

Involuntary Servitude, Public Accommodations Laws, and The Legacy of *Heart of Atlanta Motel v. United States*

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Note to 2011 Schmooze Participants: This “ticket of admission” grows out of my current research and writing on evident clashes between antidiscrimination law (and underlying rights to free and equal citizenship it seeks to vindicate) and rights to religious liberty and freedom of (expressive) association. One piece of that research is a forthcoming article with the unwieldy title, *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, Christian Legal Society, and Pluralism*, 32 CARDOZO LAW REVIEW (May 2011), in a symposium on the 20th anniversary of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 982 (1990). Another piece is a draft chapter in my book-in-progress with Jim Fleming, *Rights, Responsibilities, and Virtues* (under contract with Harvard University Press). (Eventually, I hope to situate these antidiscrimination issues in a broader framework in a book project looking at the regulation of civil society, *Free and Equal Association*.) By happy coincidence, around the time Mark invited me to this schmooze, I had been reading *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). The Thirteenth Amendment argument asserted (unsuccessfully) by the motel owner in that case gave me a beginning point for this paper. I look forward to our conversation.

I. Introduction

In this paper, I look back at and reflect on the legacy of an early, significant public accommodations case, *Heart of Atlanta Motel, Inc. v. United States*,¹ in which the Thirteenth Amendment’s prohibition of involuntary servitude makes a brief appearance but plays a larger, background role. When this challenge to the constitutionality of Title II of the Civil Rights Act of 1964 reached the United States Supreme Court, the Court unanimously affirmed the power of Congress, under the Commerce Clause, to reach private conduct through a civil rights statute reaching public accommodations. In so doing, the Court distinguished its own (in)famous precedent,

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¹379 U.S. 241 (1964).

The Civil Rights Cases (1883),² in which it held that the Thirteenth and Fourteenth Amendment 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. The motel owner challenged the Civil Rights Act of 1964 on several grounds: that Congress exceeded its powers under the Commerce Clause; that the Act violated his 5th Amendment liberty and property rights, as well as (improbably) the Thirteenth Amendment. By contrast, a newer generation of challenges to antidiscrimination law assert First Amendment claims to religious liberty or freedom of association. Nonetheless, I contend that *Heart of Atlanta Motel* is of continuing significance for contemporary clashes over the proper scope of antidiscrimination laws, the justifications for such laws, and what’s at stake for persons protected by such laws as well as for persons and entities challenging them.

Part II of this paper explicates the *Heart of Atlanta Motel* case. To convey to readers something of the context and historical significance of this case, it augments its exposition with some contemporaneous legal commentary on the case and newspaper coverage of the motel owner’s legal challenge to Title II and its journey to the U.S. Supreme Court.³ It situates the case with two other Title II announced the same day, *Katzenbach v. McClung* and *Hamm v. City of Rock Hill*, and with the lawsuit brought against Atlanta restaurant owner Lester Maddox. In presenting the case, I highlight several features of the majority and concurring opinions with resonance for subsequent

²109 U.S. 3 (1883).

³My 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 to me that I look at contemporary news coverage, something he and Joanna Grossman did in their informative article, *The Legacy of Loving*, 51 *Howard L. J.* __ (2007).

antidiscrimination laws and challenges to them. An instructive example is *Roberts v. Jaycees*,⁴ in which, twenty years later, the Court upholds a state public accommodations law and cites *Heart of Atlanta Motel* when it analogizes the dignitary harms of exclusion based on race to those based on sex. In Part III, I turn to present day scholarly 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. 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.

II. Revisiting *Heart of Atlanta Motel v. United States*

A. *The Legal Challenges to Title II in Context*

In *Heart of Atlanta Motel v. United States*,⁵ 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.”⁶ 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

⁴486 U.S. 609 (1984).

⁵379 U.S. 241 (1964).

⁶*Id.* at 247 (quoting Title II, § 201 (a)).

and which is actually occupied by the proprietor of such establishment as his residence.”⁷ This “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.”⁸

Title II also reaches discrimination or segregation “supported by state action,” which means “when carried on under color of any law, statute, regulation or any custom or usage required or enforced by officials of the State or any of its various subdivisions.”⁹ Thus, the law contains an “affirmative” declaration that all persons “shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind of 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.”¹⁰ Title II contained various exceptions, including for private clubs under certain conditions.

On July 2, 1964, just “2 hours and 10 minutes after President Johnson signed” the Civil Rights Act,¹¹ Moreton Rolleston, president and operator of the Heart of Atlanta Motel, filed his challenge

⁷*Id.* at 247.

⁸Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. Reserve L. Rev. 660, 672 (1964).

⁹*Heart of Atlanta Motel*, 379 U.S. at 248.

¹⁰*Id.*

¹¹*Atlanta Motel Sues in Major Test of Rights Act*, N.Y. Times, July 7, 1964, at 1.

to Title II in federal district court in Atlanta. Rolleston, an attorney, represented himself in the legal challenge, including arguing before the Supreme Court. Contemporary press reports note that the Heart of Atlanta Motel “has been the target of repeated demonstrations and sit-ins by Negro and white civil rights workers.”¹² As the Court recounts (and as newspaper stories confirm), “Prior to the passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it is alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.”¹³ Rolleston argued that, in passing the Act, Congress exceeded its power to regulate commerce. 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 taking of its liberty and property without due process of law and a taking of its property without just compensation.” Rolleston asked \$11 million in damages (in the event he had to comply with the law), contending desegregation would ruin his business, reputation, and goodwill.¹⁴ Pertinent to this Schmooze’s topic, he also alleged that Congress subjected the motel to “involuntary servitude,” violating the Thirteenth Amendment.¹⁵

“Involuntary servitude” was also a cry of Lester Maddox, owner of the Atlanta-based Pickrick Restaurant, the target of a lawsuit brought under Title II by “three Negroes,” George Willis Jr., Woodrow T. Lewis, and Albert Dunn, who, when, on July 3, they sought entrance at his

¹²*Hotelier Brings \$11 Million Rights Action*, Boston Globe, July 7, 1964, at 7.

¹³379 U.S. at 351.

