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Harry T. Quick

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*Public Accommodations: A Justification of
Title II of the Civil Rights Act of 1964*

I. INTRODUCTION

HISTORIANS have a penchant for depicting a period of social or economic change with a dramatic, but empty, catch phrase whereby the mind's eye can conveniently turn back to an allotted cubby-hole in search of past events. The period of change in Negro-white relations is no less deserving of description. Despite the great social and economic changes that have occurred in the American past, such as the Agrarian Reform, the Populist Revolt, and the New Deal,¹ none can compare in impact, depth, or scope to the Civil Rights movement. Since approximately 1954, the movement has gone forward apace, but this social change has been underway from the time the first trader plucked the first slave from Africa. And like a festering social sore, the problem of equality among blacks and whites has only recently reached a head. Unlike "typical" social reforms possessed of a single goal such as prohibition and greenbacks, the civil rights movement seeks broad "across the board" changes in employment, housing, voting, public accommodations, education, and lastly in attitude. Legislation, pending and passed, on national and local levels promises a degree of success for the movants. In the final analysis, however, total acceptance of the Negro into all facets of the white-dominated society will depend on a basic change in prevailing thought. Perhaps several generations will pass before significant progress will be experienced in developing a new attitude toward our non-white citizenry. Nonetheless, the Civil Rights Act of 1964² has evoked some acceptance, albeit penurious at this time. It is the object of this Note to treat in depth, one segment of that legislation: public accommodations.³ In so doing, an educative approach is adopted in the hope of providing a *ratio decidendi* for the previously uncommitted intellect. No pretense is made with respect to convincing the emotionally biased and the intellectually dishonest. That task is left to Newman's "Pulpit and Parlor."⁴

1. HOFSTADER, *THE AGE OF REFORM passim* (1955).

2. 78 Stat. 241, 42 U.S.C.A. §§ 1971, 1975a-d, 2000a-a(6), 2000b-b(3), 2000c-c(9), 2000d-d(4), 2000e-e(15), 2000f, 2000g-g(3), 2000h-h(6) (1964).

3. 78 Stat. 243; 42 U.S.C.A. §§ 2000a-a(6) (1964).

4. NEWMAN, *THE IDEA OF A UNIVERSITY* (1852).

It is, perhaps, redundant to write an *apologia* for an act passed and declared constitutional.⁵ Title II, however, of all the titles in the Civil Rights Act of 1964, has produced the greatest amount of controversy because of its intensely personal character. The segregationist, no matter how rabid, should have little difficulty in spending eight hours with a Negro in a shop;⁶ and no real problem should be encountered in the area of public contracts.⁷ But to eat next to a Negro or sleep in a bed occupied by a Negro the previous night is personally repugnant to the racist; hence, the very strong feeling pervading this area is evident. From a quasi-intellectual viewpoint, Title II represents to its opponents a challenge to their conceived notions of private property. State's righters observe that the entire act is but another intrusion by the central government into an area that ought to be state controlled. And, there are some who, in all intellectual honesty, condemn Title II for its unconstitutional utilization of the commerce clause.

In discussing these objections to the legislation and in an attempt to proselytize, consideration will be given to the act itself, and relevant legislative history, with a view toward interpretation. The Court decisions respecting Title II, a discussion of the nature of private property, and Title II vis-a-vis state public accommodation laws will also be discussed.

II. BACKGROUND OF THE PROBLEM

Governmental activity in a given area is usually in response to some real or imagined need. The public accommodations section of the Civil Rights Act of 1964⁸ is no exception to that general rule. It is the thesis of this Note that the need to which Congress responded was real. The purpose of the act is variously stated in sonorous tones,⁹ however, congressional intent is in no wise nubilous.

5. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

6. 78 Stat. 253, 42 U.S.C.A. §§ 2000e-e(15) (1964). For an in depth discussion of this problem see Note, *Employment Discrimination: State FEP Laws and the Impact of Title VII of the Civil Rights Act of 1964*, W. RES. L. REV. 608 (1965).

7. 78 Stat. 252, 42 U.S.C.A. §§ 2000d-d(4) (1964).

8. 78 Stat. 243; 42 U.S.C.A. §§ 2000a-a(6) (1964).

9. For example, the Senate Commerce Committee stated that the object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 872, 88th Cong., 1st Sess. 16-17 (1964). The House Judiciary Committee Report states:

Another signpost of freedom must be extended to the Negro if he is to overcome racial inequality and if our country is to live up to its national ideals. This is the opportunity for every individual, regardless of the color of his skin to have access to places of public accommodations. This right is so distinctive

The nationwide denial of access to Negroes in places of public accommodation is a fact that needs no documentation. And, that this denial is morally wrong ought to need no documentation. Nevertheless, a substantial number of people will deny that proposition and substitute, instead, an affirmative right of private property and freedom of association.¹⁰ Of course, it is always wiser to oppose in an affirmative fashion, and, in this instance, to cloy about the loss of personal freedom. Nevertheless, Congress responded to vocal and sometimes violent demonstrations¹¹ as well as to a variety of social, economic and diplomatic problems.

A. Diplomatic Problems

Discriminatory practices affecting black citizens of this country subjects the individual involved to humiliation and insult. The effect of these domestic practices not only affects the individual but, in an ancillary fashion, tarnishes the projected image of the United States. One cannot expect an American diplomat to eulogize with "tongue-in-cheek" the equality of opportunity in this nation to a Rhodesian when, *de facto*, Negroes are denied entrance to an American restaurant. Perhaps this fakery could have been practiced a half-century ago. But with the advent of mass communication, there is little one does not know about a foreign land, even in Rhodesia. Moreover, the situation becomes politically indefensible when a black diplomat is denied access to a hotel, restaurant or theater.¹² Enmity in those cases is not only felt for the proprietors of the establishments, but also for the United States in general.¹³ While

in its nature that its denial constitutes a shocking refutation of a free society.
BUREAU OF NAT'L AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 262
(1964).

In marked contrast is an entirely different approach to Title II taken by an opponent. "[I]t is by far the most iniquitous and unconstitutional part of the whole bill." Simpson, *The Public Accommodations Section of the Civil Rights Bill*, 25 ALA. LAWYER 305 (1964).

10. Simpson, *op. cit. supra* note 9, at 308.

11. U.S. CODE CONG. & AD. NEWS 1727 (July 20, 1964).

12. The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial . . . discrimination or segregation by establishments doing business with the general public . . . *Ibid.*

13. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 9, at 262.

13. *Ibid.*

Our nation is engaged today in cold war combat with an alien ideology. On every front — military, economic, political, and social — we must demonstrate the worth of our system. To do this, we need every ally we can obtain. Therefore, when representatives of other nations meet enmity and rejection from operators of public establishments on our soil, they carry away feelings of enmity and rejection themselves. The result of this cannot but undermine our foreign policy. *Ibid.*

legislation of whatever sort will not minimize or erase ill feeling toward the Negro, Title II can suppress blatant hostility.

B. Social Problems

The social ramifications of a diseased system are detailed in innumerable sources and need no documentation here. However, the civil rights' planks of both major parties in the presidential campaign of 1960 are relevant to this discussion. In that year the Republican and Democratic conventions took the position that racial discrimination should be eliminated.¹⁴ The late President John F. Kennedy characterized discrimination in public accommodations as a "daily insult."¹⁵ He further noted that "it should not be necessary for any American citizen to demonstrate in the streets for the opportunity"¹⁶ to enjoy the full facilities of any so-called public accommodation. Particularly tragic is the immobility of Negroes with respect to normal travel. No earthly reason can be conjured up why a Negro, on a vacation, must stretch his endurance to limits unnecessary for whites in search of acceptable accommodations.¹⁷ And then, what of Negro children? In what manner does a Negro adult inform his child that the child's needs cannot be catered to when those needs arise? It does not tax the mind to imagine the bitterness that wells up when one must inform a child that he cannot use a filling station's restroom or that buying an ice cream cone is an impossibility in a particular locale.¹⁸ But it would be a gross understatement to object to discrimination on the basis of a clean bed or an ice cream cone; these outward marks of a fatuous system only serve to underscore the affront to the dignity of a substantial segment of our populace.

14. U.S. CODE CONG. & AD. NEWS 1734-35 (July 20, 1964).

15. *Id.* at 1735.

16. *Ibid.*

17. The following material was presented to the House Judiciary Committee by an official of the NAACP.

For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip . . . [through Southern States].

How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a restroom? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white? BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 9, at 262.

18. *Ibid.*

C. *Economic Problems*

The societal aspects of discriminatory practices ought to be enough to warrant and justify passage of Title II, yet there are economic reasons which serve to add to the senselessness of discrimination. Initially, it is impossible to calculate the dollars lost to local business communities simply because of segregation. Negroes who have habitually been denied access to public accommodations and those who are aware of the uncertainties of travel are reluctant to take to the road during vacation time.¹⁹ That many communities depend to a great extent on tourist dollars is well known. Integration of hotel facilities provides additional income for cities that would not be the recipients of convention and vacation business but for desegregation. For example, the Dallas Chamber of Commerce reported in 1963 that integration in that city has added eight to ten million dollars in convention business.²⁰ After Atlanta, Georgia, hotels announced an open door policy with respect to race, three conventions promising about 3,000 delegates committed their respective organizations to meet in that city.²¹

Conversely, racial strife has produced downward trends in business activity. The opponents of Title II argue that the blame for demonstrations and violence and the consequent economic loss lies at the doorstep of Title II's proponents. But they argue speciously because demonstrations and racial strife in general occur not because of the activity of the advocates of social change. Culpability is

19. In order to illustrate the burden segregation places upon the Negro, the following chart indicates the distances that must be traversed in search of reasonable accommodations open to Negroes. If X, a Negro, were to go by car from Washington, D. C. to New Orleans, Louisiana, he would travel a total of 1217 miles.

Washington, D. C. to Petersburg, Va. -----	135 miles*
Petersburg to Raleigh, N. C. -----	150
Raleigh to Columbia, S. C. -----	185
Columbia to Atlanta, Ga. -----	215
Atlanta to Tuskegee Inst., Ala. -----	134
Tuskegee Inst. to Mobile, Ala. -----	250
Mobile to New Orleans, La. -----	148
<hr/>	
Total mileage -----	1217
*Average mileage between stops -----	174

Y, a white man, may decide to tour the Southland in a leisurely fashion and stop for the night wherever and whenever he pleases. Yet X is prohibited from proceeding on a similar plan. Y *may* stop driving after fifty miles; X *must* drive an average of 174 miles per day to reach the same destination. See note 18, *supra*.

