The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations

Elizabeth Sepper*

INTRODUCTION

More than 100 years ago, an Ohio court issued a broadside against his brethren. "A grudging construction" had been given to civil rights statutes in the South, "where under federal compulsion there are such laws at all."[1] And, he observed, "even the federal courts, with more acuteness than candor, have gone a long way towards emasculating them so far as securing the rights meant to be created by them is concerned."[2]

Professor Suja Thomas's compelling article *The Customer Caste: Legal Discrimination by Public Businesses* indicates that not much has changed. Federal courts have emasculated federal laws aimed at guaranteeing racial minorities' equal enjoyment of the world of commerce and leisure. These laws—Sections 1981 and 1982 of the Civil Rights Act of 1866 and Title II of the Civil Rights Act of 1964—now "cover only a narrow set of discriminatory behavior"

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* Professor of Law, University of Texas School of Law. My gratitude goes to Olivia Wong and Roxane Barbera for their excellent and diligent research assistance on this project. Thank you to the California Law Review editors, especially Natasha Geiling and Tani Berkowitz, for their helpful suggestions and edits.

1. Puritan Lunch Co. v. Forman, 29 Ohio C.A. 289, 295 (Ohio Ct. App. 1918).
2. *Id.*

in public accommodations.[3] Federal courts have made it "legal to follow and watch people in retail stores based on their race, give inferior service to restaurant customers based on their race, and place patrons in certain hotel rooms because of their race."[4] Black and Brown people experience humiliation, racial slurs, and bad service without recourse to federal law.

The Customer Caste makes a major contribution to the civil rights literature by compiling and analyzing the body of federal court decisions on discrimination in public accommodations—an overlooked area of civil rights law. Professor Thomas meticulously details federal court precedent under Sections 1981 and 1982 and Title II, the latter of which is the focus of this reply. As she parades decision after decision across the pages, the rejection of plaintiffs' claims seems relentless. Federal courts limit the meaning of racial discrimination, then narrow it, then limit it again.

Thomas convincingly argues that federal courts neglect the plain language of Title II,[5] which guarantees "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of public accommodations. Today's courts read language in and delete phrases at will. They limit recourse to outright refusals of service. They hold plaintiffs to exaggerated standards in order to make out a prima facie case. They appear credulous of businesses' justifications to the point of prejudice. Thomas's argument is persuasive: these decisions countermand the text of Title II, its legislative history, and modern interpretations of similar language in select other statutes.

In this reply, I add another compelling piece of evidence. I argue that the federal courts have defied the original meaning of Title II's central guarantee of "full and equal enjoyment" of public accommodations. That operative phrase had a well-defined meaning by 1964, due to the nation's long experience with near-identical state civil rights laws.

To recover the original meaning of this language, I look to state court and commission decisions contemporaneous with or pre-dating the Civil Rights Act. I show that state courts interpreted statutes with identical (or near-identical) language to prohibit precisely the practices that the federal courts now endorse. Well before the Civil Rights Act, courts and the public understood that practices that did not totally exclude or deny service nonetheless denied full and equal enjoyment of public businesses. They recognized that many of the more subtle examples of race discrimination that Thomas describes—slow service,

3. Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141, 180 (2021).

4. *Id.* at 141.

5. While Thomas analyzes protections under both the 1866 and 1964 Civil Rights Act, I focus this reply on Title II and the historical context of 1964. Older state cases might similarly show the misinterpretation of the Civil Rights Act of 1866. *See, e.g.*, Coger v. Nw. Union Packet Co, 37 Iowa 145 (1873).

discourteous treatment, and insults—also discriminated against Black customers.

Consistent with Thomas's textualist account, this history provides a corrective to the federal courts' mistaken interpretation of public accommodations law. It provides context for the term "full and equal enjoyment" that a dictionary alone cannot.[6] It also suggests alternative methods of analysis of discrimination claims. To be clear, my claim is not that federal courts should follow state law or draw on contemporary state court decisions. My goal instead is to demonstrate that for 1960s lawmakers, courts, and members of the public, the text of Title II held a particular significance precisely because they were familiar with state civil rights acts with the same operative phrase.

Part I begins by summarizing the three serious errors that Professor Thomas identifies in federal courts' interpretation of Title II. Part II describes the close relationship between federal and state civil rights laws. Enacted toward the end of Reconstruction, state public accommodations statutes shared language identical or substantially similar to the federal act. They had the same purpose of eradicating segregation and ensuring equal access to commerce and leisure. Congress enacted the Civil Rights Act of 1964 against this landscape. When it chose to use the language of "full and equal enjoyment," Congress echoed state statutes, much invoked in Northern and Western states in the 1950s and 1960s.

Drawing on state court decisions, civil rights commission materials, and contemporary reports, Parts III, IV, and V demonstrate that the language of full and equal enjoyment carried a fixed meaning in 1964 when Title II became law. Courts, commissions, and the public recognized that public accommodations law required both access and undifferentiated treatment. They took the perspective that equality required granting Black customers the same courtesies customarily extended to and expected by White customers. Moreover, decisionmakers did not defer to businesses' justifications of poor treatment, but instead took a functionalist approach to public accommodations discrimination consistent with those statutes' common law origins.

The pairing of old and new cases in this reply reveals a shameful affinity between the experiences of Black people at mid-twentieth century and today. State courts of the 1950s and '60s allowed claims of discrimination related to differential treatment, bad service, or insults to proceed. By dismissing similar claims today, their federal brethren act contrary to this history and the original meaning of Title II. As Professor Thomas ultimately concludes, they have created a customer caste under federal law.

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6. Looking to the dictionary indicates that the term enjoyment deserves a richer and broader reading but does not explain how stultifying the federal courts' approach to Title II's guarantee of "full and equal enjoyment" truly is. For a deeper understanding of "enjoy" under Sections 1981 and 1982, see Nancy Leong, *Enjoyed by White Citizens*, 108 GEORGETOWN L.J. __ (forthcoming 2021) (looking to dictionary definitions of "enjoy").

I.
FEDERAL COURTS' ERRORS OF INTERPRETATION IN *THE CUSTOMER CASTE*

Professor Thomas identifies three serious errors in federal courts' interpretation of Title II. First, and most egregiously, federal courts require outright refusal of service or ejection, thereby importing into the Civil Rights Act the contractual language of Section 1981. As Professor Thomas explains, many courts have decided that "as long as the place admitted, served, or could have served the plaintiff, no violation will exist where the place otherwise treated the plaintiff differently because of his race."[7] So, federal judges dismiss claims of racial minorities harassed, mistreated, insulted, and provided poor service.[8] With few exceptions, courts use a standard that appears on its face to allow race-based seating and service to stand.

