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UNITED STATES**

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**INVOLUNTARY SERVITUDE, PUBLIC
ACCOMMODATIONS LAWS, AND THE LEGACY OF
*HEART OF ATLANTA MOTEL, INC. v. UNITED STATES***

LINDA C. McCLAIN*

I. INTRODUCTION

In this Article, I look at two contrasting ways in which arguments about the Thirteenth Amendment's declaration that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" featured in the enactment of Title II of the Civil Rights Act of 1964¹ and in *Heart of Atlanta Motel, Inc. v. United States*,² the case in which the United States Supreme Court upheld the Act. First, the Thirteenth Amendment's prohibition of involuntary servitude makes a brief appearance in *Heart of Atlanta Motel* as an unsuccessful basis on which the motel owner challenged Title II.³ A similar claim arose in Congress when some lawmakers argued that the Thirteenth Amendment posed an "insurmountable constitutional barrier" to a federal public accommodations law because it compelled service.⁴ The second role played by the Thirteenth Amendment (barely discernible in *Heart of Atlanta Motel* but more evident in the congressional debates over Title

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*Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. This Article grew out of a paper I presented at the the 2011 Maryland Constitutional Law Schmooze on the Thirteenth Amendment, held on February 25 & 26. Thanks to organizer Mark Graber and to participants for helpful comments, and, in particular, to Garrett Epps and Rebecca Zietlow for pointing me toward additional research sources. I am also grateful to Joseph Singer for insightful comments. Stefanie Weigmann, Head of Legal Information Services, Pappas Library, and BU law students Darian Butcher and Hallie Marin provided valuable assistance with research. Comments are welcome: lmcclain@bu.edu.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (codified at 42 U.S.C. §§ 2000a-a6 (2006)). For a detailed account of the legislative debates and political struggles that preceded the passage of the Civil Rights Act of 1964, and Title II, in particular, see THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert D. Loevy ed., 1997); CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

2. 379 U.S. 241 (1964). The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

3. *Heart of Atlanta Motel*, 379 U.S. at 261.

4. S. REP. NO. 88-872, at 53 (1964) (Individual Views of Senator Strom Thurmond).

II) was as a constitutional base for a public accommodations law because denial of service on the basis of race is a badge of servitude and a vestige of slavery.⁵

When the Heart of Atlanta Motel owner's challenge to the constitutionality of Title II reached the United States Supreme Court, the Court unanimously affirmed Congress's power under the Commerce Clause to regulate private conduct through a civil rights statute affecting public accommodations. In so doing, the Court distinguished its own (in)famous precedent, the *Civil Rights Cases*,⁶ in which it held that the Thirteenth and Fourteenth Amendments could not sustain the Civil Rights Act of 1875, an earlier public accommodations law, both because denial of equal accommodations was not a "badge of slavery" or "involuntary servitude," and because the Act reached private, not state, action.⁷ As Congress, eighty years later, considered passing a new public accommodations law, that case posed a formidable constitutional obstacle. Thus, the Administration and Congress relied primarily on Congress's power to regulate commerce and secondarily on the Fourteenth Amendment.⁸ In defending the law before the Court, the United States, in turn, relied on the commerce power, allowing the Court to avoid considering whether "the remaining authority upon which [Congress] acted was . . . adequate."⁹ Nonetheless, the Thirteenth Amendment featured as a foundation for such a law in congressional hearings and reports on the urgent need for a national law ending discrimination in access to public accommodations and the need for Congress to complete the unfinished business begun by the Reconstruction Amendments.¹⁰ Conversely, prominent congressional opponents of Title II argued that reliance on the Thirteenth Amendment was "misplaced," and that Title II would enact involuntary servitude.¹¹

This Article examines how these contrasting ideas about the relationship between the Thirteenth Amendment and a public accommodations law—that it, on one hand, barred such a law, and, on the other, that it justified such a law—featured in *Heart of Atlanta Motel*

5. See *infra* Part III.

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

7. *Id.* at 11, 24–26 (“[W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude.”).

8. See *Heart of Atlanta Motel*, 379 U.S. at 250 (noting that the legislature realized that the objectives of the Civil Rights Act of 1964 “could be readily achieved” through using the commerce power granted to Congress in the Constitution).

9. *Id.*

10. See *infra* Part III.A–C.

11. See *infra* Part III.E.

and in the passage of Title II itself. Looking back at these contrasting invocations of the Thirteenth Amendment may be useful to contemporary examinations of congressional authority to secure freedom and equality, as well as to contemporary debates over the justifications for and proper scope of antidiscrimination laws, and what is at stake for persons protected by such laws and those challenging them.

Part II of this Article explicates the *Heart of Atlanta Motel* case. The motel owner challenged the Civil Rights Act of 1964 on several grounds: that Congress exceeded its powers under the Commerce Clause, and that the Act violated his Fifth Amendment liberty and property rights, as well as (improbably) the Thirteenth Amendment.¹² These grounds reflected a particular conception of private property rights rejected by the Court in *Heart of Atlanta Motel* and, prior to that, by Congress and the executive in supporting Title II: that someone who used his private property to operate a business had the liberty to serve—or refuse to serve—whomever he pleased and to compel him to serve was “involuntary servitude.”¹³ To convey to readers something of the context and historical significance of this case, I augment the case exposition with newspaper coverage of the motel owner’s legal challenge to Title II and its journey to the Supreme Court, as well as some contemporaneous legal commentary on the case.¹⁴ Part II also situates the case with two other Title II cases announced the same day, *Katzenbach v. McClung*¹⁵ and *Hamm v. City of Rock Hill*,¹⁶ and with the lawsuit brought against Atlanta restaurant owner Lester Maddox. In explicating the case, I highlight several features of the majority and concurring opinions with resonance for subsequent antidiscrimination laws and challenges to them. Although private property objections to public accommodations laws continue to surface, a newer generation of challenges to antidiscrimination law emphasizes First Amendment claims to religious liberty or freedom of association.

Part III turns from the Court’s upholding of Title II of the Civil Rights Act to Congress’s deliberations about it, and considers the contrasting appeals to the Thirteenth Amendment in arguments made

12. *Heart of Atlanta Motel*, 379 U.S. at 243–44.

13. See *infra* Parts II.D, III.B, III.E.

14. My sampling of press coverage draws on archives of national newspapers available at Boston University’s library and on archives of several southern newspapers available at Harvard University’s library. Thanks to my research assistant Hallie Marin for retrieving these sources. I thank my former colleague John DeWitt Gregory for suggesting that I look at contemporary news coverage, something he and Joanna Grossman did in their informative article, *The Legacy of Loving*, 51 *How. L.J.* 15 (2007).

15. 379 U.S. 294 (1964).

16. 379 U.S. 306 (1964).

both for and against the public accommodations law. This look at the legislative record is important because reading the case in isolation from this legislative record would leave a reader ignorant of just how strongly concerns for rectifying an intolerable injustice that should have ended long ago animated executive and legislative support for Title II. Thus, a significant part of the legacy of *Heart of Atlanta Motel* is simply the fact that the Court did uphold this new federal law so that it did not meet the fate of its 1875 predecessor.¹⁷ Part III concludes by noting that recent commemorations of the Civil Rights Act speak of Congress completing important unfinished business, even as some dissenting voices continue to object to the law's incursion on liberty and property rights.

In Part IV, I look at how certain themes in *Heart of Atlanta Motel* recur in subsequent Supreme Court cases. An instructive example is *Roberts v. United States Jaycees*,¹⁸ in which, twenty years later, the Court upheld a state public accommodations law and cited *Heart of Atlanta Motel* when it analogized the dignitary harms of exclusion based on race to those based on sex.¹⁹ In contrast, later Supreme Court cases, such as *United States v. Lopez*²⁰ and *United States v. Morrison*,²¹ distinguish *Heart of Atlanta Motel* in troubling ways, marking a much-commented upon shift away from the Court's deference to Congress's expansive use of its commerce power to remedy moral evils that hinder equality.

In the Conclusion, I turn briefly to present day arguments that are critical of the expansive scope of current public accommodations law, particularly when the inclusion of sexual orientation as a protected category appears to threaten religious liberty and freedom of expressive association. Opponents of such laws may not appeal to the Thirteenth Amendment, but they do use the language of being forced or compelled to render service in violation of conscience. At the heart of this contemporary debate is the extent to which race is a special case and to which this important precedent about eradicating race discrimination is—and is not—a helpful template for remedying sex and sexual orientation discrimination.

17. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

18. 468 U.S. 609 (1984).

19. *Id.* at 625, 628–29.

20. 514 U.S. 549 (1995).

21. 529 U.S. 598 (2000).

II. REVISITING *HEART OF ATLANTA MOTEL, INC. V. UNITED STATES*A. *The Legal Challenges to Title II in Context*

In *Heart of Atlanta Motel, Inc. v. United States*, a motel operator challenged the constitutionality of the newly enacted Title II of the Civil Rights Act of 1964, which provides, in relevant part: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”²² The definition of public accommodation included, among “establishments . . . which serve[] the public,” “any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.”²³

Title II also reaches “‘discrimination or segregation’ . . . supported by state action,” which means “when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.”²⁴ Thus, the law contains an affirmative declaration:

[T]hat all persons “shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.”²⁵

22. 379 U.S. 241, 247 (1964) (quoting Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a), 78 Stat. 241, 243) (internal quotation marks omitted).

23. *Id.* (quoting Civil Rights Act, § 201(b), 78 Stat. at 243) (internal quotation marks omitted). The “so-called ‘Mrs. Murphy’s Boarding House’” exemption was a “congressional concession to a *reductio ad absurdum*”—even before the public accommodations section of the Civil Rights Act was written, opponents of President Kennedy’s directive to Congress to pass such an act “appealed to the emotions by painting a vivid portrait of the ancient widow operating a three or four room tourist home who would, by force of the bill, be required to accommodate transients without regard to race.” Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 672 (1965).

24. *Heart of Atlanta Motel*, 379 U.S. at 248 (quoting Civil Rights Act, § 201(d), 78 Stat. at 243).

25. *Id.* (quoting Civil Rights Act, § 202, 78 Stat. at 244).

Title II contained various exceptions, including for private clubs under certain conditions.²⁶

On July 2, 1964, just “2 hours and 10 minutes after President Johnson signed” the Civil Rights Act of 1964, Moreton Rolleston, president and operator of the Heart of Atlanta Motel, filed his challenge to Title II in federal district court in Atlanta.²⁷ Rolleston, an attorney, represented himself in the legal challenge, including arguing before the Supreme Court.²⁸ Contemporary press reports noted that “[t]he Heart of Atlanta Motel has been the target of repeated demonstrations and sit-ins by Negro and white civil rights workers.”²⁹ As the Court recounted (and as newspapers confirm), “[p]rior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.”³⁰ Rolleston argued “that Congress in passing this Act exceeded its power to regulate commerce.”³¹ He asserted additional constitutional claims: the law deprived the motel “of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation.”³² Rolleston “asked \$11 million in damages” (in the event he had to comply with the law), contending that desegregation “would ruin his business, reputation and goodwill.”³³ Pertinent to this symposium’s topic, he also alleged that Congress subjected the motel to “involuntary servitude,” violating the Thirteenth Amendment.³⁴

“Involuntary servitude” was also a cry of Lester Maddox, owner of the Atlanta-based Pickrick Restaurant and the target of a lawsuit brought under Title II by three Negro³⁵ ministers, Rev. George Willis

26. Civil Rights Act, § 201(e), 78 Stat. at 243–44.

27. *Atlanta Motel Sues in Major Test of Rights Act*, N.Y. TIMES, July 7, 1964, at 1.

28. See *Heart of Atlanta Motel*, 379 U.S. at 242 (noting that Moreton Rolleston, Jr., represents the appellant).

29. *Hotelier Brings \$11 Million Rights Action*, BOSTON GLOBE, July 7, 1964, at 7.

30. *Heart of Atlanta Motel*, 379 U.S. at 243.

31. *Id.* at 243–44.

32. *Id.*

33. *Atlanta Motel Sues in Major Test of Rights Act*, *supra* note 27, at 1. One million dollars was for deprivation of property rights, and \$10 million for deprivation of his liberty right to refuse service. *Id.*

34. *Heart of Atlanta Motel*, 379 U.S. at 244.

35. The terms “Negro” and “Negroes,” rather than African-American or black, are the terms employed in the historical materials that I discuss in this article. Therefore, I use these terms when I quote or paraphrase sources. “Negro” was “the standard preferential term” used by blacks from the early twentieth century to “until the late 1960s,” when “‘Black,’ and now perhaps . . . ‘African American’” became the “preferred term.” Tom W.

Jr., Rev. Woodrow T. Lewis, and Rev. Albert Dunn. Although the ultimate companion case to *Heart of Atlanta Motel* was *Katzenbach v. McClung*, which upheld Title II against a challenge brought by Ollie's Barbeque, the initial pairing in the press was with a lawsuit brought by Willis, Lewis, and Dunn against Maddox for refusing to comply with Title II. On July 3, 1964, when these three men sought entrance to Maddox's restaurant, Maddox proceeded to chase them away at gunpoint.³⁶ In contemporary press coverage, Maddox appears as a defiant and violent segregationist, brandishing axe handles against Negroes who sought to enter his restaurant and rallying his white customers to join him in turning them away.³⁷ Along with "home-style fare," Maddox also offered up "homespun political commentary" through the voice of "Pickrick," in "Pickrick Says" advertisements in the *Atlanta Journal Constitution*.³⁸ Atlanta Mayor Ivan Allen testified in Congress in support of Title II and many Atlanta businesses desegregated before its passage. By contrast, Maddox's Pickrick remained "stubbornly wedded to the segregationist Jim Crow policies;" his restaurant became "a conspicuous symbol of segregationist defiance," and "an immediate target of civil rights activists seeking to test the new law."³⁹ A radio station employee introduced a transcript into the district court proceedings in which Maddox vehemently expressed his scorn for desegregation and its advocates: "This property belongs to me, my wife and my children. The white people have got enough of

Smith, *Changing Racial Labels: From "Colored" to "Negro" to "Black" to "African American,"* 56 PUBLIC OPINION Q. 496, 476–97 (1992). The term had "considerable handicaps to overcome," since it "tended to be used as a term of reproach by Whites and suffered from its association" with certain racial epithets. *Id.* at 498. However, it was "defined to stand for a new way of thinking about Blacks": "Racial progress and the hopes and aspirations of Blacks (especially as illustrated by [Booker T.] Washington's self-help ideology) were to be captured by the term 'Negro,' and old racial patterns in general and Southern racial traditions in particular were to be left behind with 'Colored.'" Martin Luther King Jr.'s "I Have a Dream" speech in 1963 "favored the term 'Negro,'" and used the term "Black" as an adjective and only in parallel construction with White." Nonetheless, "as the civil rights movement began making tangible progress," some argued that a new term, "Black," was needed to "shed the remnants of slavery and racial serfdom." *Id.* at 499–501.

36. *Black Upholds Rights Law*, BOSTON GLOBE, Aug. 11, 1964, at 1 (quoting Maddox); *U.S. Seeks to Join Atlanta Suit on Enforcement of Rights Act*, N.Y. TIMES, July 14, 1964, at 17 (reporting incident).

37. United Press International, *Atlanta Restaurant Defies High Court, Again Bars Negroes*, N.Y. TIMES, Aug. 12, 1964, at 1. In sharp contrast, contemporary press reports depict Mr. Rolleston as an hotelier and attorney who opposed the law, but after an initial federal court ruling against him, announced he would comply with it pending the appeal. *Id.*

38. *Government & Politics: Lester Maddox (1915–2003)*, THE NEW GEORGIA ENCYCLOPEDIA (April 4, 2004), <http://www.georgiaencyclopedia.org/nge/Article/jsp?id=h-1387>.

39. *Id.*

this and it's not because of the Negroes. It's because of renegades like Lyndon Johnson and Ivan Allen."⁴⁰

The Department of Justice successfully moved to intervene in the lawsuit against Maddox's restaurant as well as for the appointment of a three-judge panel (or, as the *Boston Globe* put it, "a three-man Federal court") to have a prompt hearing of the challenges to Title II.⁴¹ On July 22, 1964, the panel upheld Title II and issued injunctions against Heart of Atlanta Motel and the Pickrick Restaurant.⁴² The court stayed the injunction until August 11 to allow time for direct appeal to the Supreme Court.⁴³

The restaurant and motel owners announced that they would abide by the order, but as August 11 approached, they appealed to Justice Hugo L. Black for an order staying enforcement of the injunction until final action by the Supreme Court, on the ground that, otherwise, their businesses would be irreparably injured. Justice Black turned down the request, triggering Maddox's public remark about involuntary servitude: "We are just really hurt that our government will tell us that we no longer can be free as Americans and no longer can we select our customers. It's involuntary servitude; it's slavery of the first order; it shows contempt, utter disregard for the United States Constitution."⁴⁴ He vowed: "We will never integrate. Pickrick will never integrate."⁴⁵ On August 11, Maddox, "armed with a pistol and backed by 200 cheering whites, defied the nation's new Civil Rights Law again by . . . turning three Negroes away from his restaurant," shouting "You're dirty Communists and you'll never get a piece

40. E. W. Kenworthy, *2 Rights Act Suits Argued in Court*, N.Y. TIMES, July 18, 1964, at 20. On Title II's passage, Mayor Allen urged Atlantans to obey the law, while also urging Atlanta Negroes to "use their 'new rights in such a manner as to create the least possible inconvenience, disorder, or hurt feelings.'" Marion Gaines, *Mayor Asks Restraint by Negroes*, ATLANTA CONST., July 3, 1964, at 1.

41. *Early Hearing for Test Case*, BOSTON GLOBE, July 11, 1964, at 2.

42. Achsah Posey, *Federal Court Orders Maddox and Motel to Serve Negroes*, ATLANTA CONST., July 23, 1964, at 1. In addition to running this front-page story with a large headline, the *Atlanta Constitution* also published the text of the rulings: *Text of Verdict on Pickrick: 'Congress Can Deal with Bias'*, ATLANTA CONST., July 23, 1964, at 18; *Text of Decision on Suit by Motel*, ATLANTA CONST., July 23, 1964, at 18.

43. *Three Judges Reject Cafe, Motel Attack: Court Holds off Injunctions to Allow Appeal*, CHI. TRIB., July 23, 1964, at 1.

44. *Black Upholds Rights Law*, *supra* note 36, at 1. Maddox also asserted: "I'm so shocked that I've got to forego my rights under the Constitution to satisfy the agitators and the attorney general." Achsah Posey, *Motel to Comply with Order but Maddox Is Undecided*, ATLANTA CONST., Aug. 11, 1964, at 1, 6 (quoting Maddox) (internal quotation marks omitted).

45. *Won't Block Rights Law: Black Refuses to Halt Enforcement*, CHI. TRIB., Aug. 11, 1964, at 12 (quoting Maddox) (internal quotation marks omitted).

of fried chicken here.”⁴⁶ After the U.S. Attorney General obtained an order from federal court requiring Maddox to show why he should not be held in civil contempt for this refusal of service,⁴⁷ Maddox closed Pickrick restaurant “for good.”⁴⁸ Crying, Maddox blamed the President, Congress, and the Communists for closing his business and ending “a childhood dream,” and then, addressing the gathered crowd at length, he “cit[ed] numerous passages of Scripture.” By contrast, Rolleston, owner of the Heart of Atlanta Motel, said he would obey the court.⁴⁹

In denying the request for a stay, Justice Black’s memorandum referred to the power to grant a stay as an “awesome responsibility calling for the upmost circumspection in its exercise,” all the more so when a single member of the Court “is asked to delay the will of Congress to put its policies into effect at the time it desires.”⁵⁰ Justice Black, news reports emphasized, said the Civil Rights Act did not result from sudden, impulsive action, but “represented the culmination of one of the most thoroughgoing debates in the history of Congress.”⁵¹ Justice Black stated “that ‘a judicial restraint of enforcement of one of the most important sections of the Civil Rights Act would, in my judgment, be unjustifiable.’”⁵² Declining to address the constitutionality of the particular provisions of the Civil Rights Act under attack, he nonetheless expressed his belief “that the broad grants of power to Congress in the Commerce Clause and the 14th Amendment are enough to show that Congress does have at least general constitutional authority to control commerce among the states and to enforce the 14th Amendment’s policy against racial discrimination.”⁵³ Justice Black’s focus upon the Fourteenth Amendment alongside the Commerce Clause as a source of Congressional authority for the Civil Rights Act would set him (and some other Justices) apart from the majority when the Court actually ruled on the merits of the motel’s challenge.

46. United Press International, *supra* note 37, at 1.

47. Achsah Posey & Ted Simmons, *Maddox Ordered into U.S. Court in Contempt Suit*, ATLANTA CONST., Aug. 13, 1964, at 1.

48. *Cafe Is Closed for Good, Maddox Cries After He Bars 2 Negroes at Door*, ATLANTA CONST., Aug. 14, 1964, at 1.

