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The Civil Rights Act of 1964 and 'Legislating Morality': On Conscience, Prejudice, and Whether 'Stateways' Can Change 'Folkways'

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**THE CIVIL RIGHTS ACT OF 1964 AND “LEGISLATING
MORALITY”: ON CONSCIENCE, PREJUDICE, AND
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LINDA C. MCCLAIN*

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* Professor of Law and Paul M. Siskind Scholar, Boston University School of Law. I presented an earlier draft of this Article at the conference, The Civil Rights Act of 1964 at 50: Past, Present, and Future, held at Boston University School of Law on November 14-15, 2014, and am grateful to participants for comments. I thank BU Law student Jessica Lees for excellent research on the legislative history of the Civil Rights Act of 1964. Thanks to Julia Sternman for her conscientious editorial work on this Article. This Article is part of a larger project looking at historical and present-day usage of the terms “bigotry” and “conscience” in controversies over civil and constitutional rights, particularly in connection to objections to forms of marriage. I am grateful to BU Law student Gillian Stoddard Leatherberry and to Stefanie Weigmann, Assistant Director for Research, Faculty Assistance, and Technology, for valuable research assistance on that project.

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Most Americans want the Congress to act to right a wrong that has persisted for too long. The hypocrisy in which all of us have had a part has had a corrosive effect on the national conscience. Discrimination is debasing, not just to those discriminated against but to those who discriminate.

— *Civil Rights – Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 619-20 (1964) (statement of Sen. Clifford P. Case, New Jersey)

My people, who have elected me to represent their views, say that they do not believe in this kind of law; they believe, as I do, that we cannot legislate morality or reason, and we cannot eliminate by injunction the conflicts of human nature.

— *Civil Rights Act of 1964: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 563 (1964) (statement of Rep. Gillis W. Long, Louisiana)

INTRODUCTION

This Article examines arguments made in debates about the Civil Rights Act of 1964 (the “CRA”) as to whether Congress could or should “legislate morality” by passing a broad federal civil rights bill. It also looks at how invocations of “conscience” featured in those debates—particularly the argument that the national conscience demanded such a law because discrimination posed a moral crisis. Proponents and opponents of the CRA differed sharply on the role of federal law in addressing prejudice and discrimination, but even proponents recognized the limits of what law could achieve. While proponents of the CRA viewed it as removing artificial barriers created by segregation that constrained normal or natural human interaction, opponents defended segregation as natural and warned that the CRA would usher in a dangerous and forced racial intermingling and line-crossing. This Article highlights arguments made in the context of the public accommodations and employment provisions of the CRA, but also draws on rhetoric about education, where opponents’ appeals to the consequences of racial intermingling—including intermarriage—indicate continuing resistance to *Brown v. Board of Education*’s indictment of “separate but equal” in education.

A. *Bigotry, Conscience, and Controversies over Marriage*

This Article is part of a larger project examining the rhetoric of bigotry and conscience in historical and present-day controversies over civil and constitutional rights.¹ One motivation for that larger project was the sharp criticism made by the dissenters in *United States v. Windsor*,² in which the Supreme Court found part of the Defense of Marriage Act (“DOMA”) unconstitutional. The dissenting opinions contended that the majority was tarring “the political branches with the brush of bigotry”³ and casting supporters of the one man-one woman definition of marriage as “members of a wild-eyed lynch mob” with “hateful hearts.”⁴ Further, the dissenters argued that to compare race and sex discrimination with defending traditional or “conjugal” marriage would “cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.”⁵ Prominent opponents of same-sex marriage quickly enlisted the dissenters’ rhetoric to relate Justice Kennedy’s majority opinion to a “larger cultural dynamic” in which those working to “redefine marriage” threatened opponents with the “stigma of being ‘haters’ and ‘bigots,’” and “the equivalent of a racist.”⁶ This rhetoric invites the question whether the terms “bigot” or “bigotry,” for example, have any meaningful content, or whether they function simply as invectives or conversation-stoppers.

A second motivation for my larger project is that present-day controversies over the evident clash between religious liberty and state antidiscrimination laws, in an era of growing marriage equality for same-sex couples, often invoke the CRA. Opponents of same-sex marriage strenuously object to any analogy between opposing same-sex marriage and opposing interracial marriage, and they warn that religious conservatives are at risk of losing their religious liberty if the conflation of conscientious objection with bigotry goes unaddressed.⁷ Supporters of broad, religious, conscience-based exemptions for

¹ See Linda C. McClain, *Marriage, Conscience, and Bigotry* (unpublished manuscript) (on file with author).

² 133 S. Ct. 2675 (2013).

³ *Id.* at 2696 (Roberts, C.J., dissenting).

⁴ *Id.* at 2707-08 (Scalia, J., dissenting).

⁵ *Id.* at 2717-18 (Alito, J., dissenting).

⁶ Ryan T. Anderson, *Civility, Bullying, and Same-Sex Marriage*, HERITAGE FOUNDATION (July 15, 2013), <http://www.heritage.org/research/commentary/2013/7/civility-bullying-and-same-sex-marriage>, archived at <http://perma.cc/WWX9-DYD3>.

⁷ Rod Dreher, *Does Faith = Hate?*, AMER. CONSERVATIVE, Sept.-Oct. 2013, at 12, 14-15 (quoting Ryan Anderson); see also Anderson, *supra* note 6. Ryan Anderson is a Fellow at the Heritage Foundation and regularly writes essays and friend of the court briefs defending the one man-one woman definition of marriage and the religious liberty of supporters of that definition. In *Windsor*, 133 S. Ct. at 2718-19 (Alito, J., dissenting), Justice Alito cited, as an illustration of the “conjugal model” of marriage, Anderson’s coauthored book, *WHAT IS MARRIAGE: MAN AND WOMAN: A DEFENSE* (2012) (with Sherif Girgis and Robert George).

nonprofit religious organizations as well as for religious people operating for-profit businesses argue that such exemptions from providing goods and services to same-sex couples are appropriate in a way that invocations of conscience in the context of race discrimination are not.⁸ Alternatively, they may argue⁹ that whether or not objections to same-sex marriage seem—as public opinion about same-sex marriage evolves—to be a form of bigotry, broad exemptions that “advance important civil rights for proponents and opponents [of same-sex marriage] alike,” are akin to the “Mrs. Murphy” exemptions in the CRA that enabled its passage.¹⁰ Conversely, when Arizona (a state with, at that time, neither marriage equality nor an antidiscrimination law that included sexual orientation) prophylactically passed a law—vetoed by Governor Jan Brewer—to provide exemptions to businesses, Governor Frank Keating of Oklahoma insisted that “[t]his isn’t 1964 anymore,” and that “[i]f you open up your doors to the general public, you can’t pick and choose who you are going to deal with.”¹¹

To date, my historical research on bigotry and conscience has focused primarily on the context of marriage, particularly “mixed” marriage. I have examined how people applied concepts of bigotry and conscience either in defending objections to—and legal restrictions on—interracial marriage or in defending interracial marriage and attacking bans on it. I have also looked at the use of such rhetoric in discussions of interfaith marriage. Scholars defending religious liberty today often distinguish conscience-based objections to same-sex marriage as entirely different from earlier objections to interracial marriage. Nonetheless, opponents of interracial marriage resisted the label of “bigot” and appealed to conscience, morality, religious teaching, and the Bible

⁸ Robin Fretwell Wilson argues: “The religious and moral convictions that motivate objections to refuse to facilitate same-sex marriage simply cannot be marshalled to justify racial discrimination.” Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 101 (Douglas Laycock Jr. ed., 2008). Wilson is a co-author of a standard letter sent by several law professors to governors and legislators urging robust “religious conscience protection” in any marriage equality bill. On the issue of whether that protection would extend to “permit objections to interracial marriage,” the letter states, “Although such objections are likely to be rare, if not non-existent, this concern is readily addressed by a simple proviso that would” clarify that “this section does not change any provision of law with respect to discrimination on the basis of race.” Letter from Professor Wilson et al., to Governor Pat Quinn, Illinois (Dec. 18, 2012), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>, *archived at* <http://perma.cc/2NK2-JYUK>.

⁹ Robin Fretwell Wilson offers such an argument in this volume. *See generally* Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951.

¹⁰ *Id.*

¹¹ Adam Nagourney, *Arizona Bill Stirred Alarm in the G.O.P.*, N.Y. TIMES, Feb. 28, 2014, at A11.

as bases for their stance.¹² This appeal raises the question of whether a position presented as one of conscience could nonetheless be bigoted. On the other side, speeches and sermons by civil rights supporters contrast conscience and bigotry and condemn the fixation upon interracial marriage by opponents of integration.¹³ I have found that some objections to interracial marriage were part of a broader objection to intermarriage, including interfaith marriage. Opponents of such marriages argued that to characterize their opposition as rooted in prejudice was itself a form of prejudice.¹⁴ Interracial and interfaith marriages, on this view, were “problem marriages” because of their impact on the married couple, their children, their families, and society. Thus, in my larger project, I have looked extensively at the interplay of bigotry and conscience in the context of arguments both against and in support of forms of marriage: interracial, interfaith, and same-sex. One connection between intermarriage, or “mixed” marriage, and antidiscrimination law is that historical analyses of why more young people were more willing to cross racial, ethnic, religious, and economic lines to marry observed that they had more opportunity for social contact across these lines in schools, workplaces, and social settings (including fraternities, sororities, and social clubs).¹⁵ While some obstacles to such line-crossing were cultural and social, some were also legal. Thus, by prohibiting discrimination on the basis of race, national origin, religion, or (in Title VII) sex in various spheres of society, the CRA made it easier for people to interact on terms of social equality.

¹² For example, as I discuss in *Marriage, Conscience, and Bigotry*, segregationists rejected the characterization of their opposition to integration in education and to the intermarriage they believed would ensue as reflecting “bigotry” or “race prejudice,” and countered that they were “waging a fight of morality and conscience.” McClain, *supra* note 1, at 78-79 (quoting Hon. John Bell Williams of Mississippi, Address at the Defenders of State Sovereignty and Individual Liberties, Extension of Remarks of Hon. William M. Tuck, CONG. REC. 4339 (1957)). See generally FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW* 131-57 (2009) (explaining the role of “Southern white Protestant theology of race” in creating and defending antimiscegenation laws).

¹³ Many examples are available in the outstanding collection *RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT, 1954-1965* (Davis W. Houck & David E. Dixon eds., 2006) [hereinafter *RHETORIC, RELIGION*]. One striking example in the collection is Dr. Haywood N. Hill, *This I Believe*, a speech given at Trinity Presbyterian Church, Atlanta, Georgia, in January 1961, in which the speaker states: “I must live by conviction and by conscience rather than by preference and by prejudice,” even though it “entails the risk of intermarriage.” Dr. Haywood N. Hill, Address at Trinity Presbyterian Church (Jan. 1961), in *RHETORIC, RELIGION*, *supra*, at 405, 406-07. For more examples, see McClain, *supra* note 1, at 81-90.