Here, Professor Thomas's textual argument is particularly forceful. Title II of the Civil Rights Act of 1964 prohibits discrimination and segregation in public accommodations. It 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 . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[9] By requiring only access, federal courts effectively erase "full and equal enjoyment" of "advantages" and "privileges" from Title II. They insert a requirement of contract nowhere to be found in its text. It cannot be, Thomas says, that a customer is due only "goods and services" under a statute that guarantees the "full and equal enjoyment" of all aspects of the experience of the public accommodation.[10]

Second, even where service is refused, the majority of courts entertain only claims where plaintiffs can present comparators identical except for race. They draw on a test developed by the Supreme Court in the 1970s to determine whether an employer discriminated against a plaintiff. Adapted to the public accommodations context, this test, known as the *McDonnell Douglas* standard,[11] requires a plaintiff to show that she is within a protected category, was denied full enjoyment of the defendant's facilities, and similarly situated people not within her protected class received full enjoyment.

Thomas explains that "although the prima facie test is considered an easy test to meet, courts often decide the test is not met in public accommodations cases."[12] Judges tend to require exaggerated comparator evidence. Black plaintiffs cannot make out a prima facie case by establishing that White customers were served and they were not. Instead, they must show that those

7. Thomas, *supra* note 3, at 166.
8. *Id.* at 203.
9. 42 U.S.C. § 2000a (2018).
10. Thomas, supra note 3, at 187.
11. *Id.* at 159 (discussing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
12. *Id.* at 160.

White customers precisely matched their own characteristics and experience. For example, courts have demanded that in order to be appropriate comparators, White patrons likewise had to have their orders incorrectly filled, to have waited 45 minutes, and then to have attempted to leave without eating or paying for the order.[13] This test greatly limits the ability of plaintiffs facing discrimination to prevail under Title II.

There is nothing inevitable about this test. As Professor Thomas argues, the text of Title II does not so limit how a plaintiff can establish discrimination. Indeed, a minority of courts do not require a comparator. They permit plaintiffs to make out a prima facie case by showing they "received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable."[14] But those courts have limited the possibilities by defining "unreasonable" as "so profoundly contrary to the manifest financial interests of the merchant and/or its employees; so far outside of widely-accepted business norms; *and* so arbitrary on its face that the conduct supports a rational inference of discrimination."[15] The federal courts seem to have forgotten the segregationist history of businesses across the nation, where merchants widely adopted practices that deterred Black patronage—seemingly contrary to their financial interests.[16]

Third, even where plaintiffs establish a prima facie case, courts often decide that the plaintiff cannot show that the reason that the defendant offered for its treatment of plaintiff is pretext for discrimination. Under the *McDonnell Douglas* standard, businesses typically easily produce a nondiscriminatory justification—an overworked waiter, a paperwork policy, or a security concern. From Thomas's description, the federal courts prove credulous to defendants' justifications. Even where testers have shown that a policy applied to Black customers did not apply to White people, federal courts have concluded that the policy was reasonable and thus the mistreatment of Black customers justified. They have not viewed bad service, insults, and references to "you people" to indicate illegal discrimination.[17] The conclusion that federal judges simply do not believe Black people, what Thomas calls a "presumption against discrimination," seems inevitable

As she identifies these errors, Professor Thomas recognizes the probative value of interpretations of statutes that share the text and purpose of Title II.[18] She discusses the Americans with Disabilities Act, passed twenty-six years after

13. *Id.* at 161 (discussing cases against Applebee's and Denny's).

14. *Id.* at 160.

15. *Id.* (quoting Scott v. Thomas & King, Inc., No. 3:09–CV–147, 2010 WL 2630166, at *10) (emphasis added).

16. *See* THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH Chap. 5 (2008) (describing discrimination in public accommodations throughout the North and comparing to Southern discrimination).

17. Thomas, *supra* note 3, at 163.

18. *Id.* at 191.

the Civil Rights Act, and two relatively recent Michigan Supreme Court decisions involving unusual applications of a state public accommodations law which shares Title II's language.[19] But she does not look to the most relevant such laws: state laws extant when the Civil Rights Act was passed. The history of these statutes reveals not only alternative interpretive possibilities, but also the very meaning of Title II's text at enactment.

II.
THE RELEVANCE OF ENACTMENT-ERA STATE STATUTES

Enactment-era history proves a well-established modality of statutory interpretation. Here, Congress chose Title II's text against the background of state courts' interpretation of identical, and near-identical, language in state civil rights acts. That history provides key insights into the original meaning of the phrase "full and equal enjoyment" of public accommodations under the Civil Rights Act of 1964.

Tracing the evolution of public accommodations law, we find a close connection between federal and state statutes. When Congress passed the Civil Rights Act of 1875, it used the language of "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."[20] Several states, beginning with Massachusetts in 1865, passed similar statutes.[21] They essentially codified common law requirements of equal access that preexisted the Civil War, but had been denied to the states' Black citizens.[22] The federal government's efforts were stymied when the U.S. Supreme Court struck down the federal Civil Rights Act in 1883.[23] But the Court assumed that state law—and the duty of full and equal enjoyment it encompassed—would still govern.[24]

Within two years, the Court's decision sparked the passage of public accommodations statutes in Connecticut, Colorado, Nebraska, Illinois, Indiana,

19. *Id.* at 192 (citing Kassab v. Michigan Basic Property Ins. Ass'n, 491 N.W.2d 545, 546 (Mich. 1992) and Haynes v. Neshewat, 729 N.W.2d 488, 491 (2007) involving the handling of claims under an insurance policy and denial of hospital admitting privileges, respectively).

20. Civil Rights Act of 1875, 18 Stat. 335, 336.

21. Sol Rabkin, *Racial Desegregation in Places of Public Accommodation*, 23 J. OF NEGRO ED. 249, 250 (1954) (listing Pennsylvania (1866), Louisiana (1869), New York and DC (1873), Kansas (1874)).

22. *See, e.g.*, Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) ("The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places.").

23. The Civil Rights Cases, 109 U.S. 3, 17 (1883).

24. *Id.* at 25 ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them.").