49. *Id.*

50. *Black Upholds Civil Rights Law*, *supra* note 36, at 2.

51. *Id.*; *Rights Law Stay Denied by Black*, N.Y. TIMES, Aug. 11, 1964, at 24.

52. *Rights Law Stay Denied by Black*, *supra* note 51, at 24.

53. *Id.*

B. Before the Supreme Court

The Supreme Court agreed to hear oral argument on the motel's challenge on the opening day of its fall term, departing from its usual practice in order to honor the request by both sides for a prompt hearing.⁵⁴ The Court would also hear a challenge to Title II brought by owners of a different restaurant, Ollie's Barbeque, a challenge sustained by a three-judge panel of a federal district court in Birmingham, Alabama.⁵⁵ In that challenge, owners Ollie McClung Sr. and his son Ollie Jr. alleged that their restaurant did not cater to transients, but to local customers (although not those living in the Negro neighborhood where it was located, except through a "take-out service for Negroes"⁵⁶) and, thus, was not engaged in interstate commerce.⁵⁷ They alleged that they would lose \$200,000 annually if forced to serve Negroes.⁵⁸

By contrast to Ollie's Barbeque, whose connection to interstate commerce was not its clientele but the food "procured [by a local supplier] from outside the State,"⁵⁹ the Heart of Atlanta Motel clearly did business across state lines; not only through "national advertising" but also by accepting "convention trade from outside Georgia and approximately 75% of its registered guests [were] from out of State."⁶⁰ Thus, if Title II was constitutional, it would clearly apply to the motel. Prior to passage of Title II, it "had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so."⁶¹ Defending Title II, the United States "counter[ed] that the unavailability to Negroes of adequate accommodation interferes significantly with interstate travel," and that the Commerce Clause empowers Congress "to remove such obstructions and restraints."⁶²

54. Marjorie Hunter, *Supreme Court to Speed Test Of Key Clause in the Rights Act*, N.Y. TIMES, Aug. 27, 1964, at 24. By this time, the Pickrick Restaurant was not part of the hearing because, as noted above, Maddox closed the restaurant rather than integrate. Subsequently, Maddox opened a segregated cafe, and, in 1966, amidst "widespread dissatisfaction with desegregation," became governor of Georgia. See "*Government & Politics*," *supra* note 38.

55. *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964).

56. *Id.* at 296.

57. *McClung v. Katzenbach*, 233 F. Supp. 815, 817-18 n.3 (N.D. Ala. 1964), *rev'd*, 379 U.S. 294 (1964).

58. *Court Says Rights Law Invalid in Restaurant Case*, BOSTON GLOBE, Sept. 18, 1964, at 8.

59. *Katzenbach*, 379 U.S. at 296.

60. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

61. *Id.*

62. *Id.* at 244.

1. *The Involuntary Servitude Argument as Surprising Even Alice*

The United States also met Rolleston's Thirteenth Amendment argument. At oral argument, Rolleston elaborated his Thirteenth Amendment theory. He cited *Hodges v. United States*, which held that involuntary servitude included "compulsory service of one to another,"⁶³ and stated that other cases "have held that if a person is forced to serve another in business ways," such involuntary servitude violated the Thirteenth Amendment.⁶⁴ The government labeled as "entirely frivolous" the contention that "an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law."⁶⁵ In the Justice Department's brief, filed by Solicitor General Archibald Cox and Assistant Attorney General Burke Marshall, the Department argued: "No one can seriously contend that requiring a motel proprietor to accommodate Negroes on the basis of equality with guests of other races so long as he chooses to stay in business is 'akin to African slavery.'"⁶⁶

At oral argument, Solicitor General Cox dismissed Rolleston's argument in vivid terms, suggesting that it would surprise "Alice, . . . even at the end of her long journey through wonderland," if she were told

that the restaurants and other places of public accommodation in 33 states in the year 1964 are held in involuntary servitude and that the Anglo-American common law for centuries has subjected to slavery innkeepers, hackmen, carriers, wharfage men, ferriers, all kinds of other people holding themselves out to serve the public.⁶⁷

Elements of this rebuttal echo in the Court's rejection of the motel's involuntary servitude claim:

As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the *Civil Rights Cases* is to the con-

63. 203 U.S. 1, 16 (1906), *overruled in part by* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

64. *Excerpts from Rights Cases Argument*, N.Y. TIMES, Oct. 6, 1964, at 24.

65. *Id.*

66. *In Court*, BOSTON GLOBE, Sept. 29, 1964, at 8.

67. *Excerpts from Rights Cases Argument*, *supra* note 64, at 24.

trary . . . it having noted with approval the laws of “all the States” prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way “akin to African slavery.”⁶⁸

Interestingly, for the proposition that the Act’s requirement is not “akin to African slavery,” the Court cited to *Butler v. Perry*, which upheld Florida’s long-standing law that “[e]very able-bodied male person” between twenty-one and forty-five was subject to working on the roads and bridges for several days each year against a Thirteenth Amendment challenge.⁶⁹ The Court’s reasoning was that such labor was “a part of the duty” that each man owed “to the public,” rooted in the common law, and that Congress surely did not mean, in enacting the Thirteenth Amendment, to introduce any “novel doctrine[s]” or “interdict” public duties: “The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.”⁷⁰ The Court seemed to be analogizing the public duties at issue in that earlier case to the public duties of innkeepers, similarly rooted in common law but codified by state statute and similarly unthreatened by the Thirteenth Amendment.

2. *What To Do About the Civil Rights Cases?*

The Court readily concluded that Title II was constitutional as an exercise of Congress’s power to regulate interstate commerce.⁷¹ But it first had to reckon with its previous decision in the *Civil Rights Cases*,⁷² which struck down Congress’s 1875 public accommodations law (Civil Rights Act of 1875).⁷³ The Court declared the *Civil Rights Cases* “inapposite and without precedential value” as to the constitutionality of the Civil Rights Act of 1964.⁷⁴ To make this point, it contrasted the

68. *Heart of Atlanta Motel*, 379 U.S. at 261 (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

69. *Butler*, 240 U.S. at 329–31.

70. *Id.* at 330, 333.

71. *Heart of Atlanta Motel*, 379 U.S. at 250.

72. 109 U.S. 3 (1883).

73. Ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3.

74. *Heart of Atlanta Motel*, 379 U.S. at 250. There is an enormous amount of scholarly literature—to which some authors in this symposium have made valuable contributions—critical of the Supreme Court’s earlier jurisprudence that thwarted Congress’s efforts, through civil rights laws, to implement the Thirteenth, Fourteenth, and Fifteenth Amendments. See, e.g., PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999); Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 191–96 (2005); Robert J. Kaczorowski, *Revo-*

earlier civil rights public accommodations law with the present one: the former did not limit categories of affected business to those “impinging upon interstate commerce,” while the new Act carefully did so, except where state action was involved (in which case the Fourteenth Amendment provided Congress a constitutional hook).⁷⁵

Moreover, that earlier Congress did not fully consider whether the commerce power provided support for the 1875 Act. That Act, the Court explained, “was not ‘conceived’ in terms of the commerce power,” but rather, in terms of the Thirteenth, Fourteenth, and Fifteenth Amendments.⁷⁶ Thus, the earlier case is “devoid of authority for the proposition” that Congress lacks authority, under the Commerce Clause, “to regulate discriminatory practices now found substantially to affect interstate commerce.” By contrast, the contemporary Court’s decision upheld an Act that “explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing.”⁷⁷ Because it found the commerce power sufficient to uphold Title II, the Court neither considered the other grounds on which Congress relied nor addressed whether Congress had sufficient power to act under Section 5 or the Equal Protection Clause of the Fourteenth Amendment.⁷⁸

Although the Court only obliquely acknowledged that its predecessor, in the *Civil Rights Cases*, rejected the Thirteenth and Fourteenth Amendments as constitutional pegs for the Civil Rights Act of 1875, it is worth revisiting that treatment briefly. The fate of the Civil Rights Act of 1875 before an earlier Supreme Court undeniably led the later Congress to find a less vulnerable constitutional peg for its public accommodations law.⁷⁹ As one contemporary defense of Title II put it, the Court’s earlier answer to the argument that “denial of access to places of public accommodation was a badge or incident of slavery” (and thus barred by the Thirteenth Amendment) was “ab-

lutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. REV. 863, 893–99 (1986); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011). Discussing that literature is beyond the scope of this paper.

75. *Heart of Atlanta Motel*, 379 U.S. at 250–51.

76. *Id.* at 251.

77. *Id.* at 252.

78. The Court states: “This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.” *Id.* at 250.

79. See, e.g., Quick, *supra* note 23, at 683; see *infra* Part III for discussion.

rupt”: “Justice Bradley dismissed the argument as ‘running the slavery argument into the ground.’”⁸⁰ Justice Bradley further stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.⁸¹

In support, Justice Bradley observed that, prior to the abolition of slavery and enactment of the Thirteenth Amendment, freedmen enjoyed “all the essential rights of life, liberty and property the same as white citizens,” but no one argued that it invaded their status as freedmen because of “discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.”⁸² Nor did the Fourteenth Amendment ground the 1875 law, since it reached only state laws or state action, not private discrimination.⁸³ The Court noted that a remedy might be sought under state laws concerning innkeepers and public carriers, or, “[i]f the laws themselves make any unjust discrimination,” then Congress may afford a remedy under the Fourteenth Amendment.⁸⁴

In a forceful and famous dissent, Justice Harlan contended that discrimination in access to public accommodations “is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment.”⁸⁵ Taking up the majority’s argument that Congress lacked authority under the Thirteenth Amendment “to adjust what may be called the social rights of men and races in the community,” he retorted that what is at stake are not “social rights,” but constitutional rights to civil

80. Quick, *supra* note 23, at 683 (quoting *The Civil Rights Cases*, 109 U.S. 3, 19 (1883)).

81. *Civil Rights Cases*, 109 U.S. at 25.

82. *Id.*

83. *Id.* at 13 (“And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority.”).

84. *Id.* at 25.

85. *Id.* at 43 (Harlan, J., dissenting).

freedoms.⁸⁶ Thus, the rights the 1875 Act endeavored to secure and protect are legal rights:

The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed.⁸⁷

Justice Harlan reminded the Court of the circumstances surrounding the adoption of the Thirteenth Amendment and that it “did something more than to prohibit slavery as an *institution*,” it also “established and decreed universal *civil freedom* throughout the United States.”⁸⁸ The Civil Rights Act of 1866 undertook to secure to all citizens “those fundamental rights which are the essence of civil freedom;” because the institution of slavery “rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”⁸⁹ Justice Harlan stressed “[e]xemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government” as a new constitutional right, “with express power in Congress, by legislation, to enforce” it.⁹⁰ Justice Harlan also concluded that public accommodations are, in effect, agents of the state. An innkeeper exercises “a quasi public employment,” and “[t]he public nature of his employment forbids him from discriminating” based on race.⁹¹ Similarly, licensing gives amusement a public status.⁹² Thus, he viewed the entities covered by the 1875 Act as “agents of the state.”⁹³

86. *Id.* at 59.

87. *Id.* at 59–60.

88. *Id.* at 34 (emphasis in original).

89. *Id.* at 35, 36.

90. *Id.* at 56.

91. *Id.* at 40–41.

92. *See id.* at 41 (noting “that places of public amusement . . . are established and maintained under direct license of law [and] [t]he authority to establish and maintain them comes from the public”).

93. *Id.* at 58–59 (“In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State . . .”).

Finally, tackling Justice Bradley's reference to the man "emerged from slavery" who, after the aid of "beneficent legislation," must cease to be a special favorite of the law, Justice Harlan countered:

It is . . . scarcely just to say that the colored race has been the special favorite of the laws. . . . What the nation, through Congress, has sought to accomplish in reference to that race, is . . . to secure and protect rights belonging to them as freemen and citizens The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens.⁹⁴

Justice Harlan continued by analyzing forms of class tyranny in the nation's history, suggesting that "[t]o-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship."⁹⁵ As I discuss in Part III, both Justice Bradley's and Justice Harlan's opinions featured prominently in Congressional consideration of Title II.

3. *Congress Reenters the Civil Rights Field*

In *Heart of Atlanta Motel*, the Court did not explicitly revisit this earlier disagreement between the majority in the *Civil Rights Cases* and Justice Harlan, in dissent, over the Thirteenth and Fourteenth Amendments. It did note one consequence of the *Civil Rights Cases*: the long hiatus between when Congress enacted the first Civil Rights Act of 1866 and, nearly a century later, when it enacted the series of civil rights acts in the late 1950s and early 1960s.⁹⁶ How and when did Congress reenter the field? The Court detailed the legislative history of the modern Civil Rights Act, beginning with President Kennedy's call for civil rights legislation, and the stated purpose of the proposed bill he sent Congress: "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth amendments"⁹⁷

As finally adopted, the Court observed, the Civil Rights Act of 1964, of which Title II was a part, "was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facili-

94. *Id.* at 61.

95. *Id.* at 62.

96. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964).

97. *Id.* (alterations in both) (citations omitted).

ties, federally secured programs and in employment.”⁹⁸ The Court cited to legislative history making “it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”⁹⁹ “At the same time, however,” the Court continued, Congress concluded it could achieve this objective “by congressional action based on the commerce power of the Constitution.”¹⁰⁰ I shall return to this language about dignity in explicating how *Heart of Atlanta Motel* features in more recent public accommodations cases. Most pertinent to Title II, however, is that some members of the Court and of Congress thought that a prudential approach rooted in the commerce power fundamentally obscured the significant equality and citizenship issues at stake.¹⁰¹

4. *Ending Discrimination Through Peaceful and Voluntary Settlement: Demonstrations and Demanding Service as the Backdrop of Title II*

Worthy of comment in the above history is the Court’s reference to “peaceful and voluntary settlement.”¹⁰² However, the Court simply echoed the stated purpose in the Senate Report on the law, but gave no feeling for lawmakers’ sense of urgency with respect to finding that settlement.¹⁰³

Contemporaneous writings situate Title II in the context of numerous, repeated, peaceful efforts by African-American citizens—often side-by-side with white civil rights advocates—to integrate lunch counters, soda fountains, restaurants, and hotels, and, in effect demand service on equal terms. For example, an essay about the sit-in movement by civil rights attorney Marion A. Wright observed that “[t]he Freedom Rides shared a common parentage with the sit-ins—they both spring from a firm resolve to exercise full rights as American citizens” and “are both characterized by nonviolence.”¹⁰⁴ The

98. *Id.* at 246.

99. *Id.* at 250 (quoting S. REP. NO. 88-872, *supra* note 4, at 16).

100. *Id.* (quoting S. REP. NO. 88-872, *supra* note 4, at 17).

101. See discussion *infra* Parts II & III.

102. *Heart of Atlanta Motel*, 379 U.S. at 246.

103. S. REP. NO. 88-872, *supra* note 4, at 1 (“The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.”).

104. Marion A. Wright, *Public Accommodations: The Sit-in Movement: Progress Report and Prognosis*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 89, 89 (Donald B. King & Charles W. Quick eds., 1965).

Freedom Riders were successful “primarily due to the interstate nature of most travel, and state involvement with intrastate travel, rendering action by the Interstate Commerce Commission and the federal courts readily obtainable and effective.”¹⁰⁵ By contrast, sit-ins, “dealing with public accommodations in a variety of circumstances, and . . . jurisdictions,” experienced more “vicissitudes of fortune.”¹⁰⁶ He reported that the sit-ins began in 1960 when “four black students at North Carolina A. & T. College in Greensboro” attempted to get coffee at the dime store, and when “[t]he manager said he could not serve them because of local custom, . . . they just sat and waited.”¹⁰⁷ Soon after, other students at their own school and later from some other colleges joined them for future visits.¹⁰⁸ Heckling by white teenagers ensued, and “white boys waved Confederate flags, chanted, and cursed.”¹⁰⁹ After management received a bomb threat, “the police emptied the store,” and the store reopened, but with its lunch counters closed.¹¹⁰ Wright added that the sit-in movement “spread electrically throughout the entire South. Negro and white demonstrators, principally college students, aided by a sprinkling of professors, ministers, social workers, and others, peaceably invaded and picketed lunch counters, picture shows, parks, beaches, and other segregated places of entertainment, amusement, and public accommodation.”¹¹¹

This movement “wrought a transformation of southern customs,” with “capitulation,” in the majority of cases, coming “peacefully, almost gracefully,” as “many inn-keepers welcomed the pressure which enabled them to act.”¹¹² But alongside such change was resistance, often taking the form of invoking (sometimes newly-passed) state trespass or criminal mischief laws to convict demonstrators, which led to a “spate of cases . . . work[ing] their way to courts of last resort.”¹¹³

105. *Id.*

106. *Id.*

107. *Id.* at 90 (quoting Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 317).

108. Pollitt, *supra* note 107, at 317–18.

109. *Id.* at 318.

110. *Id.*

111. Wright, *supra* note 104, at 90–91.

112. *Id.* at 91.

113. *Id.*; see also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 488 (2000) (“Only after the federal courts were clogged with thousands of such cases did the Kennedy Justice Department and a bipartisan congressional coalition decide to draft federal legislation outlawing racial discrimination by business establishments and employers.”).

While there were “many exceptions,” innkeepers generally prevailed in southern state courts, and demonstrators, in federal courts.¹¹⁴

The prevalence of such trespass suits and the imperative that Title II secure a peaceful settlement of a national problem are evident in the fact that, the same day in which the Court announced its *Heart of Atlanta Motel* and *McClung* rulings, it also announced *Hamm v. City of Rock Hill*.¹¹⁵ In *Hamm*, the Court ruled that the passage of Title II abated convictions secured prior to its passage based on state trespass charges applied to Negroes for participating in “sit-in” demonstrations in luncheon facilities of retail stores in South Carolina and Arkansas.¹¹⁶ In reasoning that, just as “the Act would abate all federal prosecutions,” it should also, “by virtue of the Supremacy Clause,” abate pending state convictions, the Court stated: “The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history.”¹¹⁷ The Court elaborated:

Congress, as well as the two Presidents who recommended the legislation, clearly intended to eradicate an unhappy chapter in our history. The peaceful conduct for which petitioners were prosecuted was on behalf of a principle since embodied in the law of the land. The convictions were based on the theory that the rights of a property owner had been violated. However, the supposed right to discriminate on the basis of race, at least in covered establishments, was nullified by the statute.¹¹⁸

In contrast to *Heart of Atlanta Motel* and *Katzenbach*, which were 9-to-0 decisions, *Hamm* was a 5-to-4 decision. Title II’s concern for peaceful settlement also animated the dissents, although the dissenters reached different conclusions about the retroactive import of Title II for civil disobedience. Justice Black, for example, disclaimed any interpretation of Title II that would permit persons “refused service a ‘right’ to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay.”¹¹⁹ To the contrary, “one of the chief purposes of the 1964 Civil Rights Act was to take such disputes out of the streets and restaurants and into the courts, which Congress has granted the power to provide an adequate

114. Wright, *supra* note 104, at 91.

115. 379 U.S. 306 (1964).

116. *Id.* at 307, 317.

117. *Id.* at 315.

118. *Id.* at 315–16.

119. *Id.* at 318 (Black, J., dissenting).

and orderly judicial remedy.”¹²⁰ Here, the same extensive and thorough legislative history that led Justice Black to decline to stay the lower court’s injunction in *Heart of Atlanta Motel* led him to reject an interpretation of Title II in the face of legislative silence:

[I]n what is perhaps the most extensive and careful legislative history ever compiled, dealing with one of the most thoroughly discussed and debated bills ever passed by Congress, a history including millions and millions of words written on tens of thousands of pages contained in volumes weighing well over half a hundred pounds, in which every conceivable aspect and application of the 1964 Act were discussed *ad infinitum*, not even once did a single sponsor, proponent or opponent of the Act intimate a hope or express a fear that the Act was intended to have the effect which the Court gives it today.¹²¹

Justice White echoed Justice Black on the silence in the legislative record, contending that such silence should lead to a conclusion opposite that reached by the majority. The disruptive effects of civil disobedience also counseled this interpretation: “[H]ad Congress intended to ratify massive disobedience to the law, so often attended by violence, I feel sure it would have said so in unmistakable language”¹²²

Although *Heart of Atlanta Motel* stressed discrimination’s burden on interstate commerce in terms of its impact upon African-Americans’ freedom to travel, lawmakers and contemporaneous commentators on Title II also stress the downward economic impact of “racial strife”—segregation and demonstrations challenging it.¹²³ These twin burdens are evident in Solicitor General Archibald Cox’s oral argument before the Court. He argued that Congress made a record that segregation “was creating a grave national problem,” giving statistics both about the burdens on travel suffered by Negroes and about the number of demonstrations in 174 cities, thirty-two states, and the District of Columbia, “[a]bout a third of [which] were

120. *Id.* at 318–19.

