

# DISCRIMINATION, PRIVATE LIBERTY, AND PUBLIC ACCOMMODATIONS LAW

- Is commercial activity is a domain of private liberty that protects against state intrusion, or conversely a shared social practice that is legitimately shaped by collective political decisions?
- When the Supreme Court characterizes commercial activity as a domain of private liberty, as it did in *303 Creative*, the Court's enforcement of personal rights curtails the scope and effect of public accommodations legislation. When the Court characterizes such activity as a shared public project, as it did during the Civil Rights era, the Court authorizes the legislature to robustly enforce the public accommodations regime and advance anti-discrimination.
- The judicial classification of commercial society has wider-reaching consequences for constitutional interpretation. The most controversial decisions of the Roberts Court – such as the deregulation of campaign finance and the limitation of governmental regulatory authority over employers – are grounded in the theory that commercial activity is a domain of private liberty that deserves rights-based protections.

This debate undertakes the philosophical query of if commercial society is a matter of private liberty that insulates individuals from state overreach, or if it is a matter of collective and thus political self-determination. This debate on the bench parallels a centuries-long philosophical struggle over the nature of commercial society, running from John Locke's theory of property as private mixing of labor to the Marxist theory of social overdetermination of economic affairs to the libertarian 20<sup>th</sup> century defenses of private economic autonomy.

Generalizing this analysis beyond the public accommodations context yields the following proposition: judges should be more likely to treat commercial activity as private and rights-bearing where it reflects the perspective of an economically and socially weaker actor, and thus where insulating the commercial activity from government oversight is i) likely to deprive the commercial actor of an opportunity to realize a right, and leave them with no alternative avenues; ii) unlikely to distort broader market dynamics and iii) likely to serve the interest reflected by the right. Conversely, where market actors are more powerful, and interdicting government regulation is likely to allow them to pathologically shape market operations, judges should be disinclined to recognize their assertion of right.

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