Iowa, Michigan, Minnesota, New Jersey, Ohio, and Rhode Island.[25] The defunct federal text provided a model.[26] The language of state laws varied, but a common formulation recognized a right to "full and equal enjoyment of the accommodations, advantages, facilities, and privileges" of businesses from transport to dining to entertainment.[27]

Over the twentieth century, northern and western states oscillated between equality and exclusion. Black people would find the spaces they could enter varied from city to city and year to year. Public accommodations laws often were honored in the breach. Even when businesses did not deny service outright, they often discouraged attempts to obtain service with a variety of practices from overcharging Black customers to seating them in the kitchen. A burgeoning historical literature describes the extensive and ever-shifting color lines in commercial and leisure spaces outside the South.[28]

With the great migration of African Americans to the North, demands for equality in public accommodations escalated. In the 1910s and '20s, elite Black urban leaders achieved some measure of success in some places. For example, in Chicago, theaters came to allow Black patrons equal access. In the 1930s and early '40s, Northern and Western states saw numerous successful race discrimination lawsuits and advocacy campaigns[29] that ignited a "spirit of militancy."[30] Courts, however, remained inconstant friends to civil rights; and barriers to accessing the legal system remained high, making lawsuits relatively rare.[31]

World War II democratized the movement. Children, housewives, student activists, and beyond protested the bowling alleys, dance halls, restaurants, and pools that represented "the promise of American consumer culture"[32] and leisure time. In this period, Black activists and their allies secured the passage, amendment, and enforcement of city and state laws against public

25. Rabkin, *supra* note 21, at 250.

26. Fletcher v. Coney Island, 136 N.E.2d 344, 350 (Ohio App. Div. 1955) (discussing the close relationship between the Civil Rights Cases and Ohio's decision to legislate a public accommodations statute); Fruchey v. Eagleson, 43 N.E. 146, 147 (Ind. App. 1896) (observing that the federal statute struck down in the Civil Rights Cases had the same import and interpretation as the state statute).

27. *See, e.g.*, Colo. Session Laws, Ch. 61, p.139 (Apr. 9, 1895). Others used "full and equal accommodations, advantages, facilities, and privileges." *See* Mich. Pub. Acts 1885, p.131 § 1.

28. *E.g.*, LIZBETH COHEN, A CONSUMER'S REPUBLIC (2003); DAVID E. GOLDBERG, THE RETREATS OF RECONSTRUCTION: RACE, LEISURE, AND THE POLITICS OF SEGREGATION AT THE NEW JERSEY SHORE, 1865-1920 (2016); JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA (2009); VICTORIA W. WOLCOTT, RACE, RIOTS, AND ROLLER COASTERS: THE STRUGGLE OVER SEGREGATED RECREATION IN AMERICA (2014).

29. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1101–02 (2011).

30. *Ohio Citizens Push Discrimination Fight*, CHI. DEFENDER, Sept. 12, 1936, at 22.

31. Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841, 857-62, 865-66 (1965).

32. SUGRUE, *supra* note 28, at 135, 143.

accommodations discrimination. Some cities and states established commissions to conduct independent investigations, adjudicate complaints, and perform education, training, and testing.[33]

Again, state and federal efforts were linked. In the 1950s, President Truman's presidential commission shined a light on discriminatory practices across the country and urged state legislatures to act.[34] Between 1953 and 1961, ten northern and western states adopted legislation.[35] Several cities in states without public accommodations laws—most notably Baltimore, Maryland—passed their own ordinances.[36]

Without reference to the states, the brief history Professor Thomas recounts is incomplete. It jumps from the 1896 *Plessy v. Ferguson* decision to the 1954 *Brown v. Board of Education* decision to the 1964 Civil Rights Act.[37] In the decades between these events, brave civil rights leaders and ordinary people laid the groundwork for equality in state legislatures, courts, and civil rights commissions. Public accommodations segregation in the North and West slowly receded in the face of their charge.

Congress enacted Title II against this background. And it explicitly recognized the overlap between the federal bill and the thirty-two state public accommodations laws then in existence.[38] Indeed, the Civil Rights Act required notice to state authorities and an opportunity for state remedies before a suit could proceed in federal court.[39] When the Supreme Court considered the constitutionality of Title II, it too acknowledged its relationship to existing state law, observing that "[t]here is nothing novel about such legislation" given its

33. Hearings Before the U.S. Commission on Civil Rights, Detroit, Michigan, Dec. 14-15, 1960, at 191-92 (noting that Detroit had created an Equal Public Accommodations Committee in 1957 to do this work); Chin Jou, *Neither Welcomed, Nor Refused: Race and Restaurants in Postwar New York City*, 40 J. OF URBAN HISTORY 232, 235 (2014) (noting that New York state's 1952 amendments allowed complaints directly to the State Commission Against Discrimination instead of requiring them to go through local district attorneys' offices to file civil or criminal suits).

34. New York Comm'n Against Discrimination, Report of Progress: A Review of the Program for 1959 7 (1959).

35. NAT'L PARK SERV., CIVIL RIGHTS IN AMERICA: RACIAL DESEGREGATION OF PUBLIC ACCOMMODATIONS 50 (2009) (listing Oregon (1953), Montana (1955), New Mexico (1955), Vermont (1957), Maine (1957), Idaho (1959), Alaska (1959), New Hampshire (1961), North Dakota (1961), and Wyoming (1961)). State laws also were closely related to one another. New York Comm'n Against Discrimination, Report of Progress: A Review of the Program for 1959 7 (1959) (noting that many of the state laws adopted in the 1950s were modelled on New York's legislation).

36. NAT'L PARK SERV., ACCOMMODATIONS supra note, at 50 (other cities included Wilmington, Delaware; St. Louis and Kansas City, Missouri; and El Paso, Texas).

37. Thomas, *supra* note 4, at [page].

38. S. REP. NO. 88–872 (1964), at 7, reprinted in 1964 U.S.C.C.A.N. at 2369 (explaining statutory providing expressing "intent to not occupy the field of public accommodation legislation" and "to preserve the right of the States, and political subdivisions thereof, to enact and enforce legislation of this type"). *See generally* Caldwell, *supra* note 31 (describing state statutes in thirty-one states and D.C. extant by 1964).

39. 42 U.S.C. § 2000a-3(c) (2018).

existence in the majority of states, some for "fourscore years."[40] During this time period, lower federal courts also looked to states to understand Title II's meaning.[41]

The primary difference between Title II and its state law counterparts was its narrower scope. Concerned that the Supreme Court would again strike down the federal civil rights bill as it had in 1883, Congress listed select categories of establishments such as restaurants, gas stations, and hotels, rather than apply Title II to all places open to the public.

