

Basic Constitutional Problems In Civil Rights Proposals

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THIS DISCUSSION will be limited to what seem to me the major constitutional issues posed by the proposals for civil rights legislation now pending before Congress. There are parts of these proposals which do not appear to involve serious constitutional problems at all. These are left untouched. The questions which chiefly merit treatment center around the proposals in respect to the suffrage and in respect to equal rights to service in places of public accommodation. The fair employment practices proposals, while significant, embody requirements which have been so generally upheld when contained in state legislation, that there seems no reason to doubt their validity as federal regulations in areas subject to federal control.

In aid of clarity, despite the risk of tedium, let us review the basic principles of our polity. The United States of America comprise a federal union, with its government established by a written Constitution, emanating from the sovereign people. That Constitution created a general government ("Government of the United States") for the nation. It adopted the existing state governments as the instruments of local rule and permitted the admission of new states "into this Union" by the legislative body ("Congress") of the general government. In apportioning the powers of governance, it vested certain authorities, spelled out with greater or less specificity as the case might be, in the general government. Amongst these authorities was one of extreme breadth, but no less express for being broad, granting to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [contained in specific enumerations of legislative power granted to Congress] and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." There was no precise delineation of the governmental powers of

the states. For this there was sound reason. The states were existing entities. At independence the government of each had succeeded, within that state's boundaries, to the sovereignty vacated by the British. Some parts of this ruling power the states had exercised in common through delegates under the loose union created by the Articles of Confederation. Most governance was wielded by the respective states through their own local organs, however.



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The Constitution of the new Union, by vesting certain authority in the Government of the United States, removed inconsistent authority from the several states. This it made clear in its own supremacy clause: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all

treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Moreover, the Constitution expressly prohibited the states from acting in certain ways. But, outside of these prohibitions, those expressly imposed and those resulting from the vesting of particular powers in the general government, the adoption of the state governments as the organs of local rule under the new Union left them with the powers they originally had on independence, subject only to such restrictions as the people in each state might impose through the state's own constitution. Shortly, this truism was reduced to writing in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is what we shorten into the brief statement, so often quoted, that the federal government is one of granted powers only, while the state governments are the repositories of residual power.

It follows that, when we are confronted with a proposal that Congress legislate upon a given subject, our first inquiry must be whether authority has been granted Congress, by the Constitution, so to do. But, in so inquiring, we must be fully aware of the breadth of the jurisdiction conferred by the necessary and proper clause, the "sweeping clause" as the founders termed it. We also must remember that, once a power is found to be granted to Congress, the Tenth Amendment has no application to restrict it. This is so by the amendment's own words. It is only those powers "not delegated to the United States by the Constitution" that are reserved. Moreover, at this point we had just as well refute that the hoary old falsehood that "Congress has no police power." The po-

lice power is simply "the power to govern men and things" as Chief Justice Taney so well defined it in *The License Cases*, 5 How. 504 (U.S. 1847). To the extent of its granted powers, Congress clearly may "govern men and things" and, in so doing, it exercises the police power (*Brooks v. U.S.* 267 U.S. 432).

LET US NOW turn to the suffrage provisions of the proposed civil rights legislation. Briefly summarized, they would, as to all elections to which they apply: (1) require the application of the same standards to all persons in requirements for the registration of voters; (2) prohibit the rejection of application for registration on account of technical errors; (3) require all literacy tests for qualification to vote to be administered in writing; (4) raise a rebuttable presumption, to be applied in suits relating to suffrage, that one having a sixth grade education is literate. The version presently supported by the Administration would confine these provisions to "federal" elections, i.e. those in which votes are cast for candidates to seats in the Senate or the House of Representatives or to selection as presidential electors. However, there have been proposals to extend the application of these requirements to all elections.

Whence would Congress derive authority to legislate upon such matters, even with respect to federal elections? We must start with the proposition that the Constitution, as originally adopted, did not make any provision whatsoever for federally governed qualifications for suffrage. Senators were to be elected by state legislatures (Art. I, § 3). Members of the electoral college, who were to choose the president and the vice president, were to be appointed in each state "in such manner as the Legislature thereof may direct" (Art. II, § 1). This provision certainly would include the power to determine by whom the electors should be chosen. As to the members of the House of Representatives, these were to be chosen "by the people of the several States, and the electors in each State shall have the qualifications for electors of the most numerous branch of the State Legislature." While this provision may have made the capacity to vote for national representatives a matter of federal constitutional grant, in the same breath it equated the qualification for that suffrage with the right to vote for

members of the most numerous house in each state legislature and there is nothing in the Constitution vesting Congress with power to prescribe voting qualifications for state office. That the decision to leave the matter to the states was deliberate clearly appears from Madison's account of the convention's debates. There were too many variances in the suffrage practices of the several states to make it good politics to attempt a uniform federal rule. And, when we amended the Constitution to provide for the popular election of Senators, we copied verbatim the provisions of the original Constitution as to the qualifications of those who were to vote for members of the Senate (17th Amendment). It seems clear, therefore, that the setting of qualifications for voting, in state elections or in federal, lies beyond the powers originally delegated to the national Congress.