20. U.S. CODE CONG. & AD. NEWS 1743 (July 20, 1964).

21. *Ibid.*

entirely the burden of those who promote, counsel and participate in the denial of equal facilities.²²

Prior to demonstrations in Little Rock, Arkansas, industrial investments in that state for a two year period totaled 248 million dollars. In that same period, Little Rock added 10 new factories employing over one thousand new workers. However, after the violence in that city no new plants located in the area for two years after the strife. Simultaneously, the state of Arkansas experienced a 25 per cent decline in investments.²³ After the bomb blast that killed four Negro children in 1963, the Birmingham, Alabama Chamber of Commerce reported no new industrial commitments for the entire summer of 1963.²⁴ In that same city for the same period retail sales dropped 30 per cent.²⁴ The University Medical Center in Little Rock and the Universities of Mississippi and Alabama have reported extreme difficulty in securing qualified personnel. During 1960 and 1961, business sales fell 50 per cent in Savannah, Georgia.²⁶

It would seem fair to conclude on the basis of the above cited statistics that segregation and concomitant demonstrations produce a significant drag on local business sales, investment, and hiring practices. Thus, adverse social, economic and diplomatic conditions require that remedial action be taken. Once these conditions are posited, logic requires that the question of who shall undertake the task of change be answered.

III. NECESSITY FOR FEDERAL ACTION

The proponents of federal civil rights legislation are fond of alluding to the nearly one hundred years that have passed since the Emancipation Proclamation wherein Mr. Lincoln freed the slaves.

22. An analogous situation is present in the air corridor from West Germany to West Berlin. The air lane, by treaty, is open to Allied commercial and military aircraft. When the Soviets interfere or attempt to foreclose access to Berlin via the air route, this nation traditionally ignores threats and fully utilizes its treaty rights. The Soviets then charge the United States with dangerous practices, when this country is merely reaffirming its right of use. Thus the blame for strife cannot be placed upon the United States, but, on the other hand, on the Soviets for interference. The situation with respect to demonstrations, sit-ins, parades and the like is an affirmation of a pre-existing right. Those who seek to interfere with that right are responsible for any ensuing melee. Naturally, the objectors will argue that no right of access pre-exists. But how is that situation any different from the Soviet denials of Allied prerogatives?

23. U.S. CODE CONG. & AD. NEWS 1744 (July 20, 1964).

24. *Ibid.*

25. *Ibid.*

26. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 9, at 267.

In that period, social gains for Negroes have been grudgingly won and concessions have been niggardly. That the point is time-worn and over-used does not detract from its validity and vitality. For too long this country has indulged in the mistaken notions that: (1) there is nothing wrong with segregation; (2) there is nothing wrong with separate but equal; (3) if there is something evil about segregation, then it can be dealt with in the day to day relations of individuals; and (4) failing corrective treatment in this respect, state governments are well-equipped to deal with the issue. The reasonable protagonists for equal treatment would not deny that states are clothed with sufficient power to deal with the problem of segregation. But because a state has the *power* to act, does not carry with it the *disposition* to act. In fact, only thirty-two states have been so disposed.²⁷ And, in those states which have enacted public accommodation laws, few of those laws extend, for one reason or another, to all establishments that conduct a "public" business. Even within the same state, the statute is conflictingly construed. For example, Ohio enacted a fairly comprehensive public accommodations law in 1884.²⁸ In 1912, admittedly an early date, two similar cases were decided by two different courts in two different ways. In one case, a Negro plaintiff was denied service in an ice cream parlor. The court held that, although the Ohio statute did not specifically mention ice cream parlors, it was reasonable to conclude that the parlor was similar to the mentioned eating establishments. Therefore, the defendant had, under the statute, wronged the plaintiff by refusing to serve him.²⁹ However, one hundred and fifty miles away in the same state and at the same judicial level, a candy store with an adjacent soda fountain was likened to a hardware store (not mentioned in the statute) as opposed to an eating house.³⁰ Thus, the

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

28. OHIO REV. CODE §§ 2901.35, .36.

29. *Fowler v. Benner*, 13 Ohio N.P. (n.s.) 313 (C.P. 1912).

30. *Deuwell v. Foerster*, 12 Ohio N.P. (n.s.) 329 (C.P. 1912). The mythological reasoning of the *Deuwell* court is worth reading. After referring to mentioned establishments the court noted:

The idea was, and is, that all classes of people at some time or other will need the services of the proprietors of such places and instrumentalities. They hold themselves out for the service of everybody alike. *The service in such places and instrumentalities is wholly unlike the service of a candy store or a soda fountain, or a hardware store, and the like. It is not everybody that has a taste or desire for candy or soda water.* This comparison shows the material distinction between the two classes of business, the one being clearly public, and the other being clearly private and individual. *Id.* at 330. (Emphasis added.)

And the later additions [to the statute] of hotels, eating houses and barber

defendant was entirely justified in refusing to serve the colored plaintiff. The problem of consistency in approach and resolution is not indigenous to Ohio, but is typical of public accommodation sections and court decisions in all states. One state may not list a barbershop as a place of public accommodation,³¹ while another will include barbershops but not public bath houses.³² Despite the worthy intent of the various state legislatures in enacting these laws, they obviously do not cover the spectrum. Thus, a Negro, able to enter a barbershop in Ohio, may be rebuffed in a similar establishment in Pennsylvania where he may enter a public bath that he may not be able to enter in Wisconsin.³³ The example illustrates that although some states may be favorably disposed toward full integration of public accommodations, uniformity of result is non-existent.

At least eighteen states have indicated, for one reason or another, no disposition to exercise the power they admittedly possess. In fact, some states have demonstrated a disposition to act in a negative fashion. Mississippi, for example, under the guise of a trespass statute, has underscored with its mantle of authority segregation in places of public accommodation. The statute authorizes anyone engaged in a public business or trade to choose or select the persons with whom the individual wishes to conduct business.³⁴ In discussing the Mississippi statute and laying down guidelines for future conduct, it is not meant to preclude merchants from dealing alike with all potential customers. Thus, if an inadequately clothed person attempted to secure admission to a better class restaurant or hotel, the proprietor should be empowered to reject that person's patronage. For instance, some eating houses require that male diners wear neckties. If the rule of the house is "no necktie, no admission," then the manager should be permitted to eject non-conforming males whether white or Negro. But a law akin to the Mississippi statute is too broad in that it permits and even encourages discriminatory treatment.

shops are much more analogous to hotels and public conveyances so far as their duties toward the public than is a soda fountain or a dry goods store or a hardware store. *Id.* at 331-32.

31. PENN. STAT. ANN. tit. 18, § 4654 (1963).

32. WIS. STAT. ANN. § 942.04 (1958). This is not to say that Wisconsin permits discrimination in public bath houses; but merely illustrates that failure to specifically designate a place of accommodation or amusement may later produce conflicting judicial interpretations.

33. The states utilized in the textual example may require integration by judicial construction. The states are referred to because their respective statutes are silent in a particular area.

34. MISS. CODE ANN. § 2046.5 (1957).

Assuming therefore that discrimination is an evil, the necessity for federal intervention to the degree permitted by the Constitution is clear. Some states have no public accommodation laws, and some have extended state authority in support of discrimination. Even in states favorably disposed toward such laws, unanimity is non-existent among sister states. In some instances, courts of the same state have interpreted the accommodation statute in a different fashion. While this situation is not wholly unique to antidiscrimination laws and extends into other areas of the law, there is a clear need in this instance for uniformity. Trust law, commercial law, contract law, and the like are not insulated from the problem of consistency, but are devoid of the sense of urgency that pervades this question. Those areas of the law, while important to individuals, do not carry with them the affront to human dignity³⁵ present in the instant situation. Since states have been unable or unwilling to satisfactorily resolve the knotty problems of societal harmony in race relations, it is proper for the federal government to act in order to ensure, to constitutional limitations, equal access for all citizens to places of public accommodation.

IV. TITLE II

A. *Legislative History*

In February, 1963, President John Kennedy recommended to Congress the passage of an act that would guarantee civil rights to all American citizens.³⁶ Following that message, a number of bills were introduced and duly subjected to the mysterious machinations which only a seasoned member of Congress can fathom. Although largely irrelevant to this discussion, a hue and cry was raised with respect to alleged "railroading" of the Civil Rights Act of 1964.³⁷ Clearly, the integrity of the legislative process should be preserved unimpaired, regardless of the matter before the Congress. It will not do, in the name of equality and justice, to substitute a tyranny of the majority for discrimination upon a minority. The common good does not, and cannot, consist of the greatest good of the greatest number but in the greatest good to each individual in so-

35. U.S. CODE CONG. & AD. NEWS 1741 (July 20, 1964).

36. H.R. DOC. NO. 75, 88th Cong., 1st Sess. (1963).

37. U.S. CODE CONG. & AD. NEWS 1803-52 (July 20, 1964). For instance, one minority report protests:

If such procedural departures and parliamentary irregularities are countenanced in the future, then the committee system as a functional part of traditional legislative mechanics has expired. *Id.* at 1834.

ciety. But the Court, in two opinions related to the act, did not see fit to comment on minority charges.³⁸ Since the act is now a fact, investigation of the process is worthless.

B. Congressional Intent

The House Committee on Commerce indicated that the purpose of the act was to peaceably and voluntarily resolve the inescapable and seemingly endless web of racial discrimination.³⁹ The House Committee on the Judiciary prefaced its report indicating that the purpose of the legislation was to ensure and protect civil rights, and to enforce those rights throughout the land.⁴⁰ Conversely, certain members of Congress characterized this legislation as government by injunction;⁴¹ an expansion of federal power to the point of annihilating existing state boundaries;⁴² destructive of the civil rights of all citizens;⁴³ and an inordinate extension of the Attorney General's power.⁴⁴ But despite fanciful or derogatory phraseology, the act itself simply states in the preamble that Title II is designed "to provide injunctive relief against discrimination in Public Accommodations."⁴⁵

C. The Act

The Civil Rights Act is divided into eleven titles, only one of which is relevant here — Title II. This title purports to prohibit discrimination in places of public accommodation that are constitutionally amenable to congressional power. Title II is divided into seven sections. The first three sections contain declarations of substantive rights,⁴⁶ while the remaining sections consider remedial action.⁴⁷

38. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

39. U.S. CODE CONG. & AD. NEWS 1727 (July 20, 1964).

40. *Id.* at 1763.

41. *Id.* at 1787.

42. *Id.* at 1791.

43. *Id.* at 1805.

44. *Id.* at 1804.

45. The Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C.A. §§ 1971, 1975a-d, 2000a-a(6), 2000b-b(3), 2000c-c(9), 2000d-d(4), 2000e-e(15), 2000e, 2000f, 2000g-g(3), 2000h-h(6).

46. 78 Stat. 243-44, 42 U.S.C.A. §§ 2000a-a(1) (1964).

47. 78 Stat. 244, 42 U.S.C.A. 2000a(2)-a(6) (1964).

