bagenstos's piece. It does indeed suggest a more sweeping arc to the narrative of challenges to public accommodations laws, one connecting past, present, and perhaps future. It does so on a sound basis, mostly without appealing to essentially irrelevant arguments about the challengers' motives or funding. (I think it

would have been sounder still if, in describing shifts in arguments over the years, it had been clearer in noting that those changes are an inevitable consequence of changes in our legal surround, often internalized by those making the arguments, and not necessarily a set of intentional or covert tactical choices.)

Most important, it recognizes that the instabilities and uncertainties in this area are inevitable and universal. The question "how deeply the antidiscrimination norm may properly penetrate into previously 'social' spheres"—whether its limits are substantial, whether the government may override associational choices altogether, or whether the balance rests at some unstable point in between—is and must be a subject of continuing contestation and re-evaluation. Every new era, with its fresh controversies, demands its own renegotiation—if not of the unstable line between "public" and "private," then of the reasonable reach and limits of state power in practice. Hence the haunting nature of Bagenstos's fine article. On these questions, legal scholars may have much to say about the particular workings of legal doctrine at any given time, and a little to say about legal theory. But on the core question itself, their contributions will be of little real or lasting value.

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