It is true that, while the original Constitution also provided that the "times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof," it went on to say that "the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators" (Art. I, § 4). Clearly, however, these regulations may not go so far as to alter the qualifications for voting for candidates to these offices. As to the Senators, the original Constitution vested that prerogative in the members of the several state legislatures. Obviously, a regulation of the times, places and manner of holding the election for senators could not enlarge the suffrage thus bestowed by the Constitution. No more, on a parity of reasoning, could a similar regulation interfere with state prescription of the suffrage in respect to the lower house of the respective state legislatures or change the qualifications for voting for federal representatives constitutionally tied to those prescriptions.

THIS DOES NOT mean, however, that Congress may have no power with respect to federal elections. Certainly the power to regulate the "manner" of holding elections for senators and representatives includes safeguarding the purity of the ballot therein, as the Supreme Court many times has held. This would be sufficient to support the proposals to ban discrimination and technicality in the administration of registration laws in respect to

congressional elections. Could this reasoning extend to up-holding congressional authority to make these requirements applicable to so-called primary elections at which parties select their candidates for office? This could be supported upon the theory, gaining substantial support from recent decisions, that at least if one party has achieved practically unbroken success at the polls over the years, its primary has become an integral part of the electoral process and is to be regarded as but one step in the election. I must confess that this seems a rather tenuous logic, and I had rather base congressional power in this respect upon other grounds, to be explored shortly.

As to presidential electors, there seems even less basis for congressional action of any sort in the original Constitution. A bold theory might be worked out to the effect that the Constitution gives to the United States power to have a president and vice president chosen by fair and uncorrupted means, and thus gives Congress authority to insure this legislation under the "sweeping clause."

Wider and unquestionable bases for federal legislation of broad scope in respect to matters of suffrage are provided by various amendments to the federal Constitution. The 14th Amendment provides, in its first section, among other things, that no state "shall deny to any person within its jurisdiction the equal protection of the laws." By established judicial interpretation, this means that no state may impose arbitrary or whimsical variations in the application of its laws, or make classifications in respect to such application that have no rational connection with the object of the legislation. Coupled with the authority given Congress by the fifth section of the same Amendment, "to enforce by appropriate legislation the provisions of this article," as well as with the general authority given by the necessary and proper clause, this affords unquestionable foundation for the enactment of federal prohibitions on the application of unequal standards and the enforcement of technical disqualifications against certain groups of voters in any procedure conducted, prescribed or officially sanctioned by the state. This would include state and national elections alike, primary or general, for officers of every grade. It would include even the acts of private party organizations, to the ex-

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are there bases for the public accommodations proposals?

tent that they conduct primaries commended by state law (*Smith v. Allwright*, 321 U.S. 649). If the "state function" concept of the place of the political party, at least in a one-party state (*Terry v. Adams*, 345 U.S. 461) be accepted, racially discriminatory bans set by parties would be subject to congressional control, even though the state law purported to give the parties a free hand in the choice of their candidates and the determination of their membership.

The 15th Amendment, of course, forbids any state to abridge the right of citizens of the United States to vote on account of race, color or previous conditions of servitude, and gives to Congress express power to enforce its provisions. Here is another source of congressional authority over all elections, state or federal.

The only proposals respecting suffrage which seem at all of dubious constitutionality are those numbered (3) and (4) in our earlier summary. At first blush, they do not relate either to arbitrary discriminations so as to be justifiable as means of enforcement of the 14th Amendment or to abridgments of suffrage on racial grounds so as to be justifiable devices for enforcement of the 15th Amendment. Rather, they seem to be across-the-board limitations on the power of the states to require literacy as a qualification for voting, a power which was expressly upheld in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45. No doubt the administration of literacy tests in such manner as to violate either the 14th or 15th Amendments could be forbidden by Congress (*U.S. v. Raines*, 362 U.S. 17). But there is nothing in the oral administration of such tests to voters who have completed six or more grades of school which necessarily results in forbidden discriminations. The argument on behalf of these provisions is that requirements of this sort lend themselves readily to such discriminations and have been used for that purpose in many states. Clearly Congress could forbid such a use. On the other hand, there probably are states in which these devices are employed equally across the