But Title II's guarantee of equality was broad. Its text was identical or similar to most state laws—and to the defunct Civil Rights Law of 1875: "All 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."[42]

What did Title II's language mean? While decisionmakers might disagree on how particular cases should be resolved, this phrase held a fixed meaning by 1964. As the next Parts show, for courts, commissions, legislatures, and the public, the full and equal enjoyment of public accommodations guaranteed more than access. Differentiated and hostile treatment fell within the prohibitions of these civil rights acts, and business regulations and restrictions on racial minorities were to be closely examined.

III.
ENJOYMENT, NOT JUST ACCESS

By 1964, it was well accepted that antidiscrimination statutes guaranteed more than access. The "full and equal enjoyment" of all the amenities of public accommodations—Title II's operative provision—had two components: access and undifferentiated service.

A. Undifferentiated Treatment

In cases going back to the 1800s, state courts held that civil rights acts required more than mere access. In 1890, the Michigan Supreme Court, for example, decided that an eating house had discriminated by requiring a Black man to sit at a table on the saloon side, six feet from the restaurant side. It rejected the defendant's arguments that he did not refuse to serve the plaintiff, but rather would have "serve[d] him in precisely the same manner in which he would be

40. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–61 (1964).

41. *See, e.g.*, Wesley v. City of Savannah, Ga., 294 F. Supp. 698, 701 (S.D. Ga. 1969) (citing New York case law); U. S. by Katzenbach v. Clarksdale King & Anderson Co., 288 F. Supp. 792, 795–96 (N.D. Miss. 1965) (concluding, by looking to state precedents, that "the establishment of a sham club does not vitiate the application of the public accommodation law").

42. 42 U.S.C. § 2000a (2018).

served at the table" on the restaurant side.[43] In later decades, citing a line of case law going back to the 1920s, the California Supreme Court soundly drubbed a business for its contention that the state civil rights law "prohibits only the exclusion of prospective patrons from business establishments."[44] The textual guarantee of "full and equal accommodations, advantages, facilities, privileges, or services" also required "equal treatment of patrons in *all aspects of the business*."[45]

Granting access but restricting Black customers to certain sections of a facility or charging them different prices had long constituted denial of "full and equal" enjoyment in states with civil rights laws. In 1934, the Colorado Supreme Court considered a suit against a restaurant that had seated the Black plaintiff and his two White friends and offered to serve food to the plaintiff—if he ate in the kitchen.[46] The restaurant argued that because the plaintiff had been seated at a table and could have eaten, "there is nothing to show here that there was any discrimination."[47] The court had none of it: "there was undoubtedly the kind of discrimination against which the law is obviously aimed."[48]

The Ohio Supreme Court in 1941 observed that if plaintiffs were "limited to proof that the defendant refused absolutely to serve them," businesses routinely would prevail even when they had treated Black customers in a different and inferior way.[49] That could not be right. The text required "full and equal enjoyment of accommodations" on terms applicable to all patrons alike.[50] In that case, the business defended itself by saying it merely had invoked its right to charge plaintiffs a higher price, consistent with a policy posted over the bar. The court was unmoved, concluding that "[t]o say that the defendant did not refuse entirely but only refused if plaintiffs did not pay a discriminatory price is specious."[51]

Unlike today's federal courts, state legislatures, courts, commissions, and litigants understood the operative language of the civil rights statutes to reach an array of practices short of refusal of service. For example, in 1961, the Washington legislature amended its civil rights act to specify that the term "full enjoyment of" included "the right to purchase," "the admission of any person", and the absence of "acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or

43. Ferguson v. Gies, 82 Mich. 358, 362, 46 N.W. 718, 719 (1890).
44. Koire v. Metro Car Wash, 40 Cal. 3d 24, 29 (Cal. 1985).
45. *Id.* (emphasis added).
46. Crosswaith v. Bergin, 35 P.2d 848, 849 (Colo. 1934).
47. *Id.*
48. *Id.*
49. McCrary v. Jones, 39 N.E.2d 167, 169-70 (Ohio 1941).
50. *Id.* at 170.
51. *Id.*

solicited."[52] In the early 1960s, administrative bodies categorized discrimination as either withholding goods and services or discouraging customers through poor service or efforts to make them feel unwelcome.[53] Through enforcement efforts, businesses from gyms to cafes to beauty parlors agreed to cease evasive tactics and grant all customers their customary services and amenities.[54]

Public understandings proved consistent with these decisions. In 1922, sociologist Hannibal Gerald Duncan observed that despite the fact that Black Northerners were "supposed to be equal to the whites and have the same privileges" under the law, "[m]any discriminations are made daily in defiance of the laws."[55] He gave as examples both refusal to serve and unequal treatment, for example a boarding house that would not permit a Black man to join his fellow (White) jurors at the same table.[56] In the 1940s, prominent educator Mary Church Terrell explained that, as a Black woman, she could not eat in Washington, D.C. "from the Capitol to the White House" unless she "were willing to sit behind a screen."[57] In each of these instances, access did not guarantee equality.

Although congressional debates focused on the exclusionary practices of some public accommodations in the South, it was clear that differential treatment would be unacceptable as well. The Senate Commerce Committee Report highlighted comments from Roy Wilkins, executive secretary of the NAACP. While Congress deliberated, Wilkins said, Black Americans "throughout our country will be bruised in nearly every waking hour by differential treatment in, or exclusion from, public accommodations of every description. From the time they leave their homes in the morning . . . until they return home at night, humiliation stalks them" as they risk "differentiated service or none at all."[58] And Congress was well-aware that the federal government had been embarrassed by the ill treatment of foreign officials in businesses open to the public. Emissaries of color had been denied service in Maryland, but they also found restaurants on New York's upper East Side—at the base of the United Nations—treated them

52. Koire v. Metro Car Wash, 40 Cal. 3d at 29–30 (citing Jones v. Kehrlein, 49 Cal. App. 646, 651 (Cal. App. 1920) and Suttles v. Hollywood Turf Club, 45 Cal. App. 2d 283, 287 (Cal. App. 1941)).

53. New York Comm'n Against Discrimination, Report of Progress: A Review of the Program for 1962 14 (1962) (discussing complaints filed in 1962 and that the forms of discrimination included amenities or services "withheld or discouraged").

54. New York Comm'n Against Discrimination, Report of Progress: A Review of the Program for 1960 104 (1960) [hereafter New York Comm'n Against Discrimination 1960 Report] (finding probable cause where café that pivoted from marketing to Black patrons to "decid[ing] to discourage the patronage" and making regular customers now feel unwelcome); *id.* at 13 (noting conciliation with a nation-wide gymnasium and health emporium enterprise); *id.* at 83 (discussing barber shops and beauty parlors discouraging customers).