D. *Prohibited Discrimination*

Section 201(a)⁴⁸ not only prohibits denials of service to Negroes in places of public accommodation but guarantees *full and equal* access to all goods and services of covered establishments. It would seem, therefore, that section 201(a)⁴⁹ would not only prohibit a proprietor of a covered establishment from refusing to serve Negroes, but would also preclude separate accommodations. Thus, for example, the manager of a restaurant which is squarely within the bill could not relegate Negroes to a specific section reserved solely for that race. There are ample grounds to support this conclusion. Initially, the act specifically states, without equivocation, that no one may be denied, because of race, color, religion or national origin, full and equal access to the goods, services, privileges and advantages of the establishment. Obviously, relegation to a "Jim Crow" section of an enumerated accommodation, or segregated washrooms would not satisfy the statutory command of full and equal access. Secondly, *Brown v. Board of Educ.*⁵⁰ reversed the principle of "separate but equal" as found in *Plessy v. Ferguson*.⁵¹ Separate facilities are taken to import inherent inequality. While it is true that the principle announced in *Brown* was directed at school segregation, the validity of the premise can be analogously applied to public accommodations. Surely the Court did not, nor would it, restrict that principle to a narrow application. Lastly, the decisions in state courts considering this very question have, without hesitation, condemned the separate but equal treatment of Negroes. In Michigan, for example, the proprietor of a saloon-restaurant may not require Negroes to eat meals in a tavern section while white patrons are free to choose where they will sit.⁵² This same principle of equality and fullness of access applies to all enumerated establishments.

48. 78 Stat. 243, 42 U.S.C.A. § 2000a(a) (1964).

49. *Ibid.*

50. 347 U.S. 483 (1954).

51. 163 U.S. 537 (1896).

52. *Ferguson v. Giles*, 82 Mich. 358 (1890). Ohio follows a similar construction. In the *Puritan Lunch Co. v. Forman*, 29 Ohio Ct. App. 289 (1918), the Negro plaintiff was asked to eat his meal in what essentially was a kitchen. The court concluded that the defendant's request had as its unspoken purpose the intent

to constantly remind the blackman that his is an inferior race, whereas our constitutions, our legislation, our avowed public policy, all say it is an equal race in the eye of the law. *Id.* at 298.

The same rule was applied in the case of a theater in *Guy v. The Tri-State Amusement Co.*, 7 Ohio App. 509 (1917).

Opponents of section 201 (a)⁵³ argue that the proprietors' right to remove objectionable patrons is seriously impinged.⁵⁴ But a reasonable construction of the pertinent section does not lead to that conclusion. Indeed, the section does not preclude selective practices with respect to potential customers, provided the same standards of admission are applied to all races, colors, religions, and national origins. The ejection of a boisterous individual, regardless of race, could not subject the proprietor of a named establishment to liability. It is pointed out, however, by opponents of the bill that the owner's ejection of an undesirable patron may precipitate an action under the act. They further indicate that if a proprietor is challenged *he* must prove that the customer was ejected for a reason other than race.⁵⁵ And, this is decried as a perversion of basic evidence law. But, it is submitted that this objection is specious. Tactically, the argument is advanced to inject fear and, in truth, has no foundation in law. There is no section of the act wherein adverse treatment of a Negro person is made *prima facie* evidence or even a presumption of discriminatory practice. In seeking protection of the act, the *offended party* is put to the burden of proving discriminatory motivation.⁵⁶ Naturally the burden of going forward would shift to the defendant if the plaintiff successfully upheld his burden. But this is no more burdensome to a defendant in a "discrimination" case than to a defendant in any other type of case.

E. Public Accommodation Defined

Section 201 (b)⁵⁷ defines what establishments shall be covered by the act. The initial requirement is that the establishment must serve the public. All of the following subsections relating to specific establishments must be construed in light of the proviso respecting public service. The second general criterion is a condition prece-

53. 78 Stat. 243, 42 U.S.C.A. § 2000a (a) (1964).

54. U.S. CODE CONG. & AD. NEWS 1813 (July 20, 1964).

55. *Ibid.*

56. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 9, at 32. Admittedly, the authority for this proposition is drawn, not from Title II, but from a discussion with regard to Title VII. However, it cannot be validly argued that this evidentiary rule is therefore inapplicable to suits brought under Title II.

Whether a failure or refusal to hire or a discharge is based on race, color, religion, sex, or national origin, will be a matter of evidence, and the rules applied presumably will be similar to those applied under the Labor Relations Act. *The burden of proof initially will rest on the person alleging discrimination, but it will be possible to shift that burden by persuasive evidence of discrimination. Ibid.* (Emphasis added).

57. 78 Stat. 243, 42 U.S.C.A. § 2000a (b) (1964).

dent to liability under the act and is expressed in the alternative. The named establishments are not liable unless their operations affect commerce *or* discriminatory activity is supported by state action. That which affects commerce and that which constitutes state action are defined in subsequent sections.

Generally, the act does not purport to cover every commercial establishment, although the effect of one subsection could conceivably accomplish that end.⁵⁸

(1) *Lodgings*.—Section 201(b)(1)⁵⁹ proscribes discrimination in lodgings provided for transient guests. In its terms the section conjunctively includes all establishments which (1) serve the public, (2) serve transients, and (3) the operation of which affects commerce, with a single exception. With respect to that exception, Congress excluded the so-called "Mrs. Murphy's Boarding House" from coverage. Specifically, the exclusion covers lodgings that are located in a building containing no more than five rooms for rent. Also, the proprietor *must* actually occupy a part of the establishment. This exception represents a congressional concession to a *reductio ad absurdum*. At a time when the public accommodations section had not been completely written, opponents of the presidential recommendation 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. Perhaps a combination of several factors assisted in moving Congress to write in this exception. First, and perhaps foremost, drafting this exception represented legislative "thunder-stealing." Without the "Mrs. Murphy's Boarding House" argument, opponents of the measure could not conjure up the pathos necessary to stir nation-wide resentment. Second, and related to the first, these small establishments are not significant enough in number to warrant the legislative battle that would certainly have ensued. Third, the relationship between the small proprietor and the transient lodger are distinctly personal. This is not so in large motels or hotels. In the typical boarding house or tourist home, sanitary facilities are usually shared. Also, common meals are sometimes provided.

In drafting this exception to the general coverage of the statute, Congress was quite specific in requiring that the excused establishment be *actually* occupied by the proprietor. Thus, it would seem

58. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

59. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

that the proprietor must reside in the building; daytime habitation or mailing address usage would not seem to satisfy the statutory requirement. Also, it is apparent that Congress did not intend to allow corporations a refuge under this exception. Had Congress intended to include corporations within the exception, it certainly would have employed the word "person" as was done in section 204(a),⁶⁰ and not the word "proprietor." Further, the exception does not appear to apply to tourist or motel courts comprised of units or cabins not part of one building. Thus, if an individual owned four separate cabins which he rented to transients, the exclusion would not be applicable; the rooms or units must be a part of *one building* wherein the proprietor resides. Now that the "boarding house" exception has been considered, attention should be recalled to the principal force of section 201(b)(1).⁶¹

As noted above, the lodging must serve the public. Although a particular business may provide lodging for transients, it may not, in fact, be open to the public at large. Reference is made here to a business not excluded in the private club exception expressed in section 201(e).⁶² Conversely, the act does not apply to a business which provides public lodging but does not receive *any* transient guests. It is important to note that the section is quite emphatic in stating that a lodging business will be a place of public accommodation if it "provides lodging to transient guests." Therefore, a hotel which rents only ten per cent of its rooms (or less for that matter) to transients will be obliged to render service to all applicants.

Another question not so readily resolved is that of defining the term "transient." The act is silent concerning the meaning of that word. Conceivably, residence in a hotel for a month may constitute service to transients; or, on the other hand, it could constitute non-transient residence. The definition of transient seems to be a question of fact depending in great measure upon the nature of the facility and the locale. Thus, a summer resort renting cottages for a month or more may fit within the act. But in a large cosmopolitan hotel, one month of residence may properly be non-transient. Of course, the definition of transient cannot depend upon the meaning imported to the word "transient" by the establishment itself. This would defeat the purpose of the legislation. It is unfortunate that Congress did not define "transient." The owner of a lodging is

60. 78 Stat. 243, 42 U.S.C.A. § 2000a(a) (1964).

61. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

62. 78 Stat. 243, 42 U.S.C.A. § 2000a(e) (1964).

presently without any notion of the temporal requirement he must satisfy to escape operation of the act.⁶³

As a guideline for future conduct, formally leased accommodations for a definite period may fall outside the section.⁶⁴ Naturally, a sham lease will receive short shrift from a court asked to rule on its authenticity.

Finally, the section extends to the named accommodations if their operations affect commerce. Little problem is encountered in this regard since Congress in section 201(c)(1)⁶⁵ created a conclusive presumption that all establishments named in section 201(b)(1)⁶⁶ affect commerce within the meaning of Title II. The correctness of this congressional assumption is largely moot except to the academician. Even the Supreme Court declined to speculate in this regard when the Court ruled on the constitutionality of Title II.⁶⁷ In any event, the legislative history is replete with testimony indicating the burden on commerce imposed by discrimination of this sort.

(2) *Restaurants*.—Section 201(b)(2)⁶⁸ proscribes discriminatory practices in certain restaurants, cafeterias, lunchrooms or lunch counters, and soda fountains. Included within the subsection is any facility principally engaged in the sale of food for on-premises consumption. Included within the ban are retail establishments wherein food is sold. Gasoline stations are also included in this subsection. This portion of the act is designed to provide blanket coverage for all catering places that serve the public and the operations of which affect commerce. Here, as opposed to section 201(b)(1),⁶⁹ there are no exceptions. The provision respecting the sale of food on the premises of *any* retail establishment is obviously designed to include drugstore and department store lunch counters.⁷⁰

This section is not as pervasive as is subsection 201(b)(1),⁷¹

63. Reliance on the advice of counsel regarding the definition of transient will not be regarded as a defense. This tack was taken in an Ohio case wherein the defendant alleged no bad faith in that he had relied on advice of counsel. The court rejected this defense out of hand. "This was in no sense a defense and when it appeared without more, it [the alleged act] was sufficient to support the cause of action. . . ." *McCrary v. Jones*, 39 N.E.2d 167, 170 (1941).

64. See *Alesberg v. Lucerne Hotel Co.*, 46 Misc. 617, 92 N.Y. Supp. 851 (1905).

65. 78 Stat. 243, 42 U.S.C.A. § 2000a(c)(1) (1964).

66. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

67. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The issues surrounding the commerce clause and the act will be discussed in detail at p. 689 *supra*.

68. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(2) (1964).

69. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

70. BUREAU OF NAT'L AFFAIRS, *THE CIVIL RIGHTS ACT OF 1964*, at 82 (1964).

71. 78 Stat. 243, 32 U.S.C.A. § 2000a(b)(1) (1964).

for the definition of "affecting commerce" is considerably restricted. Section 201(c)(2)⁷² delineates the two tests applicable to establishments named in this subsection. If the eating place serves or offers to serve interstate travelers, it falls within the title. Also, if the establishment sells a substantial amount of food which has moved in commerce, it will be subject to the act. The practical difficulties involved in avoiding the two tests suggest that Congress, while fully aware of its plenary power over interstate commerce, hoped *sub rosa* to include many more establishments through default. What will constitute an offer to serve? Typically, restaurants and similar establishments especially in smaller cities and villages advertise on highway signs. Perhaps a sign stating "Eat at X's Restaurant — 500 feet ahead", located on a state highway commonly used by interstate travelers will constitute an offer to serve interstate travelers. Indeed, less overt invitations may constitute a constructive invitation to interstate travelers. Proximity to interstate traffic might constitute a constructive offer to serve interstate commerce. In addition to an offer to serve, the fact of service rendered to interstate customers will, regardless of the proprietor's intent, place the business within the section. As a practical matter, restaurant operators will not ask a white patron if he is traveling in interstate commerce, and then refuse service if an affirmative answer is received. But that failure to ask and the readiness to serve regardless of place of origin will unwittingly place the establishment within the purview of Title II. It is important to note that once the establishment is covered via interstate contacts, the restaurant must also serve local residents without regard to color. Section 201(a)⁷³ does not say "interstate travelers shall be entitled" but that "all persons shall be entitled" to access to public accommodations. This also pertains to the discussion under section 201(b)(1).⁷⁴

Section 201(b)(2)⁷⁵ also includes gasoline stations. In terms of the dispensation of gas and oil products, this inclusion was hardly necessary in that discrimination is usually not directed at those purchases. But it does become significant in relation to section 201(b)(4).⁷⁶ All gasoline stations dispensing nationally advertised products will, *ipso facto*, be included within the "offer to serve" pro-

72. 78 Stat. 243, 42 U.S.C.A. § 2000a(c)(2) (1964).

73. 78 Stat. 243, 42 U.S.C.A. § 2000a(a) (1964).

74. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

75. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(2) (1964).

76. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

vision of section 201(c)(2).⁷⁷ Also, it is even more unlikely that a gas station operator will request origin information or refuse service to an out-of-state motorist.

However, should a restaurant, retail establishment, or gasoline station operator be wary enough to foreclose the possibility of serving or offering to serve interstate customers, there is little possibility of escaping the sweeping secondary definition of that which affects commerce. In section 201(c)(2),⁷⁸ Congress specified that if an eating establishment serves a substantial portion of food that has moved in interstate commerce, it will be subject to the act. The question of what "substantial" means is, like "transient" and "offer to serve," largely a matter of fact that must be decided in each individual case. There is, however, one indication in *Katzenbach v. McClung*.⁷⁹ There, the restaurant's out-of-state purchases represented 46 per cent of the total food sold. And, the Supreme Court did not indicate that 46 per cent would be the minimum percentage within the framework of "substantial." It is conceivable that the percentage could be a good bit lower than 46 per cent. A workable standard must be formulated to guide lower courts and, even proprietors. One possible method for determining a "substantial portion of the food which it serves" might be the following. But for the food purchased from interstate sources, could the restaurant sustain the service it provides? As a matter of practice, this would involve subtracting the amount of food purchased from interstate sources from the total food served in the establishment. If the remainder would permit the restaurant to sustain its customary service, then its operations should not, absent other circumstances, be circumscribed by the act. For example, X's diner may purchase beef from sources without the domiciliary state while all other products are purchased domestically. In that case it is clear that without beef, X could not maintain his customary service. However, if X purchased pork, some vegetables, chicken and pastry from outside his own state, perhaps he could render his customary service albeit a bit truncated. But regardless of the test utilized, substantiality will be a matter for the trier of fact.

With respect to retail establishments, the section is clear that even though the lunch counter within the store purchases all of its

77. 78 Stat. 243, 42 U.S.C.A. § 2000a(c)(2) (1964). In this regard, national advertising keyed to interstate travelers should be regarded as an offer to serve.

78. *Ibid.*

79. 379 U.S. 294 (1964).

products from local sources, that counter must be desegregated if the retail outlet sells a substantial portion of products that have traveled in interstate commerce. The same is true with regard to gasoline stations. In both instances, the test of substantiality poses as great a problem as in the restaurant situation.

(3) *Entertainment.*—Section 201(b)(3)⁸⁰ proscribes discrimination in all mediums of exhibition or entertainment. As in the case of restaurants and lodgings, the section is applicable if it is open to the public and if its operations affect commerce.

While restaurants affect commerce if a *substantial* portion of food served has moved in commerce, places of entertainment affect commerce if they *customarily* present sources of entertainment that have moved in commerce.⁸¹ Again the word customarily, like substantiality, is open to various interpretations. A movie house, for example, that presents domestic films six nights a week and on the seventh night presents an out-of-state movie would probably be within the section. Within the span of one week, the theater customarily shows domestic films, however, the schedule *taken as a whole* clearly depicts a custom of showing an out-of-state movie once a week. Sporting events are subject to similar considerations. Suppose a privately owned arena produces local sporting events. However, several times a year a team located without the state plays in the arena. In that situation, compliance with the section would probably not be required since the customary fare is local talent. A locally produced track meet comprised of local talent competing with non-resident *individuals* would probably not invoke the section since the definition of what will affect commerce includes only non-resident *teams*. It should be recalled that once a custom of producing non-domiciliary entertainment has been established, the facility must be desegregated for all events of whatever origin. The act does not limit the application of the section solely to those events not locally produced.

While the section is not comprehensive in its description of specific facilities, the principle of *ejusdem generis* will be applied to broaden the scope within the meaning of "other place of exhibition or entertainment."

State courts have wrestled with the problem of interpreting specific incidents of coverage followed by all inclusive general words of coverage. Although not all states have extended their respective

80. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(3) (1964).

81. 78 Stat. 243, 42 U.S.C.A. § 2000a(c)(3) (1964).

statutes to include establishments normally considered as places of public accommodation they have been uniform in recognizing the principle of extension. The Pennsylvania Supreme Court dealt with this problem and concluded that their statute in no wise implies that only enumerated places are within the purview of the statute to the exclusion of places not mentioned.⁸² The Ohio public accommodations statute⁸³ has received a similar construction.⁸⁴ A lower court was asked to interpret the Ohio statute to include ice cream parlors and the court concluded that it was permitted wide latitude in construing the statute.⁸⁵ This holding was prompted by the words "and all other places of public accommodation" following a specific enumeration of establishments.⁸⁶ Thus, federal courts should experience little difficulty in extending section 201(b)(3)⁸⁷ to include unlisted places of exhibition and entertainment. For example, bowling alleys might be brought within the act if it can be shown that they affect commerce and are open to the public.⁸⁸

(4) *Other Establishments*.—Section 201(b)(4)⁸⁹ is perhaps the most pervasive section in Title II. Moreover, its effect will be more pronounced and widespread than the other three subsections.⁹⁰ This subsection is divided into two further divisions. In section 201(b)(4)(A)(i),⁹¹ any establishment which is *physically located* within the premises of an establishment named in sections 201(b)(1), (2) and (3)⁹² is, *ipso facto*, a place of public accommodation. Opponents of the measure have argued that any establishment of whatever nature would be covered if located within a named establishment. The contrary is closer to its actual effect. Section 201(b)⁹³ specifically states, before delving into the various subsections that only establishments which serve the public

82. *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955). The decision is especially significant because the Pennsylvania statute is relatively detailed and might be fairly construed as limited to the named establishments. *A fortiori*, a less detailed statute should receive similar treatment. PA. STAT. ANN. tit. 18, § 4654 (1963).

83. OHIO REV. CODE § 2901.35, 36.

84. *Fowler v. Benner*, 13 Ohio N.P. (n.s.) 313 (C.P. 1912).

85. *Id.* at 318.

86. *Cf. Harvey, Inc. v. Sissle*, 53 Ohio App. 405, 5 N.E.2d 410 (1936). *Contra, Faulkner v. Solazzi*, 79 Conn. 541, 65 Atl. 947 (1907).

87. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(3) (1964).

88. *Contra, BUREAU OF NAT'L AFFAIRS, op. cit. supra* note 70, at 83.

89. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

90. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 70, at 84.

91. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4)(A)(i) (1964).

92. 78 Stat. 243, 42 U.S.C.A. §§ 2000a(b)(1)-(3) (1964).

93. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

can be places of public accommodation. Further, the establishment must, according to section 201(b)(4)(B)⁹⁴ hold itself out as serving patrons of the covered establishment. Also, its operations must affect commerce. It is true, however, that "affecting commerce" is irrebutably presumed by virtue of physical affinity to a named establishment. But the establishment must still serve the public as well as hold itself out as serving patrons of the main establishment. Thus, although the main establishment serves the public, the two criteria must also be met by the attached establishment. The confusion over this issue can be traced to the mistaken belief that the test of public service is included within the sections covering restaurants, lodgings, and entertainment establishments; it is not. Serving the public is a general qualification applicable to all four subsections. An illustration will readily clarify the matter. Suppose the XYZ law firm is located within the premises of a hotel admittedly a public accommodation according to section 201(b)(1).⁹⁵ Also, the hotel management refers its guest to the XYZ firm for legal assistance. Opponents of the Civil Rights enactment have argued that the law firm would be forced to serve anyone seeking legal aid by virtue of section 201(b)(4).⁹⁶ But despite the fact that a hotel is a place of public accommodation, the law firm is located in the same building, and the firm serves patrons of the hotel, it is not a place of public accommodation since law firms do not engage in public service. Lawyers may, without cause, refuse clients by choice.⁹⁷ It is submitted that the same reasoning applies to dentists, doctors and the like. State courts have long excepted these professionals from local public accommodation laws.⁹⁸ It is, however, in the areas normally considered as serving the public that section 201(b)(4)⁹⁹ has the greatest effect.

94. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4)(B) (1964).

95. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964).

96. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964). See U.S. CODE CONG. & AD. NEWS 1838 (July 20, 1964).

97. AMERICAN BAR ASS'N CANONS OF PROFESSIONAL ETHICS IN TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY, Canon 31, 373 (1957).

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. *He has the right to decline employment.*
Id. at 383. (Emphasis added.)

98. *E.g.*, *Rice v. Rinaldo*, 44 OHIO OP. 286 (C.P. 1950). In *Rice*, the defendant was a dentist who had refused to treat the plaintiff solely because plaintiff was a Negro. The court's reasoning, while for the defendant, is weak. However, the decision is in line with the majority of jurisdictions. Lawyers were also excepted from operation of the Ohio act via dictum in the opinion.

99. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

In addition to the previously mentioned physical location *within* the premises of a covered establishment,¹⁰⁰ the converse situation is covered in section 201(b)(4)(A)(ii).¹⁰¹ Any establishment *in which is located* a covered establishment is also a place of public accommodation. For example, a bowling alley not covered by section 201(b)(3)¹⁰² but which contained a lunch counter covered by section 201(b)(2)¹⁰³ would also be within the act.¹⁰⁴ As is readily apparent, this section greatly expands the coverage of the act into areas that are truly *intrastate* commerce. An establishment located *within* a covered establishment such as hotel barbershops, beauty salons, bars, shoe shine parlors, secretarial services, car rental and theater ticket offices, and a host of other services, are now within the purview of the act. In regard to an establishment *in which is located* a covered establishment, wholly local activities such as bowling alleys, skating rinks, billiard halls, and amusement parks, wherein food, entertainment or lodging of the type mentioned in sections 201(b)(1), (2) and (3)¹⁰⁵ are available are now within the act. Aside from physical affinity, there are only two limitations on the scope of this subsection. The establishment involved must serve the public¹⁰⁶ and it must hold itself out as serving the patrons of the covered establishment.¹⁰⁷ If the establishment located within the covered establishment or the establishment within which is located a covered establishment neither holds itself out as serving the public nor holds itself out as serving patrons of the covered establishment, then the act would not be applicable. However, the likelihood of coverage for purely local businesses and services is far greater because of section 201(b)(4)¹⁰⁸ than it would be without that section. Inequitable results may flow from this section insofar as individual proprietors are concerned. For instance, two bowling alleys located across the street from one another could be oppositely affected. Suppose one bowling alley boasted a lunch counter that purchased a substantial portion of its food from interstate sources. That bowling alley would be required to accept non-white patronage, whereas the

100. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4)(A)(1) (1964).

101. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4)(A)(ii) (1964).

102. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(3) (1964).

103. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(2) (1964).

104. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 70, at 84.

105. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1)-(3) (1964).

106. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

107. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4)(B) (1964).

108. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

bowling alley across the street might be unrestricted in its discriminatory practices. Certainly, a degree of sympathy would not be out of order for the proprietor faced with this inequitable application; however, when his plight is counterbalanced with the social inequity encountered by Negro citizens, the individual's difficulty pales.

F. State Action

The presence of state authority promoting discrimination is an integral part of the effect of the Civil Rights Act of 1964. Title II coverage of a public accommodation is predicated upon two alternative grounds. Initially, 201(b)¹⁰⁹ declares that if the operation of an establishment affects commerce it falls within the act's proscriptions. Second, according to the same section, if discrimination in the named establishments is supported by state action, they too are governed by Title II. It is to the latter that attention is now turned.

(1) *State Law*.—State action is defined in Title II as encompassing three types of governmental activity.¹¹⁰ First, state action is found when discrimination is carried on under color of *any* state law, statute, ordinance, or regulation.¹¹¹ This would obviously relate to direct or indirect legislation or administrative regulation that promotes discrimination, or on the other hand forbids integration. It is not likely that many actions will be brought under this subsection simply because the level of sophistication in traditionally segregated states has erased overt discriminatory statutes. They have been replaced with the anti-business trespass statute which "reaffirms" the proprietor's "right" to select his customers and reject those he deems undesirable.¹¹² Although the unmistakable intent of these statutes is to preserve a segregated order, it would be highly speculative to argue that the act postulates these statutes as state action supporting segregation or discrimination in every conceivable business activity.

(2) *Custom or Usage*.—State action is also found when discrimination is enforced by state officials under color of custom or usage.¹¹³ In this situation, visualizations of congressional intent come readily to mind. For example, suppose segregation has been practiced in a small town for many years, and it has been the custom in local theaters to seat Negro patrons in the rear balcony. Then

109. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

110. 78 Stat. 243, 42 U.S.C.A. §§ 2000a(d) (1)-(3) (1964).

111. 78 Stat. 243, 42 U.S.C.A. § 2000a(d) (1) (1964).

112. MISS. CODE ANN. § 2046.5 (1957).

113. 78 Stat. 243, 42 U.S.C.A. § 2000a(d) (2) (1964).

a Negro attempts to enter a theater loge, refusing to sit in the balcony. The manager refuses to admit the Negro patron to the loge and summons local law enforcement officials to assist him in ejecting the unwanted intruder. The police arrive and remove the Negro from the theater foyer. Since custom dictates that Negroes may not sit in the loge area, and the police have been summoned to eject a Negro who will not sit in the balcony, the police have enforced discrimination under color of custom. The movie house, therefore, falls within the purview of the act, even though it presents only domestic films.

(3) *Action of the State.*—State action is also found when discrimination is carried on by action of the state or a political subdivision. Evidently, Congress foresaw an incident where state action, apart from statute or custom, might enforce discrimination. For example, the municipal owner of a stadium may provide for segregated seating without the benefit of statute. Here, of course, the stadium would fall within the act.

It must be recalled that any establishment that serves the public and practices discrimination, regardless of its effect on commerce, is within the act so long as state action supports that course of action. Congress noted, however, that the mere licensing of a segregated facility would not impute state action.¹¹⁴ But it seems from even a cursory reading of the state action sections, that Congress was utilizing the Fourteenth Amendment to the United States Constitution according to the prescriptions set down by the United States Supreme Court in the *Civil Rights Cases*.¹¹⁵

These cases were brought to test the constitutionality of the Civil Rights Act of 1875.¹¹⁶ There, Congress sought to forbid discrimination in all public accommodations without regard to state boundary lines. The Court found that the subject matter of the Act of 1875 was an attempt to control individual action¹¹⁷ and the fourteenth amendment could not support an invasion by Congress of this nature.¹¹⁸ In short, Congress could not take the place of state legislatures and thereby supersede them. Justice Bradley

114. BUREAU OF NAT'L AFFAIRS, *op. cit. supra* note 70, at 85.

115. 109 U.S. 3 (1883).

116. Civil Rights Act of 1875, 18 Stat. 335.

117. Civil Rights Cases, 109 U.S. 3, 11 (1883).

118. *Id.* at 13. "Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication." *Ibid.*

The Court went on to declare that congressional action had been tantamount to establishing a municipal code to regulate the private rights between men.

indicated that if the act had been directed at state action, it would have survived the constitutional question.¹¹⁹ Further, the Supreme Court, in dictum, hinted that where Congress is vested with plenary power, no consideration of state boundaries is relevant, such as in the regulation of commerce.¹²⁰ Fully cognizant of the present day application of this decision the eighty-eighth Congress used its plenary commerce power in the Act of 1964 to forbid discrimination in places of public accommodation. Section 201(d)¹²¹ satisfies all of the objections posed by the Court in the *Civil Rights Cases*.¹²² In that case, the Court was also asked to consider the effect of the thirteenth amendment¹²³ as the basis of the Act of 1875.¹²⁴ The argument put to the Court contended that the thirteenth amendment not only freed the slaves, but abolished the badges or incidents of a servile condition. In that vein, denial of access to places of public accommodation was a badge or incident of slavery. The Court's answer was abrupt. Justice Bradley dismissed the argument as "running the slavery argument into the ground . . ."¹²⁵ The majority opinion, though scholarly in approach, trails off in historical and logical inconsistency. The Court declared that after the slave had shaken off servitude and the impediments of that state, he ought to stand as any other man with respect to his rights as a citizen. In other words, there is a stage in the progress to full citizenship when the former slave can no longer look to a benevolent government in search of redress and he then must protect his rights by ordinary modes.¹²⁶

119. *Id.* at 18.

120. "Of course, these remarks do not apply to those cases in which Congress is clothed with *direct and plenary powers* of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the *regulation of commerce*. . . *Ibid.* (Emphasis added.)

121. 78 Stat. 243, 42 U.S.C.A. § 2000a(d) (1964).

122. 109 U.S. 3 (1883).

123. U.S. CONST. amend. XIII.

124. *Civil Rights Cases*, 109 U.S. 3, 19 (1893).

125. *Ibid.*

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. *Ibid.*

126. *Id.* at 25. The words of the justice are worth quoting if only to demonstrate that perhaps denial of access to public accommodations is indeed an "accoutrement" of a servile condition.

When a man has emerged from slavery, and by the aid of a beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere

Justice Harlan, in a vigorous dissent, challenged the Court's conclusions with respect to the scope of the thirteenth and fourteenth amendments. In brief, he argued that the state licenses public accommodations and because of that grant the establishment's right to remain open is based upon the sanction of public authority. And since local government represents all colors, it is inconceivable that a segment of those from whom all power flows should be denied entry into places that remain open by public fiat. That the state permits this to occur is an affront to the dignity of those denied access, and imports sufficient state action to warrant invoking the fourteenth amendment.¹²⁷ The argument with respect to the thirteenth amendment is simply that the denial of access to a public accommodation is a badge or incident of slavery that warrants congressional action under that amendment.¹²⁸

G. *Private Clubs*

As noted before, only establishments that serve the public can be places of public accommodation.¹²⁹ However, Congress saw fit to add a specific subsection declaring that private clubs or establishments not, *de facto*, open to the public are excluded from the provisions of Title II.¹³⁰ But, the club must truly be private. Admission of the public on even a limited scale will probably result in forfeiture of the private club status. One caveat must be added: if the facilities of a private club or establishment not open to the public are made available to patrons of establishments named in section 201(b),¹³¹ then discrimination is prohibited. This section is self-explanatory and, thus, requires no elaboration. Nevertheless, there was an attempt in the House version of the bill to provide that only bona fide private clubs would be exempt.¹³² In the

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. *Ibid.*

127. *Id.* at 41. "A license from the public to establish a place of public amusement, imports in law, equality of right, at such places, among all members of that public." *Ibid.*

128. *Id.* at 37.

[T]he power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race. *Ibid.*

129. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

130. 78 Stat. 243, 42 U.S.C.A. § 2000a(e) (1964).

131. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

132. U.S. CODE CONG. & AD. NEWS 1768 (July 20, 1964).

final product, however, the words "bona fide" were struck from the exemption application to private clubs. It would seem, therefore, that a group may organize a private club with the express purpose of excluding Negroes and do so with impunity. This change should be applauded. There are far too many instances of ambiguity in the act without adding the burden of investigating the organizational intent of private clubs.

H. Entitlement

The last substantive section of Title II is properly another "state action" section.¹³³ Sections 201(b)¹³⁴ and 201(d)¹³⁵ forbid state supported discrimination in *any named establishment*. But section 202¹³⁶ declares that *every establishment or place of whatever nature* shall be free from state supported discrimination. This section simply utilizes the fourteenth amendment in its broadest scope. Thus, even though a particular establishment is of an entirely local character, it may not discriminate via the utilization of any state law, statute, regulation, and the like.