121. *Id.* at 321–22 (White, J., dissenting). Also dissenting, Justice Harlan stated: “I entirely agree with my Brother BLACK’S poignant observations on this score; there is not a scintilla of evidence which remotely suggests that Congress had any such revolutionary course in mind.” *Id.* at 324 (Harlan, J., dissenting).

122. *Id.* at 328 (White, J., dissenting).

123. Quick, *supra* note 23, at 664–65 (referring to “racial strife”); Additional Views on H.R. 7152 of Hon. William M. McCulloch et al., H. REP. NO. 88-914, pt. 2, at 9–13 (1963) (detailing as burdens on commerce the dampening of travel and the economic toll of demonstrations and segregation).

concerned solely with discrimination in places of public accommodation.”¹²⁴ Cox went on to speak of the “tremendous” effect of these “demonstrations, picketing, boycotts, other forms of protest, upon business conditions,” and therefore, “upon interstate commerce.”¹²⁵

With this background in mind, let us return to the Court’s statement that the Civil Rights Act undertook “to prevent through peaceful and voluntary settlement discrimination . . . in places of public accommodation and public facilities.”¹²⁶ For example, one contemporaneous commentator on Title II predicted (too optimistically) its impact:

Happily, the civil disobedience and the beatings related to public accommodations are well-nigh over. Now the cause seekers can move on to more fertile areas such as voting rights, employment and housing. Equally appreciated will be the demise of the “rednecked” bully more than anxious to take advantage of peaceful protest. Perhaps a measure of the violence can be relegated to the limbo of forgotten history.¹²⁷

I say “too optimistically” because peaceful attempts by African-Americans to exercise the new rights secured by the Civil Rights Act and to move on, as the author suggests, to voting rights, brought new clashes and sometimes violence. News stories reporting on Moreton Rolleston’s lawsuit also report, for example, on arrests of Negroes for seeking service at restaurants, jailing of Negroes and whites for launching a voter registration campaign, violent altercations at movie theaters, whites firing shots into a hall of Negroes holding a voter registration rally, and a series of fires at Negro churches in Mississippi.¹²⁸

In denying Heart of Atlanta’s request for a stay, Justice Black observed the thorough national debate over the Civil Rights Act. Legal commentators at the time referred to Title II as passing “only after a fiery congressional debate,”¹²⁹ and as “produc[ing] the greatest amount of controversy because of its intensely personal character.”¹³⁰

124. *Excerpts from Rights Case Argument*, *supra* note 64, at 24.

125. *Id.*

126. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246 (1964).

127. Quick, *supra* note 23, at 709.

128. As *FBI Chief Left, Delta Church Burned*, BOSTON GLOBE, July 12, 1964, at 36; *Hotelier Brings \$11 Million Rights Action*, *supra* note 29, at 7; *New Clashes Mark Tests of Rights Law*, CHI. TRIB., July 7, 1964, at 7.

129. Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394, 1394 (1965).

130. Quick, *supra* note 23, at 661; *see also* Nimmer, *supra* note 129, at 1394 (calling Title II “[b]y far the most controversial aspect” of the Civil Rights Act of 1964).

By the time Congress enacted Title II, the prevalence of discrimination in public accommodations had become a national and international embarrassment.¹³¹ As one legal commentator observed: “The myriad consequences to the United States nationally and internationally of dual racial standards under a single political ideal are the true focus of national legislative concern.”¹³² Title II, thus, was soon “regarded in many quarters as a token of the nation’s sincerity in moving to resolve the ‘American dilemma.’”¹³³

On this point of sincerity and resolution, it is important not to treat the resistance of Rolleston, Maddox, and Ollie’s Barbeque to the law as emblematic of southern reaction. For example, side-by-side in the *Atlanta Constitution’s* news stories about those legal challenges were headlines such as “U.S. Responding Well To Rights Law, Says a Pleased President,”¹³⁴ “Comply in Peace, Both Races Urge,”¹³⁵ “Pleased by Rights Compliance, NAACP Opposes New Protests,”¹³⁶ “[Commerce Secretary] Hodges Hails State for Accepting Law,”¹³⁷ and “Many Doors Open Quietly to Negroes.”¹³⁸ On July 3, the *Atlanta Constitution* published an editorial, “May Our Children Look Back Proudly on Our Response to Lawful Duty,” in which the paper called for replacing “the tumult and the shouting” with “trust and progress,” and for change “without defiance or rancor.”¹³⁹ It observed: “A Congress answerable to the American people has overwhelmingly passed this law after the longest and most careful scrutiny and debate. A Southern President understanding of the region’s difficulties now becomes the law’s executor and he asks us to comply.”¹⁴⁰

131. Quick, *supra* note 23, at 662.

132. Ira Michael Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, 1965 SUP. CT. REV. 159, 163.

133. Nimmer, *supra* note 129, at 1394.

134. Bill Shipp, *U.S. Responding Well to Rights Law, Says a Pleased President*, ATLANTA CONST., July 4, 1964, at 1.

135. Ted Simmons, *Comply in Peace, Both Races Urge*, ATLANTA CONST., July 3, 1964, at 1.

136. Bill Shipp, *Pleased by Rights Compliance, NAACP Opposes New Protests*, ATLANTA CONST., July 11, 1964, at 3.

137. Sam Hopkins, *Hodges Hails State for Accepting Law*, ATLANTA CONST., July 9, 1964, at 1.

138. Associated Press, *Many Doors Open Quietly to Negroes*, ATLANTA CONST., July 4, 1964, at 2.

139. *May Our Children Look Back Proudly on Our Response to Lawful Duty*, ATLANTA CONST., July 3, 1964, at 4.

140. *Id.*

5. *The Commerce Power, Mobility, and Quantitative and Qualitative Harms*

In reasoning that Title II is a proper exercise of Congress's power to regulate interstate commerce, the Court hearkened back to the expansive account of the commerce power elaborated in *Gibbons v. Ogden*,¹⁴¹ where Chief Justice John Marshall stated that the power was as broad as commerce itself, which included "every species of commercial intercourse."¹⁴² The "test" for the proper exercise of power by Congress is whether the activity to be regulated as commerce "concerns more States than one" and "has a real and substantial relation to the national interest."¹⁴³

In concluding that the Act was within Congress's commerce power, the Court also stressed the relevance of the changed economic and social conditions in contemporary society: "the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today."¹⁴⁴ In 1875, when Congress passed the earlier Act, the Court observed:

Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. . . . The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day.¹⁴⁵

This attention to the changing nature of the economy comes up later in cases like *Roberts v. United States Jaycees*, in explaining the rationale behind a broad definition of public accommodation.¹⁴⁶

The changing nature of the economy in a more mobile society also featured in explaining the burden posed by race-based discrimination in access to accommodations. The record included testimony pertaining to:

141. 22 U.S. (9 Wheat.) 1 (1824).

142. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 254–55 (1964) (quoting *Gibbons*, 22 U.S. at 193–94) (internal quotation marks omitted).

143. *Id.* at 255 (internal quotation marks omitted).

144. *Id.* at 251.

145. *Id.*

146. *See infra* Part IV.

the fact that our people have become increasingly mobile . . . ; that Negroes in particular have been the subject of discrimination in transient accommodation, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight . . . and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself “dramatic testimony to the difficulties” Negroes encounter in travel.¹⁴⁷

This testimony in *Heart of Atlanta Motel* provided a compelling example of a serious burden on travel. Moreover, the practices were “nationwide.” Here the Court summarized testimony by the Under Secretary of Commerce about the “*qualitative*” and “*quantitative*” impact on Negroes’ ability to travel interstate:

The former [“*qualitative*”] was the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter [“*quantitative*”], there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.¹⁴⁸

This issue of the magnitude of the burdens that discrimination imposes is relevant to current discussions about whether there should be a “moral marketplace” such that government should not compel businesses to serve customers to whom they object on moral grounds (for example, a photographer who does not wish to photograph a civil union ceremony or same-sex wedding).¹⁴⁹ Douglas Laycock makes a comparative harm argument: “requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree” than the “mere inconvenience” to a same-sex couple of “having to get the same service from another provider nearby.”¹⁵⁰ However, if so many merchants in a particular community refused service to same-sex couples that such couples would face a “significant hardship,” then “the merchant’s right to moral integrity is outweighed by the same-sex couples’ right

147. *Heart of Atlanta Motel*, 379 U.S. at 252–53 (citations omitted).

148. *Id.* at 253.

149. See, e.g., ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 2–3, 303–05 (2010).

150. Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 189–98 (Douglas Laycock et al. eds., 2008).

to live in the community in accordance with *their* moral commitments.”¹⁵¹

So, too, Congress’s identification of a “nationwide” problem is relevant to subsequent debates within the Court over whether a problem that Congress addressed was “truly national” or “purely local.”¹⁵²

6. Congress May Legislate Against Moral Wrongs

Another significant feature of the Court’s opinion in *Heart of Atlanta Motel* with continuing relevance is its statement that legislating against moral wrongs is a proper governmental end pursued through antidiscrimination laws. In other words, race discrimination is a moral wrong and Congress may reach it through the commerce power.¹⁵³ The relationship between commercial and moral wrongs arose in oral argument. When the Solicitor General stated that Title II was “addressed to a commercial problem of grave national significance,” Justice Goldberg pressed him: “Only commercial, Mr. Solicitor General? Isn’t there [a] moral problem, also?”¹⁵⁴ In response, Cox said he wished to and would “emphasize repeatedly in [his] argument that Title II is addressed to a grave commercial problem.” However, he also invoked the Nation’s conscience:

Nor should we forget, Mr. Justice Goldberg, that Congress in addressing itself to that commercial problem was also keeping faith with the problems [sic] declared by the Continental Congress that all men are created equal.

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.¹⁵⁵

When pressed by Justice Harlan on the statement in the United States’s brief that “we state our case on the commerce clause,” Cox returned to the idea of a commercial problem. He stated that the record of the impact on commerce was made, and “that the impact of these disturbances arising out of racial discrimination was not merely

151. *Id.* at 199 (discussing with approval Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 150, at 77, 93–102).

152. *See infra* text accompanying notes 316–341.

153. *See Heart of Atlanta Motel*, 379 U.S. at 256–57 (explaining that the fact that Congress has exercised its commerce power to regulate moral wrongs such as gambling, misbranding of drugs, and racial discrimination, and the fact that Congress was also legislating against moral wrongs does not make such use of its commerce power any less valid).

154. *Excerpts from Rights Cases Argument*, *supra* note 64.

155. *Id.* Mr. Cox probably intended to use the term “promise” and instead used the term “problems.”

social and moral. Nobody denies that aspect of it. But that it was national and commercial.”¹⁵⁶

In its opinion, the Court observed that Congress has often regulated commerce to reach activities that are “*moral wrongs*,” such as the white-slave traffic, deceptive trade practices, and criminal enterprises.¹⁵⁷ The Court stated:

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. . . . But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. . . . Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.¹⁵⁸

Some Justices—like some lawmakers—believed, nonetheless, that this focus on “obstructions” of commerce obscured the problem of obstruction of equal citizenship.¹⁵⁹

7. *Property and Liberty Rights to Discriminate? Lessons from State Laws*

Another notable feature of the Court’s opinion is its deployment of the relationship between state and federal public accommodations law in disposing of the motel owner’s claim that the Civil Rights Act deprived him of liberty and property under the Fifth Amendment.¹⁶⁰ The Court rejected the appellant’s claim briskly. It applied a rational basis test, saying that if “Congress had a rational basis for finding that racial discrimination by motels affected commerce,” and if it used reasonable and appropriate means to eliminate that *evil*, then “appellant has no ‘right’ to select its guests as it sees fit, free from governmental regulation.”¹⁶¹ In observing that public accommodations laws are not “novel,” the Court noted that thirty-two states “now have it on their books either by statute or executive order,” as do many cities. Some laws “go back fourscore years.”¹⁶² Indeed, the Court read the *Civil*

156. *Id.*

157. *Heart of Atlanta Motel*, 379 U.S. at 256–57.

158. *Id.* at 257.

159. *See infra* Part II.D (discussing Justice Douglas’s concurrence); *infra* Part II.E (discussing Justice Goldberg’s concurrence); *see also infra* Part III (discussing the competing appeals to the Thirteenth Amendment in congressional consideration of Title II).

160. *Heart of Atlanta Motel*, 379 U.S. at 258–61.

161. *Id.* at 258–59.

162. *Id.* at 259.

Rights Cases as “[p]erhaps the first such holding” that these state laws “do not violate the Due Process Clause of the Fourteenth Amendment”: Justice Bradley “inferentially found that innkeepers, ‘by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.’”¹⁶³ The state laws have survived constitutional challenge, and, “in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court.”¹⁶⁴ The Court concluded: “As a result the constitutionality of such state statutes stands unquestioned.”¹⁶⁵

Pertinent here is how states enacted public accommodations laws even in the absence of active federal lawmaking in the area. Prior to the 1875 Act, only three states had statutes barring racial discrimination in public accommodations, but after the *Civil Rights Cases*, “states took the initiative,” with eighteen states having such laws by 1900,¹⁶⁶ and thirty-two by the time the Court heard the motel’s challenge.¹⁶⁷ However, strict judicial construction of these laws, often in the face of assertions that enforcement would infringe common law property rights, blunted their force, and some laws had fallen into disuse.¹⁶⁸ Further, when Title II was passed, no southern states had statutes barring racial discrimination in public accommodations and some state and local laws still compelled segregation.¹⁶⁹ As I discuss in Part IV, in *Roberts v. United States Jaycees*, the Court reiterates the role of state initiative protecting against discrimination in public accommodations in the absence of federal law.

163. *Id.* at 259–60 (quoting *The Civil Rights Cases*, 109 U.S. 3, 25 (1883)).

164. *Id.* at 260 (citing *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34 n.12 (1948)).

165. *Id.*

166. Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIAAMI L. REV. 456, 464 (1965).

167. *Heart of Atlanta Motel*, 379 U.S. at 260.

168. Bebermeyer, *supra* note 166, at 265 (observing that “[i]n spite of the constitutionality of the state public accommodations statutes, many of the acts have fallen into disuse and strict construction by the state courts has severely limited their effectiveness” (footnote omitted)). For a thorough analysis of the history of these state laws and the changing interpretation of the common law obligations of innkeepers with the advent of Jim Crow laws, see Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

169. See Bebermeyer, *supra* note 166, at 464 n.66 (listing all state antidiscrimination laws in place when Congress passed Title II, none of which is a southern state law). For a discussion of Attorney General Robert F. Kennedy’s testimony on the effects of state and local laws that required segregation, see *infra* Part III.A.

8. *The Harms and Benefits of Antidiscrimination Laws*

Although Rolleston alleged \$11 million in damages (in the event his motel had to comply with the law), contending desegregation would ruin his business, reputation, and goodwill, the Court found it “doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations.”¹⁷⁰ The Court’s reference to experience to the contrary echoes contemporaneous commentaries on Title II making the economic argument that ending segregation will help local economies by increasing the flow of tourist dollars into cities.¹⁷¹ But the Court also explained that if there was some harm as a result of the application of the Civil Rights Act, it was irrelevant to the Act’s constitutionality:

But whether [appellant will suffer economic loss in the long run] is of no consequence since this Court has specifically held that the fact that a “member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier” to such legislation. . . . Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.¹⁷²

These twin arguments that antidiscrimination laws do not harm those subject to them and that, in any case, harm is constitutionally permissible recur in newer generations of public accommodations controversies, although the asserted injuries are not to property but to associational and religious freedom.¹⁷³

C. *Justice Black’s Concurrence: Don’t Leave Out the Thirteenth and Fourteenth Amendments*

In his concurring opinion, Justice Black reiterated that there was an “ample basis” for Congress’s conclusions about the impact of dis-

170. *Heart of Atlanta Motel*, 379 U.S. at 260.

171. Quick, *supra* note 23, at 664 (stating that “the Dallas Chamber of Commerce reported in 1963 that integration in that city has added eight to ten million dollars in convention business,” and that “[a]fter Atlanta, Georgia, hotels announced an open door policy with respect to race, three conventions promising 3,000 delegates committed their respective organizations to meet in that city”).

172. *Heart of Atlanta Motel*, 379 U.S. at 260–61 (alterations in both) (quoting *Bowles v. Willingham*, 321 U.S. 503, 518 (1944)). The Court summarily rejected the appellant’s claim that the Civil Rights Act “is a taking of property without just compensation.” *Id.* at 261.

173. *See infra* Part IV.

crimination in interstate commerce.¹⁷⁴ Like the majority, he invoked Chief Justice Marshall's expansive interpretation of "commerce," although he turns not to *Gibbons* but to the "standard" set forth in *M'Culloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁷⁵ He also stressed that upholding the law does not "uproot and throw into the discard" the distinction between "purely local" activity and that which affects the "national interest," given the aggregate effects of many local events of discrimination.¹⁷⁶

In contrast to the majority, he expressly invoked the Thirteenth and Fourteenth Amendments as additional sources of Congress's legitimate power:

In view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. In view of the Thirteenth, Fourteenth, and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from discrimination is also a legitimate end.¹⁷⁷

He also found the means adopted appropriate and consistent with "both [the] letter and spirit" of the Constitution.¹⁷⁸ As to the motel's assertion that Title II violates the Thirteenth Amendment, Justice Black merely stated in a footnote that such an argument "is so insubstantial that it requires no further discussion."¹⁷⁹

D. Justice Douglas's Concurrence: How to Resolve the Evident Clash of Rights

In his concurring opinion, Justice Douglas extensively discussed the flaws in the appellant's assertion of property rights as a basis to defeat Title II. His analysis is instructive for contemporary clashes of

174. *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring).

175. *Id.* at 276 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)) (internal quotation marks omitted).

176. *Id.* at 275.

177. *Id.* at 276.

178. Recall that in refusing to stay the lower court's order, Justice Black referred to his belief that Congress had "broad grants of power" in both the Commerce Clause and the Fourteenth Amendment sufficient to "control commerce among the states and to enforce the 14th amendment's policy against racial discrimination." *Black Upholds Rights Law*, *supra* note 44.

179. *Heart of Atlanta Motel*, 379 U.S. at 278 n.12.

rights, for example, when rights to freedom of association and religion are in evident tension with rights to free and equal citizenship.¹⁸⁰ His concurrence is also notable for his “reluctance” to allow the Court’s decision “to rest solely on the Commerce Clause,” rather than on the legislative power contained in Section 5 of the Fourteenth Amendment.¹⁸¹ He stressed the human rights dimension of the case:

My reluctance is . . . due to . . . my belief that the right of people to be free of state action that discriminates against them because of race, like the “right of persons to move freely from State to State,” . . . “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”¹⁸²

Justice Douglas also contended that “[a] decision based on the Fourteenth Amendment would have a more settling effect,” avoiding the need for “litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler.” Justice Douglas would have construed the Act to “apply to all customers in all the enumerated places of public accommodation,” a construction that “would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.”¹⁸³ Commentary by legal scholars at the time of the decision found unpersuasive Justice Douglas’s claim that a Fourteenth Amendment holding would “have a more settling effect,” detailing the likely extensive judicial involvement and rulemaking such a holding would necessitate.¹⁸⁴

180. *See infra* Part IV.

181. *Heart of Atlanta Motel*, 379 U.S. at 279–80 (Douglas, J., concurring).

182. *Id.* at 279 (Douglas, J. concurring) (quoting *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring)).

183. *Id.* at 280. Justice Douglas reiterated that a decision based on the Fourteenth Amendment would “put[] an end to all obstructionist strategies and allowing every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.” *Id.* at 286.

184. *See, e.g.*, Paul J. Mishkin, *The Supreme Court 1964 Term*, 79 HARV. L. REV. 56, 129–31 (1965) (arguing that “[a] holding based on the fourteenth amendment would pose questions as to the scope of the newly declared right,” such as which enterprises were included and on what judicial criterion, and would require generating “a new set of constitutional standards governing private conduct covered by the amendment”); Heyman, *supra* note 132, at 163–64 (finding Justice Douglas’s opinion “more satisfactory” than the majority’s in being “verbally more direct,” but concluding that the Court, in upholding the Act based on Congress’s commerce power, “wisely” avoided the Fourteenth Amendment issue and “gratuitously fashion[ed] the detailed rules that are needed to distinguish public from private accommodations”); Stanley H. Friedelbaum, Book Review, 34 U. CHI. L. REV. 234, 236 (1966) (reviewing MILTON R. KONVITZ, *EXPANDING LIBERTIES—FREEDOM’S GAINS IN POSTWAR AMERICA* (1966)) (noting that “Konvitz berates the Court” for upholding the Civ-

For Justice Douglas, the relevant obstruction was not to commerce but to African-Americans' full realization of the rights of citizenship. He appreciated the strategic point that, in 1964, Congress relied on its commerce power to avoid "what was thought to be the obstacle of the *Civil Rights Cases*."¹⁸⁵ But Justice Douglas emphasized that the record made it "clear that the objectives of the Fourteenth Amendment were by no means ignored."¹⁸⁶ He illustrated with excerpts from the Senate Report about the clash of rights, or perhaps better, the improper assertion of rights claims to defeat public accommodations legislation.¹⁸⁷ Some of the reasoning in that Report—and his use of it—is instructive with respect to more contemporary objections to public accommodations laws.