¹⁴ *E.g.*, ALBERT I. GORDON, *INTERMARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC* 358 (1964).

¹⁵ *Id.* at 54-55.

B. *The Scientific Study of Prejudice and the Argument that “Stateways Cannot Change Folkways”*

To address the questions of whether the terms “bigot” or “bigotry” have any real meaning and how they have related to arguments about “conscience” in matters of civil rights, I have looked at the study of prejudice by prominent social scientists from the post-World War II period of the late 1940s through the early 1960s.¹⁶ In 1954, in the preface to his influential book, *The Nature of Prejudice*, Gordon W. Allport, Professor of Psychology at Harvard University, reported “the impulse”—since the end of World War II—to engage in scientific study to understand conflict and “the roots of prejudice” and find “concrete means for implementing men’s affiliative values,” that is, “hate free values.”¹⁷ He observed: “[U]niversities in many lands have given new prominence to this approach under various academic names: *social science, human development, social psychology, human relations, social relations*.”¹⁸ So, too, a variety of organizations—often in partnership with universities—dedicated to protecting the civil rights and civil liberties of minority groups turned their attention to the “science” of social relations, as book titles from that era indicate.¹⁹

That literature spurred my interest in examining arguments about whether Congress, by enacting the CRA, could or should “legislate morality.” In *The Nature of Prejudice*, Allport challenged the famous assertion of distinguished nineteenth-century sociologist William Graham Sumner that “stateways cannot change folkways,” and its modern counterparts, “you cannot legislate against

¹⁶ I have a longer discussion of this literature in my draft paper, “Marriage, Conscience, and Bigotry,” and just mention a few themes here. See McClain, *supra* note 1, at 49-74.

¹⁷ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE*, at xiv (1954).

¹⁸ *Id.* Allport was affiliated with Harvard’s Department of Social Relations. *Id.* at xviii.

¹⁹ For example, Max Horkheimer and Samuel H. Flowerman, co-editors of the Studies in Prejudice book series and directors of the newly-created Department of Scientific Research of the American Jewish Committee (“AJC”) argued that “prejudice” was a “social disease,” which social scientists could study to “search for more effective ways to prevent or reduce the virulence of the next outbreak.” Max Horkheimer & Samuel H. Flowerman, *Foreword to Studies in Prejudice*, in BRUNO BETTELHEIM AND MORRIS JANOWITZ, *DYNAMICS OF PREJUDICE: A PSYCHOLOGICAL AND SOCIOLOGICAL STUDY OF VETERANS*, at vii (1950). “An aroused conscience” about the recent “mechanized persecution and extermination of millions of human beings” was “not enough,” they argued, “if it does not stimulate a systematic search for an answer” to how it could have happened. *Id.* The AJC funded the Studies in Prejudice book series and brought together scholars to study and seek solutions to religious and racial prejudice. The series included the classic book, T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950). See also GERHART SAENGER, *THE SOCIAL PSYCHOLOGY OF PREJUDICE: ACHIEVING INTERCULTURAL UNDERSTANDING IN A DEMOCRACY* (1953). Allport acknowledges financial support from the Commission on Community Interrelations of the American Jewish Congress, the National Conference of Christians and Jews, and the Moses Kimball Fund of Boston. ALLPORT, *supra* note 17, at xviii.

prejudice” or “you cannot legislate morality.”²⁰ *Plessy v. Ferguson*,²¹ Allport pointed out, similarly reflected the premise that “law was powerless to counter ‘racial instincts.’”²² Writing a decade before the passage of the CRA, Allport considered the enactment of broad federal civil rights legislation unlikely for the foreseeable future, “unless the Senate rules are amended to control filibusters.”²³ Nonetheless, in a chapter entitled, “Ought There to be a Law?,” Allport pointed to experience with existing antidiscrimination laws, including state and municipal versions of the World War II-era Fair Employment Practices Committee (“FEPC”)²⁴ and housing laws, to argue that contact on terms of social equality can diminish prejudice and that legislation can bring about that contact.²⁵ To put this reference to social contact on terms of equality in context, one tool used to measure prejudice was the “social distance” scale that asked people if members of various ethnic, racial, and religious groups were acceptable as co-workers, neighbors, friends, kin, and marital partners.²⁶

Allport also countered the “you cannot legislate against prejudice” argument by asserting that most Americans “deep inside their consciences do approve civil rights and antidiscrimination legislation.”²⁷ In support, Allport and other social scientists drew on Gunnar Myrdal’s influential “characterization of the American Dilemma”: “Each American is susceptible to sharp conflict when his prejudices clash with his American Creed.”²⁸ Myrdal argued that this “ever-raging conflict” was “the moral dilemma” at the heart of the “problem” of the status of African Americans in the United States.²⁹ In examining the roots of

²⁰ See ALLPORT, *supra* note 17, at 469 (discussing Sumner’s assertion and its modern counterpart). For a helpful discussion, see Elliot Aronson, *Stateways Can Change Folkways*, reprinted in HATRED, BIGOTRY, AND PREJUDICE: DEFINITIONS, CAUSES & SOLUTIONS 227 (Robert M. Baird & Stuart E. Rosenbaum eds., 1999).

²¹ 163 U.S. 537 (1896).

²² ALLPORT, *supra* note 17, at 469.

²³ *Id.* at 463.

²⁴ See *infra* Part II.D for discussion of the FEPC.

²⁵ ALLPORT, *supra* note 17, at 463-64.

²⁶ *Id.* at 38-39 (discussing the work of E.S. BOGARDUS, IMMIGRATION AND RACE ATTITUDES (1928)); see also Bernard M. Kramer, *Dimensions of Prejudice*, 27 J. PSYCHOL. 389, 389 (1949).

²⁷ ALLPORT, *supra* note 17, at 472.

²⁸ Gordon W. Allport & Bernard M. Kramer, *Some Roots of Prejudice*, 22 J. PSYCHOL. 9, 33 (1946) (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY (1944)); see also ALLPORT, *supra* note 17, at 329-30 (in chapter on “Inner Conflict,” reporting and enlisting Myrdal’s theory that “the crux of the whole issue is the inner ‘moral uneasiness’ white Americans suffer at failing to make their practice conform to the American creed” (citing MYRDAL, *supra*)).

²⁹ MYRDAL, *supra* note 28, at xlix. Myrdal emphasizes this moral dimension in the introduction to his book:

Though our study includes economic, social, and political race relations, at bottom our problem is the moral dilemma of the American—the conflict between his moral

bigotry and prejudice, Allport and colleagues identified a “lack of insight”—or the absence of any conscious discomfort about this clash—as characteristic of the bigot, by contrast to the American who, in Myrdal’s terms, appreciates the conflict between conscience and prejudice.³⁰ “Shame,” or the emotion that comes from this sense of conflict, is a “step toward emancipation from bigotry.”³¹ Conversely, the prejudiced person “is disposed to regard his hostilities as natural and as fully justified by virtue of the misbehavior of the minority groups whom he dislikes.”³²

Thus, countering the idea that remedial legislation must wait for education and social and cultural change to lay the groundwork, Allport and other social scientists argued that antidiscrimination law “often breaks into a vicious cycle so that a process of healing starts to occur.”³³ Americans, Allport argued, might “squeal in protest” at such laws, but if such laws are “in line” with their conscience, they “are likely to be obeyed.”³⁴ Thus, “[i]t is not entirely true that legislation must wait on education—at least not on complete and perfect education, for legislation itself is part of the educative process.”³⁵ Moreover, Allport challenged the supposed primacy of folkways over stateways, observing that “[i]t was the Jim Crow laws in the south that in large part *created* folkways.”³⁶ By contrast, a fair practices employment law “quickly creates new folkways in a factory or department store,” a result he attributed in part to the fact that such laws resolve a conflict between conscience and practice: “People need and want their consciences bolstered by law, and this is nowhere more true than in the area of group relations.”³⁷ As I show in Part II, legislators and witnesses who supported the CRA made similar arguments about closing the gap between conscience and practice and made similar appeals to experience with existing antidiscrimination laws.

valuations on various levels of consciousness and generality. The “American Dilemma,” . . . is the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the “American Creed,” where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.

Id. (italics omitted).

³⁰ Allport & Kramer, *supra* note 28, at 35; *see also* Gordon W. Allport, *The Bigot in Our Midst*, COMMONWEAL, Oct. 6, 1944, at 582, 583 [hereinafter Allport, *The Bigot in Our Midst*] (offering an account of the “mental dynamics of bigotry”).

³¹ Allport & Kramer, *supra* note 28, at 33.

³² *Id.* at 39.

³³ ALLPORT, *supra* note 17, at 473.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 471.

³⁷ *Id.*

During World War II and in its aftermath, social scientists like Allport worried about dangerously high levels of prejudice, particularly anti-Semitic and “anti-Negro” sentiment.³⁸ Thus, along with anti-Semitism abroad and at home, racial discrimination in the U.S.—particularly the persistence of segregation rationalized under “separate but equal” and of antimiscegenation laws—provided ready source material for the study of prejudice. In 1947, President Harry S. Truman’s Committee on Civil Rights issued its report, *To Secure These Rights*, proposing a robust civil rights agenda and an end to segregation.³⁹ With Myrdal’s analysis of racism as its implicit frame, the Report identified the “gulf between our civil rights principles and our practices” and expressed belief that “the greatest hope for the future” was “the increasing awareness by more and more Americans” of that gulf.⁴⁰ The Report indicted “separate but equal” and pointed to experiences with integration in the military and (to a lesser degree) in housing and employment to insist that the doctrine “has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony.”⁴¹ In 1948, President Truman delivered to Congress a ten-point plan based on the Report’s recommendations, but he correctly perceived the measures would be received “coldly” and would not pass.⁴² However, that same year, the California Supreme Court, in *Perez v. Lippold*,⁴³ struck down California’s antimiscegenation law, a momentous decision that “jump-started the post-World War II campaign to eliminate the laws once and for all,”⁴⁴ and, in *Shelley v. Kraemer*,⁴⁵ the U.S. Supreme Court held that judicial enforcement of a private covenant to discriminate racially in housing violated the Fourteenth Amendment. Allport, for example, published *The Nature of Prejudice* before the Court struck down “separate but equal” in education in *Brown v. Board of Education*,⁴⁶ and as Congress considered new civil rights legislation to broaden the World War II-era FEPC (adopted by Executive Order).⁴⁷

³⁸ Allport, *The Bigot in Our Midst*, *supra* note 30, at 583.