board to achieve the enforcement of permissible standards of educational attainment for the exercise of voting rights. The validity of sweeping prohibitions upon their use, regardless of proof of specific abuse, will depend upon whether the judges of the Supreme Court can be convinced that uniformly these devices are used for purposes violative of the 14th and 15th Amendments. Unless this can be done, I cannot see how these provisions can be justified as legitimate exercises of congressional authority under the Constitution. I do not feel that I have sufficient familiarity with state practices in general to hazard an opinion as to what the record actually may show.

TURN WE NOW to an examination of the constitutional bases for the proposals in respect to places of public accommodation. Insofar as hotels, motels, restaurants, service stations, stores or other facilities of whatever nature cater to the needs of travelers or carriers in commerce among the states, or of those who are engaged in any way in facilitating interstate commerce, there is no room at all to question the authority of Congress to legislate. "The Congress shall have power . . . To regulate commerce . . . among the several States." (Art. I, § 8). Over and over it has been held that, in conjunction with the necessary and proper clause, this empowers Congress to regulate those who provide the facilities which aid in the carrying on of interstate commerce. (*The Daniel Ball*, 10 Wall (U.S.) 557; *Pipe Line Cases*, 234 U.S. 548; *Stafford v. Wallace*, 258 U.S. 495; *Associated Press v. NLRB*, 301 U.S. 103; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197). But the sweep of federal power extends much farther. The national legislature can intervene to govern action within a locality that may affect adversely the interstate traffic (*Wickard v. Filburn*, 317 U.S. 111). Upon this ground, the Supreme Court sustained the propriety of the National Labor Relations Act, forbidding employers generally, without regard to whether they were engaged immediately in inter-

state commerce, to engage in enumerated unfair labor practices and requiring them to bargain collectively with their employees through representatives of the latter's choosing. The constitutional theory is that the forbidden conduct has been shown by experience to be a source of industrial strife and strikes, with resultant interference with interstate commerce because the industries or businesses affected derive their raw materials from extra-state sources or manufacture products which get into the interstate market. Congress may take steps to remove this impediment (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1). The interstate relations of the business need not form its dominant activity (*Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453) nor need the individual plant's contribution to interstate commerce be a large part of the total volume of such commerce (*NLRB v. Fainblatt*, 306 U.S. 601; *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318). Herein there seems an analogy adequate to sustain the use of the commerce power as the basis for equal accommodations legislation to the extent proposed by any of the pending suggestions. The sit-ins, boycotts and other forms of protest and pressure engendered by the refusal of proprietors to abandon discrimination are similar to the disruptions of industrial peace stimulated by refusal to accept unionization and collective bargaining. Their harmful effect upon the fabric of interstate commerce is as great. Indeed, as resentment of what is deeply felt to be injustice accumulates into nationwide reaction, the adverse effect well may be greater. Such a line of reasoning affords adequate basis for preventive legislation protecting interstate commerce from this threat (*Wilson v. New*, 243 U.S. 332).

There are other constitutional grants of power which might be invoked as a foundation for national civil rights legislation. Some have proposed to base the current project upon the authority to enforce the 14th Amendment's due process of law and equal protection requirements. The difficulty here is that the 14th Amendment proscribes state action only, in this respect. It was held long ago, and I think rightly, that individual acts of discrimination or of injustice do not constitute state action (*Civil Rights Cases*, 109 U.S. 3). It would be the worst sort of disrespect for draftsmen's language to equate the acts of individuals with those of states.

More justifiable, I think, would be resort to the 13th Amendment, equally enforceable by Congress, which, in its sentence of outlawry against involuntary servitude, *does* forbid individual action (Clyatt v. U.S. 197 U.S. 207). Mr. Justice Field cogently argued that "prohibition to pursue certain callings open to others of the same age, condition and sex, or to reside in places where others are permitted to live" would place the one so affected "as respects others, in a condition of servitude" (Slaughter-House Cases, 16 Wall. 36, 90). In like vein, Mr. Justice Harlan, the elder, argued that discrimination on the ground of race or color in access to places of public accommodation "is a badge of servitude, the imposition of which Congress may prevent" (Civil Rights Cases, 109 U.S. 3, 43). True, these are dissenting voices, long silenced. But it is not unknown in our history of constitutional interpretation that the insight of dissenters becomes the true gospel, overcoming prior error. It might well be that legislation, properly drafted, invoking the 13th Amendment against concerted and widespread discrimination in respect to access to basic needs of decent life would be upheld.