One pertinent theme in the Senate Report is its articulation of the purposes of private property as an institution and how to address the clash of rights and values when one asserts property rights (as means to liberty and freedom) to defeat the freedom and liberty of others. Just as the Report notes the function of private property as a buffer against state power (and being at the mercy of others), accounts of freedom of association stress a similar buffering function (for example, as articulated in *Roberts*).¹⁸⁸ But, as this passage from the Report makes clear, this liberty-enhancing function of property does not translate into an absolute right that hinders the liberty of others:

Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? . . . [T]he English common law answered this question in the negative. *It reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain.* It is to be remembered that the right of the private property

il Rights Act under the Commerce Clause, rather than the "fourteenth amendment route, suggested by Justices Douglas and Goldberg," but argues there is "little to support Douglas's assertion that" such a ruling would have a "more settling effect" and instead that there is a "strong probability" it "might have opened the act to recurring litigation in the manner of desegregation itself in the years when the Court was compelled to depend entirely on its own inventiveness and resources").

185. *Heart of Atlanta Motel*, 379 U.S. at 284 (Douglas, J., concurring).

186. *Id.*

187. *Id.* at 284–86 (quoting S. REP. NO. 88-872, *supra* note 4, at 22–23).

188. *Roberts v. United States Jaycees*, 468 U.S. 609, 618–619 (1984) ("[W]e have noted that certain kinds of personal bonds . . . foster diversity and act as critical buffers between the individual and the power of the State." (citations omitted)).

owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations law. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty?

¹⁸⁹

The Report (quoted by Justice Douglas) explained that restrictions on private property (including the abolition of slavery) ensure that it serves its liberty-enhancing end:

Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.¹⁹⁰

In these passages from the Senate Report, readers can find important precursors or parallels to more contemporary arguments about how antidiscrimination laws advance freedom and American

189. *Heart of Atlanta Motel*, 379 U.S. at 284–86 (Douglas, J., concurring) (quoting S. REP. NO. 88-872, *supra* note 4, at 22–23) (emphasis added).

190. *Id.* at 285 (quoting S. REP. NO. 88-872, *supra* note 4, at 22–23) (internal quotation marks omitted).

ideals. There is also a parallel to arguments about the “bargain” one makes in entering the realm of business or dealing with the public.¹⁹¹

The Senate Report goes on to observe that zoning laws put greater restrictions upon private property rights than do public accommodations laws. Zoning laws are necessary, and their restrictions do not lessen the freedom-enhancing aspects of property. To the contrary, “[s]uch laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.”¹⁹²

These claims, or predictions, about legal restrictions on property are precursors to arguments in a newer generation of antidiscrimination cases that the basic goods protected by freedom of association are not injured—or not injured to a constitutionally troubling degree—by public accommodations laws requiring nondiscrimination in membership or services.¹⁹³ Here, the argument is that private property can still secure liberty and freedom for the right-holder, even if there are limits on the right.

The Senate Report is reminiscent of political liberalism’s concept of the mutual adjustment of equal basic liberties.¹⁹⁴ Thus, if eliminating racial discrimination is a prerequisite for everyone having freedom, then government legitimately bars such discrimination. Rather than accepting the criticism that antidiscrimination laws pursue the equal citizenship of some at the expense of the liberty or freedom of others, the Report envisions the necessary adjustment of freedoms and liberties so all can have them.¹⁹⁵ Title II expresses the entitlement of “all persons” to “full and equal enjoyment” of public accommodations.¹⁹⁶ In the following passage, the Report is evocative of lib-

191. *Roberts*, 468 U.S. at 633–635 (O’Connor, J., concurring) (drawing distinction between mostly “expressive” and mostly “commercial associations” and arguing: “An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”).

192. *Heart of Atlanta Motel*, 379 U.S. at 286 (Douglas, J., concurring) (quoting S. REP. NO. 88-872, *supra* note 4, at 22–23).

193. *See infra* Part III.

194. For an overview of this concept, see JOHN RAWLS, *POLITICAL LIBERALISM* 295–99 (1993).

195. *Heart of Atlanta Motel*, 379 U.S. at 288 (Douglas, J., concurring) (quoting S. REP. NO. 88-872, *supra* note 4, at 22–23).

196. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a), 78 Stat. 241, 243 (codified at 42 U.S.C. § 2000a(a) (2006)).

eral theorist John Rawls's notion of adjusting basic liberties to secure the full value of free and equal citizenship:¹⁹⁷

Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. . . . The Pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices.¹⁹⁸

The above quote speaks, in effect, about appropriate limitations on how we conceive of rights, such as the scope of the constitutionally protected right to property. Property rights may be subject to limitations if they impinge on the rights of others, such as the right to be free from discrimination in access to the goods and services offered by businesses. As property scholar Joseph Singer argues, this is an appropriate legal baseline about property rights in a free and democratic society.¹⁹⁹ Of course, as I mention below, critics of Title II emphatically rejected this notion of appropriate limitations on property rights. As I mention in Part III, a salient question in subsequent generations of public accommodations cases is how to define the scope of freedom of expressive association.

E. Justice Goldberg's Concurrence: "The Vindication of Human Dignity and Not Mere Economics"

Dignity is the basic theme of Justice Goldberg's concurrence. Congress, he agreed, had power under the Commerce Clause to enact the law, but dignity was the law's primary purpose: "The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics."²⁰⁰ In support, Justice Goldberg quoted the Senate Commerce Committee:

The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents,

197. RAWLS, *supra* note 194, at 295–99, 358–59.

198. S. REP. NO. 88-872, *supra* note 4, at 22 (quoted by Justice Douglas at 379 U.S. at 373).

199. See Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 83, 84 (2011) [hereinafter Singer, *The Anti-Apartheid Principle*] ("United States law does and should recognize a foundational anti-apartheid principle that puts out of bounds market conduct that deprives individuals of equal opportunities because of their race.").

200. *Heart of Atlanta Motel*, 379 U.S. at 291 (Goldberg, J., concurring).

hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.²⁰¹

This emphasis by Congress on dignity resonates with language in later public accommodations cases (such as *Roberts'* cite to the majority's reference to "dignity" as the primary legislative objective). Contemporaneous commentators applauded Justice Goldberg's focus upon dignity.²⁰² One review of the Court's civil rights decisions for the term praised Goldberg's themes as "more satisfactory than the majority's in that they are verbally more direct" in getting at what is not "mainly a problem of economics": "The indignity, humiliation, and frustration of Negroes resulting from such discrimination are closer to the mark" than the fact that they may be discouraged from taking trips.²⁰³

The Report's striking use of the term "public," in the passage quoted by Justice Goldberg, also defies a simple public/private division. The Report refers to being told a person is "unacceptable as a member of the public."²⁰⁴ The public realm, in this account, includes spaces in civil society where people interact, go to the movies, or purchase food. The public/private line is blurred in the sense that the "public" space is not equated with being a governmental space.²⁰⁵ It is public in the sense that an event is "open to the public" or "members of the public" are invited to attend.²⁰⁶

201. *Id.* at 291–92 (Goldberg, J., concurring) (alterations in both) (quoting S. REP. NO. 88-872, *supra* note 4, at 16).

202. In a 1965 profile of Justice Goldberg, Stephen Breyer, a former law clerk to Justice Goldberg and current Supreme Court Justice, cited this language about dignity as indicative that Justice Goldberg "has always instinctively seen the law 'as an opportunity to help people obtain social justice'—to aid them in achieving a more productive and civilized existence." Stephen G. Breyer, *Mr. Justice Goldberg*, 12 FED. BAR NEWS 379 (1965) (quoting Judge Bazelon).

203. Heymann, *supra* note 132, at 163.

204. *See supra* text accompanying note 201.

205. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(b), 78 Stat. 241, 243 (codified at 42 U.S.C. § 2000a(b)).

206. "The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of

Justice Goldberg stressed the relationship between public accommodations law and the meaning of *community* membership.²⁰⁷ He referred to an earlier concurrence in which he articulated his conviction that Section 1 of the Fourteenth Amendment “guarantees to all Americans the constitutional right ‘to be treated as equal members of the community with respect to public accommodations,’ and that ‘Congress [has] authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause . . . to implement the rights protected by § 1 of the Fourteenth Amendment.’”²⁰⁸

F. *Reactions in the Press to the Court’s Ruling*

The Court released its unanimous opinion in *Heart of Atlanta Motel* concurrently with its unanimous opinion in the Ollie’s Barbeque case, *McClung v. Katzenbach*, and its 5-to-4 opinion abating the pre-Title II sit-in convictions, *Hamm v. City of Rock Hill*. Press reaction, not surprisingly, conjoined the Court’s upholding of Title II with its “killing” the convictions and highlighted the contrast between the Court “acting with rare unanimity” in the first two cases and dividing 5-to-4 on the fate of the sit-in convictions.²⁰⁹ The *Atlanta Constitution’s* headline read: “Supreme Court Upholds Rights Law in Case Here” and continued: “Tells States to Kill All Sit-In Cases.”²¹⁰ Some northern and southern newspapers ran a picture of Moreton Rolleston hearing the news by telephone, with a caption that he was “not surprised” by the Court’s decision.²¹¹ Some featured pictures of Ollie McClung Sr. or of the Heart of Atlanta Motel.²¹² Some quoted and even headlined Rolleston’s reaction and prediction: “It makes possible a socialistic

subsection (b) of this section.” § 201(e) (codified at 42 U.S.C. § 2000a(e)). For a list of the establishments which are considered “public” under the Act, see § 201(b) (codified at 42 U.S.C. § 2000a(b)).

207. For an interesting discussion of the relationship between public and private space and how public accommodations laws had a predicate in a communitarian and corporatist strand of Anglo-American law protecting travelers, see A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53 (2005).

208. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 293 (1964) (quoting *Bell v. Maryland*, 378 U.S. 226, 317 (1964) (Goldberg, J., concurring)).

209. Andrew Glass, *High Court Upholds New Rights Law, Frees All Sit-Ins*, BOSTON GLOBE, Dec. 15, 1964, at 1; *High Court Upholds Accommodations Law, Kills Early Sit-in Cases*, (Louisville) COURIER-J., Dec. 15, 1964, at 1.

210. *Supreme Court Upholds Rights Law in Case Here—Tells States To Kill All Sit-in Cases*, ATLANTA CONST., Dec. 15, 1964, at 1, 10.

211. Ted Lippman, *Supreme Court Upholds Rights Law in Case Here—Dismisses Appeal by Motel*, ATLANTA CONST., Dec. 15, 1964, at 1, 10.

212. Jerry T. Baulch, *High Court Ruling Backs Rights Law*, ATLANTA CONST., Dec. 15, 1964, at 1 (photo of Ollie McClung Sr. “At Work”).

state and eventual dictatorship. This is a sad day for the cause of individual freedom.”²¹³

The press reported President Lyndon Baines Johnson’s official statement expressing hope for continuing and increasing “reasonable and responsible acceptance” of the Civil Rights Act “now that the Supreme Court also has ruled” and praising the South for accepting the Act, despite initial opposition:

The Civil Rights Act of 1964 was proposed by Two Presidents. It was overwhelmingly adopted by Congress and now the constitutionality of its public accommodations section has been upheld by a unanimous vote of the Supreme Court.

The nation has spoken with a single voice on the question of equal rights and equal opportunity.

I have been heartened by the spirit with which the people of the south have accepted the act even though many were opposed to its passage.²¹⁴

President Johnson, in this statement, links the unanimity of the Court to the unified—“single”—voice of the nation. Civil rights leaders stressed the role of the many sit-ins throughout the South as a catalyst for speaking with this national voice and interpreted the Court’s opinion as vindicating those efforts.²¹⁵ Thus, John Lewis, then a leader of the Student Nonviolent Coordinating Committee, hailed the Court’s ruling as “the landmark in the struggle for complete social, economic and political equality for all Americans,” stating that it “vindicated the thousands of demonstrators who made the civil rights bill not only possible but imperative.”²¹⁶ The press quoted Roy Wilkins, executive secretary of the NAACP, as stating that the Court “recognized the justification for the acts of thousands of young people who exercised their moral right to equal service even before the [civil rights] law was passed.”²¹⁷ Thus, although reading *Heart of Atlanta Mo-*

213. *Warns Court Opens Door to Socialist U.S.*, CHI. TRIB., Dec. 15, 1964, at 2; “*Socialistic State*” *Foreseen*, N.Y. TIMES, Dec. 15, 1964, at 48; see also Achsah Posey, *His Fight Is Over*, *Motel Man Says*, ATLANTA CONST., Dec. 15, 1964, at 1, 10.

214. *LBJ Hails Acceptance—Praises Southern Reaction to Law*, BIRMINGHAM POST-HERALD, Dec. 15, 1964, at 9 (internal quotation marks omitted).

215. *Negro Leaders Jubilant Over Rights Decision, Await Compliance*, ALA. J., Dec. 15, 1964, at 10.

216. *Id.* The reference here to “social equality” is striking, given Justice Harlan’s insistence in his dissent in the *Civil Rights Cases* that access to public accommodations was about civil rights, not social rights or compelled social intercourse. See *supra* text accompanying notes 85–95.

217. *Warns Court Opens Door to Socialist U.S.*, *supra* note 213 (alterations in the original).

tel as an isolated text does not reveal this fuller story of struggle and transformation, the above quotes suggest that a significant legacy of the case is the perception that, in upholding Title II, the Court weighed in favorably on and gave added legitimacy to this momentous national development.

President Johnson might have been heartened by the mayor of Atlanta's statement that many states had "had public accommodations laws for many years," and that "Congress had the full right to take the same steps to eliminate gross discrimination against individuals on an interstate basis," and by the president of the Atlanta Restaurant Association expressing confidence "that our patrons, customers and friends will understand this position" and urging association members to comply.²¹⁸ Georgia Governor Carl Sanders, however, reiterated that his opposition to the public accommodations law was "well known and a matter of record" (including his Congressional testimony); rather than echoing President Johnson's hopes, he stated: "The court has acted now, and there is no need for further comment by me."²¹⁹ Openly critical of the Court and urging resistance, Governor George Wallace, in neighboring Alabama, called the decision "a staggering blow to the free enterprise system and the rights of private property owners."²²⁰ Wallace erroneously referred back to the Court's earlier decision in the *Civil Rights Cases* as invalidating "such an act under the commerce clause," and urged: "Despite this setback there should be continuing resistance to such attacks on the system that has made this nation great and strong."²²¹

Editorials in some southern newspapers expressed worry about Congress's expansive use of the commerce power and the Supreme Court's "edict," which "puts virtually no limit on what can be called 'interstate commerce' or on the power of congress to regulate it."²²² For example, taking a different tone than its op-ed on the signing of Title II, the *Atlanta Constitution* deemed the ruling "no surprise," calling it "another step in the steady onward march of Federal dominion

218. Posey, *supra* note 213.

219. *Id.*

220. John Williams, 'Rough Blow' Wallace Says of Decision, MONTGOMERY ADVERTISER, Dec. 15, 1964, at 1.

221. *Id.* In contrast to Wallace's characterization, press analysis noting the Court's change over the last century—from *Dred Scott* to its 1964 opinions—accurately reported that the Commerce Clause was not at issue in the earlier public accommodations law. It also noted that the Court's reversal "is a reflection of the change in attitude in this country toward Negroes." James Marlow, 5 Decisions Stand Out in Civil Rights History, ALA. J., Dec. 16, 1964, at 10.

222. David Lawrence, *Fateful Day in History*, ALA. J., Dec. 16, 1964, at 4.

over lives of the people.” It counseled that “it is a ruling which we must live with. Time may bring changes, but certainly not in the foreseeable future.”²²³ The *Montgomery Advertiser* similarly combined resignation to living with the Civil Rights Act with a warning of its severe deprivation of “sacred” property rights:

It is pointless now to argue whether the ruling was good law or bad law: the finding will rule the country in this realm. It is one of the most consequential nullifications of property rights in the history of the court

. . . .

It may be argued that the throttling of a restaurant’s right to choose its clientele or a department store to reject a job applicant are benign in purpose. Even if you account the law’s purpose as benevolent, you have to concede that it is a grand scale deprivation of property rights previously held sacred in this country.²²⁴

Similarly, the *Birmingham News* interpreted the unanimity of the Court as probably meaning there was “no real prospect of judicial overturning of any other sections in the new act,” even as it observed that “the Court has joined Congress in protecting some rights at the specific expense of rights of others;” it warned that the decision may pose a “grave danger” as a precedent for using government power “to act further against private enterprise practices.”²²⁵

To return to Rolleston himself: the hotel owner remarked that the “decision nullifies the rights and principles which the Constitution was designed to perpetuate” and “opens the frightful door to unlimited power of a centralized government in Washington, in which the individual citizens and his [sic] personal liberty are of no importance.”²²⁶ This statement, perhaps unwittingly, invites attention to flaws with the original constitutional scheme, which perpetuated certain forms of inequality and nullified the very legal status and rights of African-Americans. Moreover, all these reactions evince a more abso-

223. *No Surprise Ruling*, ATLANTA CONST., Dec. 15, 1964, at 4.

224. *More to Come*, MONTGOMERY ADVERTISER, Dec. 15, 1964, at 4. In one op-ed, the author criticized the Court’s “edict” for “chang[ing] the whole constitutional system overnight,” instead of the nation proceeding by constitutional amendment, and concluded: “It remains to be seen whether this method of governing the United States will be accepted in the long run by the people, and whether they will submit to changes of such far-reaching character in American life without the usual constitutional processes being observed.” Lawrence, *supra* note 222.

225. *Opinion of the Week: At Home and Abroad*, N.Y. TIMES, Dec. 20, 1964, at E9 (excerpting the BIRMINGHAM NEWS).

226. *Id.* (quoting Moreton Rolleston).

lute conception of property rights, a conception rejected in the Senate Report, and, implicitly, in Title II.

Another theme in the press's reaction to the Court's ruling in *Heart of Atlanta Motel* and its companion cases is that it is time to move on to the next challenges in ending separate but equal and securing equality. Thus, the *New York Times* cautioned that the decisions were a "major step," but would "by no means . . . eliminate all racial problems," for example, integration in the North, where "discrimination in public accommodations has long been outlawed."²²⁷ It admonished:

But the issue no longer is a question of legality. The primary concern now is not resistance to the law but the Negro's poverty and inadequate education. These remaining problems can be solved only through massive efforts to deal with de facto school segregation and discrimination in jobs and housing, which have been the causes of racial unrest in the North all along.²²⁸

Similarly, a "Negro" civil rights lawyer, Donald L. Hollowell, commented: "The decision is most important and extremely gratifying . . . [and now] we can all . . . turn our concerted attention to promoting the general welfare and other basic needs such as jobs, housing and education."²²⁹ Legal commentators, too, expressed similar conviction about the need for "cause seekers" to move on from the era of "civil disobedience and the beatings related to public accommodations" to remaining challenges, addressed by other parts of the Civil Rights Act, such as the "more fertile areas" of "voting rights, employment and housing."²³⁰

For critics of the Civil Rights Act, by contrast, what lay ahead was more encroachments on private rights. Looking ahead to implementing the Act's provisions barring discrimination against a job applicant based on race or creed, one op-ed warned this was "a hard blow at an employer's right to run his own business according to his own lights and prejudices."²³¹ Maddox himself rode widespread public reaction against integration to victory as governor of Georgia. It is a common observation that President Johnson recognized his support for the

227. *The Nation: Court on Rights*, N.Y. TIMES, Dec. 20, 1964, at E2.

228. *Id.*

229. *Opinion of the Week: At Home and Abroad*, *supra* note 225 (alteration in original).

230. Quick, *supra* note 23, at 709.

231. *More to Come*, *supra* note 224.