³⁹ TO SECURE THESE RIGHTS: THE REPORT OF HARRY S. TRUMAN’S COMMITTEE ON CIVIL RIGHTS, at iv (Steven F. Lawson ed., 2004).

⁴⁰ *Id.* at 59. On Myrdal’s analysis of the role of conscience as infusing the Report, see *id.* at 22 (“Although the committee cited Myrdal only once in its final report, the document [it] produced . . . was infused with his central assumptions.”).

⁴¹ *Id.* at 117.

⁴² *Id.* at 33.

⁴³ 198 P.2d 17 (Cal. 1948).

⁴⁴ PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 206 (2009).

⁴⁵ 334 U.S. 1 (1948).

⁴⁶ 347 U.S. 483 (1954).

⁴⁷ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941) (“There is established in the Office of Production Management a Committee on Fair Employment Practice, which shall

This historical background provides context for this Article's consideration of the insistence, in legislative debates about the CRA, on bridging the gap between conscience and American founding ideals and social practice by passing a federal antidiscrimination law. That context is also relevant to this Article's consideration of competing arguments made about whether Congress could or should "legislate morality." Thus far, my research finds little reliance on expert opinion (such as that of social scientists studying prejudice) in arguments for the CRA, but instead appeals to "common sense" and "experience" under state and local antidiscrimination laws to insist that antidiscrimination laws can and do change behavior. Opponents of the CRA also appealed to "experience," invoking prior unsuccessful federal efforts to "legislate morality"⁴⁸ (such as Prohibition) and insisting that a federal civil rights law would wrongly thrust the federal government into a problem that state and local governments knew better how to address.

I. CONGRESS CAN AND MUST "LEGISLATE MORALITY"

In this section, I identify several strands of argument made by supporters of the CRA with respect to legislating morality: (1) conscience and morality demand passage of the CRA; (2) ample precedent exists for Congress passing legislation to address moral issues; (3) while legislation cannot do everything, such as change hearts and minds or prejudicial attitudes, it can at least regulate behavior and prohibit wrongdoing; (4) experience with other antidiscrimination laws and common sense indicate that such laws can bring about change that may even, eventually, extend to attitudes;⁴⁹ and (5) rather than forcing choice in social relations, the law preserves freedom of choice in areas of social relations.

consist of a chairman and four other members to be appointed by the President."). The life of the Committee would later be extended by executive order following World War II. *See* Exec. Order No. 9664, 10 Fed. Reg. 15301 (Dec. 22, 1945) ("The duties and responsibilities imposed upon the Committee on Fair Employment Practice by Executive Order 8802 . . . shall be continued thereunder."). Although President Truman proposed an extension of the FEPC, the FEPC's work came to an end in June 1946, when Congress failed to appropriate funding for it. *TO SECURE THESE RIGHTS*, *supra* note 39, at 96.

⁴⁸ Arguments about private property and freedom of association featured prominently in oppositions to the CRA, particularly the public accommodations provisions, as my co-panelist Joseph Singer and others have discussed. I am not discussing those objections in this paper unless they arose in connection with discussion of legislating morality. In other work, I discuss how opponents of Title II invoked arguments about involuntary servitude, while some proponents countered that Title II would eliminate lingering badges of servitude and slavery. *See* Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83 (2011).

⁴⁹ Indeed, some proponents foresaw a day when attitudes were so changed and fairness so internalized that such a code would no longer be necessary. *See infra* text accompanying note 114 (remarks by Walter P. Reuther).

A. *Conscience and Morality Demand Passage of the CRA*

Proponents of the CRA argued that Congress could and must “legislate morality” to close the gap between conscience and race relations in the United States. Myrdal’s identification of the “sharp conflict” between Americans’ prejudices and their “American Creed”⁵⁰ and his argument that the problem was fundamentally a “moral” one⁵¹ find echoes in many statements in support of the CRA. Marking the gap between America’s “professed beliefs and our actual practices,” for example, New Jersey Senator Clifford P. Case stressed conscience in asserting:

[M]ost Americans want the Congress to act to right a wrong that has persisted for too long. The hypocrisy in which all of us have had a part has had a corrosive effect on the national conscience. Discrimination is debasing, not just to those discriminated against but to those who discriminate.⁵²

Another New Jersey Senator, Harrison Williams, argued that Congress must address discrimination because “our morality is at stake.”⁵³

Attorney General Robert F. Kennedy insisted that racial discrimination in public accommodations is “morally offensive to us all” and that Title II stands on a “moral principle.”⁵⁴ Kennedy invoked the scales of justice to argue that “the need for this country to live up to its ideals” clearly outweighed “the right of privately owned public service enterprises to insult large sections of their public by refusing to serve them, for no reason than the arbitrary and immoral logic of bigotry.”⁵⁵ Given that such a right was “plainly a right to commit wrong,” “[s]urely, in the balancing, there can be no question on which side the scales must fall.”⁵⁶ Kennedy stressed that discrimination in public accommodations requires “Negroes to suffer humiliation and deprivation that no white citizen would tolerate,” adding that it was no surprise that such discrimination “has been the source of more than 65 percent of the 1,580 civil

⁵⁰ See Allport & Kramer, *supra* note 28, at 33; see also MYRDAL, *supra* note 28, at xlix (referring to “ever-raging conflict”).

⁵¹ MYRDAL, *supra* note 28, at xlix.

⁵² *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 619-20 (1963) (statement by Sen. Clifford P. Case, New Jersey).

⁵³ *Civil Rights Commission: Hearings on S. 1117 and S. 1219 Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 64 (1963) (statement of Sen. Harrison A. Williams, New Jersey) (arguing that the U.S. Civil Rights Commission must continue to address discrimination against minorities’ voting rights).

⁵⁴ *Civil Rights: Hearings on H.R. 7152 as amended by Subcomm. No. 5 Before the H. Comm. on the Judiciary*, 88th Cong. 2655 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

⁵⁵ *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 22 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

⁵⁶ *Id.*

rights demonstrations that have taken place since May [1963].”⁵⁷ In his recent book, *The Civil Rights Revolution*, Bruce Ackerman argues that supporters of the CRA identified “institutionalized humiliation” as “the heart of the problem of racism in America.”⁵⁸ He points to key speeches by political leaders stressing that “monstrous humiliations” was the “evil” that the public accommodation law would address, and “freedom from indignity” was the freedom the CRA would advance.⁵⁹ Dr. Martin Luther King Jr.’s famous *Letter from a Birmingham Jail* wrote of “being humiliated day in and day out by nagging signs reading ‘white’ and ‘colored’” and by the denial of goods and services.⁶⁰

Legislators and witnesses (similar to the social scientists discussed in the Introduction) also argued that most Americans wanted to do the right thing, but needed the help of a strong national law. For example, Walter Reuther, President of the United Automobile Workers (“UAW”), testified:

There is great good will in Americans in all parts of the country to do the right thing. The Deerfield prejudice of Illinois suburbia is just as evil as the Bull Connor prejudice of the South. Down deep in the hearts of most Americans there is the desire to do the right thing—but the right thing will not be possible in Chicago or Birmingham unless there are strong laws backed up by the Federal Government.

Sweatshop employers a generation ago, and today, are a constant embarrassment to enlightened employers. Strong labor laws are welcomed by employers who want to do the right thing, and strong civil rights laws are welcomed by businessmen, labor unions, school boards, State officials, voting registrars, and others who want to do the right thing with respect to first-class citizenship for all Americans.⁶¹

Another labor leader, Gus Tyler, Assistant President of the International Ladies’ Garment Workers’ Union, stressed how such a law would protect “the man who wants to do the right thing,” but who, without such a law, is “not free to follow his conscience, because he fears the competition of a man who is doing the wrong thing.”⁶² Tyler elaborated: “A body of legislation, especially

⁵⁷ *Id.*

⁵⁸ BRUCE ACKERMAN, *THE CIVIL RIGHTS REVOLUTION* 13 (2014).

⁵⁹ *Id.* at 136 (quoting speeches by Hubert Humphrey and arguing that they “deserve[] a central place in our understanding of the Second Reconstruction”).

⁶⁰ *Martin Luther King’s “Letter from Birmingham Jail,”* ATLANTIC (Apr. 16, 2013, 11:00 AM), <http://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/>, archived at <http://perma.cc/783D-89E8> (reprinting letter on fiftieth anniversary, April 16, 2013).

⁶¹ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. N. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1939 (1963) (written testimony of Walter P. Reuther, President, United Automobile Workers).

⁶² *Id.* at 2193 (statement of Gus Tyler, Assistant President, International Ladies’ Garment

when it rests on our avowed ideals, tends to liberate the man who wants to do the right thing so he can follow his conscience. A body of legislation doesn't only check the wrongdoer: it frees the rightdoer. Here we have decades of experience."⁶³

"[T]he American way to go about tackling a very difficult problem," argued Dr. Duncan Howlett, Chairman of the District of Columbia Advisory Commission of the Civil Rights Commission, is "to arouse the conscience of people, to let them see what the problem is, to gather facts, to point the moral, to call for action."⁶⁴ Thus, in a hearing to consider whether to make the President's Commission on Civil Rights a permanent agency, the executive director of the American Civil Liberties Union ("ACLU") attested to the importance of "information and education," stating that the reports of the Commission have "pricked the conscience of the public and much has followed from that attention and that acceptance of the moral responsibility implicit in it."⁶⁵

Some legislators who asserted that the nation's "conscience" as well as "our sense of decency and human dignity demand that we try to eliminate discrimination due to race, color, [and] religion" emphasized that successfully eliminating discrimination would result in other countries looking to the U.S. for "having given substance to the dream of freedom and equality."⁶⁶

During the oral argument before the Supreme Court in *Heart of Atlanta Motel v. United States*,⁶⁷ a challenge brought by a motel operator to Title II, Justice Goldberg teased out the issue of conscience in pressing Solicitor General Archibald Cox when the latter argued that Title II was "addressed to a commercial problem of grave national significance."⁶⁸ When Goldberg asked, "Isn't there [a] moral problem, also," Cox answered that, although he would "emphasize repeatedly" the commercial problem that Title II addressed (given the commerce power argument), Congress was also "keeping faith" with the

Workers' Union).

⁶³ *Id.*

⁶⁴ *Civil Rights Commission: Hearings on S. 1117 and S. 1219 Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 260 (1963) (statement of Dr. Duncan Howlett, Chairman, D.C. Advisory Comm., Civil Rights Commission).

⁶⁵ *Id.* at 66-67 (statement of John de J. Pemberton, Jr., Executive Director, ACLU).

⁶⁶ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1861 (1963) (statement of Rep. James C. Healey, New York). On concern for the international reputation of the United States as a spur to national civil rights efforts, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

⁶⁷ 379 U.S. 241 (1964).