55. HANNIBAL GERALD DUNCAN, THE CHANGING RACE RELATIONSHIP IN THE BORDER AND NORTHERN STATES 62 (1922).

56. *Id.* at 62-63.

57. PAULA C. AUSTIN, COMING OF AGE IN JIM CROW DC Loc. 830 (2019).

58. S. REP. NO. 88–872 (1964), at 15, reprinted in 1964 U.S.C.C.A.N. at 2369 (observing that the state public accommodations laws targeted the same problem as the federal act).

poorly. Title II would instead guarantee "the right to enjoy equal treatment"[59]—both access and undifferentiated service.

B. Prompt, Courteous Service

Prompt, courteous service was baked in to demands for full and equal treatment throughout the twentieth century.[60] In the 1920s, the *Chicago Defender* called on Black Chicagoans to "report all cases where you are refused service *or treated unfairly*." Long waits, rude service, and being ignored meant the management was acting "in defiance of the laws."[61] The press would publicize such cases: "If the management of these places wish to cater to a certain class or race let them openly violate the law by placing signs in their windows"[62]

In the 1930s, a group of students brought a civil rights action based on an experience that mirrors many Title II lawsuits today. In an incident described as typical for Black students in the college town, these University of Illinois students experienced a long wait and denial of service at a café. After seating themselves, they waited, observed the waitress serving customers who entered after them, and asked the waitress to take their order. She replied that she was too busy, and the students eventually heard the proprietor tell the waitress not to serve "those people." The students left, prepared to file suit and with assurances that their White classmates would appear as witnesses.[63]

Adulteration of food also was widely recognized as a violation of the guarantee of equal enjoyment. Black citizens reported that waiters would add salt to food or pour dishwater to drink.[64] A decade before the federal Civil Rights Act, civil rights testers in New York City observed the practice of discouraging their patronage by serving rotting, or excessively salty or spicy food.[65] There is a resemblance to a 1998 suit against Pizza Hut that Thomas describes, where a restaurant manager put his hands on Black customers' pizza and lifted the cheese after they complained about insufficient sauce.[66]

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59. S. REP. NO. 88–872 (1964), at 16, reprinted in 1964 U.S.C.C.A.N. at 2369.

60. *Race Barrier Beaten Down at N.Y. Hotel*, CHI. DEFENDER, Aug 11, 1934, at 5 (reporting on picketing of a hotel coffee shop that resulted in its agreement to serve people without discrimination and that when a mixed race group sat "dinner was served within ten minutes").

61. DUNCAN, *supra* note 55, at 62-63 (1922) (where a Black patron is "ignored," "if he complains, it is explained as an oversight"—with the result that he avoids the business and potential humiliation in the future); *see also Restaurant Man Fined $50.00 for Discrimination*, PLAINDEALER (Cleveland), Dec. 6, 1929 (noting judgment in favor of Black customers who "were told they must eat in the balcony" and "after a long wait inferior food was brought" and that similar suits brought previously had always settled to avoid setting precedent).

62. *Judge Desires His Opinion to Override Laws*, CHI. DEFENDER, Dec. 15, 1923, at A2.

63. *Sue Champaign Restaurant for $2,000*, CHI. DEFENDER, Mar. 27, 1937, at 8.

64. DUNCAN, *supra* note 55, at 62-63.

65. Jou, *supra* note 33, at 251.

66. Thomas, *supra* note 3, at 169 (discussing Bobbitt v. Rage, Inc., 19 F. Supp. 2d 512, 515 (W.D.N.C. 1998)).

Another device was to insult people of color. In an extreme manifestation, bartenders and waiters were known to serve Black customers and then smash their glasses promptly after they had finished, a practice that sometimes led to successful civil rights suits.[67] Civil rights era courts understood public accommodations law to protect against such insults and indignities.[68] By contrast, from Thomas's description, it seems probable that federal courts today would say these practices, though unpleasant or insulting, were not obviously racially motivated and therefore not actionable.[69]

Poor service, insults, and delays would need to come to an end to ensure equality. Administrative and advocacy actions thus took aim at differential treatment. For example, by 1950, African Americans in New York usually were not denied service outright, as had once been the practice.[70] But testers surveying restaurants found that 42 percent treated racial minorities rudely. A couple entering a midtown Manhattan restaurant found themselves seated at a table for six in a darkened corner near the restrooms, even though the many other more desirable tables were available. Service was "exceedingly rapid," each course brought before the previous one was finished. By publicizing the discrimination to union and management groups, civic groups gained greater compliance with the antidiscrimination law such that by 1952, the survey found racial minorities "received exactly the same courtesy enjoyed by every other customer."[71] During the same period, Detroit set up an Equal Public Accommodations Committee that sought to "assure that any person will receive *proper, courteous service*" in places offering service to the public.[72] It too reported success through legal training and outreach.

As this history shows, state courts of the 1950s and '60s understood "full and equal" accommodations to guarantee equal, customary, and courteous treatment. By limiting Title II, which shares the language of state statutes, to outright refusals of service, federal courts overlook the ordinary and original meaning of its text.[73] They permit continued practices of seating Black customers

67. MAURICE DAVIE, NEGROES IN AMERICAN SOCIETY 290 (1949) (calling this an "old practice" and noting a variation on this theme in 1946 Chicago where three Black patrons were charged for the beer and for the glasses, with the bartender saying they could take the glasses with them). *See also* Ross v. Schade, 7 Conn. Supp. 443, 443-44 (Super. Ct. 1939) (finding discrimination where two Black men were served two beers, were overcharged, and watched the bartender smash their glasses once they finished drinking); Richard Goldsberry, *Negro Actors Cheered, Then Barred at Hotels, Restaurants*, CHI. DEFENDER, June 1, 1946, at 3 (reporting on famous singing group being served a meal in Wyoming and then having their plates broken).

68. Anderson v. Pantages Theater Co., 194 P. 813 (Wash. 1921).

69. Thomas, *supra* note 4, at [page].

70. Jou, *supra* note 33, at 239-40.

71. Rabkin, *supra* note, at 258. *Restaurant Bias in N. Y. Decreasing*, CHI. DEFENDER, June 28, 1952, at 9 (reporting that interracial survey by Committee on Civil Rights in Manhattan - that "[t]wo principal types of discrimination were found. The Negro team was usually shown to a less desirable table or received poorer service and endured rudeness").