¹⁴*Atlanta Motel Sues in Major Test of Rights Act*, N.Y. Times, July 7, 1964, at 1. \$1 million was for deprivation of property rights; and \$10 million for deprivation of his liberty right to refuse service. *Id.*

¹⁵379 U.S. at 244.

restaurant, he chased away at gunpoint.¹⁶ Although the ultimate companion case to *Heart of Atlanta Motel* was *Katzenbach v. McClung*,¹⁷ 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. Contemporary press reports depict Mr. Rolleston as a 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. In sharp contrast, Mr. Maddox features 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. 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*.¹⁸ Even as many Atlanta businesses desegregated before passage of Title II, "Maddox's Pickrick remained stubbornly wedded to the segregationist Jim Crow policies;" thus, "as a conspicuous symbol of segregationist defiance, the Pickrick became an immediate target of civil rights activists seeking to test the new law."¹⁹ A radio station employee introduced into the district court proceedings, for example, a transcript of a tape recording, in which Maddox said to the three plaintiffs:

I'll use axe handles, I'll use guns, I'll use my fists, I'll use my customers, I'll use my employees, I'll use anything at my disposal. This property belongs to me, my wife and my children. The white people have got enough of this and it's not because of the

¹⁶*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).

¹⁷379 U.S. 294 (1964).

¹⁸"Lester Maddox (1915-2003)," *Government & Politics*, *The New Georgia Encyclopedia*, <http://www.georgiaencyclopeida.org/nge/Article/jsp?id=h-1387> (visited Feb. 12, 2011).

¹⁹*Id.*

Negroes. It's because of renegades like Lyndon Johnson and Ivan Allen.²⁰

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.²¹ On July 22, a three-judge panel upheld Title II and issued injunctions against Heart of Atlanta Motel and the Pickrick Restaurant. The court stayed the injunction until August 11 to allow time for direct appeal to the U.S. Supreme Court.²² 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."²³ He vowed: "We will never integrate. Pickrick will never integrate."²⁴ *The New York Times* story featured a picture of Maddox – captioned, "Segregationist Remains Defiant" – placing boxes of ax handles at the entrance of his restaurant, with a sign reading,

²⁰E.W. Kenworthy, *2 Rights Act Suits Argued in Court*, N.Y. Times, July 18, 1964, at 20.

²¹*Early Hearing for Test Case*, Boston Globe, July 11, 1964, at 2.

²²*Three Judges Reject Cafe, Motel Attack: Court Holds Off Injunctions to Allow Appeal*, Chi. Trib., July 23, 1964, at 1.

²³*Black Upholds Rights Law*, Boston Globe, Aug. 11, 1964, at 1. Other papers carried this quote, or portions of it: [add e.g. from southern papers].

²⁴*Won't Black Rights Law: Black Refuses to Halt Enforcement*, Chi. Trib., Aug. 11, 1964, at 1.

“souvenir (or otherwise) \$2 each.”²⁵ 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 of fried chicken here.”²⁶ By contrast, Moreton Rolleston, owner of the Heart of Atlanta motel, said he would obey the court.²⁷

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.”²⁸ Justice Black, news reports emphasize, “said the Civil Rights Act did not result from sudden, impulsive action, but represented the culmination of one of the most thorough debates in the history of Congress.”²⁹ Black stated that “a judicial restraint of enforcement of one of the most important sections of the Civil Rights Acts would, in my judgement, be unjustifiable.” 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

²⁵*Atlanta Restaurant Defies High Court, Again Bars Negroes*, N.Y. Times, Aug. 12, 1964, at 1.

²⁶*Atlanta Restaurant Defies High Court, Again Bars Negroes*, N.Y. Times, Aug. 12, 1964, at 1.

²⁷*Won’t Block Rights Law*, *supra* note *.

²⁸*Black Upholds Civil Rights Law*, *supra* note *, at 2.

²⁹*Id*; *see also Rights Law Stay Denied by Black*, N.Y. Times, Aug. 11, 1964, at 24.

the 14th Amendment's policy against racial discrimination."³⁰ Black's focus upon the 14th 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.

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 to honor both sides' request for a prompt hearing.³¹ By this time, the Pickrick Restaurant was not part of the hearing because Maddox closed the restaurant rather than integrate.³² Maddox reopened a segregated cafe, and subsequently, in 1966, amidst "widespread dissatisfaction with desegregation," became Governor of Georgia.³³ 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 federal court in Birmingham, Alabama. 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,

³⁰*Rights Law Stay Denied by Black, supra note **.

³¹Marjorie Hunter, *Supreme Court to Speed Test of Key Clause in the Rights Act*, N.Y. Times, Aug. 27, 1964, at 24.

³²*Id.*

³³"Lester Maddox (1915-2003)," *Government & Politics, The New Georgia Encyclopedia*, <http://www.georgiaencyclopeida.org/nge/Article/jsp?id=h-1387> (visited Feb. 12, 2011). The Encyclopedia entry states that, "riding a wave of reaction to the Civil Rights Act," Maddox entered the 1966 gubernatorial contest and "shocked many political observers" by defeating liberal former governor Ellis Arnall in the Democratic primary and then, becoming governor when, according to the Georgia's constitution's procedures, the Democratically-controlled legislature resolved the three-way election by selecting Maddox. Maddox "surprised many by serving as an able and unquestionably colorful chief executive." *Id.*

except through a “take-out service for Negroes”³⁴) and, thus, was not engaged in interstate commerce. They alleged that they would lose \$200,000 annually if forced to serve Negroes.³⁵

By contrast to Ollie’s Barbeque, whose connection to interstate commerce was not its clientele but the food “procured [by a local supplied] from outside the state,”³⁶ the Heart of Atlanta Motel clearly did business across state lines, not only through national advertising but by accepting “convention trade from outside Georgia;” “approximately 75% of its registered guests are from out of State.” 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.”³⁷ Defending Title II, the United States countered that “the unavailability to Negroes of adequate accommodation interferes significantly with interstate travel,” and that Congress has power under the Commerce Clause “to remove such obstructions and restraints.”³⁸

1. The Involuntary Servitude Argument as Surprising Even Alice

The United States also met Rolleston’s 13th Amendment argument. It 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.”³⁹ In the Justice Department’s brief,

³⁴Katzenbach v. McClung, 379 U.S. 294, 296 (1964).