⁶⁸ *Excerpts from Rights Cases Argument*, N.Y. TIMES, Oct. 6, 1964, http://www.nytimes.com/1964/10/06/excerpts-from-rights-cases-argument.html?_r=1, archived at <http://perma.cc/HND5-XZ3J>.

promise that “all men are created equal.”⁶⁹ He added: “The failure to keep that promise lay heavy on the conscience of the entire nation, North as well as South, East as well as West.”⁷⁰

B. *Congress Can “Legislate Morality” and There Is Ample Precedent for Doing So*

Lawmakers and witnesses also argued that, whether or not the civil rights bill would be “legislating morality,” ample precedent existed for Congress to “require by law what is demanded by morality.”⁷¹ Missouri Senator Edward Long observed:

Most of our criminal laws are fundamentally moral. The minimum wage law, the child labor law, and many others are founded in morality. The civil rights legislation before us today seeks to do no more. . . . It merely seeks ways and means to help make the guarantees of our Constitution, the law of the land, a reality for all Americans.⁷²

Similarly, Representative William M. McCulloch enumerated many examples where “Congress has enacted legislation on social and moral grounds”: “[k]idnapping, child labor, prostitution, gambling, abuse of migrant labor, slave labor, adulterated food and drugs, mislabeling, and many other unacceptable activities have been legally proscribed by Congress.”⁷³ Murray A. Gordon, of the American Jewish Congress, testified:

I think it is also too late in the day for anyone to argue seriously that this type of legislation is undesirable because you cannot legislate morality. That is an argument that one finds wherever important social legislation is developed. . . . But we have had such legislation now for almost 20 years.⁷⁴

Witnesses and lawmakers, as these examples demonstrate, countered the “legislating morality” objection by pointing to the success of prior legislation aimed at moral harms. When the Supreme Court, in *Heart of Atlanta Motel*, upheld Title II against constitutional challenge, the Court observed that Congress had often regulated commerce to reach activities that are “moral wrongs” (such as deceptive trade practices, criminal enterprises, and the white-

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Civil Rights—The President’s Program, 1963: Hearing on S. 1731 and S. 1750 Before the S. Comm. on the Judiciary*, 88th Cong. 20-21 (1963) (statement of Sen. Edward V. Long, Missouri).

⁷² *Id.* at 21.

⁷³ Additional Views on H.R. 7152 of Hon. William M. McCulloch, H.R. REP. NO. 88-914, pt. 2, at 8 (1963).

⁷⁴ *Equal Employment Opportunity: Hearings on H.R. 405, 2999, 4031 and Similar Bills Before the H. General Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 88th Cong. 124 (1963) (statement of Murray A. Gordon, the American Jewish Congress).

slave traffic).⁷⁵ The Court stressed that the “fact” that Congress was “legislating against moral wrongs” in many prior laws regulating commerce did not “render[] its enactments” any “less valid.”⁷⁶ It is beyond the scope of this Article to revisit the strategic choice made by the Kennedy and Johnson Administrations and supporters of the CRA, in light of the lesson of the *Civil Rights Cases*,⁷⁷ to emphasize Congress’s Commerce Clause power more than the Fourteenth Amendment as the constitutional underpinning for the CRA.⁷⁸ The salient point here is that legislative debate showed an acute consciousness of the need to right a moral wrong and the propriety of Congress passing legislation to do so.

C. *Realism About What Civil Rights Legislation Can Achieve: Changing Behavior, if Not Hearts and Minds*

While proponents of the CRA appealed to the nation’s conscience and insisted that an urgent moral problem necessitated civil rights legislation, they also recognized the limits of what such a law could do. Prominent civil rights movement leaders and legislators called for such realism: the law could reach behavior; it might or might not transform underlying attitudes. For example, New Jersey Senator Harrison A. Williams, Jr. stated:

As Martin Luther King said: “Morality cannot be legislated; but behavior can be regulated. The law may not change the heart, but it can restrain the heartless.” We have seen this in so many areas where we know we can’t change the heart of man, the mind of man, but we can regulate his behavior.⁷⁹

Reverend Richard Allen Hilderbrand, President of the New York City Branch of the NAACP, testified: “This is not going to be any cure-all. I realize that, but it is going to be a cure-some.”⁸⁰ He elaborated: “[T]here is some pressure that can be exerted and . . . with the presence of the law, whether a person wants to do right or not, if he is prohibited from doing wrong by the power of the law, he is not going to flout it to the extent that he does now.”⁸¹ Testifying in a hearing about the public accommodations bill, Roy Wilkins, Executive Secretary of the NAACP, distinguished between reaching conduct

⁷⁵ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964).

⁷⁶ *Id.*

⁷⁷ 109 U.S. 3 (1883).

⁷⁸ See generally RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES* (2001).

⁷⁹ *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 652 (1963) (statement of Sen. Williams).

⁸⁰ See *Equal Employment Opportunity: Hearings on H.R. 405, 2999, 4031 and Similar Bills Before the H. Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 88th Cong. 31 (1963) (statement of Rev. Richard Allen Hilderbrand, President, New York City Branch, NAACP).

⁸¹ *Id.*

versus reaching hearts and minds: “We have seen this in so many areas where we know we can’t change the heart of man, the mind of man, but we can regulate his behavior. We have done it in the Armed Forces, and we have done it in many other areas.”⁸² Wilkins’s testimony also appeals to past experience with the success of prior civil rights measures—a theme to which I return below.

Despite the limits of using legislation to rectify a moral problem, proponents insisted that it was necessary to try to do so because proponents are “on the side of the angels,” however limited the effect of the legislation might be.⁸³ Others agreed that legislation “can help although it cannot do everything.”⁸⁴ Instead, “[r]eliance must be had in the ultimate analysis on individuals, their civic pride. You have to appeal to their morality. The people must do that which they feel is righteous.”⁸⁵

For example, Representative McCulloch, an author of the CRA and the ranking Republican on the House Judiciary Committee, stressed the difficulty of legislating in the field of “morals and the thinking and attitudes of human beings,” stating that any such legislation is “only a persuasion and a proper urging.”⁸⁶ He added: “I hope no one [will] get the opinion that this legislation would solve this most troublesome domestic problem facing this country, and it won’t.”⁸⁷

As these examples illustrate, proponents of the CRA acknowledged the difficulty of legislating morality, but they insisted upon the necessity of using law to bridge the gap between conscience and social practice. They distinguished the immediate, pragmatic goal of regulating and changing behavior and the longer-term goal of changing hearts and minds. Thus, Michigan Senator Philip A. Hart asserted that, while you cannot legislate morality, a civil rights law that applies to everyone will mean society will “get used to the idea and become accustomed to it, we will learn to live with it.”⁸⁸

⁸² See *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 656 (1963) (statement of Roy Wilkins, Executive Secretary, NAACP).

⁸³ See *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 252 (1964) (statement of Rep. William M. McCulloch, Ohio).

⁸⁴ *Id.* at 184 (statement of Rep. Emanuel Celler, New York).

⁸⁵ *Id.*

⁸⁶ *Id.* at 246 (1964) (statement of Rep. William M. McCulloch, Ohio); *id.* at 207-08. President Kennedy said of McCulloch’s support for the CRA, “Without him it can’t be done.” See *Advocate for Civil Rights*, WILLIAM M. MCCULLOCH, <http://www.williammcculloch.org/advocate.html>, archived at <http://perma.cc/R5EX-NP9J> (last visited Feb. 9, 2015).

⁸⁷ *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 246-47 (1964) (statement of Rep. McCulloch).

⁸⁸ *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 183 (1963) (statement of Sen. Philip A. Hart, Michigan).

He elaborated: “[Y]ou can learn from a law that requires you to expose yourself to something which you think you will find disagreeable.”⁸⁹

D. *The Appeal to Experience and Common Sense: What Law Can Do*

Many legislators and witnesses also pointed to “experience” to show that when laws prohibit discriminatory conduct, behavior changes, and sometimes attitudes also change. The testimony on this point parallels the rejoinder by Allport and other social scientists to the proposition that “stateways cannot change folkways” and that law will only succeed after social and cultural change. For example, Richard Bennett, Chairman, Community Relations Division, American Friends Service Committee, Philadelphia, pointed to experience with other antidiscrimination laws to stress the impact of regulating behavior on eventual attitudinal change:

People say you cannot legislate morality. However, laws do control behavior and uphold rights. In the process of acting without discrimination, people’s attitudes change. Further, experience has shown the difference between how people say they will act in advance of some proposed change in hiring or housing or school patterns and what they actually do—when the change comes. Anticipated overt actions do not in most cases materialize.⁹⁰

Bennett offers no citation for this appeal to experience, but his statement is similar to Allport’s discussion about the difference between people’s anticipated reaction to a changing policy to end discrimination and what they actually do.⁹¹ Allport described experience with state and local equivalents of the federal FEPC, observing that, “if employers and customers are *asked* in advance, they often give verbal objections to working with, or being served by, certain minority group members. But it turns out that when equality is practiced, there is little objection.”⁹² Indeed, experiments indicate that often “there is not even any awareness that change has taken place.”⁹³

Allport concludes that experience with new antidiscrimination laws has brought a “new insight” about the handling of prejudice: “It turns out that few employers are confirmed in their prejudices; they are merely following what they assume to be accepted folkways. They are cooperative when they are

⁸⁹ *Id.* at 184.

⁹⁰ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1985-86 (1963) (statement of Richard Bennett, Chairman, Community Relations Division, American Friends Service Committee, Philadelphia, PA).

⁹¹ ALLPORT, *supra* note 17, at 466-67.

⁹² *Id.* at 466.

⁹³ *Id.* at 466-67 (describing an experiment conducted in large department store in New York where “a Negro and white clerk worked side by side”).

assured that customers, employees, and the law prefer, or at least expect, a condition of no discrimination to prevail.”⁹⁴

The Senate Report on Title II, the public accommodations bill, also noted this dynamic and the gap between predictions of resistance and actual experience once the law passes:

It is, moreover, clear that where desegregation in public establishments has been achieved either by community biracial efforts or legislation or ordinance, it has been done without the adverse economic results that had been forecast by its opponents. Richard Marshall, an attorney of El Paso, Tex., advised the committee by letter of the actual experience in his city with a public accommodations statute similar to S. 1732. . . .