Civil Rights Act would cost the Democratic Party the South “for a long time to come.”²³²

III. THE COMPETING APPEALS TO THE THIRTEENTH AMENDMENT IN CONGRESSIONAL CONSIDERATION OF TITLE II

Reading *Heart of Atlanta Motel* in isolation from the larger context of congressional consideration of what became Title II could lead the reader to catch only a glimpse of the role the Thirteenth Amendment played in the 1964 public accommodations law. The goal of this Part is to illustrate how appeals to the Thirteenth Amendment featured both in arguments supporting the bill and opposing it. Two distinct understandings of the Thirteenth Amendment’s relevance were at work: to empower Congress to address the intolerable discrimination African-Americans still experienced in everyday life, nearly 100 years after emancipation, and (as in Rolleston’s argument) to bar Congress from compelling “private” businesses to serve customers they did not wish to serve. Given space constraints, I do not attempt an exhaustive look, but focus on two sources: the arguments made by the U.S. Attorney General’s office in support of the public accommodations law and any references to the Thirteenth Amendment made in the Senate Report on S. 1732,²³³ the public accommodations bill, and the various Individual Views included with it.²³⁴ That examination reveals that proponents of the bill shared a concern to remedy what they viewed as a significant moral problem, but some were more pragmatic in looking for a constitutional hook (commerce) that would avoid the

232. SUSAN DUDLEY GOLD, *THE CIVIL RIGHTS ACT OF 1964*, at 115 (2011) (“On the night after signing the civil rights bill, President Johnson sadly predicted the political ramifications of the act. ‘I think we just delivered the South to the Republican party for a long time to come,’ Johnson told his press adviser, Bill Moyers.” “[H]is words proved true” because even though he won the 1964 election “in a landslide,” his opponent, Senator Barry Goldwater, “received support from the five states of the Deep South (Louisiana, Alabama, Mississippi, Georgia, and South Carolina)” and “in the years that followed, the South consistently voted for Republicans for president”). For contemporary press reports of the 1964 presidential election outcome, see Tom Wicker, *Johnson’s Plurality Sets Record; Many Democrats Gain by Sweep*, N.Y. TIMES, Nov. 5, 1964, at 1 (reporting that “[o]nly in a belt of five states across the Deep South could Mr. Goldwater claim victory for his brand of conservatism. In those states his victory margins were rolled up in predominantly segregationist areas”). Press coverage of Johnson’s 1964 landslide observed that “the most remarkable percentages [in Johnson’s landslide] concerned Negro voting”: in the South, in 1956, “President Eisenhower won 45 percent of Negroes; in 1960, Mr. Kennedy won 69 percent. Tuesday Mr. Johnson polled 95 percent of a sizeable Southern Negro vote.” Wicker, *supra*, at 21.

233. This is the Senate version of what became, after a compromise bill, Title II.

234. There was less discussion of the Thirteenth Amendment in the House Report, but I also consider it.

Court overturning the new law. For some lawmakers (as for Justice Goldberg), this emphasis upon commerce failed to capture the dignity and citizenship issues at stake. I conclude this Part by examining the rhetoric of a 2004 House Resolution commemorating the fortieth anniversary of Congress's passage of the Civil Rights Act and statements made in support. One opponent of that resolution, Rep. Ron Paul, Republican of Texas, sounded property rights arguments similar to those made in opposition to the act and echoed several years later when his son (and eventual United States senator from Kentucky) Rand Paul found himself in a political firestorm after criticizing Title II.²³⁵

A. Testimony by the Attorney General and Assistant Attorney General

In his testimony before the Senate Committee on Commerce, Attorney General Robert F. Kennedy advanced a pragmatic view that discrimination in public accommodations was a national problem—and injustice—that required a remedy, and the Commerce Clause supplied Congress the authority to provide that remedy.²³⁶ The Thirteenth Amendment, Kennedy remarked more than once, was also a possible foundation for S. 1732; indeed, he stated that it “might very well be stronger than the 14th amendment” as a basis because, by contrast to the Fourteenth Amendment, it did not have a state action requirement.²³⁷ While he personally believed that the Thirteenth and Fourteenth Amendments provided additional authority for the law, Kennedy repeatedly observed that the Supreme Court's decision in the *Civil Rights Cases* was still “the law of the land” and that resting the bill on the Fourteenth Amendment alone—as some senators proposed to do—would put a “heavy burden” on the bill, avoidable if Congress used the dual hooks of commerce and the Fourteenth Amendment.²³⁸ Kennedy praised and indicated agreement with Justice Harlan's dissent in that case and predicted that, given how much had changed in the eighty years since that opinion, the Court would likely sustain a Fourteenth Amendment basis for the law.²³⁹ However,

235. See Adam Nagourney & Carl Hulse, *Tea Party Pick Causes Uproar on Civil Rights*, N.Y. TIMES, May 20, 2010, at A1.

236. *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearings on S. 1732 A Before the Senate Comm. on Commerce*, 88th Cong. 28 (1963), [hereinafter *Hearings on S. 1732, pt. 1*] (statement of the Hon. Robert F. Kennedy, Attorney General of the United States).

237. *Id.* at 74.

238. *Id.* at 23, 78.

239. *Id.* at 77–78 (noting that, in 1963, there is “more travel,” thus implicating a citizen's right to travel as a privilege and immunity of citizenship and also “that the shipment of

because there was reasonable disagreement on the issue, including in the Justice Department itself, the more prudent course was relying on Congress's clear authority under the Commerce Clause.

The Thirteenth Amendment was also a lodestar for Kennedy's testimony about why a national law was necessary to address the harms to citizenship and personhood stemming from race-based refusals of service and the fact that, nearly one hundred years after emancipation, blacks still experienced injustice and indignity. A few passages from his testimony are illustrative: "With the adoption of the 13th, 14th, and 15th amendments, the American Negro was freed from slavery and made a citizen in full standing—on paper, at least. But for most of the past hundred years we have imposed the duties of citizenship on the Negro without allowing him to enjoy the benefits."²⁴⁰ Kennedy further stated: "Plainly, when a customer is turned away from such a place because of the color of his skin, it imposes a badge of inferiority on that citizen which he has every right to resent."²⁴¹ Kennedy also referenced persisting racial inequality as evidence of a failure to realize the Thirteenth Amendment.

Strikingly, when Senator Strom Thurmond questioned Kennedy's invocation of the Thirteenth Amendment as a basis for the bill and countered, instead, that the only involuntary servitude at issue would be that experienced by the business owner, due to the public accommodations law, Kennedy's answer shifted to the unfilled promises of the Thirteenth Amendment for American Negroes, nearly a century after emancipation:

When the 13th amendment was written, it involved granting to the Negroes all the privileges, rights, and immunities of all the other citizens.

I think quite frankly, Senator, that there are sections of the country where they have never received that and this is a whole major effort. It doesn't just go to allowing them to go into a tavern or barbershop or store of one kind or another. It involves that fact that they are not permitted to register or vote in elections so they can't change the system in their own State. It involves the fact they have not had an adequate education, so they can't rise above the lowest positions. . . .

Senator, it is 1963. . . . [A]ll of this effort to keep the Negro from obtaining really a decent and reasonable life in the

goods, the movement of goods, is far different now than it was during the period of the time of the 14th amendment," with much more state licensing and regulation).

240. *Id.* at 24.

241. *Id.* at 18.

United States—it is all part of a system. . . . [T]herefore, [because] they haven't received all their rights and privileges under the 14th amendment, . . . you could . . . argue forcefully that under the 13th amendment that this would be declared constitutional. I think it is a different situation than in 1883 because we have gone 80 more years when these practices and procedures still exist.²⁴²

The testimony of Burke Marshall, Assistant Attorney General of the Civil Rights Division in the Department of Justice, parallels Kennedy's in naming the Thirteenth Amendment as among the constitutional bases for the federal public accommodations bill. Indeed, Marshall referred to the *Civil Rights Cases* majority opinion's belief "that [the Thirteenth Amendment] gave Congress the power, not only to enact legislation against the institution of slavery itself, as such, but against the badges, the remaining badges left over from the previous condition of servitude."²⁴³ He added (contrary to Justice Bradley's view, of course, but in keeping with Justice Harlan's): "One of the badges, one of the remnants of the institution of slavery, based on race in this country was the denial of access to these places covered by this bill [S. 1732]. So that is why I think the 13th amendment positively gives the Congress power to move in this area."²⁴⁴ However, Marshall also—like Kennedy—stressed the pragmatic case for resting primarily on Congress's Commerce Clause power and the "heavy burden" Congress would put on the bill—in light of the *Civil Rights Cases*—if it rested solely on the Fourteenth Amendment.²⁴⁵ Thus, Marshall conceded, under the 1883 case, "Congress did not have the power under the 13th or 14th amendment to compel the proprietors to render service to Negroes."²⁴⁶

Marshall, like Kennedy, sounded moral themes of a long overdue remedy for intolerable racial discrimination. He observed that establishments "in business to serve the public" practice "systematized and complete" racial discrimination, subjecting "countless members of the public—citizens of this country guaranteed equality of treatment by our Constitution" to "daily suffer the humiliation of being denied ser-

242. *Id.* at 118–19.

243. *Id.* at 231–32 (statement of Burke Marshall, Assistant Attorney General, Civil Rights Division, Department of Justice).

244. *Id.* at 232 (insertion added).

245. On the Thirteenth Amendment as a basis for the law, see *id.* at 206, 230–31. On the "heavy burden" point, see *id.* at 248.

246. *Id.* at 208.

vice for no reason other than the color of their skin.”²⁴⁷ Pointing to the escalation in the number of sit-ins and demonstrations with respect to segregated facilities as evidence of “the intensity with which millions of our citizens resent this treatment,” Marshall asserted, “no problem is of greater immediate importance than discrimination in places of public accommodation.”²⁴⁸ Asked to defend this statement, Marshall clarified “that the need for curing this problem goes back a very long way,” but it was the intensification of the demonstrations—and the support for them, along with the failure of voluntary and persuasive efforts in some localities—that made the matter so urgent.²⁴⁹ When asked whether the public accommodations bill “aim[s] at the thing which is the point of highest irritation and frustration and offense,” Marshall answered that this was “true in the places where this kind of discrimination exists,” and that the bill “would bear very heavily upon how 18 or 19 million Americans feel they are looked upon by their Government.”²⁵⁰

Marshall combined the pragmatic concern with fashioning a bill that could deal with the Supreme Court’s *Civil Rights Cases* “8-to-1 decision” with the urgent need “to deal with the substantive problems, the substantive evil, that is causing a great deal of turmoil, and is permitting to continue a system of injustice and racial intolerance in this country.”²⁵¹ When senators pressed the point that the Fourteenth Amendment was better suited to remedy bias, prejudice, and discrimination than the commerce power, Marshall reiterated the risk of relying “solely” on the Fourteenth Amendment and stated that Congress had the power, under commerce, to deal “now” with a “very urgent” national problem.²⁵² Marshall, like Kennedy, did state that the 1883 “case could be distinguished in some sense,” due to changes in the degree of state regulation of business “and the fact that in many places these practices have been required or encouraged, not only tolerated . . . by State officials and State laws and local officials and local ordinances.”²⁵³

247. *Id.* at 205.

248. *Id.*

249. *Id.* at 214–15.

250. *Id.* at 237–38.

251. *Id.* at 220.

252. *Id.*

253. *Id.* at 224.

B. The Senate Report on S. 1732

Congress did not explicitly rely on the Thirteenth Amendment, notwithstanding Kennedy's comments about it as a possible foundation. The Senate Report candidly notes the "formidable obstacle to a favorable determination" that the 1883 Supreme Court holding concerning the 1875 public accommodation law posed "[a]t the outset."²⁵⁴ Here, it mentions the Court's rejection of the Fourteenth Amendment as a basis because of the lack of state action; it does not mention the Thirteenth Amendment ruling in the case. Noting the "large body of legal thought" that believed the Court might reverse that decision or distinguish it, the Report stated: "That question, however, was not before the committee, for the instant measure is based on the commerce clause," which the 1883 opinion did not foreclose as a basis for a public accommodations statute.²⁵⁵ It refers to an Appendix to the Senate Report, a memorandum prepared by constitutional law scholar Paul Freund, *Constitutional Bases for the Public Accommodations Bill*, which led with—and concentrated upon—Congress's authority to enact the law under the commerce power.²⁵⁶ The memo concluded that "[t]he commerce power is clearly adequate and appropriate," and also counseled: "No impropriety need be felt in using the commerce clause as a response to a deep moral concern. Where social injustices occur in commercial activities the commerce power is a natural and familiar means for dealing with them."²⁵⁷ This theme of Congress properly addressing a moral problem through the commerce power features in the Senate Report and, as discussed in Part II, in the Court's *Heart of Atlanta Motel* opinion. With respect to the Fourteenth Amendment, Freund offered some thoughts about why the Court had not overruled the *Civil Rights Cases* decision and explored what kind of rights an overruling of the cases "would create for the courts and for Congress to enforce."²⁵⁸

The Senate Report also situates the law in the framework of common law obligations of innkeepers and rejects (as quoted in Justice Douglas's opinion) private property objections to the bill. Simi-

254. S. REP. NO. 88-872, *supra* note 4, at 12.

255. *Id.*

256. *Id.* at 82–92 (Appendix, *Constitutional Bases for the Public Accommodations Bill*).

257. *Id.* at 92.

258. *Id.* Freund added, "The Court may be the readier to accept this basis for the legislation if a consensus is reached as to those principles by the proponents of this constitutional approach." He concluded that it is "uncertain" whether the Supreme Court would sustain the legislation under that basis "because of the necessity to find principles of inclusion and exclusion in opening up a new class of constitutional claims against private enterprises." *Id.*

larly, Freund deflects objections rooted in property and associational rights: “There is no serious question of the right of association or of property or of privacy as a barrier to the legislation, applicable as it is to commercial places of public accommodation.”²⁵⁹

The Report does not explicitly mention the Thirteenth Amendment. It clearly treats the new public accommodations law, however, as affording a long-overdue remedy. The Senate Report looks back to the 1875 Act and to the recommendations, made in the 1947 Report of President Harry S. Truman’s Committee on Civil Rights titled *To Secure Those Rights*, that states enact public accommodations laws (and better enforce the ones they have). It states: “This bill, then, is the second attempt to achieve Federal legislation and the third time equal access to public accommodations has been recommended as a national goal.”²⁶⁰ Appropriately, then, the theme of the unfinished business of eradicating the legacy of slavery is very strong, as is its implicit invocation of the Thirteenth Amendment’s broad aim of equal civil liberties.²⁶¹

C. Explicit Reliance on the Thirteenth Amendment to Support the Public Accommodations Bill: Senator Prouty’s Individual Views

Accompanying the Senate Report were the individual views of several senators. An impassioned statement offering the Thirteenth and Fourteenth Amendments as a better foundation than the commerce power featured in the individual views of Senator Winston L. Prouty, a Republican from Vermont. Prouty maintained that because human dignity was at stake in discrimination, to label this as a matter of commerce insulted such dignity.²⁶² He offered alternative bills: one resting solely on the Thirteenth and Fourteenth Amendments and another adding them to the commerce power. In support, Prouty attached to the Senate Report over 200 pages of law review articles and Supreme Court opinions (primarily about the Fourteenth

259. *Id.*

260. *Id.* at 11.

261. The Senate Report quotes President Kennedy on “how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. . . . Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.” *Id.* at 8–9.

262. S. REP. NO. 88-872, pt. 2 (1964) (Individual Views of Sen. Winston L. Prouty).

Amendment).²⁶³ Although the Thirteenth Amendment is the focus of this Article, it bears mention that Prouty's Fourteenth Amendment argument appealed to the Citizenship Clause—the first clause of Section 1, which does not have a state action requirement.²⁶⁴ He pursued both his Thirteenth and Fourteenth Amendment arguments when questioning constitutional law scholar Erwin Griswold in the Senate hearings. Griswold expressed initial skepticism about whether Congress could “describe and define incidents of national citizenship to include national protection of civil rights,” but then commented that Prouty's idea had potential and that perhaps it could be stated that “Congress was, in doing this, defining and prescribing the rights of citizens of the United States under the 14th amendment.”²⁶⁵

Turning to the Thirteenth Amendment, Prouty included his exchange with Griswold, in which Prouty invoked Justice Harlan's view in his dissent in the *Civil Rights Cases* “that there are burdens and disabilities which constitute badges of slavery and servitude and that Congress had the power to enact legislation of a direct and primary character” to eradicate not only the institution of slavery, but also those “badges and incidents.” He then asked Griswold, “Would you say that segregation as a system is ‘slavery’ within the contemplation of the framers of the 13th amendment?” to which Griswold said, “Yes, I think so.”²⁶⁶ Prouty quoted Griswold's further response:

This is quite consistent with, and is in support of, the position I have suggested here; that in addition to the commerce clause and the 14th amendment, Congress should definitely utilize its powers under the 13th amendment in passing the pending bill.

263. Part 2 of Senate Report No. 88-872 consists entirely of Prouty's individual views, alternative bills, and materials attached to the Report.

264. For a contemporary argument about Congress's power under the Citizenship Clause, see Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

265. S. REP. NO. 88-872, *supra* note 262, at 6. Prouty also reproduces Griswold's answer to Senator Pastore where, in discussing the *Civil Rights Cases*, Griswold observes that it involved Section 2, not Section 1, of the Fourteenth Amendment, and that *Edwards v. California* could

furnish strong authority for saying that Congress, under section 1 and section 5 of the 14th amendment, has power to prescribe that the right to move freely from State to State—and that includes being accommodated when you move, because you can't move and just sleep in the ditch by the side of the road—is a right which Congress can prescribe under the 14th amendment.

Id.

266. *Id.* at 7.

Justice Harlan used “badges” of slavery. I said “vestiges” of slavery. I think we mean exactly the same thing.²⁶⁷

Like Kennedy, Prouty viewed contemporary discrimination as a legacy—a vestige—of slavery. He contended that, based on his “reading of the legislative history of the 13th and 14th amendments to the U.S. Constitution, . . . the intention of the framers to elevate the freed slaves to full civil freedom has been sidetracked by history. Various judicial, legislative, and executive obstructions have fallen across the path to full citizenship.”²⁶⁸ His bill, resting in the Thirteenth and Fourteenth Amendments, instead of the commerce power, “sought to abolish the historical consequences of slavery and enable the son of the slave to attain the full stature of citizenship,” specifically, the federal citizenship that “was made dominant over State citizenship,” with the enactment of the Thirteenth and Fourteenth Amendments.²⁶⁹ Prouty found in the testimony of Robert Kennedy (including the passages I cite above) support for his own argument that discrimination is an “affront to citizenship” and that the basis for a public accommodations law that protects dignity should be citizenship, not commerce.²⁷⁰

In support of his Thirteenth Amendment argument, Prouty puts into the Senate Report “the very valuable law review article” by equality theorist Jacobus tenBroek,²⁷¹ which supports the interpretation of the Thirteenth Amendment as broadly conceived to obliterate the incidents of slavery and protect “the emancipated negro and his white friends . . . in the privileges and civil liberties of free men.”²⁷² Professor tenBroek identifies a critical question: “What was the ‘slavery’ which the Thirteenth Amendment would abolish?”²⁷³ Based on his study of the legislative debates, he observes that “[t]he opposite of slavery is liberty,” but the liberty was “itemized and detailed,” in terms of securing the former slave’s “natural and God-given rights,” and affording the “equal protection under the law.”²⁷⁴ He concludes that

267. *Id.*

268. *Id.* at 8.

269. *Id.* at 9.

270. *Id.* at 10–11.

271. *Id.* at 7 (referring to the article as Appendix F). The article, Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951), appears at S. REP. NO. 88-872, *supra* note 262, at 223–55. The original page numbers of the article appear to have been removed for inclusion as an Appendix to the Report.

272. Jacobus tenBroek, *supra* note 271, at 176.

273. *Id.* at 179.

274. *Id.* at 179–80 (internal quotation marks omitted).

both proponents of the Thirteenth Amendment and those who feared its consequences agreed on a broad conception of the “slavery” that would be abolished: “the involuntary personal servitude of the bondman; the denial to the blacks, bond and free, of their natural rights through the failure of the government to protect them and to protect them equally; [and] the denial to the whites of their natural and constitutional rights through a similar failure of government.”²⁷⁵ Proponents and opponents of the Thirteenth Amendment both understood that it intended a “revolution in federalism.”²⁷⁶ Professor tenBroek explains this revolution:

[T]he Thirteenth Amendment either gave or confirmed congressional power to enforce a constitutional prohibition against slavery everywhere in the United States; and the liberty which Congress now had constitutional mandate to enforce was not just the liberty of the blacks but the liberty of the whites as well and included not just freedom from personal bondage but protection in a wide range of natural and constitutional rights.²⁷⁷

However, when Congress subsequently debated the civil rights bills and the Freedmen’s Bureau bill—legislation intended to implement the Thirteenth Amendment and obliterate the “infamous Black Codes” that replaced the slave codes—opponents of the Thirteenth Amendment “now switched to a restrictive interpretation of the Thirteenth Amendment,” such that “[t]he evil of Negro elevation and equality which they had loudly proclaimed it would bring about they now insisted had not been intended to be achieved by it.”²⁷⁸ This “narrow constructionist argument” about “the meaning of ‘slavery’ and its abolition”—for example, that it “merely dissolved the relation of master and slave”—featured as a ground for opposing measures to “wipe out the remnants, badges and indicia of slavery.”²⁷⁹

Opposing this narrow constructionist view, “Senator Trumbull, a principal draftsman both of the Thirteenth Amendment and the Civil Rights Bill,” referred to the Declaration of Independence and the privileges and immunities of citizens in the Constitution and exclaimed:

275. *Id.* at 180.

276. *Id.* at 174.

277. *Id.* at 183.

278. *Id.* at 188, 189.