V. REMEDIES UNDER TITLE II

Remedial action under Title II is purposefully limited to injunctive action. Of course, the court may impose criminal penalties in the event that an injunction is ignored. But the tenor of the remedy sections is conciliatory. Great reliance is placed upon local resolution of racial problems in states with public accommodation laws. This approach is entirely in keeping with the stated purpose of the legislation which is a peaceful resolution of problems arising out of a social revolution.

A. Interference

Section 203¹³⁷ prohibits anyone from interfering in any way with rights and privileges granted under the substantive sections of Title II. Also, punishment for the exercise of those rights is expressly prohibited.¹³⁸ This prohibition would seem to be directed

133. 78 Stat. 244, 42 U.S.C.A. § 2000a-1 (1964).

134. 78 Stat. 243, 42 U.S.C.A. § 2000a(b) (1964).

135. 78 Stat. 243, 42 U.S.C.A. § 2000a(d) (1964).

136. 78 Stat. 244, 42 U.S.C.A. § 2000a-1 (1964).

137. 78 Stat. 244, 42 U.S.C.A. § 2000a-2 (1964).

138. 78 Stat. 244, 42 U.S.C.A. § 2000a-2(c) (1964).

against civil and criminal trespass actions where the defendant was seeking entry into a public accommodation and was ejected solely because of race. This section would abate any local action under the supremacy clause.¹³⁹

B. *Restraining Orders*

Section 204(a)¹⁴⁰ provides that a civil action may be brought requesting relief when a violation of section 203¹⁴¹ is imminent or in progress. This preventive relief includes a temporary and permanent injunction or restraining order. The individual who has been or will be wronged by a denial of rights granted in the substantive portions of Title II is the proper party to bring the action.

The same section permits the Attorney General to intervene in an action brought by an individual, but only when the Attorney General certifies to the court that the case is of pressing public interest.¹⁴² Apparently, the court may, in its discretion, refuse to allow intervention by the Attorney General. This conclusion is warranted when one considers that the House version of Title II would have permitted the Attorney General to sue for an injunction, *ad libitum*. That Congress eventually changed the portion of the bill authorizing this action buttresses the conclusion that federal intervention will be permitted only in unusual circumstances. The special circumstances might include a novel application of the act that might impair its vitality, an impecunious plaintiff, or one who through intimidation fears for his safety if a suit were to be brought by him.

C. *Procedure in States with Public Accommodation Laws*

Section 204(c)¹⁴³ is indicative of the congressional intent to permit states to settle their racial problems on a local level. In that spirit, Congress required that states with public accommodation laws as well as appropriate enforcement procedures be notified of pending suits. The state wherein the alleged violation is said to have occurred must be notified in a specified fashion to the end that the state can proceed under its laws to remedy the violation. After appropriate notice, the state has thirty days within which to initiate

139. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

140. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

141. 78 Stat. 244, 42 U.S.C.A. § 2000a-2 (1964).

142. BUREAU OF NAT'L AFFAIRS, *THE CIVIL RIGHTS ACT OF 1964*, at 87 (1964).

143. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(c) (1964).

proceedings. If the state fails to act, then the provisions of section 204(a)¹⁴⁴ can be invoked. For example, suppose X, a Negro, is denied access to a restaurant located in Ohio. The Ohio Revised Code specifically prohibits discrimination in restaurants and also provides for criminal penalties for the violation of the section.¹⁴⁵ Ohio also has recently created a Civil Rights Commission charged with the responsibility of resolving, to the extent of its power, racial disturbances.¹⁴⁶ Because of these statutes, X may not proceed against the restaurant under Title II, but must notify the proper local authorities of the violation. This section of Title II does not designate which local authority should be notified, but presumably this designation is left to the states. In Ohio, it is submitted that in a criminal action under section 2901.35, the proper authority is the prosecutor of the county wherein the violation took place. Under the Ohio Revised Code's provision for a Civil Rights Commission, the proper party to notify would be that body. If Ohio fails to take the initiative in remedying the situation within thirty days, X can bring an action in a federal district court.¹⁴⁷

D. Procedure in States without Public Accommodation Laws

Section 204(d)¹⁴⁸ provides that where an alleged act of discrimination occurs in a state which has no law prohibiting discrimination, a civil action may be brought under section 204(a).¹⁴⁹ Naturally, since notification would be a vain act in that situation, no state authority need be informed of the discriminatory conduct. Nevertheless, this does not indicate that Congress abandoned the hope of voluntary settlement. The court in its discretion may refer the matter to the Community Relations Service established under Title X.¹⁵⁰ As long as the court believes that a voluntary settlement can be arranged, the court may permit the Community Relations Service to pursue that course but the Community Relations Service cannot retain jurisdiction for longer than sixty days.¹⁵¹

144. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

145. OHIO REV. CODE §§ 2901.35 to .36.

146. OHIO REV. CODE §§ 4112.01 to .08.

147. 78 Stat. 245, 42 U.S.C.A. § 2000a-6(a) (1964).

148. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(d) (1964).

149. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

150. 78 Stat. 267, 42 U.S.C.A. § 2000g (1964).

151. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(d) (1964). Although the section indicates a sixty day period, the court, in its discretion, may extend the sixty day period to one hundred and twenty days. If no settlement has been reached, the court must regain jurisdiction over the matter and enforce Title II.

E. *Suits Initiated by the Attorney General*

Section 204(a)¹⁵² controls the intervention of the Attorney General in an action brought by a private citizen where the question is one of general public importance. But section 206(a)¹⁵³ authorizes the Attorney General to bring an action for injunctive relief when, in his judgment, he has reasonable cause to believe that a person or persons are engaged in a practice designed to restrict the full enjoyment of facilities anticipated by Title II. This section seems to provide for correcting covert action designed to minimize the effect of Title II as opposed to an effort to vindicate overt discrimination which would properly be treated under section 204(a).¹⁵⁴ An instance of the unique applicability of section 206(a)¹⁵⁵ would occur in the event of a mass reaction to Title II. For example, a business men's group might decide that it will, in concert, discourage Negro patronage by delaying service in each members' establishment. An individual, under a strict reading of section 204(a),¹⁵⁶ would be powerless to enjoin this group action. Yet the Attorney General, clothed as he is with the power to seek an injunction against "any person or *group of persons* . . . [who are about to engage] in a *pattern or practice of resistance* to the full enjoyment of any of the rights secured by this title,"¹⁵⁷ can prohibit the concerted covert action of a business community. In this respect, the "wait and see" attitude of deference to state authorities and reference to the Community Relations Service is inapplicable to a suit brought by the Attorney General. Perhaps this policy is wise in that speed would seem to be crucial in a situation comparable to the above example.

F. *Enforcement*

Section 207(b)¹⁵⁸ is quite clear in stating that the remedies provided for in Title II are the *sole* remedies available under the act. However, it is also pointed out that the section is not designed to replace or supplant other available state and federal remedies.¹⁵⁹

152. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

153. 78 Stat. 245, 42 U.S.C.A. § 2000a-5(a) (1964).

154. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

155. 78 Stat. 245, 42 U.S.C.A. § 2000a-5(a) (1964).

156. 78 Stat. 244, 42 U.S.C.A. § 2000a-3(a) (1964).

157. 78 Stat. 245, 42 U.S.C.A. § 2000a-5(a) (1964). (Emphasis added.)

158. 78 Stat. 246, 42 U.S.C.A. § 2000a-6(b) (1964).

159. The textual discussion does not, of course, cover each remedial section of Title II.

VI. THE COMMERCE CLAUSE AND CONSTITUTIONALITY

The great furor surrounding Title II, the most explosive title in the Civil Rights Act of 1964, concerned the congressional use of the commerce clause¹⁶⁰ as one justification for the act. Opponents of the measure derided the bill allowing that Congress had abused its power and that the commerce clause was an insufficient basis upon which to act. The Congress approached the Civil Rights Act with some degree of trepidation recalling that the Supreme Court in 1883 had struck down the Civil Rights Act of 1875.¹⁶¹ It is suggested that Congress made a moral judgment that discrimination was wrong and then initiated a legislative shopping spree to find appropriate constitutional "hooks" upon which to peg its determination. This conclusion is in part substantiated by a brief submitted to the House Judiciary Committee by Professor Paul Freund.¹⁶² In that brief, Professor Freund wrote that Congress need feel no compunction in utilizing the commerce clause to respond to social injustice and a deep moral need.¹⁶³ Indeed, the Supreme Court in the *Civil Rights Cases*¹⁶⁴ suggested the proper basis for a civil rights act despite its adverse ruling with respect to the Act of 1875. Justice Bradley remarked that the tenor of his decision would be wholly inapplicable in an area in which Congress is "clothed with direct and plenary power" over the entire area "as in the regulation of Commerce . . ."¹⁶⁵ That Court further noted that Congress was possessed of sufficient power to regulate a proper subject matter in every detail as well as the conduct of individuals.¹⁶⁶ It is somewhat surprising that this judicial suggestion was not utilized until eighty years after its enunciation.

The opponents of Title II rely heavily upon a supposed constitutional infirmity with respect to the commerce clause. According to their interpretation of that clause, Congress can only deal with the interstate movement of people and chattels as they cross state boundaries.¹⁶⁷ The essential objection is that Title II not only

160. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States. . . ."

161. *Civil Rights Cases*, 109 U.S. 3 (1883).

162. U.S. CODE CONG. & AD. NEWS 1739 (July 20, 1964).

163. *Ibid.* "The commerce power is clearly adequate and appropriate. No impropriety need be felt in using the commerce clause as a response to a deep moral concern."

164. 109 U.S. 3 (1883).

165. *Id.* at 18.

166. *Ibid.*

167. U.S. CODE CONG. & AD. NEWS 1837 (July 20, 1964).

demands that accommodations be afforded to transients, but the act also requires, once the establishment is covered, that accommodations be extended to local, nontransient Negroes. Irrelevant bulwarks are then created to buttress the argument. In the main, these arguments point to congressional action in other areas which, by analogy, would not extend the commerce clause to the limits required by the Civil Rights Act of 1964. In other words, Congress has not gone this far; *ergo* it "obviously" cannot extend its power this far.¹⁶⁸ However, the fact that Congress has not *yet* designated certain establishments as engaging in interstate commerce is in no way authoritative for the proposition that Congress *does not possess* the power to legislate in a wholly distinct area. Because Congress has proceeded only so far is not to say that Congress cannot go beyond that point. In reply it might be sufficient to say that Congress has not yet *fully* utilized its plenary power under the commerce clause and the necessary powers clause.