³⁵*Court Says Rights Law Invalid in Restaurant Case*, Boston Globe, Sept. 18, 1964, at 8.

³⁶McClung, 379 U.S. at 296.

³⁷39 U.S. at 243.

³⁸*Id.* at 244.

³⁹*Id.* at 244.

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.’”⁴⁰

At oral argument, Rolleston elaborated his Thirteenth Amendment theory. He cited a case (*Hodges v. United States*), in which the Court held that involuntary servitude included “compulsory service of one to another,” and stated that “there have been other cases which have held that if a person is forced to serve another in business ways,” that involved involuntary servitude prohibited by the Thirteenth Amendment.⁴¹ Solicitor General Archibald Cox dismissed Rolleston’s argument in vivid terms, suggesting that it would surprise even “Alice . . . at the end of her long journey through wonderland.” As excerpted in the press, Cox told the Court:

Appellant also argues that the act violates the 13th Amendment. It is enough to point out that the motel is a corporation. But surely it would turn the world upside down for anyone to seriously suggest the 13th Amendment was intended to prohibit either Congress or the state governments from guaranteeing Negroes equality of treatment in places of public accommodation.

And Alice, I think, even at the end of her long journey through wonderland, would have been surprised to be 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 kind of other people holding themselves out to serve the public.⁴²

Elements of this rebuttal echo in the Court’s rejection of the motel’s “involuntary servitude” claim:

⁴⁰*In Court*, Boston Globe, Sept. 29, 1964, at 8.

⁴¹*Excerpts From Rights Cases Argument*, N.Y. Times, Oct. 6, 1964, at 24.

⁴²*Excerpts From Rights Cases Argument*, N.Y. Times, Oct. 6, 1964, at 24.

We find no merit in the remainder of appellate’s contentions, including that of “involuntary servitude.” 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 contrary . . . 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.”⁴³

2. *What to do about the Civil Rights Cases (1883)*

In addition to its “Alice in wonderland”-like assertion by the Heart of Atlanta Motel owner, the Thirteenth Amendment had a significant, if not explicitly stated, role both in the passage of Title II of the 1964 Civil Rights Act and in the Court’s upholding of it. The Court readily concluded that Title II was constitutional as an exercise of Congress’s power to regulate interstate commerce. But it first had to reckon with its previous decision in *The Civil Rights Cases* (1883), which struck down Congress’s earlier public accommodations law. It declared that case “inapposite and without precedential value” as to the constitutionality of the Civil Rights Act.⁴⁴ It contrasted the 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). That earlier Congress did not fully consider whether the Commerce power provided support for the earlier Act. That Act, the Court explains, was “not ‘conceived’ in terms of the commerce power,” but rather, in terms of the Thirteenth, Fourteenth, and Fifteenth

⁴³379 U.S. at 262.

⁴⁴379 U.S. at 250 (distinguishing *Civil Rights Cases*, 109 U.S. 3 (1883)). There is an enormous scholarly literature – to which some members of this schmooze have made valuable contributions – critical of the Supreme Court’s earlier jurisprudence that thwarted Congress’s efforts, through civil rights laws, to implement the 13th, 14th, and 15th amendments. *See, e.g.*, Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (2005 edition). Discussing that literature is beyond the scope of this paper.

amendments.⁴⁵ 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,” and, thus, of “no relevance” to the contemporary Court’s decision, “where the Act 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.”⁴⁶ Because it finds the commerce power sufficient to uphold Title II, the Court neither considers the other grounds on which Congress relied nor addresses whether Congress had sufficient power to act under Section 5 and the Equal Protection Clause of the Fourteenth Amendment.⁴⁷

Although the Court only obliquely acknowledges 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 that earlier Civil Rights Act undeniably led the later Congress to find a seemingly less vulnerable constitutional peg for its public accommodations law.⁴⁸ As one contemporary defense of Title II put it, the Court’s earlier answer to the argument that “denial of access to place of public accommodation was a badge or incident of slavery” was “abrupt”: it dismissed the argument as “running the slavery argument into the ground.”⁴⁹ In the words of Justice Bradley:

When a man has emerged from slavery, and by the aid of a beneficent legislature has

⁴⁵379 U.S. at 251.

⁴⁶379 U.S. at 252.

⁴⁷ 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.

⁴⁸*See, e.g., Public Accommodations, supra note **, at 683.

⁴⁹*Id.*

shaken off the inseparable concomitant of that state, there must be some stage in the process 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.⁵⁰

In support, Bradley observes that prior to the abolition of slavery, “thousands of free colored people” enjoyed “all the essential rights of life, liberty, and property the same as white citizens,” but no one argued that it invaded their “personal status as freedom” because “they were subjected to discrimination 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.”⁵¹ Nor does the Fourteenth Amendment ground the law, since it reaches only state action, not private discrimination. The Court notes that remedy might be sought under state laws concerning innkeepers and public carriers, or, if those laws themselves “make any unjust discrimination,” then Congress may afford a remedy under the Fourteenth Amendment.⁵²

In a forceful and famous dissent, Justice Harlan contends that discrimination in access to public accommodations “is a badge of servitude, the imposition of which congress may prevent under its power, through appropriate legislation, to enforce the thirteenth amendment.”⁵³ 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 this community,” he retorts that what is at stake are not “social rights,” but constitutional rights to civil freedoms. “No government ever has brought, or ever can bring, its people into social intercourse against their wishes,” and “no legal right

⁵⁰109 U.S. at 25.

⁵¹109 U.S. at 25.

⁵²*Id.* at 24-25.

⁵³*Id.* at 42.

of a citizen is violated by the refusal of others to maintain merely social relations with him, even upon grounds of race.”⁵⁴ However, 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 is 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.” Harlan argues that to suggest that the presence of a “colored citizen in a court-room” was an “invasion of the social rights of white persons” is analogous to suggesting that the claim of a “colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.”⁵⁵

Harlan reminds 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.”⁵⁶ 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.”⁵⁷ Congress, he continues, has “express power to enforce that amendment,

⁵⁴*Id.* at 59.

⁵⁵*Id.* at 60.