Many of the theaters and restaurants welcomed with relief the passage of the ordinance, since they had the force of law behind their natural desire to serve all patrons without causing arguments on their business premises. I do not think that even the most fervent 1962 opponents of the ordinance among the restaurants and hotel people would today be able to state that this legislation had either harmed their business, taken any of their property or profits from them, deprived them of any of their liberties, or created any super police power in the community.⁹⁵

As economic historian Gavin Wright has detailed, by the 1960s, “most laws requiring segregation had been repealed,” so that it was the fear of loss of business and white customers that “was repeatedly expressed” in resistance to integration and the persistence of discriminatory folkways.⁹⁶ Wright’s study of the actual effects of the CRA finds a similar dynamic to that identified in the Senate Report, in which feared economic ruin failed to materialize and integration proved to be beneficial for businesses.⁹⁷

For many proponents of the CRA, successful experience with state FEPCs and public accommodations laws provided reason to predict a federal law would succeed. For example, New York Senator Jacob K. Javits asserted: “We have the valuable precedents of the many States and individual businesses having had experience” with FEPCs, “including, with the Supreme Court decision in the *Airplane* case that a State FEPC law applies even to interstate commerce, industry in interstate commerce, and I think the situation has mounted to the point where, in a social sense, we are ready for a Federal FEPC.”⁹⁸

⁹⁴ *Id.* at 466.

⁹⁵ S. REP. NO. 88-872, at 21-22 (1964).

⁹⁶ See GAVIN WRIGHT, *SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH* 76-77 (2013).

⁹⁷ Wright argues that the CRA brought about a process of “collective coevolutionary learning” as businesses learned that white customer reaction was not as severe as feared, and white customers learned desegregation was “not as bad as they had feared.” *Id.* at 101.

⁹⁸ See *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H.*

Experience with FEPC legislation also featured in rejoinders to the argument that Congress could not legislate morality. For example, James Farmer, National Director of the Congress of Racial Equality (“CORE”), testified about the fact that, while about half the states had laws banning employment discrimination, more than half did not.⁹⁹ He elaborated: “There is also a notion about our not being able to legislate morality and therefore we should not try to have an FEPC that springs from the view that the employer has the right to choose his employees also.”¹⁰⁰ Farmer countered that while “an employer like any other American does have a legal right to his prejudices,” that right must be must be cabined where “those prejudices [are allowed] to [en]danger other citizens or to [en]danger the Nation.”¹⁰¹ Farmer offered vivid analogies to drive home the rightful role of law in limiting the ability to act on prejudice:

I have a right to dislike a man, I have a right to hate him, legally; perhaps morally I don't. I have a legal right even to wish him dead, but I don't have a legal right to kill him. The State then steps in and says, “This you must not do,” so an employer if providing jobs in the job market does not have a right to allow whatever prejudices he may have to keep other American citizens from earning a living in keeping with their ability, their qualifications, and their training, so that business is not private property in the sense that a man's home is. The businessman and the union both have a public responsibility. They are not only producing goods and services but they are also providing jobs in the job market.¹⁰²

Experience with state and municipal public accommodation laws also featured in support for the CRA and the many effects that antidiscrimination law could have on conduct and even attitudes. For example, Karl F. Rolvaag, Governor of Minnesota, pointed to experience with Minnesota's public accommodation law to counter the argument that tourism and business would suffer if public accommodations were covered by a federal law:

We have made our public accommodations law and the actions known throughout the country. And, as I pointed out, put this on the face of every roadmap that is published by the State of Minnesota, by our highway department: “Minnesota provides full and equal enjoyment of all places of public accommodation and amusement under statute 327.09 to all persons of every race, religion, and national origin.” It is well-known.

Comm. on the Judiciary, 88th Cong. 969 (1963) (statement of Sen. Jacob K. Javits, New York).

⁹⁹ See *Equal Employment Opportunity: Hearing on S. 773, S. 1210, S. 1211, and S. 1937 Before the S. Subcomm. on Emp't and Manpower of the Comm. on Labor and Public Welfare*, 88th Cong. 219-20 (1963) (statement of James Farmer, National Director, Congress of Racial Equality).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

We have had no problems with the general public acceptance. It has caused no problems as far as our tourist industry is concerned. It is thriving. It is healthy. And we feel it is a good public act. . . . Our tourist business this year is 100 percent up over what it was last year in most areas of our State.¹⁰³

Pennsylvania's successful experience with its public accommodations law (which dated back to 1887) also featured as evidence that federal legislation could be successful.¹⁰⁴ Thus, Pennsylvania Representative William S. Moorhead declared: "I think that the experience we have had in Pennsylvania shows that I am not proposing a racial Armageddon for my southern friends."¹⁰⁵

Nelson A. Rockefeller similarly testified about New York's "highly successful experience . . . in the application and administration" by its State commission for human rights of its public accommodations law.¹⁰⁶ Rockefeller explained that the implementation process, similar to that for the employment discrimination law, was that, immediately following the passage of the law, the commission "initiated a statewide educational program" and "held a series of public meetings with leaders representing business, industry, the clergy, labor, and community organizations in all major cities and communities throughout the State."¹⁰⁷ Some witnesses testified that the passage of a state or local public accommodations law was, in itself, "educational . . . for many people who had discriminated before" because it "reflected a will of the community."¹⁰⁸ Other witnesses cautioned that merely passing an employment discrimination or public accommodations law would not be enough "to close the gap between the principle and practice of nondiscrimination."¹⁰⁹ Appealing to Michigan's experience with its public accommodations law, Governor George Romney

¹⁰³ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1117-18 (1963) (statement of Hon. Karl F. Rolvaag, Governor of Minnesota).

¹⁰⁴ See *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1745 (1963) (statement of Mayor Joseph M. Barr, Pittsburgh, PA).

¹⁰⁵ *Id.* at 1750 (statement of Rep. William S. Moorhead, Pennsylvania).

¹⁰⁶ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1175-77 (1963) (statement of Governor Nelson A. Rockefeller, New York).

¹⁰⁷ *Id.*

¹⁰⁸ See *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1148 (1963) (statement of Edmond F. Rovner, Civic Affairs Director, International Union of Electrical Workers, AFL-CIO).

¹⁰⁹ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1179 (1963) (statement of Gov. George Romney, Michigan).

stressed the importance of “firm enforcement” to back up the law.¹¹⁰ The Japanese-American Citizens League similarly testified about the critical need for effective enforcement once “the legal conduct is set down as the standard of the community;” it added that, “Our experience has taught us that once compliance becomes the accepted and automatic order, the tensions and questions of the transitional stage pass away.”¹¹¹

Some witnesses drew parallels (although not perfect analogies) between stages in the labor movement and in the civil rights movement with respect to the path toward adopting legislation. For example, Tyler sketched a trajectory from “unparalleled” violence to recognition of unions to a recognition of rights, bringing with it “growing respect and a growing sense of responsibility on both sides,” such that differences between labor and management could be “expressed in debate and adjudicated through peaceful settlement.”¹¹² This path from violence to peaceful adjudication resonates with Robert Kennedy’s statement (quoting President Kennedy) that the civil rights bill would move the problem “out of the streets and into the courts.”¹¹³

Some supporters of the CRA foresaw a day when federal civil rights law might not even be necessary, as people would have internalized its standards. In striking testimony, Walter P. Reuther, UAW President, called upon Congress to strengthen the civil rights bill under debate; he envisioned passage of a strengthened bill as a step toward a sunset for civil rights law, when Americans had so internalized the law’s ideals that the civil rights law itself would not be necessary:

Someday there will be a Federal code of civil rights which will protect every American, from birth to death, against discrimination in voting, in housing, in education, in employment, in public accommodations. Such a legal code of racial security will be the fulfillment of the promise of our

¹¹⁰ *Id.*

¹¹¹ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 2529 (1963) (statement of the Japanese-American Citizens League).

¹¹² *Id.* at 1968-70 (1963) (statement of Gus Tyler, Assistant Pres. of the Int’l Ladies’ Garment Workers’ Union).

¹¹³ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 22 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States). Specifically, President Kennedy warned that:

We face, therefore, a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.

President John F. Kennedy, *Report to the American People on Civil Rights*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (June 11, 1963), http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx, archived at <http://perma.cc/JFR6-3P53>.

forefathers [in the Declaration of Independence] that all men are in fact equal beings. Someday, after this code has been accepted by all American, prejudice will end and the code will fall into disuse. Such a code of civil rights will have set a standard of conduct that will make fair practices in all walks of life not only a rule of conduct but a condition of mind and of heart.¹¹⁴

For Reuther, the ideal trajectory would be from regulating conduct to providing an internal rule for hearts and minds.¹¹⁵

E. *Leaving Room for Choice in Social Relations*

In her contribution to this symposium, Professor Robin Fretwell Wilson details the various justifications offered for the “Mrs. Murphy exemptions” to the CRA, including associational rights, privacy, and simply political expediency.¹¹⁶ As Wilson observes, “everyone understood that the fictional Mrs. Murphy was a bigot,” who rejected would-be tenants solely due to race.¹¹⁷ As noted above, Attorney General Robert F. Kennedy insisted that “the arbitrary and immoral logic of bigotry” underlying refusals of service by “privately owned public service enterprises” must yield to “the need for this country to live up to its ideals.”¹¹⁸ In hearings about the public accommodations law, Kennedy was asked “on what legal . . . and moral grounds” he justified the “Mrs. Murphy roominghouse exception.”¹¹⁹ He defended the exemption on the ground that, although the civil rights law was legislating morality, government was not “attempting to become involved in social relationships.”¹²⁰ He elaborated that public accommodations law did not affect those “who own small rooming houses and live on the premises themselves and just have a few rooms to rent” because “it becomes virtually a social operation.”¹²¹

¹¹⁴ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States before Subcomm. N. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1940 (1963) (written testimony of Walter P. Reuther, President, UAW).

¹¹⁵ This idea of internalizing law is evocative of the passage in Deuteronomy that refers to the religious person having the law before their eyes and written in their hearts. *See Deuteronomy* 11:18 (King James) (“Therefore shall ye lay up these my words in your heart and in your soul, and bind them for a sign upon your hand, that they may be as frontlets between your eyes.”).

¹¹⁶ Wilson, *supra* note 9, at 973.

¹¹⁷ *Id.*

¹¹⁸ See text accompanying notes 55-56.

¹¹⁹ *See Civil Rights: Hearings on H.R. 7152 as Amended by Subcomm. No. 5 Before the H. Comm. on the Judiciary*, 88th Cong. 2700 (1963) (question by Mr. Poff).