With respect to the arguments concerning transient versus non-transient, it is apparent that opponents of the act have misinterpreted its effect. The Civil Rights Act of 1964 does not purport to address itself to a definition of transient or non-transient. The act does not directly seek to "qualify" *certain individuals* by reason of domicile. But, the bill does purport to "qualify" *establishments* by determining that a particular establishment affects commerce, *per se*. If the former were the case, then no one could justify, under the commerce clause, requiring acceptance for all who apply for entry. But, fortunately, Congress has not foolishly entered the area of defining *who* will or will not affect commerce. Congress has, however, defined *what*, and under what circumstances an establishment will, affect commerce. Therefore, if an accommodation or place of amusement operates in such a manner as to affect interstate commerce, then it must extend those services to all who ask for them regardless of domicile. Whether this was the most judicious path along which Congress might have proceeded is irrelevant since the only question now open for debate is the constitutionality of that action. In this regard it appears that under the commerce clause wherein Congress has plenary power¹⁶⁹ and under

168. *Id.* at 1837-38.

Until 1959, *even* the NLRB did not claim jurisdiction under the interstate commerce clause over such establishments, and jurisdiction was asserted then only with respect to hotels grossing more than \$500,000 under the theory that the volume of business was a yardstick to the quantum of interstate activity. *Ibid.* (Emphasis added.)

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

the necessary powers clause,¹⁷⁰ the Civil Rights Act of 1964 is constitutional.

Commerce Clause

While segregationists would object to any civil rights measure, the particular "hue and cry" surrounding the use of the commerce clause can be largely traced to its historical development. The clause has as its object a dual purpose. First, the commerce clause represents, next to the war power, the single most important source of affirmative federal power.¹⁷¹ Second, the commerce clause provides the federal government with immense negative or restrictive power over state and local governments.¹⁷² The restrictive power possessed by the federal government over interstate commerce has been emphasized to the extent that any positive power has been minimized and oft neglected. It is submitted that the Civil Rights Act of 1964 is based upon that affirmative right to regulate rather than on the negative right of restriction. Further, it is necessary to distinguish these powers for it would seem that the restrictive power could not support the act.¹⁷³ If Congress could only *restrict* individuals and states from interfering with interstate commerce, it could not compel public accommodations to accept local non-transient Negroes. But since Congress also possesses the right to *regulate* commerce and has all the necessary power to enforce regulations, Congress could constitutionally require, as a necessary concomitant of interstate activity, public accommodations and amusements to also accept the trade of local residents.

From a historical point of view, the commerce clause has been developed and defined as a basically restrictive power over state activity. Initially, commerce was defined solely as the movement

170. U.S. CONST., art. I, § 8, cl. 18. "The Congress shall have power to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers . . ."

171. CONSTITUTION OF THE U.S. ANNOT. 150 (1963). [hereinafter cited as CONST. ANNOT.].

172. *Ibid.* See ROTSCHAEFFER, CONSTITUTIONAL LAW 228-29 (1939).

173. There is no authority apart from the author's viewpoint to sustain this conclusion. But that others have not considered this problem renders the thought no less valid although considerably less persuasive. Consider for a moment the dilemma facing one who carefully studies the Civil Rights Act. No difficulty is found when utilizing the congressional restrictive power over commerce, to sustain the act with respect to transient Negroes. However, how does one justify service to local Negroes under that restrictive power. Despite the logical difficulty, the dilemma is partially resolved when the act is juxtaposed with the pervasive power of Congress over the *regulation* of commerce.

of chattels in the interstate flow of business.¹⁷⁴ John Marshall in *Gibbons v. Ogden*¹⁷⁵ expanded the definition beyond that of buying and selling to include all forms of movement¹⁷⁶ anticipating and including "every species of movement of persons and things. . . ."¹⁷⁷ It has been estimated that prior to 1900, approximately 1400 commerce clause cases reached the Supreme Court. The great majority of those cases involved the commerce clause as a restriction on state activity.¹⁷⁸ However, in recent years the regulatory or positive approach has expanded the notion of commerce to include, within the congressional purview, those operations or activities which in movement are wholly intrastate, but nevertheless affect interstate commerce.¹⁷⁹ This spirit has become entrenched to the extent that the Court now considers that "no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress."¹⁸⁰ Again in *Gibbons v. Ogden*,¹⁸¹ Marshall in examining the power Congress possesses in this regard exclaimed that the power is one to regulate. He noted that the power was complete in itself and knew no limitations other than those prescribed in the Constitution.¹⁸² Opponents of the 1964 Civil Rights Act generally do not challenge the nature of Congress' plenary power over interstate commerce but do object to its application to intrastate activity. But the objection is baseless in that the plenary power extends, in certain circumstances, to intrastate activity.¹⁸³ The effective control of interstate commerce often involves a necessary degree of control over intrastate activity.¹⁸⁴ In the case of

174. ROTTSCHAEFFER, *op. cit. supra* note 172, at 230-31.

175. 9 Wheat. 1 (1824).

176. *Id.* at 189-92. "The subject to be regulated is commerce; . . . The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more — it is intercourse." *Ibid.* (Emphasis added.).

177. CONST. ANNOT. *op. cit. supra* note 171, at 152.

178. *Id.* at 150.

179. *Id.* at 153-54. The New Deal legislation typifies the use of the regulatory power. *Id.* at 182-93.

180. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

181. 9 Wheat 1 (1824).

182. *Id.* at 196.

183. This objection could only be aimed at section 201(b)(1), 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964), which presumptively concludes that lodgings serving the public affect interstate commerce. The other accommodations mentioned in the act affect commerce by their own activities.

184. ROTTSCHAEFFER, *op. cit. supra* note 172, at 252.

However, the power of Congress over . . . activities is not limited to such part

lodgings, for example, there may be some situations wherein strictly local dealings are involved. Although this may be the case, congressional control is still valid in that the act does not cover dealings or people but is concerned with establishments. Once an establishment is within the act it does not vacillate in and out of the penumbra of coverage but remains covered for all purposes. It would be ludicrous to argue that for a series of five people or five dealings, a motel would be in interstate commerce three times and intrastate commerce twice.

B. *Non-Commercial Commerce*

In assessing the rectitude of congressional action, there is no need to delve into the myriad economic relationships between public accommodations and amusements, denial of access to Negroes and the total effect on the nation's economy. Moral and quasi-moral reasons may be advanced to support congressional action in the area of interstate commerce. For example, the Mann White Slavery Act prohibits the interstate transportation of women for immoral purposes. This form of morality legislation, although sustained under the commerce clause,¹⁸⁵ involves no element of commerce. The public accommodations section of the act is primarily directed toward the same end; namely, the eradication of a congressionally determined immoral situation.

The Supreme Court and the Act

Two test cases arose almost immediately upon passage of the Civil Rights Act of 1964.¹⁸⁶ Both cases were argued and considered together in that both attacked the constitutionality of Title II. In *Heart of Atlanta Motel, Inc. v. United States*,¹⁸⁷ a three judge district court sustained the validity of Title II as it applied to the Heart of Atlanta Motel.¹⁸⁸ Almost at the same time, a three judge district

thereof as constitutes interstate commerce. The effective control of interstate transportation will frequently require some regulation of . . . other activities that may be closely related thereto or even inextricably interwoven therewith." *Ibid.*

185. *Camminetti v. United States*, 242 U.S. 470 (1917).

186. In addition to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), a third case, *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), was also decided. *Hamm* is relevant to a discussion of the public accommodations section and more extensive treatment can be found in Note, *Civil Disobedience in the Civil Rights Movement: To What Extent Protected and Sanctioned*, 16 W. RES. L. REV. 711 (1965).

187. 379 U.S. 241 (1964).

188. 231 F. Supp. 393 (N.D. Ga. 1964).

court sitting in Birmingham, Alabama, declared Title II unconstitutional in its application to Ollie's Barbecue located in Birmingham;¹⁸⁹ however, the Supreme Court reversed that case in *Katzenbach v. McClung*.¹⁹⁰ Since the two cases arise from different facts and are based on different subsections of Title II, they will be treated separately.

(1) *Heart of Atlanta Motel*.—The Heart of Atlanta Motel is located near interstate highways in Atlanta, Georgia. It advertises nationally and accepts transient as well as local guests. The motel has always followed a policy of refusing its facilities to Negroes.

Heart of Atlanta proceeded to attack Title II on three grounds: (1) Congress exceeded its power under the commerce clause; (2) Title II violates the fifth amendment in that it is a taking of liberty and property without due process of law and without adequate compensation; and (3) Congress, by requiring that Negroes be accommodated against the appellant's will, violated the thirteenth amendment in that appellant was subjected to involuntary servitude. The appellees joined the issues arguing: (1) Congress had the power to pass Title II under the commerce clause; (2) Title II represents reasonable regulation which is not forbidden by the fifth amendment; and (3) the thirteenth amendment abolished slavery and the appellant could not utilize it to reinstate a badge of forbidden slavery. The Court, as expected, upheld the decision of the district court in all respects.

Initially, the Court ruled inapposite the *Civil Rights Cases*¹⁹¹ in that the Civil Rights Act of 1875 broadly proscribed all discrimination under the aegis of the fourteenth amendment. That act was much broader than the Civil Rights Act of 1964 and was declared unconstitutional for that reason. But since the act of 1964 relies upon the commerce clause as its source of authority, a decision rendered on a broader piece of legislation and directed at the fourteenth amendment could not be controlling precedent. The Court, after disposing of questionable precedent, directed its attention to the basis of the congressional action. The Court did not delve into the congressional findings that discrimination constitutes a burden on commerce. This unusual judicial reticence may be traced to several factors. First, the Court was understandably reluctant to delve into the legislative prerogative. Justice Clark confined his analysis to

189. 233 F. Supp. 815 (N.D. Ala. 1964).

190. 379 U.S. 294 (1964).

191. 109 U.S. 3 (1883).

summarizing the highlights¹⁹² and concluded that the legislative record proved conclusively that discrimination impedes interstate travel.¹⁹³ Second, as noted above, it is not altogether necessary for Congress to gather overwhelming economic data since the commerce clause will support moral legislation, as for example, the Mann White Slave Act.

The next consideration was directed at the nature of the congressional power over interstate commerce. The Court quoted extensively from *Gibbons v. Ogden*¹⁹⁴ in seeking to define the word "commerce." Mr. Justice Clark, writing for the majority, enunciated a two-pronged test as derived from the *Gibbons* standards. The "activity" sought to be regulated must concern more than one state and it must bear a "substantial relation to the national interest."¹⁹⁵

In response to the first qualification, the Court noted that the rule is long established that commerce includes the movement of people from one state to another¹⁹⁶ and that movement, in order to be protected or regulated under the commerce clause, need not be commercial in nature.¹⁹⁷ Then the Court detailed action taken by Congress under the authority of the commerce clause which had little or no relation to commercial activity.¹⁹⁸ The point of this documentation is to point out that legislating against moral wrongs does not weaken the validity of such action.¹⁹⁹

The Court next considered whether the local operation of an establishment could remove it from the purview of the clause and hence blunt the application of Title II. This was rejected in favor of the proposition that if interstate commerce is affected, it does not matter how local the operation is; it will be subject to the act.²⁰⁰ Further, Justice Clark pointed out that the congressional history clearly depicts the overall effect discrimination has upon interstate commerce.