Still another possible foundation might be found in those broad and numerous authorities to provide for the national defense that commonly are categorized as the war power. It long has been well settled that this power may be used to safeguard against conflict not then actually raging (Ashwander v. TVA, 297 U.S. 288). In the nineteenth century, the Supreme Court held that Congress, under this power, might take action directed toward increasing the individual spirit of patriotism and the disposition to serve in defense of the country by expropriating land upon which to construct a national shrine in memory of those who had made the supreme sacrifice in that behalf (U.S. v. Gettysburg Elec. Ry. Co., 160 U.S. 668). It requires no violent extension of this doctrine, under existent world conditions, to establish that Congress might remove two very serious threats raised against our national safety by widespread racial discrimination: (1) the indisposition of its victims to sustain the defense of a country in which they are second class citizens; (2) the disapproval, if not the actual hostility, which it engenders in so many parts of the world from which we must have benevolence, at least, and most

likely, active support, to survive against our enemies.

Granted that civil rights legislation falls within the constitutional competence of Congress under its granted powers, there still remains the question whether the prohibition on racial discrimination by the proprietors of businesses operated for public accommodation violates constitutional restrictions on the exercise of governmental power. This is the heart of the complaint, so frequently voiced, that these proposals strike at our constitutional right of individual liberty.

Of course, unrestricted liberty does not exist in any social order. What the Constitution provides is not that one shall never be deprived of liberty. Instead the direction is that "no person shall be deprived of life, liberty, or property, without due process of law" (5th Amendment). *With* due process of law, therefore, there may be deprivation. Due process, in this sense, simply means that the deprivation shall be in accordance with established provisions of law which, in themselves, are not unreasonable or arbitrary. To put it in another way, the laws must be aimed at an objective which reasonably may be regarded as in the public interest. The means chosen must be reasonably adapted to bring about the desired objective. They must not interfere with legitimate interests as to make it unreasonable and arbitrary to seek to accomplish the public interest.

THERE SEEMS little ground for challenging the pending proposals on the two first grounds. It is in respect to the last that differences of opinion arise. Many urge that there is too violent interference with personal choice as to association and personal relationship. It is urged that one's control of his property and his business is destroyed. To these arguments, it may be rejoined that one's constitutional right to liberty ceases when its exercise seriously harms others or endangers the common welfare. It is at least arguable that unrestricted freedom to discriminate on racial grounds in business relations passes beyond these limits. Even under less stressful conditions, state civil rights legislation has been upheld against due process objections. Is it likely that national law will be held to be more strictly bounded? And to the objection that the national proposals extend to many more and varied enterprises than

do the ordinary state civil rights laws, it may be rejoined that the situation is more acute, the need more pressing, than those which stimulated the enactment of the state statutes of the past. In this connection it may be suggested that business enterprises are not ventures in private enjoyment. They seek support in public patronage. Is it too much to insist that they should accommodate all those of the public who offer respectable and peaceful patronage? There was a time when, by the common law of England, one who followed any occupation as his common means of livelihood must serve all suitable persons who applied, on reasonable terms and without discrimination. This "law of the common callings" passed into relative obsolescence as increasing mobility of occupation and freedom of commerce destroyed the gap between proprietor and patron and rendered the competition of the open market an effective safeguard against abuse. But it has always survived as to certain pursuits in which competition was not an effective safeguard, and our courts have held, with sporadic and now rejected exceptions, that the legislators are free to extend these obligations of the common callings whenever the effectiveness of competition seems to have broken down. This matter of racial discrimination, it well may be argued, is an area in which the saving graces of competition have not worked.

One final word seems in order. Liberty is, indeed, the greatest civic treasure, if it is used responsibly. The dominant thought in the Lawyers' Conference on Civil Rights at the White House in June, 1963, was that much governmental action in defense of civil rights could be avoided, if individuals voluntarily would observe the Golden Rule in these matters of race relationships. It would be a great public service if those who express so much concern about the encroachments on liberty arising from governmental action to promote civil rights would devote their efforts to render that action unnecessary. If, in general, communities, groups and individuals would but follow Micah's injunction to do justice, to love mercy and to walk humbly with God, civil rights laws might still be necessary to care for isolated instances of injustice, but in practice they rarely would need invocation. Our society would be more tranquil, more worthy of commendation in the sight of man and God.