⁵⁶*Id.* at 34.

⁵⁷*Id.* at 36.

by appropriate legislation.” Harlan stresses exemption 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.

Harlan also concludes that public accommodations are, in effect, agents of the state. An innkeeper exercises a “quasi public employment,” and the “public nature of his employment forbids him” from discriminating based on race.⁵⁸ Similarly, licensing gives amusement a public status. Thus, he views the entities covered by the 1875 Act as “agents 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, Harlan counters:

It is . . . scarcely just to say that the colored race has been the special favorite of the laws. What the nation, thorough congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freedman and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileged belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.

Harlan continues by analyzing forms of class tyranny in the nation’s history, suggesting that “To’ day it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship.”⁵⁹

3. Congress reenters the civil rights field

In *Heart of Atlanta Motel*, the Court does not explicitly revisit this earlier disagreement between the majority and Justice Harlan over the Thirteenth and Fourteenth Amendment. Certainly, it notes one consequence of *The Civil Rights Cases*: the long hiatus between when Congress enacted

⁵⁸*Id.* at 40-41.

⁵⁹*Id.* at 62.

the first Civil Rights Act of 1866 and, nearly a century later, it enacted the series of Civil Rights Acts in the late 1950s and early 1960s. How and when did Congress reenter the field? The Court details 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 of Congress by the power conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth amendments⁶⁰

As finally adopted, the Court observes, the Civil Rights Act, 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 facilities, federally secured programs and in employment.”⁶¹ The Court cites 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 accommodations to public establishments.’”⁶² “At the same time, however,” the Court continues, Congress concluded it could achieve this objective “by congressional action based on the commerce power of the Constitution.”⁶³ I shall return to this language about dignity in explicating how *Heart of Atlanta Motel* features in more recent public accommodations cases.

4. Ending discrimination through peaceful and voluntary settlement: demonstrations and demanding service as the backdrop of Title II

⁶⁰379 U.S. at 245.

⁶¹*Id.* at 246.

⁶²*Id.* at 250 (citing to the Senate Commerce Committee Report No. 872, at 16-17).

⁶³*Id.* (quoting Senate Report)

Worthy of comment in the above history is the Court's reference to "peaceful and voluntary settlement." Here the Court simply echoes the legislative history. Contemporaneous writings situate Title II in the context of numerous, repeated, peaceful efforts by Negro citizens – often side-by-side with white civil rights advocates – to integrate lunch counters, soda fountains, restaurants, and hotels. In effect, to demand service on equal terms. For example, an essay about the sit-in movement by civil rights attorney Marion A. Wright observes that the 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.⁶⁴ The 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." By contrast, sit-ins, "dealing with public accommodations in a variety of circumstances" and jurisdictions, experienced more vicissitudes of fortune." He reports the genesis of the sit-ins in 1959, when "four Negro students at North Carolina A & T College in Greensboro, North Carolina," decided to do something about "some of the segregated situations to which they were exposed."⁶⁵ They attempted to get coffee at the dime store, and, when "the manager said he could not serve them because of local custom," they "just sat and waited." Soon after, other students at their own school and later from some other colleges joined them for future visits. Heckling by white teenagers ensued, and "white boys waved Confederate flags, chanted, and cursed." After management received a bomb threat, the police "emptied the store," and the store reopened, but with

⁶⁴Marion A. Wright, *Public Accommodations: The Sit-in Movement: Progress Report and Prognosis*, in *Legal Aspects of the Civil Rights Movement* 89 (Donald B. King and Charles W. Quick eds., 1965).

⁶⁵*Id.* at 90 (quoting Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 *Duke L.J.* 315, 317-318 (1960)).

its lunch counters closed. Wright adds that the sit-in movement “spread electrically through the entire South,” and “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.”⁶⁶ This movement “wrought a transformation of southern customs,” with “capitulation,” in the majority of cases, coming “peacefully, almost gracefully,” as “many innkeepers welcomed the pressure which enabled them to act.” 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 . . . working] their way to courts of last resort.”⁶⁷ While there were “many exceptions,” innkeepers generally prevailed in southern state courts, and demonstrators, in federal courts.⁶⁸

The prevalence of such trespass suits and Title II’s aim of peaceful settlement are evident in the fact that, the same day that the Court announced its *Heart of Atlanta* and *McClung* rulings, it also announced *Hamm v. City of Rock Hill*,⁶⁹ in which it 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. 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 states: “The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our

⁶⁶*Id.* at 90-91.

⁶⁷*Id.* at 91.

⁶⁸*Id.*

⁶⁹379 U.S. 304 (1964).

history.”⁷⁰ The Court again speaks of closing an “unhappy chapter”:

As we have said, Congress, as well as two Presidents who recommended the legislation, clearly intended to eradicate an unhappy 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 a 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.⁷¹

By contrast to *Heart of Atlanta* and *McClung*, which were 9-0 decisions, *Hamm* was a 5-4 decision. Title II’s concern for peaceful settlement also animates these dissents. Justice Black, for example, disclaims 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.” 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 and adequate and orderly remedy.”⁷² Here, the same extensive and thorough legislative history that led him to decline to stay the lower court’s injunction in *Heart of Atlanta Motel* leads him to reject an interpretation of Title II in the face of legislative silence:

in 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.⁷³

⁷⁰*Id.* at 315.

⁷¹*Id.* at 315-316.

⁷²*Id.* at 318-319 (Black, J., dissenting).

⁷³*Id.* at 321. Also dissenting, Justice Harlan states: “I entirely agree with my Brother Black’s poignant observations on this score; there is not a scintilla of evidence which remotely suggests that

Justice White echoes Justice Black on the silence in the legislative record, contending that such silence should lead to the conclusion opposite that reached by the majority. The disruptive effects of civil disobedience also counsels this interpretation: “[Had 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 . . . Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer.”⁷⁴

Although *Heart of Atlanta Motel* stresses discrimination’s burden on interstate commerce in terms of its impact upon African Americans’ freedom to travel, contemporaneous commentary on Title II also stresses the downward economic impact of “racial strife” – segregation and demonstrations challenging it.⁷⁵ 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 moral problem,” giving statistics both about the burdens on travel suffered by Negroes and about the number of demonstrations in 174 cities, 32 states, and the District of Columbia, “about a third of [which] were concerned solely with discrimination in places of public accommodation.”⁷⁶ Cox goes on to speak of the “tremendous” effect of these “demonstrations, picketing, boycotts, other forms of protest” upon “business conditions,” and therefore, “upon

Congress had any such revolutionary course in mind.” *Id.* at 324 (Harlan, J., dissenting).