279. *Id.* at 189, 186.

“It is the intention of this [Civil Rights] bill to secure those rights.”²⁸⁰ Any statute that does not treat citizens equally and “deprived any citizen of civil rights which are secured to other citizens” is a “badge of servitude.”²⁸¹ Professor tenBroek argues that the repeated references in the debates to the “full” and “equal” enjoyment of rights point to a “broad” and “far flung” idea of equal protection.²⁸² That protection is “[a]t the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen’s Bureau and Civil Rights Bill.”²⁸³ He concludes that the sponsors of the Thirteenth Amendment viewed it “as doing the whole job—not just cutting loose the fetters which bound the physical person of the slave; but restoring to him his natural, inalienable and civil rights; or what was the same thing in other words, guaranteeing to him the privileges and immunities of citizens of the United States.”²⁸⁴ Slavery’s opposite is liberty, “[b]ut liberty in society, civil liberty, consists of natural liberty as restrained by human laws protecting all men in their antecedent rights and being both general and equal.”²⁸⁵ He further concludes that “[t]he Thirteenth Amendment nationalized the right of freedom,” and the “equal right of all to enjoy protection in those natural rights which constitute that freedom.”²⁸⁶ The Fourteenth Amendment, passed after doubts arose about the adequacy of the Thirteenth Amendment, “reenacted” the Thirteenth and “made the program of legislation designed to implement it constitutionally secure or a part of the Constitution.”²⁸⁷

Professor tenBroek’s article, thus, appears in the Senate Report as support for Prouty’s appeal to the Thirteenth Amendment as a foundation for the 1964 Act. His historical analysis tends to buttress Prouty’s argument that, under the Thirteenth Amendment, Congress has the power to enact legislation to eradicate the badges and incidents of slavery, but “that the intention of the framers to elevate the freed slaves to full civil freedom has been sidetracked by history.”²⁸⁸

280. *Id.* at 190–91. Professor tenBroek explains that “[m]any other speeches are to the same effect.” *Id.* at 192 n.46 (giving numerous examples using language of “securing” or “protecting” rights).

281. *Id.* at 191.

282. *Id.* at 199–200.

283. *Id.* at 200.

284. *Id.*

285. *Id.*

286. *Id.* at 203.

287. *Id.*

288. S. REP. NO. 88-872, *supra* note 262, at 8 (Individual Views of Sen. Winston L. Prouty).

In this context, the *Civil Rights Cases* are a primary example of the sort of “obstruction” of this “path to full citizenship.”²⁸⁹

To return again to Trumbull’s invocation of the Declaration of Independence, it is striking that the phrase “to secure those rights” is echoed some eighty years later, in the title to President Harry S. Truman’s Committee on Civil Rights report.²⁹⁰ The report takes note of “the fate of the civil rights program developed by Congress following the close of the Civil War,” with an earlier Supreme Court striking down (in the *Civil Rights Cases*) the 1875 public accommodations act.²⁹¹ The report observes that Justice Harlan’s dissent in the *Civil Rights Cases* is “a particularly powerful statement,” noting that “[a]s interpreted by the Supreme Court the Constitution does not guarantee equal access to places of public accommodation and amusement.”²⁹² In light of this constitutional interpretation, the report expresses the “hope that enforcement will make practice more compatible with theory” in the “[eighteen] states that have already enacted [antidiscrimination statutes]” while recommending that “all of the states should enact such legislation, using the broadest possible definition of public accommodation.”²⁹³ Written before *Brown v. Board of Education*,²⁹⁴ the report recommended “[t]he elimination of segregation, based on race, color, creed, or national origin, from American life.”²⁹⁵ The Thirteenth Amendment is one of “several specific constitutional bases” it identifies “for federal action in the civil rights field.” As Rebecca Zietlow has observed, “[t]he 1964 Civil Rights Act incorporated a number of the recommendations” contained in this report.²⁹⁶ It was this report, along with the 1875 Act, the Senate Report referred to when it observed that the 1964 Civil Rights Act was the third time it had recommended a public accommodations law.

289. *Id.* at 8, 10.

290. Steven F. Lawson, *Preface to TO SECURE THESE RIGHTS: THE REPORT OF PRESIDENT HARRY S. TRUMAN’S COMMITTEE ON CIVIL RIGHTS*, at iv (Steven F. Lawson ed., 2004) (1947) [hereinafter Lawson, *TO SECURE THESE RIGHTS*].

291. *Id.* at 131.

292. *Id.* at 109, 131. The report observes that “[e]ighteen states have statutes prohibiting discrimination in places of public accommodation”—although the states’ actual “practice does not necessarily conform to the law”—but “[twenty] states by law compel segregation in one way or another.” *Id.* at 109–10.

293. *Id.* at 183.

294. 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

295. See Lawson, *TO SECURE THESE RIGHTS*, *supra* note 290, at 179 (determining that “[t]here is no adequate defense of segregation”).

296. Rebecca Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 945 n.1 (2005).

D. The House Report and Individual Views

There is far less discussion concerning the Thirteenth Amendment and involuntary servitude in the House Report (and its accompanying individual views) on the Civil Rights Act of 1964. Nonetheless, the “general statement” in the Report presents a strong theme that the new civil rights bill will rectify longstanding injustices and secure the substantive rights of citizenship, thus addressing unfinished business concerning the end of slavery:

Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.²⁹⁷

The House Report finds that the “national need” for “national legislation” is evident from the slow progress made in eliminating discrimination, the “growing impatience by the victims of discrimination,” and “a growing recognition on the part of all our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.”²⁹⁸ Indeed, like the Reconstruction Congress and the 1947 report, the House Report speaks of the need “to secure these rights”: “A number of provisions of the Constitution of the United States clearly supply the means to secure these rights, and H.R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis.”²⁹⁹

Several representatives, nonetheless, felt there was “a need for fuller documentation of the reasons for the bill,” and, in their additional views, explicitly linked the current bill to the unfinished business of Reconstruction. They led with the Fourteenth Amendment, Sections 1 and 5: “Almost a century has elapsed since its ratification, yet not since Reconstruction has Congress enacted legislation fully implementing the article. A key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and of the several States.”³⁰⁰ They also implicitly appealed to the Thirteenth Amendment by asserting that, over one hundred years

297. H.R. REP. NO. 88-914, at 18 (1963).

298. *Id.*

299. *Id.*

300. H.R. REP. NO. 88-914, pt. 2, at 1 (1963) (Additional Views of Hon. William M. McCulloch et al.).

since emancipation, “the Negro continues to bear the burdens of a race under the traces of servitude,” evident by “the barrier[s] of racial inequality” in “employment, education, public service, amusement, housing, and citizenship.”³⁰¹ Defending Title II, the Congressmen characterized access to public accommodations “regardless of the color of his skin” as “[a]nother signpost of freedom [that] must be extended to the Negro if he is to overcome racial inequality and if our country is to live up to its national ideas.”³⁰² They asserted: “This right is so distinctive in its nature that its denial constitutes a shocking refutation of a free society.”³⁰³ They contended that nondiscrimination in such places is a demand of “the badge of citizenship—extended to Negro as well as white by the 14th amendment,” and they would ground Title II not only in the commerce power—here confirming Congress’s power to legislate on moral and social grounds—but also in the Fourteenth Amendment.³⁰⁴ They dismissed the “freedom of association” and “rights of privacy” objections to Title II as “ludicrous” in light of the distinction between establishments holding themselves open to the public and private organizations and the existence of public accommodations laws in thirty-two states.³⁰⁵

E. The Equation of “Rendering Involuntary Service” with “Involuntary Servitude”: Invoking the Thirteenth Amendment to Oppose the Civil Rights Bill

In Part II, I reviewed how Moreton Rolleston, owner of the Heart of Atlanta Motel, unsuccessfully asserted that Title II, as applied to his motel, constituted involuntary servitude. In Congress, some lawmakers made similar claims. I will discuss the example of Senator Strom Thurmond, whose “individual views” are attached to the Senate Report on the public accommodations law.³⁰⁶ For Thurmond, the “only valid application” of the Thirteenth Amendment to the law was as

301. *Id.* at 2.

302. *Id.* at 7.

303. *Id.*

304. *Id.* at 7–8.

305. *Id.* at 9.

306. The Minority Report to the House Report does not explicitly raise the involuntary servitude objection to Title II. It objects to the reported bill as “*the greatest grasp for executive power conceived in the 20th century.*” H.R. REP. NO. 88-914, *supra* note 300, at 64 (Committee on Judiciary Minority Report). Among the many civil rights it asserts that the new bill will “seriously impair” is “[t]he right of owners of inns, hotels, motels, restaurants, cafeterias, lunchrooms, soda fountains, motion picture houses, theaters, concert halls, sports arenas, stadiums and other places of entertainment to freely carry on their businesses in the service of their customers (title II, title VI, and title VII).” *Id.* at 64–65.

“proof of the unconstitutionality of this measure,” not as a support for it.³⁰⁷ Even while taking what tenBroek would call a “narrow constructionist” reading of the Thirteenth Amendment with respect to how to interpret the “badges” of slavery, Thurmond invokes the term “involuntary servitude” broadly to describe the burden of Title II on property owners and their employees.

On the narrow construction point, Thurmond challenges the hearing’s reference to the Thirteenth Amendment as a source of authority—additional to the Commerce Clause and the Fourteenth Amendment—for Title II, stating that “the misplaced reliance on this amendment should not go unanswered.”³⁰⁸ Thurmond draws parallels between historical and contemporary arguments that denial of access to public accommodation was “[o]ne of the badges . . . of the institution of slavery,” asserting: “there is no more validity to it now than the Court conceded to it in the opinion handed down in 1883.”³⁰⁹ Thurmond quotes the passage from the Court’s opinion in which Justice Bradley refers to such an interpretation of the Thirteenth Amendment as “running the slavery argument into the ground.”³¹⁰ Thurmond stresses that the members of the Court lived “through the purported abolition of the institution of slavery” and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, and thus “a clear understanding of the purposes of the amendments can be attributed to them.”³¹¹ Thurmond also offers additional arguments about why denial of access to public accommodations is not a badge or vestige of slavery, including the existence of such discrimination in states outside of the South that have “never known slavery” and testimony before Congress “that discrimination on account of race, color, religion, or national origin is not unique to the United States, but may be found in many other countries.”³¹²

Turning to how the Thirteenth Amendment, in his view, *does* apply to Title II—as “an insurmountable constitutional barrier,” he turns from the Amendment’s abolition of slavery to its prohibition of involuntary servitude. Thurmond’s rationale is that the new law “does authorize, even necessitate, involuntary servitude,” because “there is no constitutional right for any individual to demand service in the

307. S. REP. NO. 88-872, *supra* note 4, at 43 (Individual Views of Sen. Strom Thurmond).

308. *Id.* at 49.

309. *Id.* at 50 (discussing *The Civil Rights Cases*, 109 U.S. 3 (1883)).

310. *Id.* at 51 (same).

311. *Id.*

312. *Id.* at 52.

purely private establishments which would be covered by this bill.”³¹³ By contrast, “[t]here does now exist a right of ownership of private property,” which, case law indicates, allows a private property owner to be “‘irrational, arbitrary, capricious, even unjust in his personal relations’ and still be free from arbitrary governmental interference.”³¹⁴ Title II would “give[] legal sanction to a totally new and dangerous principle” by “constrict[ing] the personal and property rights of all American individuals in an attempt to create a privilege for the favored few.”³¹⁵ Patrons of “private establishments would retain their right to pick and choose among the many,” but an establishment owner would lose his “right to pick and choose [his] customers.” “Who can deny that this amounts to involuntary servitude?”³¹⁶

Thurmond finds support for his interpretation of “involuntary servitude” as covering “so-called antidiscrimination laws which compel one person to serve another” in a dissenting opinion in a 1959 Washington State case upholding the state’s public accommodations law. He quotes Judge Mallery, in dissent, on why the Thirteenth Amendment should bar such laws, asserting analogies between forms of “compelled” service:

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude

Through what an arc the pendulum of Negro rights has swung since the extreme position of the *Dred Scott* decision. Those rights reached dead center when the 13th amendment to the U.S. Constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to “involuntary servitude” to Negroes.³¹⁷

This state court judge, quoted by Thurmond, no doubt chose a deliberately racially provocative example of a white woman having to touch a black woman, perhaps in a state of undress, in order to stir

313. *Id.*

314. *Id.* (quoting *Peterson v. City of Greenville*, 373 U.S. 244 (1964)).

315. *Id.*

316. *Id.*

317. *Id.* at 53 (alteration in original) (quoting *Browning v. Slenderella Sys.*, 341 P.2d 859, 869 (Wash. 1959) (en banc) (Mallery, J., dissenting)).

fears of unwanted and uncomfortable racial mixing—a different paradigm case than someone trying to get food at a lunch counter.³¹⁸

The simple equation made by Thurmond and by this judge between “servitude” and serving customers relies on the characterization of such businesses as entirely “private” and, in so doing, ignores (as I discussed above) the background rules of the English common law concerning the duty of innkeepers and other businesses who put out a sign and are open to the public. Moreover, the reference to the pendulum swing also is evocative of Justice Bradley, who suggested in the *Civil Rights Cases*, that there must come a point when the Negro ceases being a “special favorite of the laws” and must stand on his own feet.³¹⁹ Similarly, Thurmond concludes that the public accommodations law “directs an invasion of private property by a favored class of individuals and assures them the assistance of the Federal Government in their efforts. It amounts to a first and significant step toward the complete control of private lives and property, obliterating the remaining freedom of the individual.”³²⁰

Thurmond buttresses his Thirteenth Amendment argument against the public accommodations law by citing to “a very scholarly and well-prepared brief . . . submitted for the record by Mr. Alfred Avins, on behalf of the Liberty Lobby.”³²¹ Avins—evidently a “prolific writer on public accommodations law”³²²—advanced in his writing the view that public accommodation laws gave African-Americans “special privileges,” and that “civil rights laws, which started as a way of giving

318. The Washington case involved a refusal to wait on an African-American woman at a salon that advertised that it would provide a sample “slenderizing treatment.” No details are provided about the nature of the treatment. See *Browning*, 341 P.2d at 861 (majority opinion). For many readers, this mention of the fear of unwanted racial mixing may bring to mind that, in 2003, several months after Senator Thurmond’s death, his family acknowledged that 78-year-old retired school teacher Essie Mae Washington-Williams was Thurmond’s biracial, nonmarital daughter. She was born, in 1925, to a black teenage housekeeper in the Thurmond household with whom Thurmond had sexual relations when he was 22 years old. David Mattingly, *Strom Thurmond’s Family Confirms Paternity Claim*, CNN.com (Dec. 16, 2003), <http://www.cnn.com/2003/US/12/15/thurmond.paternity/index.html?iref=allsearch>. Essie Mae Washington-Williams learned that Thurmond was her father and met him when she was 16; thereafter, he provided some financial support and they had intermittent contact over the years. Rebecca Leung, *Essie Mae on Strom Thurmond*, CBS NEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2003/12/17/60II/main589107.shtml>.

319. 109 U.S. 3, 25 (1883).

320. S. REP. NO. 88-872, *supra* note 4, at 75–76.

321. *Id.* at 53; *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1202 (1963) [hereinafter *Hearings on S. 1732, pt. 2*] (statement of Alfred Avins on behalf of the Liberty Lobby).

322. Singer, *No Right to Exclude*, *supra* note 168, at 1299 n.37.

Negroes the same rights as everybody else, have culminated in a system giving them more rights than anybody else.”³²³ In the “brief” to which Thurmond refers, Avins canvasses case law about involuntary servitude and extracts from it a principle he repeatedly asserts: “To coerce personal service is to impose involuntary servitude.”³²⁴ The jurisprudence on the common law obligation of innkeepers and other establishments open to the public stresses the “duty to serve,” but Avins instead equates “rendering involuntary service” with “involuntary servitude.”³²⁵ Avins focuses not only on the rights of the owner of the commercial establishment, but also on the employee who must render the service or refuse, on pain of the punishment of leaving his job (violating his constitutional “right to work”).³²⁶ Avins warns: “however compelling the need may seem that individuals serve others in particular situations, such a requirement flies in the face of the strong and clear policy of the 13th Amendment.”³²⁷ Avins quotes language from the Supreme Court, declaring that “[t]he undoubted aim of the 13th amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States” and warns that “[t]he clear words of this amendment cannot be frittered away by subtle subterfuge or refined legaleze.”³²⁸ Avins argues that the arbitrariness of the refusal to serve makes no difference—a contention also made by Thurmond about the rights of private property owners.³²⁹ Avins concludes with a supposedly “compelling” historical irony “that in 1963, Negroes are demanding laws to compel whites to serve them in the very same occupations which they themselves were freed from serving whites in 1863, and demanding

323. Alfred Avins, *What Is a Place of “Public” Accommodation?*, 52 MARQ. L. REV. 1, 59, 69 (1968) (footnote and internal quotation marks omitted). Singer explains that Avins’s argument was that the 1875 public accommodations law did so by cutting back on states’ ability to repeal the common law right of access, which some states had done to avoid giving African-Americans a right of access. Singer, *No Right to Exclude*, *supra* note 168, at 1299 n.37.

324. *Hearings on S. 1732, pt. 2, supra* note 321, at 1209 (statement of Alfred Avins).

325. On these common law duties, see *id.* at 1202 (“A statute which requires one person to render involuntary service to another immediately raises the question of its constitutionality under the 13th amendment.”); Singer, *No Right to Exclude*, *supra* note 168, at 1439–43 (discussing the common law implications of public right of access laws).

326. See *Hearings on S. 1732, pt. 2, supra* note 321, at 1212–15 (statement of Alfred Avins) (explaining how forcing individuals to serve minorities or lose their job “constitutes such a degree of coercion as to make the service involuntary”).

327. *Id.* at 1215.

328. *Id.* at 1215–16 (alterations in original) (footnote omitted) (quoting *Pollock v. Williams*, 322 U.S. 4, 17 (1914)).

329. S. REP. NO. 88-872, *supra* note 4, at 63 (“The fundamental attribute of property is the right to exclude others.”) (citations omitted).

this under the name of ‘freedom.’”³³⁰ Avins appeals to the broad intended scope of the Thirteenth Amendment—to “‘reach[] every race and every individual’” and be “a charter of universal freedom for all persons.”³³¹

But this freedom, in his view, is wholly compatible with discrimination. Like Thurmond, Avins quotes dissenting Judge Mallery’s statement about the pendulum swing to “subjecting white people to ‘involuntary servitude’ to Negroes,” adding this further quote: “[D]iscrimination is but another word for free choice. Indeed, he would not be free himself if he had no right so to do. In dealings between men, both cannot be free unless each acts voluntarily, otherwise one is subjected to the other’s will.”³³²

F. The 2004 Commemoration of the Civil Rights Act and Dissenting Views in 2004 and 2010

In 2004, the House of Representatives adopted—with one “nay” vote—a resolution honoring the fortieth anniversary of congressional passage of the Civil Rights Act of 1964 and “encourag[ing] all Americans to recognize and celebrate the important historical milestone” of such passage.³³³ The language of the resolution and the rhetoric of the lawmakers speaking in support of it have little to do with goods moving in commerce and much to do with the same kind of arguments that supported Title II itself: appeals to political morality and to a long struggle to secure equality.³³⁴ That resolution recognizes the civil rights movement as a catalyst to the passage of the Act: “[T]he Civil Rights Act of 1964 was the result of decades of struggle and sacrifice of many Americans who fought for equality and justice.”³³⁵ It also implicitly recognizes the Act as a long-overdue remedy to a national problem of discrimination: “Whereas generations of Americans of every background supported Federal legislation to eliminate discrim-

330. See *Hearings on S. 1732, pt. 2, supra* note 321, at 1216 (continuing that “a century ago, Negroes had a near monopoly on the service occupations now engaged in by employees of so-called ‘places of public accommodation’”).

331. *Id.* at 1217–18 (quoting *Hodges v. United States*, 203 U.S. 1, 16–17 (1906)).

332. *Id.* at 1218–19 (quoting *Browning v. Slenderalla Sys.*, 341 P.2d 859, 868 (Wash. 1959) (en banc) (Mallery, J., dissenting)).

333. *Honoring 40th Anniversary of Passage of Civil Rights Act of 1964*, 150 CONG. REC. 13,661, 13,661–62 (2004) [hereinafter *40th Anniversary*].

334. *Cf. Zietlow, supra* note 296, at 948 (arguing that the “forthright discussion of fundamental constitutional and moral values” in the congressional debate over the 1964 Act makes the debate “particularly rich in constitutional meaning”).

