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Heart of Atlanta Motel: Public Accommodation Law at 50

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Fifty years ago, Congress passed the Civil Rights Act (CRA) of 1964.[1] This landmark piece of legislation outlawed certain forms of discrimination across the nation, including discrimination on the basis of race, color, religion, sex, or national origin.

One of the types of discriminatory conduct prohibited by the CRA was discrimination in public accommodation.[2] This provision faced immediate legal challenge, and on December 14 of that same year, the Supreme Court of the United States, in *Heart of Atlanta Motel, Inc. v. United States*, upheld these provisions of the CRA as a valid exercise of Congress's Commerce Clause power.[3]

The landmark decision is of increased relevance today. As activists seek to compel photographers to enter contractual relationships or bakers to bake cakes, the potential scope of federal antidiscrimination law should be assessed objectively before passions are raised and legal principles fall by the wayside.[4] To make such an assessment, a careful look at *Heart of Atlanta* is required.

The Commerce Clause Justification for the CRA. Section 201 of the CRA provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[5] It defines generally "public accommodation" to include inns, motels, restaurants, cafeterias, gas stations, theaters, concert halls, sports arenas, and other similar establishments, so long as their actions "affect commerce." In other words, the CRA carefully defines "public accommodation" as any type of establishment that might be necessary for travel or might be a destination for travel.

Congress so defined public accommodation for a good reason. The powers of Congress are limited and enumerated: When the CRA was passed in 1964, there was serious doubt as to its constitutionality. In fact, Congress had previously passed a public accommodation law in 1875 following the Civil War and passage of the Thirteenth, Fourteenth, and Fifteenth Amendments that provided that "all persons...shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement" and imposed penalties for violations.[6] This act was struck down by the Supreme Court in the *Civil Rights Cases* as beyond the powers of Congress under the Thirteenth or Fourteenth Amendments. The Court noted that "no other ground of authority for [the 1875 act was] suggested."[7]

Thus, when Congress passed the CRA, it was known that the Thirteenth and Fourteenth Amendments could not provide Congress with the legislative authority to pass the public accommodations provisions, but it was unclear whether the Commerce Clause could provide that authority. Writing

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for the majority in *Heart of Atlanta*, Justice Tom Clark distinguished the 1875 act from the CRA:

> Unlike [the CRA], the 1875 Act broadly proscribed discrimination [in public accommodations] without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of [the CRA] is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people.[8]

In other words, while the precise limits of Congress's Commerce Clause power as delineated in *Heart of Atlanta* are not fully clear, the Supreme Court in that case did find it persuasive that the CRA limited its applicability to discrimination in public accommodation where that discrimination "impinged" upon interstate commerce.

Any federal law that goes beyond the CRA and prohibits discrimination in public accommodation that is purely intrastate in character, while perhaps laudable, would be constitutionally suspect, at least without limiting application of those laws to businesses with other links to interstate commerce.[9]

Cakes and Hotels. How might discrimination in public accommodation affect interstate commerce? As the Court noted in *Heart of Atlanta*, "discrimination by hotels and motels impedes interstate travel."[10] There was, the Court noted, "obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging."[11] Put another way, Congress's Article I, Section 8, Commerce Clause authority to pass the public accommodation provisions of the CRA is closely tied to the fact that a black family hoping to travel out of state might be discouraged from doing so if they knew they would have trouble finding a hotel along the way.

Would a national law prohibiting discrimination in public accommodation against same-sex couples go beyond Congress's Commerce Clause authority? Unlikely. Same-sex couples are among the most affluent social groups in America, and as deep-pocketed tourists, their inability to find a hotel would, in principle, provide at least the same (if not greater) justification for a law protecting them as the CRA protected those who were turned away from public accommodation on the basis of race, color, religion, or national origin.[12] One might argue whether such laws are wise or unwise, but their grounding in the Constitution seems today to be a forgone conclusion.