⁷⁴*Id.* at 328 (White, J., dissenting).

⁷⁵Quick, *supra* note *, at 664-665.

⁷⁶*Excerpts from Rights Case Argument*, Oct. 6, 1964, at 24.

interstate commerce.”⁷⁷

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.”⁷⁸ For example, one contemporaneous commentator on Title II predicts (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.⁷⁹

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. Lester Maddox’s conduct at his Pickrick is but one example.⁸⁰ 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.⁸¹

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 refer to Title II as passing “only

⁷⁷*Id.*

⁷⁸379 U.S. at 246.

⁷⁹Quick, *supra* note *, at 709.

⁸⁰See *New Clashes Mark Tests of Rights Law*, Chi. Trib., July 7, 1964, at 7.

⁸¹See *id.*; *Hotelier Brings \$11 Million Rights Action*, Boston Globe, July 7, 1964, at 7; *As FBI Chief Left, Delta Church Burned*, Boston Globe, July 12, 1964, at 36.

after a fiery congressional debate,”⁸² and as “produc[ing] the greatest amount of controversy because of its intensely personal character.”⁸³ By the time Congress enacted Title II, the prevalence of discrimination in public accommodations had become a national and international embarrassment.⁸⁴ 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.”⁸⁵ Title II, thus, was soon “regarded in many quarters as a token of the nation’s sincerity in moving to resolve the ‘American dilemma.’”⁸⁶

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 hearkens back to the expansive account of the Commerce power elaborated in *Gibbons v. Ogden* (1824), where Chief Justice John Marshall stated that the power was as broad as commerce itself, which included “every species of commercial intercourse.”⁸⁷ 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.”⁸⁸

⁸²Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 Colum. L. Rev. 1394 (1965).

⁸³Quick, *supra* note *, at 661; Nimmer, *supra* note *, at 1393 (calling Title II “by the far the most controversial aspect” of the Civil Rights Act of 1964).

⁸⁴*Id.* at 662.

⁸⁵Ira Michael Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, 1965 S. Ct. Rev. 159, 163 (1965).

⁸⁶Nimmer, *supra* note *, at 1394.

⁸⁷379 U.S. at 254-255.

⁸⁸*Id.* at 255.

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."⁸⁹ The Court observes:

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.⁹⁰

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

Another way the changing nature of the economy in a more mobile society features is in explaining the burden posed by race-based discrimination in access to accommodations. The record including testimony as to:

the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; 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 required the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel.⁹¹

This testimony in *Heart of Atlanta* provides a compelling example of a serious burden on travel. What's more, the practices were "nationwide." Here the Court summarizes testimony about

⁸⁹*Id.* at 251.

⁹⁰*Id.* at 251.

⁹¹*Id.* at 252-253.

the *qualitative* and *quantitative* impact on Negroes' ability to travel:

These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well . . . This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former 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, 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. . . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.⁹²

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).⁹³ 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."⁹⁴

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. 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

⁹²*Id.* at 253.

⁹³*See, e.g.*, ROBERT VISCHER, *CONSCIENCE AND THE COMMON GOOD* (2010).

⁹⁴See discussion in Part III.

commercial, Mr. Solicitor General? Isn't there a moral problem, also?"⁹⁵ In response, Cox said he wished to and would "emphasize repeatedly" in his argument "that Title 2 [sic] 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 – I believe this should be "promise"] declared by the 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.⁹⁶

When pressed by Justice Harlan on the statement in the United States's brief that "we stake our case on the commerce clause," Cox returns to the idea of a commercial problem. He states 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 social and moral. Nobody denies that aspect of it. But that it was national and commercial."⁹⁷

In its opinion, the Court observes 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. The Court states:

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. 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.⁹⁸

⁹⁵*Excerpts from Rights Cases Argument, supra note **.

⁹⁶*Id.*

⁹⁷*Excerpts From Rights Cases Argument, supra note **.

⁹⁸397 U.S. at 257. For an argument that discrimination is wrong when it demeans by not treating others as of equal moral worth, see Deborah Hellman, *When Is Discrimination Wrong?* (2008).

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 deprives him of liberty or property under the Fifth Amendment. The Court rejects appellant's claim briskly. It applies a rational basis test, saying if Congress had a rational basis for finding that racial discrimination by motels affected commerce and if it uses 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."⁹⁹ In observing that public accommodations laws are not "novel," the Court notes 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."¹⁰⁰ Indeed, the Court reads *The Civil Rights Cases* as "perhaps 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.'"¹⁰¹ 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."¹⁰² The Court sums up: "As a result the constitutionality of such state statutes stands unquestioned."¹⁰³

Pertinent here is how states enacted public accommodations laws even in the absence of

⁹⁹*Id.* at 258-259.

¹⁰⁰*Id.* at 259.

¹⁰¹*Id.* at 260.

¹⁰²*Id.* (citing *Bob-Lo Excursion C. v. People of State of Michigan*, 333 U.S. 28 (1948)).

¹⁰³*Id.* at 260.

active federal lawmaking in the area. While, prior to the 1875 Act, only three states had statutes barring racial discrimination in public accommodations, after the Civil Rights Cases, “states took the initiative,” with 18 states having such laws by 1900,¹⁰⁴ and 32 by the time the Court heard the motel’s challenge. 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.¹⁰⁵ Further, when Title II was passed, no southern states had statutes barring racial discrimination in public accommodations.¹⁰⁶ As I discuss in Part III, in *Roberts v. Jaycees*, the Court reiterates the role of state initiative protecting against discrimination in public accommodations in the face of the absence of federal law.

8. The harms and benefits of antidiscrimination laws

Although Rolleston alleged \$11 million in damages (in the event hit 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.”¹⁰⁷ The Court’s reference to experience to the contrary echoes contemporaneous commentaries on Title II making, as it were, the business case that ending segregation will help local

¹⁰⁴ Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. Miami L. Rev. 456, 464-466 (1964).