335. *40th Anniversary, supra* note 333, at 13,661.

ination against African Americans.”³³⁶ The resolution “applaud[s] all those whose support and efforts lead [sic] to passage” of the Act, the “most comprehensive civil rights legislation in our Nation’s history.”³³⁷

The individual statements by members of Congress in support of House Resolution 676 also recognize the role of struggle in bringing about the Act (including those by members of Congress who were, at the time, civil rights leaders and activists, such as Rep. John Lewis of Georgia³³⁸ and Rep. Eleanor Holmes Norton of the District of Columbia³³⁹). Representative Lewis himself reminded his colleagues that “the Civil Rights Act of 1964 just did not happen,” but “took many years, many months of struggle on the part of a disciplined and organized movement that created . . . an environment for action” by the President and Congress.³⁴⁰ Lewis situated the Act in the environment of “the American south” of the 1950s and 1960s, where “[s]egregation and discrimination were the order of the day,” and where, as a child and then a “participant in the civil rights movement,” he saw the “white” and “colored” signs marking stores, train stations, restaurants, and hotels.³⁴¹ He recalls that the nonviolent efforts of “ordinary people,” met by beatings, jailings, and killings, and then the death of the four young girls in a church bombing, created a “righteous indignation,” where “[a]ll across America, by the hundreds and thousands, people started demanding that the Federal Government act.”³⁴² Because of this action and the response by two presidents and Congress, America has witnessed “a nonviolent revolution in America, a revolution of values, a revolution of ideas.”³⁴³ America today, he concluded, is a “better Nation, we are a better people, better in the process of laying down the burdens of race.”³⁴⁴ This language of burden, of course, brings to mind shedding the badges and incidents of slavery, of which segregation was one component. In 2011, Lewis, who was a leader of the Student Nonviolent Coordinating Committee in the 1960s and the youngest speaker at the 1963 March

336. *Id.*

337. *Id.*

338. *Id.* at 13,664 (remarks by Rep. Jackson-Lee) (describing Rep. Lewis as “our own special icon and warrior for peace”).

339. *Id.* (“Might I first give my accolades and appreciation to the gentlewoman from the District of Columbia (Ms. NORTON) for her fight on the battlefield for civil rights . . .”).

340. *Id.* at 13,663 (remarks by Rep. Lewis).

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

on Washington, received the Medal of Freedom for his work in the civil rights movement and his work in Congress.³⁴⁵

Lewis refers to a revolution of values and ideas. An African-American representative from a later generation, Artur Davis of Alabama, referred to himself and similar representatives as the “legatees” as well as “the hope of what was done here 40 years ago,” that changing the law could “build an America that had never been.”³⁴⁶ Davis and other speakers also referred to the morality of the Act. Davis refers to using “the power of law to shape the American dream” and that, contrary to the “fashionable” claim that “you cannot legislate morality in this country,” the Act shows that “law can be used to shape our moral character; law can be used to set the boundaries of what we will tolerate and what we will not accept.”³⁴⁷ Another speaker praised the leaders who championed the Act as “visionaries armed with a truly moral cause,” quoting Senator Everett Dirksen on the point that the Act was “essentially moral in character.”³⁴⁸

In an echo of Lewis’s statement about finally laying down the burdens of race, another Congressman reminded lawmakers that the Supreme Court, in the nineteenth century, had struck down the “prototypical form” of the Act, but “[i]n 1964, the Congress acted and we made it stick.”³⁴⁹ “[F]inally,” with this Act, America could send a message to the world about protecting individual “freedom not only from outside aggressors, but from those in your own country who would deny employment benefits to you or deny you access to a public place because of your race, color, religion, sex or national origin.”³⁵⁰ This is a striking parallel to the 1947 Presidential report, which noted that the greatest threats to civil rights could come from private individuals and groups.³⁵¹ The 1964 Act, thus, helped America live up to its founding ideals:

[W]ith this enactment, the United States finally established in permanent, positive law the fulfillment of the vision of the grand words of our founders; that our Nation would not

345. Kori Schulman, *President Obama Honors Presidential Medal of Freedom Recipients*, THE WHITE HOUSE BLOG (Feb. 15, 2011, 10:53 AM), <http://www.whitehouse.gov/blog/2011/02/15/watch-live-president-obama-honors-presidential-medal-freedom-recipients> (describing John Lewis as “a giant of the Civil Rights movement”).

346. *40th Anniversary*, *supra* note 333, at 13,665 (remarks of Rep. Davis).

347. *Id.*

348. *Id.* at 13,666 (remarks of Rep. Visclosky).

349. *Id.* at 13,664 (statement of Rep. Cox).

350. *Id.*

351. Lawson, *TO SECURE THESE RIGHTS*, *supra* note 290, at 109.

treat its citizens differently any more than they are treated differently in the eyes of God, their creator.³⁵²

One speaker explicitly sounded the theme that the segregation the Act attacked was part of “the legacy of slavery,” which the Act “brought us closer to dismantling;” he also noted “de facto discrimination [that] continues to pervade many of our institutions,” and observed that there are still forms of second class citizenship that require national attention.³⁵³ Because the Act also included a historic prohibition on sex discrimination in employment, speakers drew analogies between race and sex in terms of their narratives of progress made—and progress still to be made—by 1964³⁵⁴ and even by 2004.³⁵⁵

Now I turn to the lone objector to the resolution: Representative Ron Paul, father of current Senator Rand Paul and a candidate for the 2012 Republican presidential nomination, explained that he joined his “colleagues in urging Americans to celebrate the progress this country has made in race relations.”³⁵⁶ However, he continued, contrary to the claims of the supporters of the Civil Rights Act and supporters of the commemorative resolution, “the Civil Rights Act of 1964 did not improve race relations or enhance freedom.”³⁵⁷ While Paul did not explicitly refer to involuntary servitude, the language of coercion and force—as well as impingement on private property rights—is prominent in his objection:

Instead, the forced integration dictated by the Civil Rights Act of 1964 increased racial tensions while diminishing individual liberty.

The Civil Rights Act of 1964 gave the federal government unprecedented power over the hiring, employee relations, and customer service practices of every business in the country. The result was a massive violation of the rights of private property and contract, which are the bedrocks of free socie-

352. *40th Anniversary*, *supra* note 333, at 13,663 (statement of Rep. Cox).

353. *Id.* at 13,666 (statement of Rep. Cummings).

354. *Id.* at 13,663–64 (statement of Rep. Cox).

355. *Id.* at 13,664–65 (statement of Rep. Jackson-Lee) (calling attention to “the progress we have yet to make in order to fulfill the tenets of [the] Civil Rights Act of 1964,” such as voting rights problems in her home state of Texas).

356. *Id.* at 13,667 (statement of Rep. Paul).

357. *Id.* Thanks to Garrett Epps for pointing this historical parallel out to me. See Garrett Epps, *Rand Paul’s American Mistake: Taking ‘New’ for ‘Unconstitutional,’* THE ATLANTIC (May 25, 2010), <http://www.theatlantic.com/national/print/2010/05/rand-pauls-american-mistake-taking-new-for-unconstiutional/57246/> (observing that Rand Paul was “channelling ancestral voices” when he “blundered into arguing that the Civil Rights Act of 1964 was somehow constitutionally suspect”).

ty. The federal government has no legitimate authority to infringe on the rights of private property owners to use their property as they please and to form (or not form) contracts with terms mutually agreeable to all parties. The rights of all private property owners, even those whose actions decent people find abhorrent, must be respected if we are to maintain a free society.³⁵⁸

In this passage, Paul's conception of both what it means to have a "free society" and of private property rights is similar to that asserted by Senator Strom Thurmond in opposition to the 1964 Act.³⁵⁹ Thurmond (as discussed above) explicitly condemned Title II as involuntary servitude and countered with a conception of private property on which "an individual may be 'irrational, arbitrary, capricious, even unjust in his personal relations' and still be free from arbitrary governmental interference."³⁶⁰ Thurmond asserted that voluntary desegregation was the only kind that would be successful, just as Paul asserted that progress in race relations was "due to changes in public attitudes and private efforts," not because of the Act. Paul also challenged Congress's "erroneous interpretation" of its power to regulate interstate commerce.³⁶¹

Writing several years before this congressional resolution, Reva Siegel and Robert Post argued that the "protracted struggle" culminating in the passage of the 1964 Act "fundamentally altered the ways in which Americans reasoned about national power, changing understandings of both federalism and liberty."³⁶² Pertinent here is their contention that "[b]efore 1964, it was still commonplace for public figures like Robert Bork and Milton Friedman to decry the prospect of federal interference with the freedom of business owners to discriminate in their choice of customers or employees, and to equate it with McCarthyism, communism, fascism, socialism, involuntary servitude, or worse." Those types of "public and prominent objections to federal enforcement of antidiscrimination norms now sound like voices from another world."³⁶³

358. *40th Anniversary*, *supra* note 333, at 13,667 (statement of Rep. Paul).

359. S. REP. NO. 88-872, *supra* note 4, at 46.

360. *Id.* at 52 (quoting *Peterson v. City of Greenville*, 373 U.S. 244, 250 (1963)).

361. *40th Anniversary*, *supra* note 333, at 13,667.

362. Post, *supra* note 113, at 492.

363. *Id.* at 492-93 (footnote omitted). Epps discusses this observation in the context of drawing parallels between objections to the 1964 Act and to the recent federal health care law. Epps, *supra* note 357.

In 2004, Representative Paul rooted his objections not in any explicit “ism” so much as “diminishing individual liberty” and (correspondingly) overweening bureaucratic and judicial control.³⁶⁴ He was, after all, the sole “nay” vote, which tends to confirm “the fundamental changes wrought by the second Reconstruction,” of which the 1964 Act was a significant part.³⁶⁵

In 2010, controversy erupted when Rand Paul, son of Representative Paul and winner of the Kentucky Republican primary for U.S. Senate (with the support of the Tea Party), made public statements that seemed critical of Title II and supportive of a right of private businesses to take race into account in deciding whether to serve customers.³⁶⁶ For Paul, the problem rested in the notion that government could tell a privately owned business what to do. In a newspaper interview, Paul was asked whether it would be okay not to serve Dr. Martin Luther King at the Woolworth’s counter.³⁶⁷ His answer is strikingly similar to Thurmond’s and his father’s answer in terms of his conception of what a “free society” must tolerate: “I would not go to that Woolworth’s, and I would stand up in my community and say it’s abhorrent,” he responded. “In a free society, we will tolerate boorish people who have abhorrent behavior. But if we’re civilized people, we publicly criticize that and don’t belong to those groups or associate with those people.”³⁶⁸

In subsequent interviews, Paul elaborated on his views, stressing the public or private distinction and his preference for local rather than federal solutions.³⁶⁹ On MSNBC, Paul answered Rachel Maddow’s question about desegregating lunch counters with an odd analogy to prohibiting guns in restaurants:

Well, what it gets into then is if you decide that restaurants are publicly owned and not privately owned, then do you say that you should have the right to bring your gun into a restaurant even though the owner of the restaurant says, “Well, no, we don’t want to have guns in here”; the bar says, “We

364. *40th Anniversary*, *supra* note 333, at 13,667 (statement of Rep. Paul).

365. Post, *supra* note 113, at 493.

366. Joseph Gerth, *Rand Paul Embroiled in Civil Rights Controversy over Remarks Made on Courier-Journal Video Interview*, COURIER-JOURNAL.COM (May 20, 2010), <http://www.courier-journal.com/article/20100520/NEWS0101/5200351/Rand-Paul-embroiled-Civil-Rights-controversy-over-remarks-made-Courier-Journal-video-interview>.

367. *Id.*

368. *Id.*

369. Ken Rudin, *Rand Paul in Civil Rights Bill Firestorm*, NPR.ORG (May 20, 2010), <http://www.npr.org/blogs/politicaljunkie/2010/05/20/127009788/kentucky-gop-unity-rally-on-saturday-mongiardo-d-won-t-see-recanvass>.

don't want to have guns in here because people might drink and start fighting and shoot each other." Does the owner of the restaurant own his restaurant? Or does the government own his restaurant? These are important philosophical debates but not a very practical discussion.³⁷⁰

In the face of a firestorm over his various remarks about the Civil Rights Act, Paul issued a statement that (1) clarified his support for the Civil Rights Act and disavowed any intent to repeal it; (2) acknowledged that the constitutional issues surrounding the Act were debated at the time and settled by judges; (3) acknowledged the long and unfinished struggle for civil rights; while also (4) condemning "overreaching" by the federal government, most recently in health care:

I believe we should work to end all racism in American society and staunchly defend the inherent rights of every person. . . .

Let me be clear: I support the Civil Rights Act because I overwhelmingly agree with the intent of the legislation, which was to stop discrimination in the public sphere and halt the abhorrent practice of segregation and Jim Crow laws.

. . . [S]ections of the Civil Rights Act were debated on Constitutional grounds when the legislation was passed. Those issues have been settled by federal courts in the intervening years.

. . . .

The issue of civil rights is one with a tortured history in this country. We have made great strides, but there is still work to be done to ensure the great promise of Liberty is granted to all Americans.³⁷¹

And finally, Paul struck a different concluding note about the risks of overreaching federal governmental power and warned that liberty is threatened by regulation:

This much is clear: The federal government has far overreached in its power grabs. Just look at the recent national healthcare schemes, which my opponent supports. The federal government, for the first time ever, is mandating that individuals purchase a product. The federal government is

370. *Id.*

371. *Id.*

out of control, and those who love liberty and value individual and state's rights must stand up to it.³⁷²

G. A Question of Baseline: Property Rights and Duties and Understandings of Freedom

For Rand Paul, private property ownership translates into an entitlement to be free from federal regulation, which threatens liberty and individual and state's rights. That is his baseline. His public statement, thus, condemns Jim Crow laws and supports stopping discrimination "in the public sphere." Although this public statement is silent on the question of private discrimination, his earlier, more controversial remarks—and writings—insist on the significance of the public/private distinction, and that "[a] free society will abide unofficial, private discrimination," including exclusion on the basis of skin color.³⁷³ Of course, Title II treated only certain private establishments as public accommodations, just as contemporary state public accommodations laws—although often more expansive than Title II—do not treat every private entity as a public accommodation.³⁷⁴

In the debates over Title II, many proponents viewed the relevant baseline as the common law duty of innkeepers and certain other entities to serve the public. The Senate Report stressed that "the requirement that public accommodations and facilities serving the general public do so without racial or religious discrimination is neither new nor novel" and asserted that "[t]he doctrines that to a large extent sustain this result are deeply rooted in English common law but by no means limited to common carriers."³⁷⁵ The Report devoted considerable space to rebutting the claim that private property rights are absolute and bar a public accommodations law (some of which Justice Douglas quotes in his concurrence, as discussed in Part II).³⁷⁶ Implicitly, it rejected any notion that a duty to serve the public without discrimination when one operates a business "in which the public has an interest" is a form of involuntary servitude.³⁷⁷ But the Report

372. *Id.*

373. Gerth, *supra* note 366 (quoting Paul's 2002 letter to the editor of the *Bowling Green Daily News*: "A free society will abide unofficial, private discrimination . . . even when that means allowing hate-filled groups to exclude people based on the color of their skin. It is unenlightened and ill-informed to promote discrimination against individuals based on the color of their skin. It is likewise unwise to forget the distinction between public (taxpayer-financed) and private entities." (alteration in original)).

374. Singer, *No Right to Exclude*, *supra* note 168, at 1414–15.

375. S. REP. NO. 88-872, *supra* note 4, at 9.

376. *Id.* at 22–23.

377. *Id.* at 9–10.

also noted how, in the late nineteenth century and well into the twentieth century, states adopted laws that abrogated this common law duty and even, in some instances, required segregation.³⁷⁸ Similarly, when Attorney General Robert Kennedy testified in support of the bill, he provided a list of the various state laws mandating segregation.³⁷⁹ As Kennedy did, the Senate Report also pointed out the incongruity that, while private property rights now were invoked as supposed constitutional barriers to Title II, “the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race.”³⁸⁰ Congress viewed a national law as necessary because, although a majority of states now had laws protecting against racial discrimination in access to public accommodations, eighteen did not.³⁸¹ Indeed, noting that President Truman’s 1947 report recommended that states enact public accommodations laws (at that time eighteen states had such laws), the Senate Report (as noted above) stated: “This bill, then, is the second attempt to achieve Federal legislation and the third time equal access to public accommodations has been recommended as a national goal.”³⁸²

As Joseph Singer exhaustively demonstrates, “[t]he legal treatment of public accommodations is ambiguous, changing, and confused from after the Civil War until the start of the Jim Crow era in the 1880s”—the era during which Congress passed the 1875 Act and the Court struck the Act down.³⁸³ This was due in part to some states retrenching on the common law obligation either by abrogating it completely³⁸⁴ or by courts interpreting it to permit racial segregation in providing services.³⁸⁵ Noting these developments, Singer calls Justice Bradley’s statement in the *Civil Rights Cases* about the current state of state laws concerning innkeepers and public carriers (“Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith

378. *Id.* at 10.

379. *Hearings on S. 1732, pt. 2, supra* note 321, at 20–21 (putting into record “State or Local Laws Compelling Racial Segregation in Public Accommodations”).

380. S. REP. NO. 88-872, *supra* note 4, at 22.

381. *Id.*

382. *Id.* at 11.

383. Singer, *No Right to Exclude, supra* note 168, at 1353–54.

384. *Id.* at 1386–88.

385. *Id.* at 1367–73.

apply for them”) “shocking” in its “disingenuousness.”³⁸⁶ With the advent of Jim Crow laws, states required segregation.

The confused state of public accommodations law in that era was also due to tension between competing legal understandings of property rights, with one baseline being an absolutist right to exclude and the other, invoked by Congress a century later, being that when one hangs out a sign, one invites in the public and cannot exclude for arbitrary reasons. The first baseline would permit posting the “whites” and “colored” signs so pervasive in segregation; the latter would not.³⁸⁷ Singer observes, “American law now contains a fundamental background principle of equality in the rules governing the marketplace. Congress has made this clear.”³⁸⁸ Singer links this baseline to the Thirteenth Amendment’s abolition of slavery as well as to civil rights statutes. Contrary to the conception of “liberty” and a “free society” articulated by Title II’s critics and, more recently, by Rand Paul, Singer contends: “Civil rights statutes are not intrusive interferences with liberty. They are what make us a free and democratic society.”³⁸⁹ He elaborates:

Our constitutions, statutes, and common law protect our democracy from devolving into a racial caste society, feudal society, or a patriarchy. This protection comes from setting minimum standards for economic relationships compatible with the norms of a free and democratic society that treats every person with equal concern and respect.³⁹⁰

Contrary to the notion of what a free society must tolerate, however odious, Singer argues that “[s]egregation and exclusion on the basis of race are outside the bounds of acceptable conduct by owners and operators of public accommodations in a free and democratic society;” they are inconsistent with “our current settled convictions about the contours of economic relationships” in such a society.³⁹¹ Part of the legacy of *Heart of Atlanta Motel* and the law it upheld is creating those settled convictions.

386. *Id.* at 1397–98 (quoting *The Civil Rights Cases*, 103 U.S. 3, 25 (1883)).

387. *Id.* at 1373.

388. Singer, *The Anti-Apartheid Principle*, *supra* note 199, at 109.

389. *Id.* at 107 (emphasis removed).

390. *Id.*

391. *Id.* at 108. Singer uses as an example the trouble Rand Paul got into because of his criticism of the Civil Rights Act of 1964. *Id.* at 107.

IV. THE LEGACY OF *HEART OF ATLANTA MOTEL* FOR SUBSEQUENT ANTIDISCRIMINATION LAWS AND THEIR CRITICS

What is the legacy of the *Heart of Atlanta Motel* case for later anti-discrimination laws and challenges to them? An instructive example of how salient themes in the majority and concurring opinions recur in subsequent jurisprudence is *Roberts v. United States Jaycees*.³⁹² In this case, twenty years after the Civil Rights Act of 1964 and the Court's upholding of its constitutionality, the Court upheld the application of Minnesota's public accommodations law to the Jaycees against a constitutional challenge that requiring the organization to admit women violated its rights to freedom of association.³⁹³ Several themes important to the *Heart of Atlanta Motel* case recur in the Court's analysis. First, and perhaps most important, is "dignity" and the analogy the Court draws between stigmatic harms based on race and sex discrimination. The Court intermingles Minnesota's concerns about protecting its citizens "from a number of serious social and personal harms" with the Court's own recognition, in its anti-stereotyping Equal Protection cases, about harms to dignity and to participation in society.³⁹⁴ Citing *Heart of Atlanta Motel*, in which "we emphasized that [Title II's] fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments,'" the Court interchanges race and sex in its statements about the stigmatic injury due to denial of equal access to public establishments.³⁹⁵

A second interesting feature is the Court's reference to the relationship between federal and state antidiscrimination laws and the long federal hiatus after the *Civil Rights Cases*. The Court remarks upon the initiative of states in passing antidiscrimination laws in the absence of federal legislative efforts. It observes: "The Minnesota Human Rights Act at issue here is an example of public accommodations laws that were adopted by some States beginning a decade before enactment of their federal counterpart, the Civil Rights Act of 1875[.]"³⁹⁶ Between the time the Supreme Court invalidated the Civil Rights Act of 1875 and when Congress "reentered the field in 1957," Minnesota's civil rights laws, like those of many other states, was "the

392. 468 U.S. 609 (1984).