However, a federal public accommodation law that applied to wedding photographers, cake bakers, and other service providers unrelated to interstate travel would arguably go beyond *Heart of Atlanta* and rest on dubious constitutional grounds. There is a world of difference between a black family unable to find a place to sleep at 2 a.m. and a same-sex couple targeting one wedding cake bakery during daylight working hours, weeks in advance of their ceremony, when there are 10 other bakeries available whose proprietors are perfectly willing to bake them a cake. One situation involves interstate commerce; the other does not—and that difference has constitutional salience.

1. Civil Rights Act of 1964, Public Law No. 88–352, Sec. 201.
2. 42 U.S. Code § 2000a.
3. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
4. See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* (U.S. Apr. 7, 2014) (No. 13-585). This case involved a New Mexico wedding photography company that refused to photograph a same-sex ceremony and was ultimately found by the New Mexico Supreme Court to be in violation of the New Mexico public accommodations statute.
5. Civil Rights Act of 1964, Public Law No. 88–352, Sec. 201.
6. 18 Stat. 335 (1875).
7. 109 U.S. 3 (1883) at 32.
8. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 249.
9. Interestingly, Title VII of the CRA provides an exemption to its employment discrimination provisions for certain religious work. 42 U.S. Code § 2000e-1(a). The public accommodation provisions of Title II provide no such exemption.
10. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 253.
11. Ibid.
12. Religion and national origin, like sexual orientation, are not things that are readily apparent.

Expanded Commerce Clause Jurisprudence. To be sure, in the years since *Heart of Atlanta*, Commerce Clause jurisprudence has developed. Specifically, in *Scarborough v. United States*, the Supreme Court upheld a federal prohibition on felon gun ownership "in commerce or affecting commerce" where the only nexus to interstate commerce was that at some point the gun had traveled across state lines.[13] It is theoretically possible that a cake whose ingredients traveled in interstate commerce could be found properly regulable under a federal public accommodation statute and that such a statute would be upheld by the Supreme Court. On the other hand, a statute similar to the 1875 act struck down in the *Civil Rights Cases* would undoubtedly be overbroad with respect to a host of businesses, and a cake baker using locally sourced materials would have a strong "as applied" challenge to the statute.

Furthermore, the statute in *Scarborough* dealt specifically with regulating a thing in interstate commerce, whereas a public accommodation statute would be concerned with discrimination, not the travel of cake materials. It is not clear that a non-germane nexus to commerce would be sufficient to uphold such a statute.[14]

This is not to say that states are constitutionally prohibited from passing broader public accommodations statutes than the CRA. Whether good policy or not, various states define "public accommodation" far more broadly than the federal government does,[15] and state legislatures are not bound by Article I of the Constitution.

Congress Should Be Concerned with National Issues. Congress should not pass laws that go beyond the CRA and regulate purely intrastate commerce. The Supreme Court has not taken and will not take this expansive view of federal authority. Furthermore, Congress has an independent obligation only to consider and pass legislation that comports with the nation's constitutional system of government.

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13. *Scarborough v. United States*, 431 U.S. 563 (1977).
14. Cf. *United States v. Lopez*, 514 U.S. 549 (1995), in which the Supreme Court struck down a federal law that prohibited gun possession near schools as beyond the scope of Congress's Commerce Clause authority. In so doing, the Court identified three categories of proper exercises of Commerce Clause authority: regulating (1) the channels of commerce, (2) the instrumentalities of commerce or persons or things in commerce, and (3) activities with a "substantial relation to interstate commerce." While the *Lopez* court characterized *Heart of Atlanta* as within the first category, *Scarborough* would certainly fall into the second category (presuming its holding was constitutional at all). And whether a federal public accommodation statute relating to sexual orientation would fall into the first or third category, both categories arguably require, as a constitutional matter, some showing that a regulated activity either "substantially affects" interstate commerce (*Lopez*) or "impinges" (*Heart of Atlanta*) upon interstate commerce. In other words, where Congress is not regulating the instrumentalities of commerce or things in commerce directly but is regulating with an eye toward some other goal, a merely incidental connection to interstate commerce is not constitutionally sufficient.
15. *See, e.g.,* Colo. Rev. State. § 24-34-601 (defining public accommodation to include "any place of business engaged in any sales to the public and any place offering services, facilities, advantages, or accommodations to the public").