¹⁰⁵*Id.* (observing that “in 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”).

¹⁰⁶*Id.*

¹⁰⁷379 U.S. at 260.

economics by increasing the flow of tourist dollars into cities.¹⁰⁸ But the Court also explains that if there is some harm as a result of the application of the Civil Rights Act, this is irrelevant to the Act's constitutionality:

But whether this be true or not [whether appellant will suffer economic loss in the long run] is 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.¹⁰⁹

As I discuss in Part III, these twin arguments that antidiscrimination laws do not harm those subject to them and that, in any case, some 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.

C. Justice Black's concurrence – Don't Leave Out the Thirteenth and Fourteenth Amendments

In his concurring opinion, Justice Black reiterates the "ample basis" for Congress's conclusions about the impact of discrimination on interstate commerce.¹¹⁰ Like the majority, he invokes Chief Justice Marshall's expansive interpretation of "commerce," although he turns not to *Gibbons* but to the "standard" set forth in *McCulloch 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

¹⁰⁸Quick, *supra* note *, at 664 (reporting that "the Dallas Chamber of Commerce reported in 1963 that integration in that city has added eight to ten millions dollars in convention business. After 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.").

¹⁰⁹379 U.S. at 260 (citing, on the personal liberty point, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953)). The Court summarily rejects the appellant's claim that the Civil Rights Act is a "taking of property without just compensation."

¹¹⁰379 U.S. at ____.

adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹¹¹ By contrast to the majority, he expressly invokes the Thirteenth and Fourteenth Amendments as additional sources of Congress’s legitimate power: “By this standard Congress acted within its power here. 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.”¹¹² He also finds the means adopted appropriate and consistent with “both [the] letter and spirit” of the Constitution.¹¹³

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

Some attention to Justice Douglas’s concurrence is in order, given the extensive discussion he offers of flaws with the appellant’s assertion of property rights as a ground to defeat Title II. His analysis is instructive for contemporary clashes of rights, for example, when rights to freedom of association and religion are in evident tension with rights to free and equal citizenship. 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 14th Amendment. He stresses the human rights dimension of the case:

My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interest of human rights. It is rather 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,” (*Edwards v. People of State*

¹¹¹*Id.* at 276.

¹¹²*Id.* at 276.

¹¹³ 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 14th 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 *.

of California) . . . “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”¹¹⁴

He also contends that “a decision 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”:

Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.¹¹⁵

Contemporaneous commentary by legal scholars finds unpersuasive Douglas’s claim that a Fourteenth Amendment holding would “have a more settling effect,” detailing the likely extensive judicial involvement and rule-making such a holding would necessitate.¹¹⁶

¹¹⁴379 U.S. at 279.

¹¹⁵*Id.* at 280. Justice Douglas reiterates 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.

¹¹⁶*See, e.g.,* Paul M. Mishkin, *The Supreme Court 1964 Term Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 129-131 (1965) (arguing, contra Douglas, 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”); Ira Michael Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, 1965 S. Ct. Rev. 159 (1965) (finding 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” avoids the Fourteenth Amendment issue and “gratuitously fashioning the detailed rules that are needed to distinguish public from private accommodations. . .”); Stanley H. Friedelbaum, *Book Review: Expanding Liberties – Freedom’s Gains in Postwar America (Milton R. Konvitz, 1966)*, 34 U. Chi. L. Rev. 234, 236 (1966) (noting Konvitz “berates the Court” for upholding the Civil Rights Act under the commerce clause, rather than the “fourteenth amendment route, suggested by Justices Douglas and Goldberg,” but arguing there is “little to support” Douglas’s assertion that such a ruling would have a “more settling effect” and instead 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.”)

Douglas appreciates 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.”¹¹⁷ But the record makes it clear that “the objectives of the Fourteenth Amendment were by no means ignored.” He illustrates 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. I reproduce some of the excerpts he quotes here because some of the reasoning in that Report – and his use of it – is instructive with respect to more contemporary arguments about whether a person who operates a business is allowed to assert religious objections to offerings goods or services.

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), defenses of freedom of association stress a similar buffering function (for example, as articulated in *Roberts*). Douglas quotes the following passage from the Report, which, toward the end, refers to the impact on liberty of abolishing slavery:

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 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

¹¹⁷379 U.S. at 284.

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? Certainly denial of a right to discriminate or segregate 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.¹¹⁸

In this passage from the Senate report, readers can find important precursors or parallels to more contemporary arguments about how antidiscrimination laws advance freedom and American ideals. There is also a parallel to arguments about the “bargain” one makes in entering the realm of business or dealing with the public.

The Senate Report goes on to observe that zoning laws put greater restrictions upon private property rights than public accommodations laws. Zoning laws are necessary, and their restriction does not lessen the freedom-enhancing aspects of property:

There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations are necessary so that human beings may develop their communities in a reasonable manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.¹¹⁹

In both of these excerpted passages is the argument that legal regulation (whether it be

¹¹⁸379 U.S. at 284-285 (quoting S. Rep. 872).

¹¹⁹*Id.* at 285-286 (quoting S. Rep. 872).

antidiscrimination laws or zoning laws) will not harm property owners (in legally cognizable ways). That is, these restrictions do not “detract from” private property’s role “in securing individual liberty and freedom.” These claims, or predictions, are precursors to arguments in 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, in other cases, in offering of services). 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 the liberal concept of the adjustment of equal basic liberties. 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/freedom of others, the Report envisions the necessary adjustment of freedoms and liberties so all can have them. Title II expresses the entitlement of “all persons” to “full and equal enjoyment” of public accommodations. In the following passage, the Report is evocative of Rawls’s notion of adjusting basic liberties to secure the full value of free and equal citizenship:

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; this pledge will be furthered by elimination of such practices.¹²⁰

The above quote speaks, in effect, about appropriate limitations on how we conceive rights, such as the scope of 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

¹²⁰*Id.* at 286.

in access to the goods and services offered by businesses.¹²¹ Of course, as I mention below, critics of Title II emphatically rejected then 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 agrees, 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 . . . as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics. The Senate Commerce Committee made this quite clear:

“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, 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 may be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.”¹²²

This emphasis by the legislators on dignity resonates with language in later public accommodations cases (such as *Jaycees*, which, as noted above, cites the majority’s reference to “dignity” as the primary legislative objective). Contemporaneous commentators applauded Goldberg’s focus upon dignity.¹²³ One review of the Court’s civil rights decisions for the term praised Goldberg’s themes

¹²¹Eventually cite to Joseph Singer’s work on the limits on property rights.