¹²⁰ *Id.* at 2700 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

¹²¹ *Id.*

II. ARGUMENTS AGAINST “LEGISLATING MORALITY” THROUGH THE CIVIL RIGHTS LAW

In this Part, I explicate several lines of argument that opponents of the CRA offered bearing on the issue of legislating morality and on the appeal to conscience to justify a federal civil rights law. First, opponents warned against trying to change human nature as well as laws of nature. Some appealed to God as a “segregationist” who separated the races. Second, they asserted that differences between the races were a reason not to force associations between them. At the same time, they rejected integration and warned of harms from inevitable race mixing. Much of this testimony reveals continuing opposition to *Brown v. Board of Education*, which held “separate but equal” in education was unconstitutional.¹²² Arguments about the impact of integration on children also indicate the appeal to parental prerogatives to preserve segregation. CRA opponents argued that the proper way to overcome prejudice was for racial minorities to build their own support network of businesses, schools and social institutions to change their social situation. Third, they invoked freedom of choice and association as well as rights of private property. Fourth, a different objection was that, to the extent discrimination was a problem, state and local governments knew better how to address it. Opponents pointed to Prohibition as a cautionary tale of a failed attempt by the federal government to legislate morality, leading to ineffective enforcement and returning the issue to the states. They drew different inferences than supporters of the CRA about the experience of localities and states with antidiscrimination laws. Fifth, they accused proponents of integration of being hypocrites who lived insulated and segregated lives but who were willing to force integration on poorer white Americans.

A. *Forced Integration Would Violate Natural Law and Nature and Lead to Harmful Mixing; Parallel Societal Structures Are the Better Path*

Opponents of the CRA contended that America would face drastic social consequences if Congress forced integration and forms of social mixing. Such attempts to achieve social change would fundamentally harm the societal structures of both black and white societies. Opponents appealed to the “natural law” and to racial difference. They also argued that the proper way to overcome prejudice was for racial minorities to build their own support network of businesses, schools, and social institutions to change their social situation.

Opponents of the CRA attributed segregation to “natural law,” which, they claimed, underlies freedom of associations. Thus, North Carolina Senator Sam Ervin stated:

¹²² 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

I think that people segregate themselves in society on the basis of race in obedience to a natural law which is that like people seek like people, and I think one of the most precious rights of all Americans, of all races, is the right to be allowed to select their own associates and associates for their immature children.¹²³

Ervin argued that the goal was not to force racial co-habitation, but instead to

provide the opportunity for each American, Negro or white or oriental or any other kind, to have free access and free opportunity to move wherever his talents, his ability, his money, and his tastes will permit him to go, within the rights of other people to live their lives as they want to do so.¹²⁴

Some opposition to the CRA shows the continuing opposition to integration of public schools. J. C. Chambers, of the Los Angeles City Board of Education, argued for “providing the proper educational opportunities” for each racial group rather than “indiscriminate mixing of people.”¹²⁵ Mississippi Governor Ross Barnett warned of the negative consequences of racial mixing: “Senator, frankly I don’t [think] they ought to integrate in the schools. They start dancing together, playing together, now and then intermarriage between the Negroes and the whites, and it has never worked in any country. It has always ended up in a mongrel race, if it is practiced long enough and extensively enough.”¹²⁶ This fear of a mongrel race was a frequently repeated defense of antimiscegenation laws, including in the Virginia Supreme Court’s opinion in *Naim v. Naim*,¹²⁷ an opinion later endorsed by reference by the Virginia Supreme Court in *Loving v. Virginia*.¹²⁸

Opponents of the CRA entered into the Congressional record two pre-*Brown* court cases, which rooted segregation in education in “the white race” seeking to avoid the danger of jeopardizing the “purity” of each race due to racial

¹²³ See *Civil Rights Commission: Hearings on S. 1117 and S. 1219 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 41-43 (1963) (statement of Sen. Sam J. Ervin, North Carolina).

¹²⁴ *Id.*

¹²⁵ See *Racial Discrimination in Federally Assisted Educ. Programs: Hearing on H.R. 7771 Before the Select Subcomm. on Educ. of the H. Comm. on Educ. and Labor*, 88th Cong. 45-55 (1963) (statement of J. C. Chambers, Member, Los Angeles City Board of Educ.).

¹²⁶ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 394-96 (1963) (statement of Gov. Ross Barnett, Mississippi).

¹²⁷ 87 S.E.2d 749 (Va. 1955).

¹²⁸ 147 S.E.2d 78, 82 (Va. 1966), *rev’d*, 388 U.S. 1 (1967) (“Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case.”).

intermixing and mingling and daily association, including “social intercourse and social equality.”¹²⁹ Dr. Kuttner of Liberty Lobby asserted another problem with this mixing: when forced integration in schools occurs, there is “white resentment, the white parent feeling that his child is mixing with people who might reveal standards of behavior which are unacceptable perhaps by the white parents.”¹³⁰ In this statement, dangerous mixing includes not only the threat to racial purity through intermarriage, but also the threat posed by different social or behavioral norms. On the first threat, Kuttner pointed to marriages by prominent “Negro leaders” to “white” wives both to suggest the harm that integration could have on “Negro society” and to warn of the desire of such minority leaders to marry across racial lines as a “sign of success” and “to mingle very intimately in white society.”¹³¹

Some opponents of the CRA appealed to natural differences to support an idea of parallel, but equal societies, while others clearly linked difference with moral or other inferiority. Parallel social structures promote harmony, they argued; forced integration, the opposite. Thus, C. Maurice Weidemeyer, Delegate to the Maryland General Assembly, asserted:

I do not think this country can survive integrated. Many great nations that started out with the same foundation of resources and the same human beings, with the same capabilities, have not progressed to that extent. Why? Because they started about the same time as this Nation, and they fostered integration.¹³²

Louisiana Representative Joe D. Waggoner argued that due to civil rights legislation, “[t]he races have been pitted against each other and Americans, Negro Americans and the white Americans as well, have been divided as a result of this agitation.”¹³³

A related idea was that parallel social structures are preferable and that any advancement in racial progress will come from self-improvement by racial minorities within their parallel structures. Thus, in addition to opposing integration, Weidemeyer also argued that minorities have the ability to correct

¹²⁹ See *Civil Rights Commission: Hearings on S. 1117 and S. 1219 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 416-17 (1963) (reading into record *Gong Lum v. Rice*, 275 U.S. 78 (1927) and *Briggs v. Elliott*, 103 F. Supp. 920 (E.D. S.C. Charleston 1952) (reporting testimony that “the only practical way of conducting public education in South Carolina is with segregated schools”)).

¹³⁰ See *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1968-70 (1963) (statement of Dr. Kuttner, Representative of Liberty Lobby, Washington, D.C.).

¹³¹ *Id.*

¹³² See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 584 (1963) (statement of C. Maurice Weidemeyer, Delegate to the Maryland General Assembly).

¹³³ *Id.* at 1572 (statement of Rep. Joe D. Waggoner, Louisiana).

“injustices” by catering “to their own people.”¹³⁴ Opposing the public accommodations law, he asserted:

The privileges and accommodations which the proponents of this measure contend are denied to Negro citizens are not denied to them at all, because they have the same opportunity to go into business and to conduct a hotel or restaurant or other types of businesses, just as much as any other citizens who have previously done so.¹³⁵

Opponents testified that, if integration is forced, businesses will thus be deprived of their ability to “recognize a Greek for a Greek, and an Italian for an Italian and an Irishman for an Irishman.”¹³⁶ Restaurateur John G. Vonetes elaborated: “When I meet a colored person, not in my business, when they come into my door, I shake. Whether that is a movement of conscience or something else, the excitement or anything, I am not in a position to say on this business of conscience. I say, I am sorry that we have to differentiate.”¹³⁷

The notion that forcing integration, rather than segregation, harmed African Americans by “brand[ing]” them as “inferior” was a theme in Governor Wallace’s testimony.¹³⁸ Wallace attacked the *Brown* decision and its “message”: “I would like to say if I were a Negro I would resent the 1954 decision of the Supreme Court because that decision, in effect said, ‘You are inferior, and you cannot get a good education and you cannot develop unless you mix with whites.’”¹³⁹ Segregation, he insisted, far from being “synonymous with hatred,” was in the best interest of all parties.¹⁴⁰

B. *God as Segregationist and Author of Race Differences*

Some opponents of the CRA appealed to God as a segregationist, thus giving a divine root for the law of nature that forced integration defied. For example, Samuel J. Setta, Chairman of the Referendum Committee of Easton, Maryland and a “motel owner and operator” of a typical “‘Mom and Pop’ operation,” contested the Attorney General’s emphasis on the “immorality of discrimination,” countering with the immorality of a law that would destroy businesses by compelling people to deal with “the Negro socially.”¹⁴¹ Setta contended that neither Christianity nor Judaism had been able “to integrate” and that the “30 states” in the United States that have antidiscrimination laws

¹³⁴ *Id.* at 563-64 (statement of C. Maurice Weidemeyer, Delegate to the Maryland General Assembly).

¹³⁵ *Id.*

¹³⁶ *Id.* at 1079-80 (1963) (statement of John G. Vonetes, Restaurateur, Petersburg, VA).

¹³⁷ *Id.*

¹³⁸ *Id.* at 498 (statement of Gov. George C. Wallace, Alabama).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 587 (1963) (statement of J. Setta, Chairman, Referendum Committee of Easton, Maryland).

are “just as segregated as the 20 that don’t.”¹⁴² He explained that human laws compelling race mixing defied the law of nature rooted in God’s plan for the races:

You are bucking a law which was never enacted by any legislature when you pass a law like this, the law of nature. God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth, and if God didn’t see fit to mix people who are we to try it?¹⁴³

This passage vividly illustrates what Fay Botham calls the White Southern Protestant theology of race, where Biblical stories like God scattering the people after they built the Tower of Babel served to justify racial segregation—and bans on interracial marriage.¹⁴⁴ What is perhaps even more striking is that Setta goes on to find justification for segregation in the life of Jesus:

Christ himself never lived an integrated life, and although He knew His life on earth would be a model for all mankind, when he chose His close associates, they were all white. This doesn’t mean that He didn’t love all His creatures, but it does indicate that He didn’t think we had to have all this togetherness in order to go to heaven.¹⁴⁵

Setta concludes: “Gentlemen, we should give a lot of serious thought to these final remarks of mine and not try to outdo God in the makeup of the world.”¹⁴⁶

Another appeal to God as the author of racial difference was made by R. Carter Pittman, an attorney from Dalton, Georgia. One emphasis of his testimony was to establish the existence of race differences (including in brain size and IQ) that justified racial segregation.¹⁴⁷ Pittman argued that the “specious propaganda that all men are created equal, and that there are not such differences between whites and Negroes as are significant for education and social purposes underlies the entire integration movement,” and was the “foundation” for *Brown* and for S. 1732 (the public accommodations bill).¹⁴⁸ Pittman insisted the question was one of “difference,” not of “inferiority or superiority,” for questions about inferiority or superiority made sense only with respect to specific purposes: “Certainly the Negro is a superior prizefighter and

¹⁴² *Id.* at 589.

¹⁴³ *Id.*

¹⁴⁴ BOTHAM, *supra* note 12, at 148-57.