72. Hearings Before the U.S. Commission on Civil Rights, *supra* note 33, at 201.

73. Thomas, *supra* note 3, at 177.

in undesirable locations even when tables are available or the customers ask for a table at the front. They do not perceive insulting, differential treatment as discrimination, even where Black customers are called "[y]ou damned idiot"[74] or more commonly "you people."[75] Contrary to public understandings of "full and equal enjoyment" at mid-twentieth century, federal courts now read Title II to authorize slow, delayed, and insulting service for people of color.

IV.
WHITE EXPECTATIONS, NOT PRECISE COMPARATORS

The problem of lack of comparators has long plagued the ability of claimants to challenge discrimination in public accommodations. Under federal precedent, the treatment of White customers matters both to the prima facie case—were you treated worse based on your race?—and to business defenses justifying the treatment—was the bad treatment or refusal to serve based on a reason that applied to all customers?

State courts did not always require a comparator—let alone a precise one—at the time of Title II's enactment. For example, in 1943 in what the *Chicago Defender* called "one of the most widely discussed cases of its kind," a jury returned a verdict for Eloise Townsend in her suit against a department store for refusing to allow her to try on a hat. The judge denied defendant's motion for a new trial notwithstanding the verdict. He did not require Townsend to present a comparator. He took notice that most people try on clothing and hats before buying them.[76] It was part and parcel of the privileges and advantages of retail shopping. Thomas' analysis suggests that today's federal judges would have reached a contrary result, unless the plaintiffs could produce an identically situated White customer.

During the civil rights era, statutory language that was substantially the same or identical to Title II was understood to permit a more flexible standard. In New York, where a landmark civil rights law phrased like Title II already had an eighty-year history, a commission in 1960 found probable cause for discrimination in a complaint that, on Thomas's account, federal courts would now throw out. There, a Black couple who had been seated in a booth next to the kitchen asked to move closer to the entrance. The owner responded that they had been seated according to the next waitress available but he otherwise "manifested indifference toward their dissatisfaction." Before the commission, the restaurant argued that it had followed the usual practice for assigning tables and that any

74. Thomas, *supra* note 3, at 176 (quoting Acey v. Bob Evans Farms, Inc., No. 2:13–cv–04916, 2014 WL 989201, at *4 (S.D. W.Va. Mar. 13, 2014)).

75. Thomas, *supra* note 3, at 178 (quoting Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 699 (D. Md. 2000)).

76. *Upholds Woman's Right to Try on Hat in Store*, CHI. DEFENDER, June 12, 1943, at 22.

indifference was "toward the summer visitors who were not regular customers."[77]

At this point, a federal court would have dismissed the complaint. The complainants had no comparator of White customers known to them to be summer visitors. The business justification was neutral, and discrimination against summer visitors was not prohibited. But the investigating commissioner instead concluded that whether due to the "subconscious reaction of a busy proprietor or . . . an intentional effort to slight complainant," the effect was to deny equal treatment. "The truth is that other accommodations would have been granted had complainant been white," he said.[78]

Another pairing of modern and 1960s cases showcases the difference a standard that considers how White people expect to be treated would make. Fifty years after the Civil Rights Act was passed, a federal court decided *Lee v. Delta Air Lines, Inc*, a case Thomas describes. A Black passenger with platinum medallion status on Delta airlines was made to move out of the priority line to the back of the general line so that a White customer, with less favorable status, could be served.[79] Delta argued that the treatment was due to its desire to move all passengers as quickly as possible and that the plaintiff was required to ask for expedited service. The federal court concluded that the plaintiff could not show the reason was pretext for discrimination.

In 1960, the New York Commission Against Discrimination reached precisely the opposite conclusion in an even more subtle case. There, the complainants had booked a Caribbean island tour with first-class airline seats, but British Airways seated them in economy class. The airline "contended that the first-class seats had been exhausted by non-tour passengers who were entitled to priority" and that nothing could be read into the absence of any Black passengers in first class.[80] The investigating commissioner found probable cause of race discrimination, because the couple had not been advised that non-tour passengers took priority nor of "their privilege of being placed on a waiting list for first class seats."[81] A White customer likely would have been so advised. Consideration for one's status—here as a tour customer promised first-class tickets—fell within statutory terms of advantages and privileges.[82]

The heightened formalism of the federal courts, by contrast, limits the meaning of discrimination. Thomas demonstrates that with few exceptions, federal courts entertain only those claims where plaintiffs can present

77. New York Comm'n Against Discrimination 1960 Report, *supra* note 54, at 104.

78. *Id.*

79. Lee v. Delta Air Lines, Inc., 38 F. Supp.3d 671, 672-73 (W.D. Pa. 2014). The case was brought under Section 1981.

80. New York Comm'n Against Discrimination 1960 Report, *supra* note 54, at 121-22. (1960).

81. *Id.*

82. This is consistent with the common law tradition of access to public accommodations. Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70, 85-86 (2019) (discussing the way dignitary torts asserted the plaintiff's status).

comparators identical except for race. Rather than consider the original understanding of discrimination under public accommodations law, they look to a standard invented by the Supreme Court in the 1970s in the context of employment discrimination—and worse, Thomas says, hold plaintiffs to an exaggerated burden. People of color may see that White customers are treated better and establish that they experienced bad, hostile, or insulting treatment. They are hard pressed, however, to find customers situated exactly the same, especially in the low-information context of restaurants, retail stores, and other businesses.

State courts in the civil rights era employed a more functional analysis. The key question was whether the business had denied to people of color what was "the customary service and amenities" of the business.[83] They sometimes explicitly considered what White people would expect, a standard that often supported the plaintiff's prima facie case.[84] If a policy customarily did not apply to White customers, then it was not custom at all, and the business had denied full and equal enjoyment. As the next Part shows, state decisionmakers looked closely at business justifications, evaluating their reasonableness and general applicability.

V.
SCRUTINY OF BUSINESS PRACTICES, NOT CREDENCE

Professor Thomas's account makes evident that federal courts have not risen to the challenge of detecting business subterfuge. But she sometimes suggests that subtlety and subterfuge are new.[85] She notes the observation of one federal court that, "in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade."[86]

The possibility of evasion, however, has been a constant in antidiscrimination law. In 1931, the ACLU noted this problem. "Despite the decisiveness and inclusiveness of the law" in New York, "[d]iscrimination . . . when committed by subterfuge, is difficult of proof."[87] It gave examples reflective of today's federal docket: at hotels, a customer informed that "all accommodations were taken or reserved would be hard put to ascertain the truth of the assertion;" at restaurants, a patron might find the waitstaff do "not go so

83. *Id.* (finding probable cause where a café began to deny Black customers the privileges and amenities it had previously provided them in order to discourage their patronage).