393. *Id.* at 626.

394. *Id.* at 625.

395. *Id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)) (alterations in both).

396. *Id.* at 624.

primary means for protecting the civil rights of historically disadvantaged groups.”³⁹⁷ The Court notes that, “[l]ike many other States, Minnesota has progressively broadened the scope of its public accommodations law,” adding “sex” to the list of protected categories in 1973.³⁹⁸

A third implicit parallel between the two cases is that the Court approves Minnesota’s adoption of “a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct,” a definition reflecting the realities of a changing economy.³⁹⁹ *Heart of Atlanta Motel* observed that “the conditions of transportation and commerce have changed dramatically” from 1875, such that the Court “must apply those principles to the present state of commerce” where “[t]he sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation’s commerce than such practices had on the economy of another day.”⁴⁰⁰ Citing to its own sex-discrimination precedents in support, the *Roberts* Court states that “[t]his expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”⁴⁰¹ The Court accepts the Minnesota court’s explanation that the local chapters of the Jaycees are “‘place[s] of public accommodations’” because of “the various commercial programs and benefits offered to members,” such that “[l]eadership skills are ‘goods,’ [and] business contacts and employment promotions are ‘privileges’ and ‘advantages.’”⁴⁰² The Supreme Court concludes: “Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.”⁴⁰³

A fourth parallel concerns the issue of harm to the entity treated as a public accommodation. In *Heart of Atlanta Motel*, the Court observed that evidence was to the contrary on the owner’s claim that integration would harm his business, but even if there was some harm,

397. *Id.*

398. *Id.*

399. *Id.* at 625–26.

400. *Heart of Atlanta Motel*, 379 U.S. at 251.

401. 468 U.S. at 626.

402. *Id.* at 626 (alterations in original) (quoting *U.S. Jaycees v. McClure*, 305 N.W. 2d 764, 772 (Minn. 1981)).

403. *Id.*

that was constitutional.⁴⁰⁴ The type of harm alleged in *Roberts* was harm from forced inclusion of women as members.⁴⁰⁵ The Court in *Roberts*—and subsequently in *Board of Directors of Rotary International v. Rotary Club of Duarte*⁴⁰⁶ and *New York State Club Association, Inc. v. City of New York*⁴⁰⁷—opined that forcing an all-male group to accept female members would not significantly burden it or its ability to convey messages.⁴⁰⁸ But the Court went on to assert that even if the public accommodations law “causes some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes.”⁴⁰⁹ Here the Court, in another parallel to *Heart of Atlanta Motel*, turns to the language of discrimination as an evil that government may prevent: “As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”⁴¹⁰ By contrast, the Court reached a different conclusion in *Boy Scouts of America v. Dale* with respect to New Jersey’s public accommodations law compelling the Boy Scouts to admit a homosexual as a scoutmaster: not only would that law unconstitutionally impair the Scouts’ ability to convey its messages, but—the court summarily asserted—New Jersey’s interests did “not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”⁴¹¹

I will now look briefly at how *Heart of Atlanta Motel* features in two recent Supreme Court opinions cutting back on the Court’s deference to Congress’s exercise of its commerce power, *United States v. Lopez*⁴¹² and *United States v. Morrison*.⁴¹³ I will focus more on *Morrison* because it considered an antidiscrimination law, the civil rights remedy portion of the Violence Against Women Act. The majority and the dissents in these controversial decisions differ over the import of *Heart of Atlanta Motel*. The majorities in *Lopez* and *Morrison* stress the need to distinguish the truly economic from the noneconomic and the truly national from the purely local and warn of Congress using the

404. *Heart of Atlanta Motel*, 379 U.S. at 260.

405. *Roberts*, 468 U.S. at 615.

406. 481 U.S. 537, 547 (1987).

407. 487 U.S. 1, 13 (1988).

408. *Roberts*, 468 U.S. at 615, 627–29.

409. *Id.* at 628.

410. *Id.*

411. 530 U.S. 640, 659 (2000).

412. 514 U.S. 549 (1995).

413. 529 U.S. 598 (2000).

commerce power so as to “obliterate” such distinctions.⁴¹⁴ *Heart of Atlanta Motel* features in string citations for Congress’s power to “regulate the use of the channels of interstate commerce.”⁴¹⁵

In *Lopez*, where the Court invalidated the federal Gun-Free School Zones Act, *Heart of Atlanta Motel*, along with *McClung* (the Ollie’s Barbeque case), feature as instances where the Court has “upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.”⁴¹⁶ By contrast, the majority finds an insufficient impact on the national economy to warrant a federal law concerning guns in schools.⁴¹⁷ Concurring Justices Kennedy and O’Connor offer *Heart of Atlanta Motel* as an “example[] of the exercise of federal power where commercial transactions were the subject of regulation” and reassure that this and other authorities are “within the fair ambit of the Court’s practical conception of commercial regulation and are not called in question by our decision today.”⁴¹⁸

Justice Souter’s dissent in *Lopez* cites *Heart of Atlanta Motel* and *McClung* to highlight the proper deference the Court should give to Congress, under rational basis review, once it “find[s] that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce.”⁴¹⁹ In *Heart of Atlanta Motel*, he explains, “with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation . . . the Court simply made explicit” the deferential test implicit in its earlier precedents.⁴²⁰ Justice Souter warns of the “backward glance,” at the end of the century, toward the Court’s “untenable” jurisprudence from the *Lochner* era, pointing to its reliance on problematic distinctions between the commercial and noncommercial.⁴²¹

In Justice Breyer’s dissent (joined by Justices Stevens, Souter, and Ginsburg), *Heart of Atlanta Motel* and *McClung* appear as cases in which the Court recognized that a problem of discrimination could have economic and personal harm. Thus, the Court upheld the law

414. *Morrison*, 529 U.S. at 616–18; *Lopez*, 514 U.S. at 557, 567–68.

415. *Morrison*, 529 U.S. at 609 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)); *Lopez*, 514 U.S. at 558 (same).

416. *Lopez*, 514 U.S. at 559.

417. *Id.* at 567.

418. *Id.* at 573–74 (Kennedy, J., concurring).

419. *Id.* at 607 (Souter, J., dissenting) (internal quotation marks omitted).

420. *Id.*

421. *Id.* at 608.

in *McClung* “in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States.”⁴²² In those cases, Justice Breyer writes, “the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well.”⁴²³ He argues that similar human and social harms and national economic consequences stem from “local instances” of school violence, “taken together and considered as a whole.”⁴²⁴ Further, he argues that upholding the law as under the commerce power would, as in *Heart of Atlanta Motel*, “simply . . . apply pre-existing law to changing economic circumstances.”⁴²⁵

In *Morrison*, the majority struck down the civil rights remedy portion (concerning gender-motivated acts of violence) of the Violence Against Women Act (“VAWA”).⁴²⁶ Referencing *Lopez*, Chief Justice Rehnquist repeats its invocation of *Heart of Atlanta Motel* for the points that “Congress may regulate the use of the channels of interstate commerce” and that the Court has upheld a “wide variety of congressional Acts regulating intrastate economic activity where [it has] concluded that the activity substantially affected commerce.”⁴²⁷ The Court goes on to conclude that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁴²⁸ In *Lopez*, the Court said Congress lacked sufficient findings, but here, the VAWA provision before the Court “is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”⁴²⁹ However, findings alone are not enough, for as *Lopez* teaches (citing Justice Black’s concurring opinion in *Heart of Atlanta Motel*): “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than

422. *Id.* at 626 (Breyer, J., dissenting).

423. *Id.*

424. *Id.* at 626–27.

425. *Id.* at 624–25.

426. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (“Congress’ effort . . . to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.”).

427. *Id.* at 609, 610 (citations and internal quotation marks omitted).

428. *Id.* at 613.

429. *Id.* at 614 (emphasis in original).

a legislative question, and can be settled finally only by this Court.”⁴³⁰ In an often-criticized passage, Chief Justice Rehnquist asserts: “The Constitution requires a distinction between what is truly national and what is truly local,” concluding that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”⁴³¹ Moreover, the *Civil Rights Cases* opinion makes an appearance as still “good law” on the need for there to be state action to trigger the protections of the Fourteenth Amendment.⁴³²

In a dissent joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter observes that “the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II”: *Heart of Atlanta Motel* and *McClung*.⁴³³ He notes that “Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars,” and also had “evidence” about the differential spending of the average black and white family, attributed in significant part to discrimination.⁴³⁴ When Congress built a record concerning VAWA, it relied on estimates in dollar costs (in the billions) of the harms of domestic violence.⁴³⁵ But Justice Souter also stresses the human costs, pointing out how, in building the record for VAWA, Congress noted analogies between racial discrimination and gender-based violence:

Equally important [to the cost estimates], gender-based violence in the 1990’s was shown to operate in a manner similar to racial discrimination in the 1960’s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, “[g]ender-based violence bars its most likely

430. *Id.* (quoting *Lopez*, 514 U.S. at 557 & n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

431. *Id.* at 617–18 (citations omitted).

432. *See id.* at 624–26 (noting that the VAWA “is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias”).

433. *Id.* at 635 (Souter, J., dissenting).

434. *Id.*

435. *Id.* (noting that in 1994, Congress relied “on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of \$3 billion in 1990 . . . and \$5 to \$10 billion in 1993”).

targets—women—from full partic[ipation] in the national economy.”⁴³⁶

Justice Souter asserts that, until *Lopez*, VAWA “would have passed muster” in the period “in which the law enjoyed a stable understanding” of Congress’s power under the Commerce Clause.⁴³⁷ He observes that “this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964.”⁴³⁸ Indeed, in the “aftermath” of that turmoil, the Court “not only reaffirmed” that stable understanding, but also “declined to limit the commerce power through a formal distinction between legislation focused on ‘commerce’ and statutes addressing ‘moral and social wrong[s].’”⁴³⁹

In Justice Breyer’s dissent, joined by Justices Stevens, Souter, and (in certain parts) Ginsburg, he takes the majority to task for its untenable distinction between “economic” and “noneconomic” activities.⁴⁴⁰ He enlists *Heart of Atlanta Motel* and *McClung* at several points, not only to illustrate the difficulty of drawing such a line but also to demonstrate Congress’s authority “to keep the channels of interstate commerce free from immoral and injurious uses.”⁴⁴¹ Justice Breyer also enlists *Heart of Atlanta Motel* in his critique of the majority’s distinction between truly local and truly national activity in light of an increasingly interconnected nation:

We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate.⁴⁴²

436. *Id.* at 635–36 (citation omitted).

437. *Id.* at 637.

438. *Id.*

439. *Id.* (quoting *Heart of Atlanta Motel, Inc v. United States*, 397 U.S. 241, 257 (1964)). This “stable understanding” is that “the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, . . . extended to all activity that, when aggregated, has a substantial effect on interstate commerce.” *Id.*

440. *Id.* at 656 (Breyer, J., dissenting).

441. *Id.* at 656–58 (quoting *Heart of Atlanta Motel*, 379 U.S. at 256).

442. *Id.* at 660 (citing *Heart of Atlanta*, 379 U.S. at 251). Finally, although Justice Breyer would sustain the VAWA provision at issue under the Commerce Clause, and does not reach the question of Congress’s authority under Section 5 of the Fourteenth Amendment (also reminiscent of the *Heart of Atlanta Motel* Court), he questions the relevance of the *Civil Rights Cases* to the instant case. *Id.* at 664. The 1883 case held that Section 5 “does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons*,” but the federal government’s argument about the VAWA civil rights remedy is that it aimed to remedy actions of “*state actors*”—the documented fail-

The Court's sharp departure from deference to Congress's judgments about its exercise of the commerce power to address significant moral and social evils with national economic dimensions makes the prudential strategy adopted by Congress in enacting Title II—and supported by the Court in upholding Title II—now seem all the more historic. The fate of the commerce power in such decisions has also sparked considerable discussion by scholars of more robust understanding and employment of the Fourteenth Amendment, including the Citizenship Clause (championed so long ago by Senator Proudy).⁴⁴³ Perhaps such examination might fruitfully include the potential of the Thirteenth Amendment, which, I have argued, played a significant, if underappreciated, role in the passage of the 1964 federal public accommodations law⁴⁴⁴

V. CONCLUSION

An aim of this Article was to draw attention to the contrasting ways that arguments about the Thirteenth Amendment's prohibition on slavery and involuntary servitude played a role in the enactment of Title II of the Civil Rights Act of 1964 and in *Heart of Atlanta Motel, Inc. v. United States*, in which the United States Supreme Court upheld that public accommodations law. The hotel owner, like some members of Congress who opposed Title II, alleged that the Thirteenth Amendment was a bar to Title II, because compelling business owners to serve customers constituted involuntary servitude. This Article detailed the rejection of that argument by Justice Department officials arguing for the bill before Congress as well by a unanimous Supreme Court in *Heart of Atlanta Motel*. It examined Congressional understandings of property rights that viewed antidiscrimination law as a proper measure to secure the equal rights of all, rather than as an unconstitutional trampling upon private property rights.

The second role played by the Thirteenth Amendment, barely discernible in *Heart of Atlanta Motel*, but readily evident in the Congressional hearings on Title II and in the Senate Report, was as an appropriate constitutional foundation for a public accommodations

ure of states "to provide adequate (or any) state remedies for women injured by gender-motivated violence." *Id.* (emphasis in original).

443. *See supra* note 264 and accompanying text. Reva Siegel and Robert Post come to mind in these efforts. *See supra* note 363 and accompanying text.

444. *Cf.* Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1684 (2001) (retrieving "lost story" of the role of the Thirteenth Amendment and involuntary servitude in the Department of Justice Civil Rights Section's approach to free labor in its civil rights practice of the 1940s and 1950s).

law because denial of service on the basis of race was a badge and incident of servitude and a vestige of slavery. On the one hand, the Attorney General and various lawmakers argued that, in light of the fate of the public accommodations law of 1875, struck down in the *Civil Rights Cases*, the prudent, pragmatic course was to rest Title II on Congress's power to regulate interstate commerce, rather than on the Reconstruction Amendments. Indeed, although Congress did rest the law on the commerce power and the Fourteenth Amendment, the Court upheld the law solely on the basis of the commerce power, thus avoiding the need to rule on whether Congress's remaining authority for the law was adequate. On the other hand, in explaining why the law was necessary and an urgent moral imperative, the Attorney General and some lawmakers appealed to the Thirteenth Amendment and argued that such a law was necessary to fulfill the promises of Reconstruction and to remedy the forms of unequal citizenship experienced daily by millions of African-Americans in the United States. Indeed, some members of Congress would have grounded the bill more explicitly on the Thirteenth Amendment to clarify what they viewed as the crux of the matter. To read *Heart of Atlanta Motel* in isolation from its historical context is to miss this significant role played by the Thirteenth Amendment.

As I have illustrated by supplementing my analysis of that case with an examination of contemporary news accounts and legal commentary, a significant part of the legacy of *Heart of Atlanta Motel* was that the Court did uphold Title II and that this new federal civil rights law did not meet the fate of its 1875 predecessor. Public officials as well as civil rights activists enlisted this unanimous decision as signaling that the nation spoke in a unified voice and that the Civil Rights Act, passed after lengthy and often fractious debate in Congress, signaled a milestone in securing long-overdue full and equal citizenship for African-Americans. The Court's upholding of Title II, thus, is an example of institutional branches cooperating and reinforcing each other, rather than the Court stymieing legislative efforts to fulfill the promise of the Reconstruction Amendments. To borrow a phrase from Jack Balkin, we could view the passage of Title II and the Court's upholding of it as an example of "constitutional redemption": through the efforts of social and political movements to redeem the unfulfilled promises of the Constitution, Congress enacted a law that officially repudiated racial segregation in public accommodations, and the Court lent its imprimatur to this new vision of the Constitu-

tion and of the meaning of equality.⁴⁴⁵ As I have discussed, when Congress commemorated the fortieth anniversary of the Civil Rights Act, it interpreted the passage of the law in these same terms of redeeming a promise and completing the unfinished business of Reconstruction, even if Congress pragmatically grounded Title II in its ample authority under the commerce power.

In upholding Title II, the Court also rejected—as did Congress in enacting Title II—a vision of the Constitution under which rights to liberty and private property were an absolute entitlement to be free from regulations and to engage in arbitrary discrimination. On that repudiated view, legislation forbidding racial discrimination in serving the public was a form of compelled—hence, involuntary—servitude. Instead, such civil rights laws further the goal, as Joseph Singer argues, of a “free and democratic society,” in which there is a “fundamental background principle of equality in the rules governing the marketplace.”⁴⁴⁶

What is the legacy of *Heart of Atlanta Motel* and of the enactment of Title II for newer generations of antidiscrimination laws and challenges to them? Part of the value of retrieving the complex role of the Thirteenth Amendment in this context is to appreciate the Civil Rights Act of 1964 as an effort by Congress to complete the unfinished business of Reconstruction. Nonetheless, I have also suggested that several themes in the majority and concurring opinions in that case have resonance for more recent public accommodations laws that bar discrimination on such bases as sex and sexual orientation. These include the following ideas: (1) persons suffer dignitary harm when they are denied goods and services; (2) discrimination in public accommodations imposes economic and human costs; (3) antidiscrimination laws address moral evils; (4) conceptions of commerce and what affects it must take into account the changing nature of the economy; and (5) antidiscrimination law properly resolves the clash of rights in a way that furthers the equal basic liberties and freedom of all citizens.

One argument made against Title II—both at that time and more recently—is that a “free society” must tolerate discrimination.⁴⁴⁷ Public accommodations laws reflect a different value judgment with re-

445. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 121–23 (2011) (describing the rhetoric of the civil rights movement of the 1960s and arguing that “the language of the unpaid debt, or the promises yet unfulfilled to be kept in the future, is the most natural metaphor of hope for eventual constitutional redemption”).

446. Singer, *The Anti-Apartheid Principle*, *supra* note 199, at 107, 109.

447. See *supra* text accompanying notes 358–359 and 368.

spect to entities deemed to be “places of public accommodations.”⁴⁴⁸ Looking at more recent challenges to public accommodations laws, a frequent scenario is that such laws forbid discrimination on the basis of sexual orientation or marital/civil union status, and a merchant argues that compelling him or her to serve a same-sex couple violates constitutional rights to free exercise of religion or freedom of association. Or a religious entity deemed a public accommodation for certain purposes argues that it should be exempted from serving same-sex couples. Both those who argue that refusing service is justifiable and those who argue that it is not look back to the civil rights movement and an earlier generation of civil rights laws, but draw different conclusions about their import for these more recent conflicts. For example, the conservative Christian proclamation, *The Manhattan Declaration*, criticizes “the use of anti-discrimination statutes to force religious institutions, businesses, and service providers of various sorts to comply with activities they judge to be deeply immoral or go out of business.” Having to serve same-sex couples, despite religious objections to homosexual relationships, is a prime example. *The Manhattan Declaration* appeals to Dr. Martin Luther King, Jr.’s *Letter from a Birmingham Jail* to support the place of civil disobedience and to resist laws “that purport to compel citizens to do what is unjust.”⁴⁴⁹ This statement does not explicitly invoke the Thirteenth Amendment, but the notion of compelled service may bring involuntary servitude to mind. By contrast, supporters of the right of same-sex couples to obtain goods and services invoke *Heart of Atlanta Motel* to emphasize that public accommodations laws seek to remedy the dignitary harms that flow from the denial of service; they argue that those who choose to engage in commerce must abide by the rules.⁴⁵⁰

These competing invocations of the legacy of an earlier era’s civil rights struggles and legislative enactments highlight the continuing importance of assessing the import of this legacy. As my discussion of how the *Roberts v. United States Jaycees* Court deployed *Heart of Atlanta Motel* suggested, one vital part of this challenge is examining the role of analogy between race discrimination and other forms of discrimination, such as that based on sex or sexual orientation. That is a task

448. See, e.g., N.J. STAT. ANN., Civil Rights, Title 10, § 10.5-5 (defining “place of public accommodation” broadly).

449. *Manhattan Declaration: A Call of Christian Conscience*, November 20, 2009, at <http://manhattandeclaration.org/the-declaration/read.aspx> (last visited Dec. 6, 2011).

450. See, e.g., Chai Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 149, at 123, 152–53 & 281 n.131.

in which I, like many others, am currently engaged.⁴⁵¹ My hope is that this Article might be of some small assistance to others engaged in that necessary work.

451. See Linda C. McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society*, 32 CARDOZO L. REV. 1959 (2011); JAMES E. FLEMING & LINDA C. MCCLAIN, RIGHTS, RESPONSIBILITIES, AND VIRTUES (book in progress); see also Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007) (exploring how the distinctive histories of civil rights movements addressing race, sex, and sexual orientation might explain the different rules concerning religious exemptions to antidiscrimination laws on these three bases).