¹⁴⁵ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Congress 590 (1963) (statement of J. Setta, Chairman, Referendum Committee of Easton, Maryland).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 893 (statement of R. Carter Pittman, Attorney, Dalton, Ga.).

¹⁴⁸ *Id.* at 911.

is superior in other ways because God made him different.”¹⁴⁹ Pittman purported to illustrate with examples of “the same differences . . . throughout the animal kingdom,” concluding that: “We are going to have problems until the end of time, as Aristotle said, if you mix races. If you leave them apart there is no antagonism.”¹⁵⁰ Pittman also blamed communist agitators for seeking to “bring about racial animosity in this country.”¹⁵¹

A variant on the appeal to natural difference was that because of such differences, true equality is impossible and any civil rights legislation aimed at equality must fail. For example, Representative Waggonner argued that:

[H]uman nature teaches me that there never has been any such thing as equality within any one race and there never has been and never will be equality between different races, regardless of the different amount of legislation that you might place upon the lawbooks of this land and at the lowest level or at the highest level. It simply cannot be done.¹⁵²

C. *The Federal Government Fails When It Attempts to Legislate Morality*

As a threshold matter, opponents argued that it was not “the function of the Federal Government to regulate morality,” and it certainly did not have the power under the economic justification of the Commerce Clause.¹⁵³ They also argued that the federal government’s attempt to legislate morality would be ineffectual because such laws attempted to change human nature. Opponents frequently cited the federal government’s unsuccessful attempt during Prohibition to restrict the use of alcohol. As discussed in the next section, they also argued that, to the extent racial prejudice and discrimination were problems, addressing them was best left to state and local governments.

Opponents argued that legislating morality and moral principles were useless because human and individual choice are at the heart of eradicating racial discrimination. On this view, civil rights law will not be able to change human behavior. Thus, Louisiana Representative Gillis W. Long argued: “My people who have elected me to represent their views, say that they do not believe in this kind of law; they believe, as I do, that we cannot legislate morality or reason, and we cannot eliminate by injunction the conflicts of human nature.”¹⁵⁴

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 912. Pittman asserts, for example, that he once unsuccessfully tried to “train a rabbit dog and a bird dog together” and “ruined them both,” because “[t]hey were different.” *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1572 (statement of Rep. Joe D. Waggonner, Louisiana).

¹⁵³ See *Civil Rights—The President’s Program, 1963: Hearings on S. 1731 and S. 1750 Before the S. Comm. on the Judiciary*, 88th Cong. 40 (1963) (statement of Sen. Sam J. Ervin, North Carolina).

¹⁵⁴ *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 563 (1964) (statement of Rep. Gillis W. Long, Louisiana).

Opponents asserted that individuals must be able to make their own choices regarding morality without Congress imposing its own preferences. They challenged the propriety of Congress setting up a “nationwide standard which is, in large part, a standard of morality and human decency as to how the businessman must treat customers and prospective customers.”¹⁵⁵ As attorney Laurence H. Eldredge elaborated this objection, people have a right to be “unreasonable and nasty”:

I doubt that it is the function of law to impose such standards even where 75 percent of the nation strongly approves of the standard and its imposition. Unless we come to a welfare state, the other 25 percent have the right to remain free to be unreasonable and nasty if they can withstand the community condemnation which results.¹⁵⁶

Notable in Eldredge’s argument is recognition of the possibility of social, or communal, rather than legal pressure as a possible avenue of change. Along those lines, James J. Kilpatrick, Editor of the *Richmond News Leader* (and influential architect of opposition to *Brown*),¹⁵⁷ argued that Congress cannot change morality because:

[Y]ou go about it through the churches; you go about it through persuasion, through the ordinary arts of human relations, and that this is how things are corrected, with an occasional nudge here and there from economic pressure. You correct it by a sense of shame.¹⁵⁸

By contrast to Kilpatrick, supporters of the CRA believed (like Allport and other social scientists) that the “shame” about the gap between the American Creed and actual practice was one reason that Americans would—ultimately—embrace a strong civil rights law.

Like proponents of the CRA, opponents recognized the limits of law in changing hearts and minds, but this, for them, was a reason to reject the law entirely. Thus, Jack Lowery, an attorney from Louisville, Kentucky asserted:

The plain truth of the matter, as anyone knows who considers it, is that men cannot be forced to love and respect their fellow men by even the most stringent governmental edict. If moral changes could be effected so easily, let me assure this committee that I would be the first to applaud the enactment of such laws.¹⁵⁹

¹⁵⁵ See *Civil Rights—The President’s Program, 1963: Hearing on S. 1731 and S. 1750 Before the S. Comm. on the Judiciary*, 88th Cong. 235 (1963) (statement of Laurence H. Eldredge, lawyer).

¹⁵⁶ *Id.*

¹⁵⁷ See Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMM. 10 (1993).

¹⁵⁸ *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 428 (1963) (statement of James J. Kilpatrick, Editor of the *Richmond News Leader*).

¹⁵⁹ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of*

Lowery also pointed to racial “unrest” as evidence that “racial harmony cannot be achieved by governmental edict.”¹⁶⁰

Other opponents of S. 1732 stressed that legislating morality offended associational freedom. For example, “[i]t is not the proper function of Government to legislate for moral purposes” as it removes individuals’ “inherent right of self-determination of their associations.”¹⁶¹ South Carolina Representative Albert W. Watson argued that the public accommodations law has “exceedingly little to do with economics and is an outright attempt to legislate individual morality and private association. Of course, this is no field for the Federal Government.”¹⁶²

Some opponents countered the language of legislating morality by insisting that moral objections underlie attitudes toward African Americans. Thus, Samuel J. Setta, Chairman, Referendum Committee of Maryland, asserted: “The Negro people will gain acceptance when they meet certain standards of morality and living conditions. No law can accomplish this. This is the one objective the Negro will have to work for and earn himself.”¹⁶³

Opponents also countered assertions about the immorality of discrimination by stating that it is “just as immoral to enact laws which will legislate a man into bankruptcy or into a business relationship which will make his life a daily ordeal.”¹⁶⁴

Some opponents countered the idea that Congress was legislating based upon America’s conscience by refusing to “pass legislation on the basis of mob pressure.”¹⁶⁵

D. *Addressing Discrimination Should Be Left to State and Local Governments*

Opponents argued that civil rights is not an issue about morality but the rights of state and local governments to address a distinctly local problem. Opponents testified that even though “[t]he President has said the racial

Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 88th Cong. 2382-83 (1963) (statement of Jack Lowery, Esq.).

¹⁶⁰ *Id.*

¹⁶¹ *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 601 (1963) (statement of Edgar S. Kalb, Manager, Triton and Beverly Beaches, Maryland).

¹⁶² *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1714 (1963) (statement of Rep. Albert W. Watson, South Carolina).

¹⁶³ *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 587 (1963) (statement of Samuel J. Setta, Chairman, Referendum Committee of Maryland).

¹⁶⁴ *Id.*

¹⁶⁵ See *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 581 (1964) (statement of Rep. Albert W. Watson, South Carolina).

dilemma which confronts us is not confined solely to the South,” the people of the South would most acutely “feel the effects of this bill, if passed.”¹⁶⁶ Opponents insisted that the “problem” in the South was “qualitatively different” than in the North.¹⁶⁷ Representative Watson testified: “What happens to the innumerable establishments throughout the South such as public theaters, restaurants, and . . . fairs which will lose business as soon as integration occurs. . . . This will happen because the two races in the South (and in the northern cities) are separated by cultural and moral differences.”¹⁶⁸ This statement parallels earlier statements opposing school integration and other forms of mixing of white and black children because of supposed behavioral differences.¹⁶⁹

Opponents also argued that state and local rather than national solutions were the better path, since addressing racial problems at the local level would draw upon individualized knowledge. North Carolina Representative L. H. Fountain asserted:

All over my home State of North Carolina and throughout America, responsible local people of both races who are closest to the problem and, therefore, know what can and in due time must be done, are solving the problem with a spirit and a will, with courage, conviction, conscience, and with commonsense and judgment that cannot be legislated.¹⁷⁰

Another North Carolina legislator, Representative Basil L. Whitner, similarly asserted: “[I]t has been a privilege for me to have participated in programs and efforts on the local level which contributed to better race relations and opportunities for our Negro friends.”¹⁷¹ He predicted, by contrast, that “the legislation before us would breed further discontent and friction, rather than to eliminate it.”¹⁷² South Carolina Representative William Jennings Bryan Dorn asserted: “It is past time that we begin to talk about what we have accomplished in the field of race relations in the United States and the fantastic progress that we have made. We have a better record in race relations than any other country in the world with a similar problem.”¹⁷³ But he also asserted that

¹⁶⁶ See *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1705 (1963) (statement of Rep. Albert W. Watson, South Carolina).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1713-14.

¹⁶⁹ See *supra* text accompanying notes 130-131.

¹⁷⁰ See *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 602 (1964) (statement of Rep. L. H. Fountain, North Carolina).

¹⁷¹ *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 459 (1964) (statement of Rep. Basil L. Whitner, North Carolina).

¹⁷² *Id.*

¹⁷³ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1596 (1963) (statement of Rep. William Jennings Bryan Dorn, South Carolina).

states were the vehicle of progress.¹⁷⁴ Dorn contended that although there were repeated calls for a federal civil rights law to address lynching, none was passed; instead, “this crime was eliminated by the States, the local communities, and the people of this Union—completely eliminated.”¹⁷⁵ This proved, he concluded, that “with legislation of this nature, it is best handled at the local and the State level.”¹⁷⁶

Opponents to the CRA who stressed that the problem of civil rights must be solved at the local and state levels appealed to federalism, claiming that the bill would result in an expansion of the Federal Government over the rights of the States without solving the problem. Illustrative is this statement by Representative Long:

I am here to plead for recognition of a danger within this legislation of an unwarranted and alarming extension of the Federal Government into realms never before charted—of creating unenforceable laws that can only perpetuate bureaucracy and do little to solve the basic problems involved in the struggle over civil rights. This bill has been called an omnibus bill. I would prefer to call it omnivorous.¹⁷⁷

Because of the distinctly local knowledge required to address delicate social problems, opponents argued that the issues underlying the CRA are not about morality but instead are about ensuring the essential balance between State and Federal governments.

South Carolina Representative Albert W. Watson expressed doubt that “the passage of a law here on the national level will solve this particular problem[;]” he contended: “I think that we are doing a disservice to those we purport to help, as we would lead them to believe that we can solve this very delicate racial problem with a wave of the magic, legislative wand.”¹⁷⁸

In arguing against Congress’s ability to regulate morality with respect to segregation, opponents of the CRA analogized it to the prior failure of national Prohibition laws, enacted “in years of hysteria about drinking.”¹⁷⁹ Mississippi Representative William M. Colmer observed that, “we got everybody all stirred up and we passed a national prohibition law,” and then “turned around and repealed it,” because “we recognized that we could not legislate on the question of temperance.”¹⁸⁰ South Carolina Representative W. J. Bryan Dorn

¹⁷⁴ *Id.*

¹⁷⁵ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1573-74 (1963) (Statement of Hon. W. J. Bryan Dorn, Rep., South Carolina).