84. This method of analysis seems particularly appropriate for analyzing claims under Section 1981, which guarantees those rights "enjoyed by white citizens."

85. Thomas, *supra* note 3, at 165 ("[N]owadays, most companies do not act in this obviously discriminatory manner to deny admission or service."); *id.* at 153 ("[D]iscrimination and segregation have continued—sometimes in old ways and sometimes in new ways.").

86. *Id.* at 165 (quoting Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1358 (N.D. Ga. 2005)).

87. American Civil Liberties Union, Black Justice 23 (1931).

far as to refuse service" but nonetheless "humiliate him to the extent of making a second visit to the place inadvisable."[88]

Consider *Browning v. Slenderella*. In 1956, Ola Browning entered the Slenderella salon in Seattle for an appointment she had scheduled over the phone. She gave her name at the reception desk and was asked to take a seat. Several times, the receptionist assured her that she would be helped soon. But "the reception room would fill up with women and would empty again as they were served, and it became apparent to Mrs. Browning that everyone except herself was receiving service." Nearly two hours later, she confronted the manager, asking if the salon planned to serve her. The manager did not say yes or no, remained courteous, and replied "I just know you won't be happy here." Browning went home.[89]

From Thomas's account, today's federal courts would not recognize a viable claim from these facts under Title II or Section 1981. The salon did not explicitly refuse Browning service based on her race; everyone had acted polite, and she still might have received her treatment had she continued waiting.

Seventy years ago, the state trial, appellate, and supreme courts instead rose to the challenge. Each held that these more subtle practices denied Browning her rights to enjoy the privileges of public accommodations. The Washington Supreme Court ultimately ruled that "discrimination may arise just as surely through 'subtleties of conduct' as through an openly expressed refusal to serve."[90]

By the time of the Civil Rights Act, the public, litigants, commissions, and courts in Northern and Western states recognized these more subtle tactics as denials of "full and equal enjoyment." As one court said:

> One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct' play no small part.[91]

In such circumstances, the state decisionmakers tended to require businesses to prove that their reasons for differential treatment or denial of services were not pretext for racial discrimination. They did not impose on plaintiffs a burden where they had no particular knowledge of other customers or of business practices.

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88. *Id.* (noting an example where a waiter took forty minutes to set the table).

89. Browning v. Slenderella Sys., 341 P.2d 859, 867 (Wash. 1959).

90. *Id.* In that same time period, the Massachusetts Commission Against Discrimination investigated and conciliated a near identical complaint against a beauty salon. The business agreed to end its longstanding practice of ignoring would-be Black patrons until they became tired of waiting and left. Fourteenth Annual Report of the Massachusetts Commission Against Discrimination, Nov. 30, 1954 to Nov. 30, 1955, at 6.

91. Castle Hill Beach Club v. Arbury, 142 N.Y.S.2d 432, 439 (N.Y. Sup. Ct. 1955) (quoting Holland v. Edwards, 307 N.Y. 38, 45 (N.Y. 1954)).

Building on the common law foundation of public accommodations laws, state courts and commissions scrutinized business policies raised in defense to civil rights suits. Under the common law tradition, businesses had both rights and duties to craft reasonable regulations of their customers. Classic examples included dress codes or requirements of good comportment. But as Black people became full citizens during Reconstruction and civil rights statutes codified rights of access, businesses invoked their rules—for example, excluding troublemakers or requiring membership cards—in racially discriminatory ways.

In order to ensure business regulations did not impinge on full and equal enjoyment, courts undertook to scrutinize their reasonableness. In California, for example courts interpreted the state civil rights statute to require this analysis, as it guards against all arbitrary discrimination.[92] Thus, the California Supreme Court identified a number of "arbitrary and unlawful" practices, such as "limiting the number of student patrons, restricting students to certain hours or portions of the premises, or levying a minimum charge on student purchases."[93]

Business rules had to be reasonable both on their face and in their application. Consider a 1955 case where an amusement park justified denying admission to a Black woman based on its policy of excluding troublemakers. Having seen her photographed by a known member of the NAACP, the park's employees barred her entry on the grounds that she too might be a member and therefore a troublemaker. The Court squarely rejected this justification. While a business had the freedom, and indeed the duty, to exclude known troublemakers, an invocation of a blanket policy was not enough. The defendant had the burden of showing that "the plaintiff was excluded because she had a personal disqualification which would be a proper cause for the exclusion not only of the plaintiff but also of every citizen who personally possessed that disqualification."[94] The business had to show "personal fault" of the would-be patron.[95]

This common law style of analysis would result in different outcomes in a number of the cases Thomas discusses. Consider for example the case against Applebee's to which Professor Thomas frequently returns. There, the court credited the restaurant's assertions that some members of the plaintiffs' group had been disruptive and had skipped out on their bills in the past. The restaurant was not required to prove the personal fault of each, or any, member of the group.[96] Indeed, as the court and the restaurant admitted, some, or perhaps all, of

92. Elizabeth Sepper & Deborah Dinner, *Shared Histories: The Feminist and Gay Liberation Movements for Freedom in Public*, 54 U. RICHMOND L. REV. 759, 784 (2020) (discussing the unique way that California's statute targets all arbitrary discrimination as well as per se arbitrary discrimination based on race and other protected traits).

93. Koire v. Metro Car Wash, 40 Cal. 3d 24, 30 (Cal. 1985).

94. Fletcher v. Coney Island, 136 N.E.2d 344, 350 (Ohio App. Div. 1955).

95. *Id.*

96. Thomas, *supra* note 3, at 161 (observing that restaurant "did not identify the people whom it alleged had not paid and admitted that some of the people in the group may have properly paid").

the plaintiffs were mistreated by association, a practice that state courts half a century earlier would have viewed as pretext for race discrimination. Yet, this federal court permitted the restaurant to prevail simply by invoking a facially reasonable policy and without having to prove that the behavior of each individual plaintiff fell within the scope of the policy.