¹²²*Id.* at 292 (quoting Senate Report, p. 16).

¹²³In a 1965 profile of Justice Goldberg, Stephen Breyer, a former law clerk to Justice Goldberg (and now, of course, a Supreme Court Justice), cites this language about dignity as indicative that Justice Goldberg “has always instinctively seen the law ‘as an opportunity to help

as “more satisfactory than the majority’s in that they are 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.¹²⁴

The Report’s striking use of the term “public,” in the passage quoted by Goldberg, also defies a simple public/private division. The Report refers to being told a person is “unacceptable as a member of the public.” The public realm, in this account, includes spaces in civil society where people interact, where people 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. It is public in the sense that an event is “open to the public” or “members of the public” are invited to attend.”

Goldberg stresses the relationship between public accommodations law and the meaning of *community* membership.¹²⁵ He refers to an earlier concurrence in which he articulates his conviction that Section 1 of the 14th 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 the Commerce Clause and under section 5 of the 14th Amendment to “implement the rights protected by Section 1 of the Fourteenth Amendment.”¹²⁶

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).

¹²⁴Heyman, *supra* note *, at 163.

¹²⁵For 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 Law & Hist. Rev. 1 (2005), available at <http://www.historycooperative.org/cgi-bin> (visited Feb. 14, 2011).

¹²⁶379 U.S. at 293.

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 5-4 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 5-4 on the fate of the sit-in convictions.¹²⁷ The *Atlanta Constitution's* headline read: "Supreme Court Upholds Rights Law in Case Here" and continued: "Tells States to Kill All Sit-In Cases."¹²⁸ 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.¹²⁹ Some featured pictures of Ollie McClung Sr. or of the Heart of Atlanta Motel.¹³⁰ Some quoted and even headlined Rolleston's reaction and prediction: "It makes possible a socialistic state and eventual dictatorship. This is a sad day for the cause of individual freedom."¹³¹

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 and

¹²⁷Andrew 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*, The Courier-Journal, Dec. 15, 1964, at 1.

¹²⁸*Supreme Court Upholds Rights Law in Case Here – Tells States To Kill All Sit-In Cases*, *Atlanta Constitution*, Dec. 15, 1964, at 1.

¹²⁹*See id.*; *see also Rights Law Wins Big Test*, *Atlanta Const.*, Dec. 15, 1964, at 1, 10.

¹³⁰*High Court Ruling Backs Rights Law*, Birmingham Post-Herald, Dec. 15, 1964, 1 (photo of Ollie McClung Sr. "At Work").

¹³¹*His Fight Is Over, Says, Hotel Man*, *Atlanta Const.*, Dec. 15, 1964, at 1, 10; *Warns Court Opens Door to Socialist U.S.*, Chi. Trib., Dec. 15, 1964, at 2; "Socialistic State" Foreseen, N.Y. Times, Dec. 15, 1964, 48.

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 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.

There already has been encouraging widespread compliance with the act in the five months it has been law. Now that the Supreme Court also has ruled I think we all join in the hope and the solution that this kind of reasonable and responsible acceptance of law will continue and increase.¹³²

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. Thus, John Lewis, leader of the Student Nonviolent Coordinating Committee, hailed the Court’s ruling as “a 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.”¹³³ 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.”¹³⁴

¹³²*LBJ Hails Acceptance; Praises Southern Reaction to Law*, Birmingham Post-Herald, Dec. 15, 1964, at 9.

¹³³*Negro Leaders Jubilant Over Rights Decision, Await Compliance*, Alabama Journal, Dec. 15, 1964, at 10. Note the reference here to “social equality;” compare Harlan on public accommodations not being about “social rights.”

¹³⁴*Warns Court Opens Door to Socialist U.S.*, *supra* note *.

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 or 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.¹³⁵ On the other hand, Georgia Governor Sanders 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."¹³⁶ 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."¹³⁷ 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."¹³⁸

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

¹³⁵*His Fight Over, Says Motel Man, supra note **.

¹³⁶*Id.*

¹³⁷John Williams, 'Rough Blow' Wallace Says of Decision, *Montgomery Advertiser*, Dec. 15, 1964, at 1; *Wallace Hits Court Ruling: Staggering Blow to Rights, He Says*, *Birmingham Post-Herald*, Dec. 15, 1964, at 9.

¹³⁸*Id.* By 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. Journal*, Dec. 16, 1964, at 10.

be called “interstate commerce” or on the power of Congress to regulate it.”¹³⁹ For example, the *Atlanta Constitution* deemed the ruling “no surprise,” calling it “another steady step in the steady onward march of Federal dominion 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.”¹⁴⁰ The *Montgomery Advertiser* similarly combined resignation to living with the Civil Rights Act with 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.

It will not be the end of the world, but it is difficult to see how Americans can look upon such federal juggernauting without taking fright.¹⁴¹

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 of the new act,” even as it observed that “the Court has joined Congress in protecting some rights at the specific expense of others;” it warned that the decision may pose a “grave danger” as a precedent for using government

¹³⁹David Lawrence, *Fateful Day in History*, Ala. Journal, Dec. 16, 1964, at 4; *see also No Precedent? Make One*, Ala. Journal, Dec. 16, 1964, at 4.

¹⁴⁰*No Surprise Ruling*, Atlanta Const., Dec. 16, 1964, at 4.

¹⁴¹*More to Come*, The Montgomery Advertiser, Dec. 15, 1964, at 4. In one op ed, the author criticizing the Court’s “edict” for changing 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 *.

power “to act further against private enterprise practices.”¹⁴² 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 personal liberty are of no importance.”¹⁴³ 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 absolute conception of property rights, a conception rejected in the Senate Report, and, implicitly, in Title II.