¹⁷⁶ *Id.*

¹⁷⁷ See *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 563 (1964) (statement of Rep. Gillis W. Long, Louisiana).

¹⁷⁸ *Id.* at 579 (statement of Rep. Albert W. Watson, South Carolina).

¹⁷⁹ *Id.* at 170 (statement of Rep. William M. Colmer, Mississippi).

¹⁸⁰ *Id.*

similarly asserted: “We had an unfortunate experience with prohibition which was a moral question. Finally, after a few years, it was decided that the Federal Government couldn’t handle it, and it must be returned to the States. This was done in 1933, and I think wisely so.”¹⁸¹ Opponents argued that, like Prohibition, attempts to legislate racial issues would also fail. Thus, Representative Colmer drew the parallel:

You cannot legislate successfully in this field any more than you could in national prohibition that you opposed so much. You are attempting to tell people how they have to treat their fellow man in their social, economic, and other contacts with him. You know and I know and everybody in this room knows that you cannot do it that way.¹⁸²

W. Franklin Morrison, Executive Vice President, First Federal Savings & Loan Association, similarly asserted: “Now, any such legislation, which tries to legislate social progress, or force a situation, is liable to have the same fate as the prohibition amendment.”¹⁸³

Opponents also pointed to Prohibition as a “classic” cautionary tale of “an ill-fated effort on the part of the Federal Government to legislate morals,” which, led the federal government, “[a]fter a sad experience with Federal enforcement,” to “admit failure and return the problem to the States.”¹⁸⁴ Thus for opponents, Prohibition served as proof that Congress should not attempt to regulate morality and instead the solutions to civil rights problems must be determined by local and state governments based upon individual and local experience.

Opponents of the CRA also rejected the arguments made by supporters of the CRA that experience with state and local antidiscrimination laws was predictive of the success of a strong national law. Some opponents predicted that federal antidiscrimination laws in employment would be ineffectual based upon the experience of the ineffectiveness of various state FEPC laws, as evidenced by reports of how employers and employment agencies find ways to

¹⁸¹ *Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 1573-74 (1963) (statement of Hon. W. J. Bryan Dorn, Rep., South Carolina).

¹⁸² *See Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 170 (1964) (statement of Rep. William M. Colmer, Mississippi).

¹⁸³ *Equal Employment Opportunity: Hearings on H.R. 405, 2999, 4031 and Similar Bills Before the H. Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 88th Cong. 308-09 (1963) (statement of W. Franklin Morrison, Executive Vice President, First Federal Savings & Loan Association).

¹⁸⁴ *See Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1595 (1963) (statement of Rep. William Jennings Bryan Dorn, South Carolina).

work around them and violate the law.¹⁸⁵ Why presume, they asked, that a federal FEPC would be any more effective?

E. *Proponents of Integration Are Hypocrites Who Live Insulated and Segregated Lives*

Finally, opponents of the proposed civil rights law characterized supporters of the law and of integration as hypocrites who lived insulated and segregated lives and sought to force integration on poor white people and the common man and his family. For example, R. Carter Pitman, an attorney from Dalton, Georgia, asserted: "Wealth and political power are great insulators. Race mixing in daily life is only for the poor. It is not for the hypocritical plutocrat. A show of race mixing is for the rich and powerful, but never the real thing."¹⁸⁶ In particular, he attacked the exemption in the public accommodations bill as "a carefully devised rathole for those who spend their time preaching integration for the poor whites, while philosophizing about it over cocktails within the segregated shelters of exempt clubs."¹⁸⁷ He added: "It is improbable that any man who had anything to do with the preparation of this bill or who sponsors it now either lives in a 10-percent integrated neighborhood or sends his children to a school where Negro children constitute as much as 10 percent of the enrollment."¹⁸⁸

CONCLUSION: PRESENT-DAY IMPLICATIONS OF THE "LEGISLATING MORALITY" DEBATE

The aim of this Article was to examine arguments made that Congress could and should legislate morality by passing the Civil Rights Act of 1964 and, in doing so, close the disturbing gap between American ideals and race relations in the United States. I have highlighted that proponents of the CRA appealed to conscience, predicting that people of good conscience would welcome a strong national law. I have suggested that these themes in the congressional debates over the CRA resonate with those found in the social science studies of prejudice in the post-World War II era, which built on

¹⁸⁵ See *Nation's Manpower: Hearings Relating to the Training and Utilization of the Manpower Resources of the Nation Before the S. Subcomm. on Emp't and Manpower of the Comm. on Labor and Pub. Welfare*, 88th Cong. 771, 772-773 (1963) (describing results of a telephone survey conducted in six cities, in February 1963, by teams of members of the American Jewish Congress. "The caller, without revealing his or her identity, asked whether the agency could provide a 'white Protestant stenographer.'" The result of the survey found that many agencies accepted the order, and the various agencies likewise acknowledged that they were aware of the illegality of their actions).

¹⁸⁶ See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 901 (1963) (statement of R. Carter Pittman, attorney, Dalton, Georgia).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Myrdal's identification of the sharp conflict between American ideals and prejudice.

I have also looked at that social science literature to illustrate that social scientists took the problem of prejudice, and, particularly, of bigotry, seriously. They sought to understand the nature and dimensions of prejudice as well as what role law might play in reducing prejudice. They considered the role of conscience in triggering emotions like shame that could bring about a reduction in prejudice and discrimination. They considered the impact of social contact on terms of social equality on people's attitudes. Discriminatory laws limited the possibility of such contact, while antidiscrimination laws could help create new "folkways" allowing such contact in different spheres of society. Again, there are interesting parallels in debates over the CRA. Legislators and witnesses appealed to practical experience with local and state antidiscrimination initiatives and predicted that a strong civil rights law could change behavior, if not hearts and minds, but might eventually change attitudes as well.

Opponents of the CRA, I have shown, countered that Congress should not attempt to legislate morality and would fail if it did so. Far from viewing the CRA as bridging the gap between conscience and practice, they contended that the CRA enacted a controversial morality and that its agenda of "forcing" integration was contrary to nature, to God's own design, and to social harmony and racial progress. It is worth stressing the appeal to natural law and divine law in this opposition, since, in present-day arguments about the proper scope of civil rights laws, those who seek religious conscience-based exemptions bristle at the notion that religiously-based resistance to racial integration is of any relevance to present-day controversies. Given the frequency with which the terms "bigot" and "bigotry" appear in present-day battles over civil rights and, particularly, the evident clash between religious liberty and marriage equality, a more complete study of that social science literature could be illuminating. Social scientists such as Allport studied the role of religion both in "making" and "unmaking" prejudice and pointed out that religious bigotry and prejudice, as a historical matter, have been more predominant than racial prejudice.¹⁸⁹ Although some contend that the label of "bigot" serves as a conversation stopper in present-day discourse about religious liberty and antidiscrimination law, one could counter that discussions about conscience and bigotry sometimes treat the appeal to religion as a conversation stopper in the sense that any sincere belief must be accommodated and is wholly distinct from the bigoted views of the past. A more complete appreciation of the literature about prejudice would aid in making sense of these controversies and finding peaceful resolutions. These are topics I leave for future work.

Finally, it would be fruitful to consider how earlier debates about civil rights law as appropriately or inappropriately "legislating morality" compare to

¹⁸⁹ See ALLPORT, *supra* note 17, at 444-57 (discussing relationship between religion and prejudice).

present-day understandings about the legal enforcement of morality. Robert F. Kennedy insisted that discrimination in public accommodations law, for example, was “morally offensive” and that the nation living up to its ideals through passing a public accommodations law overrode “the arbitrary and immoral logic of bigotry.”¹⁹⁰ What do “moral” and “immoral” mean in that context? Is the CRA an example of Congress legislating *political* morality and expressing moral disapproval of discrimination? Is the Defense of Marriage Act (“DOMA”), by contrast, an example of legislating *sexual* morality and expressing moral disapproval of a sexual minority? Does that distinction make a constitutional difference after *Romer v. Evans*,¹⁹¹ *Lawrence v. Texas*,¹⁹² and *United States v. Windsor*?¹⁹³ Arguably, *Windsor* addressed the legal enforcement of morality in two distinct ways. First, while Congress justified DOMA by furthering a moral conviction about heterosexuality and traditional marriage and signaling moral approval of homosexuality, Justice Kennedy read this as constitutionally impermissible disapproval of a class—same-sex couples lawfully married under state law.¹⁹⁴ At the same time, in describing New York’s “evolving understanding of the meaning of equality” in marriage,¹⁹⁵ leading it, after a “statewide deliberative process, to “correct” what they now perceived “to be an injustice that they had not earlier known or understood”¹⁹⁶ by enacting the Marriage Equality Act, Justice Kennedy arguably is recounting moral progress in the sense or realization of important ideals of political morality.

It is important not to avoid facile analogies between the enactment of the CRA and present-day struggles for LGBT rights. Nonetheless, the question of the different meanings of “legislating morality” is worth pursuing. The CRA, in prohibiting discrimination, attacked a moral evil and expressed moral values, commitments, and ideals. Contemporary antidiscrimination law also legislates morality in the sense of expressing moral values and commitments.¹⁹⁷ Supporters of the CRA, similar to social scientists studying

¹⁹⁰ See *supra* text accompanying notes 55-56.

¹⁹¹ 517 U.S. 620 (1996) (holding that an amendment to Colorado’s state constitution preventing state and local governments from creating protected statuses based on sexual orientation was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment).

¹⁹² 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and finding that sodomy laws violate the Fourteenth Amendment).

¹⁹³ On this question, see generally Linda C. McClain, *From Romer v. Evans to United States v. Windsor, Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL’Y 351 (2013).

¹⁹⁴ *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

¹⁹⁵ *Id.* at 2692-93.

¹⁹⁶ *Id.* at 2689.

¹⁹⁷ On this point, see Chai Feldblum, *Moral Conflict and Conflicting Liberties, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, supra* note 8, at 123, 130-135.

prejudice, predicted that a law that bridged the gap between conscience and practice would gain support, even if there was initial resistance. Today, in the context of LGBT rights, “conscience” more typically features in opposition to antidiscrimination laws that allegedly reach too far. On the other hand, the rapidly growing acceptance and approval of same-sex marriage suggests that, for some people, aligning law with “conscience” may be a reason for that shift.