In addition to scrutinizing regulations for reasonableness on their face and in their application, state courts also required them to be general applicable—that is, defendants had to prove their rules were "effective alike to all patrons."[97] As a court explained in 1941, the "gist" of a public accommodations claim is "that the defendant denied to the plaintiffs, because of color only, the full enjoyment of the accommodations of his place of business *for reasons which were not applicable alike to all patrons*."[98] Civil rights era courts thus tended to scrutinize business policies and practices that seemed facially neutral, like showing an ID or making a reservation, for their comprehensiveness—something that, as Professor Thomas shows, most federal courts are unwilling to do.

Exceptions to a reasonable, seemingly neutral rule signaled that the business had discriminated. Consider a case brought by Dr. T. Price Hurst, an Amherst College and Harvard Medical School graduate and medical faculty member at Howard University. In 1933, when his party tried to check in late at night for their hotel reservations, they were turned away.[99] The hotel defended against the resulting lawsuit by asserting a policy of canceling reservations "not called for by 'about 11pm.'" The policy was reasonable. But the plaintiffs prevailed, because, as the Black press reported, they "produced a surprise witness" who two weeks later reserved a room, "claimed it at 1:05 am and was cheerfully accommodated."[100]

Federal courts invert this analysis. Thomas gives the example of a Black plaintiff who required a new room key during his stay at a Marriott. He established that the hotel gave a new key to a White patron in the same time period without requiring identification. By contrast, the plaintiff was escorted to his room by security and made to show identification. The judge found the policy reasonable and the exception for a White guest irrelevant.[101] Likewise, another federal judge dismissed a suit brought by a group of Black men told to disperse into smaller groups at a shopping mall, a directive that the business justified by a purported concern that large groups get in the way of others. But White testers walking in the same-sized group faced no such scrutiny, and the security team

97. McCrary v. Jones, 39 N.E.2d 167, 169-70 (Ohio 1941).

98. *Id.*

99. *Jim Crow Hotel Must Pay Race Citizens $400 Damages*, CHI. DEFENDER, Sep 30, 1933, at 1.

100. *Id.*

101. Thomas, *supra* note 3, at 162 (discussing Sherman v. Marriott Hotel Servs., 317 F. Supp. 2d 609, 613–15 (D. Md. 2004)).

otherwise was inconsistent in enforcing any such rule.[102] In both of these contemporary cases, civil rights era courts instead likely would have found discrimination. While the policies might be justified, they were not actually enforced evenly.

The common law style of analysis employed by state courts during the civil rights era indicates an alternative to the 1970s *McDonnell Douglas* test that federal courts now employ. "Full and equal enjoyment" meant that business rules had to be reasonable on their face, reasonably and specifically applied to the plaintiff, and generally applicable and generally applied to all customers irrespective of race or color. Otherwise, courts, litigants, and the public understood, those rules were pretext for discrimination. This approach is better grounded in both the text and the history of public accommodations laws. It merits further exploration and analysis as to whether modern-day state courts continue the approach today.

CONCLUSION

In *The Customer Caste*, Professor Thomas paints a grim picture. People of color live under a system of Jim Crow, where they cannot be excluded outright from leisure and commerce but do not enjoy the privileges and advantages granted White customers. Instead of rooting out discrimination, the federal courts endorse inequality and hollow out the protections of Title II of the Civil Rights Act, contrary to its text and legislative history. As this reply has shown, the courts' miserly interpretation defies Title II's original meaning as well.

By the civil rights era, "full and equal enjoyment" of the amenities of public accommodations had fixed meaning for state courts, legislatures, and the public. State courts did not require the denial of a contract—an implausible reading of statutory language that mentions no contract. Courts and commissions did not dismiss out of hand complaints for poor service, insults, or long waits. They were more likely to scrutinize business policies and practices for their reasonableness and general applicability——something that, as Professor Thomas shows, most federal courts are unwilling to do. These states and their courts varied, but they all gave some meaning to the words "full and equal" enjoyment. The public, Congress, and the courts would have understood Title II to mean the same.

Without considering the original meaning of Title II, Thomas's prescription for reform falters. To be sure, federal courts should reevaluate their interpretation of Title II, as Professor Thomas argues. The capacious language of the statute, its legislative history, and the original meaning of its operative phrase all lead to the conclusion that the federal courts have misconstrued "full and equal enjoyment" of public accommodations under the federal Civil Rights Act. But federal courts need not undertake this reevaluation from scratch. They have a

102. Vaughn v. N.S.B.F. Mgmt., Inc., No. 95-CV-70282-DT, 1996 WL 426445, at *7 (E.D. Mich. Apr. 1, 1996).

long line of state court and commission decisions on which to draw to understand the original meaning of Title II and correct their missteps.

But a correct interpretation of Title II by the federal courts will only go so far. Given her focus on the federal courts, Thomas cannot help but conclude that today people of color are subject to "daily, legal discrimination and segregation in public accommodations throughout the country."[103] Not so. In the vast majority of states, the daily discrimination and segregation that people of color face are illegal. Nearly all states and a number of cities have robust public accommodations laws. State statutes tend to apply broadly to all businesses open to the public.[104] While the practice of modern-day state courts and commissions merits further exploration and analysis, state institutions generally seem to recognize discrimination where federal judges are uncomprehending.[105]

And yet the Jim Crow system Thomas describes persists. Courts can only do so much. In a country with millions of public accommodations, tackling discrimination requires renewed emphasis on and resources for outreach, licensing, education, and more.[106] Ultimately, we may need to move beyond the framework of antidiscrimination law to imagine what might be required to shape a public that all people may fully and equally enjoy.

103. Thomas, *supra* note 3, at 148.

104. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638-52 (2016) (analyzing public accommodations statutes across the fifty states and identifying their boundaries).

105. Although a comprehensive analysis of state law today is outside the scope of this reply, see, e.g., 1998 ILHUM LEXIS 384, *10-12 (noting that state commission precedents "strongly favor[ed]" recovery in a case where a waitress said she had not seen "you folks" come in and had left Black customer waiting and observing of the restaurant's justification of the poor service that "[i]f the 'bad waitress' defense is to be used successfully, both black and white patrons should have received bad service"); Lewis v. Doll, 765 P.2d 1341 (Wash. App. 1989) (noting that, given more subtle patterns of discrimination, "[a]ny defendant can respond to a discriminatory effect with a claim of some subjective preference or prerogative and, if such assertions are accepted, prevail in virtually every case" and as a result "when a discriminatory effect is present, the courts must be alert to recognize means that are subtle and explanations that are synthetic").

106. Jou, *supra* note 33, at 238 (observing that even in 1958, "it would have taken an individual more than 19 years of dining at three different establishments per day to have sampled all of" New York's 22,000 restaurants).