Another theme in press reaction to the Court’s ruling in *Heart of Atlanta Motel* and its companion cases is that it is time, now, 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.”¹⁴⁴ 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.¹⁴⁵

Similarly, a “Negro” civil rights lawyer, Donald L. Hollowell commented: “The decision is most important and extremely gratifying . . . we can all . . . turn our concerted attention to promoting the

¹⁴²*Opinion of the Week: At Home and Abroad*, N.Y. Times, Dec. 20, 1964, at E9 (excerpting the *Birmingham News*).

¹⁴³*Id.* (quoting Moreland Rolleston).

¹⁴⁴*The Nation: Court on Rights*, N.Y. Times, Dec. 20, 1964, at E2.

¹⁴⁵*Id.*

general welfare and other basic needs such as jobs, housing and education.”¹⁴⁶ 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 such as voting rights, employment and housing.”¹⁴⁷

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 are, 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.”¹⁴⁸ Maddox himself rode widespread public reaction against integration to victory as Governor of Georgia. And it is a common observation that President Johnson recognized his support for the Civil Rights Act would cost the Democratic Party the south for some years to come.

Part III. The Legacy of *Heart of Atlanta Motel* for Newer Generations of Public Accommodations Laws and their Critics

Note to Schmooze participants: Since this ticket already greatly exceeds the price of admission, I outline Part III here. It will consider the legacy of the *Heart of Atlanta Motel* case for newer generations of public accommodations laws and challenges to them.

A. My primary example of how salient themes in the majority and concurring opinions recur in later cases will be *Roberts v. Jaycees*. In this case, twenty years after the Civil Rights Act of 1964 and *Heart of Atlanta Motel*, 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. Several themes important to the *Heart of Atlanta* case recur in the Court’s analysis: (1) First, and perhaps most important, is “dignity” and the analogy the

¹⁴⁶*Opinion of the Week: At Home and Abroad*, *supra* note *.

¹⁴⁷Quick, *supra* note *, at 709. *See, e.g.*, Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 Stan. L. Rev. 1 (1965).

¹⁴⁸*More to Come*, *supra* note *.

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 antistereotyping/Equal Protection cases, about harms to dignity and to participation in society. 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. (2) The Court remarks upon the initiative of states in passing antidiscrimination laws in the absence of federal legislative efforts. It observes that, between the time the Supreme Court invalidated the Civil Rights Act of 1875 and when Congress “reentered the field,” Minnesota’s civil rights laws, like those of many other states, were the “primary means of protecting the civil rights of historically disadvantaged groups.” Minnesota added “sex” to the list of protected categories in 1973. (3) The Court approves a functional definition of public accommodations that recognizes the changing economy. (4) 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, that was constitutional. The type of harm alleged in *Roberts* was harm from forced inclusion of women as members. The Court in *Roberts* – and in *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) and *New York State Club Association, Inc. v. City of New York* (1988) – opined that forcing an all-male group to accept female members would not significantly burden it or its ability to convey messages. By contrast, the Court reached a different conclusion in *Dale* with respect to New Jersey’s public accommodations law compelling the Boy Scouts to admit a homosexual as a Scout master.

B. I will then give brief consideration to some other Supreme Court opinions (including some dissents in controversial cases) and lower court cases. In the closely-divided, controversial decisions *United States v. Lopez* and *United States v. Morrison*, the majority and the dissents differ over the import of *Heart of Atlanta Motel*. The majority stresses the need to distinguish the truly economic from the noneconomic and the truly national from the purely local. *Heart of Atlanta* features in string citations for Congress’s power to “regulate the use of the channels of interstate commerce.” In *Lopez*, the majority cites it as an example of “the exercise of federal power where commercial transactions were the subject of regulation,” and reassures that this and other authorities are “within the fair ambit of the Court’s practical conception of commercial regulation and not called in question by our decision today.” The dissents stress Congress’s power through commerce to address serious moral and social wrongs through the Commerce power and challenge the Court’s denial of the problems at issue as local rather than national. In *Morrison*, in a dissent joined by Justices Ginsberg 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,” referring to aggregate dollar costs of the harms of domestic violence. He also points 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, [gender-based violence] bars its most likely targets - women - from full participation in the national economy.”

C. I then consider the legacy of the case for ongoing debates over whether there should be a more robust “moral marketplace” and less governmental regulation. My primary example is the clash between religious liberty and protecting persons on the basis of sexual orientation, including allowing same-sex couples access to civil marriage. The issue of dignity surfaces as does the issue of the proper reach of public accommodations laws. On the one hand, some proponents of full civil rights for gay men and lesbians stress the dignitary harms of denial of such rights. State courts upholding challenges to state marriage laws also recognize the dignitary claims of gay men and lesbians. On the other hand, some scholars counter that even though there is some force to the argument that there are parallels between the dignitary harms suffered due to discrimination based on race and those based on sexual orientation, there is also a salient difference, when the latter discrimination stems from religious conviction. Thus, Robin Fretwell Wilson contends: “The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.” Some scholars argue that current antidiscrimination law intrudes too deeply into civil society. Thus, Robert Vischer advocates a moral marketplace where government is just one participant, not a monopolist. One argument for such a moral marketplace is that this pluralistic approach should prevail unless it would impose a substantial hardship because the person subject to discrimination cannot find the service elsewhere or that it is great hardship to go elsewhere.¹⁴⁹ I consider analogies drawn from race discrimination to sexual orientation as well as the contrast between a firm national policy against race discrimination and current national policy concerning sexual orientation discrimination, which is not yet firm and sometimes, as in the Defense of Marriage Act, is a national policy *of* discrimination. Meanwhile, a not insignificant number of states have fairly robust antidiscrimination laws that now include sexual orientation, and several states allow same-sex couples to marry. Challenges brought by states and couples to DOMA may lead to some shift in national policy. The repeal of Don’t Ask Don’t Tell is one shift.

¹⁴⁹See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al., eds. 2008). In particular, Robin Wilson and Douglas Laycock argue for conscientious exemptions based on religious grounds unless this would pose a serious hardship to the person seeking goods or services; see also VISCHER, *supra* note * (“moral marketplace”).