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

193. *Id.* at 250.

194. 9 Wheat 1 (1824).

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

196. *Smith v. Turner*, 7 How. 283 (1849).

197. *Caminetti v. United States*, 242 U.S. 470 (1916). "Nor does it make any difference whether the transportation is commercial in character." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964).

198. For example, deceptive practices in the sale of products, *FTC v. Mandel Bros.*, 359 U.S. 385 (1959); to professional football, *Radovich v. National Football League*, 352 U.S. 445 (1957); and gambling, *Champion v. Ames*, 188 U.S. 321 (1903).

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

200. See *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949).

Addressing itself to the appellant's second contention, that is, that the fifth amendment prohibits the taking of property that allegedly occurs under Title II, the Court rejected that amendment's applicability to this situation. It is noted in this respect that thirty-two states have enacted public accommodation laws none of which have ever been successfully attacked as taking property in violation of the fourteenth amendment.²⁰¹ As if to appease those who decry Title II from an economic standpoint, the Court considered for a brief moment the fact that it is highly unlikely that economic loss will parallel integration of public accommodations and amusements.²⁰² Then adding a parenthetical, Justice Clark stated that economic loss is irrelevant anyway since loss by a member of a regulated class has never been a barrier to legislation.²⁰³ Having dispensed with the main objections, Justice Clark, apparently tiring of the futile arguments, discussed the remaining contentions concerning the fifth amendment's applicability in an almost cavalier fashion. The prohibition of discrimination in places of public accommodation does not impair individual liberty,²⁰⁴ and there is no merit in the claim that Title II takes property without compensation.²⁰⁵

The final argument concerning involuntary servitude is also given short shrift. According to Justice Clark, the act only codifies the long standing inn keeper rules²⁰⁶ which pre-date the thirteenth amendment, and as such the amendment cannot be used to controvert the reason for its existence. The Court concludes by noting that Congress has broad discretion to decide how obstructions to com-

201. According to the court's compendium, the following states have enacted public accommodations laws. ALASKA STAT. ANN. §§ 11.60.230 to .240 (1962); CALIF. CIV. CODE §§ 51-54 (1954); COLO. REV. STAT. ANN. §§ 25-1-1 to -2-5 (1953); CONN. GEN. STAT. ANN. § 53-35 (1961); DEL. CODE ANN. tit. 6, ch. 45 (1963); IDAHO CODE ANN. §§ 18-7301 to -7303 (1961); ILL. ANN. STAT. ch. 38, §§ 13-1 to -4 (Smith-Hurd 1961); IND. ANN. STAT. §§ 10-901 to -914 (1961); IOWA CODE ANN. §§ 735.1-2 (1950); KAN. GEN. STAT. ANN. § 21-2424 (Supp. 1962); ME. REV. STAT. ANN. ch. 137, § 50 (1954); MD. ANN. CODE art. 49B, § 11 (1964); MASS. ANN. LAWS ch. 140, §§ 5, 8 (1957); MICH. STAT. ANN. §§ 28.343-344 (1962); MINN. STAT. ANN. § 327.09 (1947); MONT. REV. CODES ANN. tit. 64, § 211 (1962); NEB. REV. STAT. ANN. ch. 20, §§ 101, 102 (1954); N.H. REV. STAT. ANN. ch. 354, §§ 1, 2, 4, 5 (1963); N.J. STAT. ANN. tit. 10, §§ 1-2 to -7; tit. 18, §§ 25-1 to -6 (1963); N.M. STAT. ANN. §§ 49-8-1 to -6 (1963); N.Y. CIV. RIGHTS, art. 4, §§ 40, 41; N.D. CENT. CODE § 12-22-30 (1963); OHIO REV. CODE §§ 2901.35-36; ORE. REV. STAT. §§ 30.670, 30.675, 30.680 (1963); PA. STAT. ANN. tit. 18, § 4654 (1963); R.I. GEN. LAWS ANN. §§ 11-24-1 to -6 (1956); S.D. SESS. LAWS 1963, ch. 58; VT. STAT. ANN. tit. 13, §§ 1451, 1452 (1958); WASH. REV. CODE ANN. §§ 49.60.010-170, 9, 91. 010 (1962); WIS. STAT. ANN. § 942.04 (1958); WYO. STAT. ANN. §§ 6-83.1, 6-83.2 (1963).

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

203. See *Bowles v. Willingham*, 321 U.S. 503, 518 (1944).

204. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964).

merce may be removed. And it is subject only to the "caveat" that the means Congress selects must be reasonably ordered to a constitutional end.²⁰⁷

D. *Katzenbach v. McClung*²⁰⁸

The district court in *McClung* declared Title II unconstitutional as applied to Ollie's Barbecue.²⁰⁹ This action was taken because the court determined that Congress had exceeded its power under the commerce clause by creating a conclusive presumption that a restaurant affects commerce if it purchases a substantial portion of food from interstate sources or offers to serve interstate commerce.

Ollie's Barbecue is a family owned restaurant in Birmingham located some distance from an interstate highway. It followed a practice of discriminating against Negroes. In the year preceding this case, Ollie's Barbecue purchased approximately 46 per cent of its total food stuffs from a local dealer who purchased from interstate sources.

In reversing the district court, the Supreme Court relied on the *Heart of Atlanta* case for a major portion of its reasoning. But it must be recalled that this case is brought under a different subsection of the act — 201(b)(2).²¹⁰ Ollie's Barbecue may be included within Title II if either of two facts are present: (1) it serves or offers to serve interstate travelers; or (2) it purchases a substantial portion of food from interstate sources. The former, by stipulation or neglect, was not considered in this case; only the latter is subjected to judicial scrutiny. The government argued that Ollie's Barbecue purchased a substantial portion of food from sources without Alabama and thus application of the act is imposed in this situation. Thus Ollie's Barbecue, by its participation in the total effect of discrimination, has imposed "commercial burdens of national magnitude upon interstate commerce."²¹¹ The

205. *Id.* at 261.

206. *Ibid.* As will be noted below, the Court is guilty of a broad oversimplification when it states that public accommodation laws merely codify the common law inn keeper rule. At best that rule would serve as a basis of section 201(b)(1) relating to lodging, 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(1) (1964). The other sections hardly find a source in that rule.

207. *Id.* at 261-62.

208. 379 U.S. 294 (1964).

209. 233 F. Supp. 815 (N.D. Ala. 1964).

210. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(2) (1964).

211. *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

appellee, however, took issue with the connection between out-of-state purchases and consequent burdens on commerce.

The Court reasoned that in the congressional investigations the determination was made that racial discrimination in restaurants resulted in a considerable loss of the Negro dollar for on-the-premises spending.²¹² The fact of this lessened spending adversely affects interstate commerce.²¹³ "The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys."²¹⁴ It must be admitted that the failure of Ollie's Barbecue to purchase more foodstuffs to serve more people has a less than *de minimus* effect on the national economy; however when that reduced spending is multiplied by many restaurants in many cities across the nation, the total effect is a little more than the proverbial "drop in the bucket." In addition to economic loss, the restaurant policies in certain areas have a marked effect on interstate travel.²¹⁵ The Court utilized this argument in reaching the conclusion that the district court erred in holding that there was no relationship between discriminatory practices in restaurants and interstate commerce. Here the Court considered the extent of congressional power to regulate essentially local activities. On the authority of *Wickard v. Filburn*,²¹⁶ Justice Clark contended that no matter how local the activity, it can be regulated by Congress under the commerce clause if the activity exerts a substantial economic effect on interstate commerce.²¹⁷ Only those activities which are wholly local are exempt from regulation under the commerce clause.²¹⁸ But the Court, nevertheless, considered that Ollie's Barbecue, because of its interstate purchases, substantially affects interstate commerce.

The appellees in this case argued that the conclusive presumption of coverage is wrong and they would substitute a case by case determination of applicability. Justice Clark answered that the Court is foreclosed from investigation into each case when Congress has adopted a rational schema for regulation of particular activi-

212. For a chart illustrating the spending differentials between white and Negro, see BUREAU OF NAT'L AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 266 (1964).

213. *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964).

214. *Id.* at 299.

215. U.S.CODE CONG. & AD. NEWS 1741-42 (July 20, 1964).

216. 317 U.S. 111 (1942).

217. Although Justice Clark uses the words economic effect, it is not to be taken as being a *sine qua non* of regulation, for as pointed out in the *Heart of Atlanta* case, regulation may be based on moral grounds as well.

218. *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964), citing *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824).

ties.²¹⁹ The attitude taken by the majority in summing up both cases is revealing.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no *express* constitutional limitation it has been the rule of this Court, going back almost to the founding days of the republic not to interfere.²²⁰

E. *Concurring Opinions*

Justices Black, Douglas, and Goldberg appended separate concurring opinions to the *Heart of Atlanta* case. Those opinions will be briefly considered for their contrasted reasoning.

Justice Black seemed to express his opinion in order to demonstrate a broader base for sustaining the validity of the measure. He noted that the necessary and proper clause,²²¹ when added to the commerce clause, extends to Congress the power to regulate strictly local activities within a single state if those activities affect the flow of commerce.²²² Also, Justice Black analogized this case to the *Shreveport*²²³ case where the Court recognized that Congress has full power to regulate wholly intrastate activity if that intrastate activity would exert a harmful effect on interstate commerce. Thus, Congress may, under its authority to foster and regulate interstate commerce, do that which it could not do directly.²²⁴ However, Justice Black warned that the essential distinction between purely local and that which is interstate commerce ought to be preserved.²²⁵ Thus not every remote discriminatory act should be a justification for calling into play the immense power Congress possesses. Harking back to the principles enunciated by Marshall in *McCulloch v. Maryland*,²²⁶ Justice Black concluded that if the end is legitimate, the means are appropriate, Congress is not prohibited by the Constitution elsewhere, the action is within the scope of the commerce and necessary powers clauses.²²⁷

219. *Id.* at 303-04.

220. *Id.* at 305.

221. U.S. CONST. art. I, § 3, cl. 18.

222. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 271 (1964) (concurring opinion).

223. 234 U.S. 342 (1914).

224. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 272 (1964) (concurring opinion).

225. *Id.* at 275.

226. 4 Wheat. 316 (1819).

227. Justice Black also considers and rejects the motel and restaurant owners' arguments based on the fifth and thirteenth amendments. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 277-78 (1964) (concurring opinion).

Justice Douglas expressed his disappointment with the majority opinion because it rested solely on the commerce clause.²²⁸ He is quick to point out that his dissatisfaction does not lie in any belief that the commerce clause is inadequate to the task but that it is unfortunate to group cattle, fruit, steel, and coal with basic human rights. Justice Douglas would much prefer to sustain the Civil Rights Act of 1964 on the fifth section of the fourteenth amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.²²⁹

This preference for the fourteenth amendment arises from a conviction that the section affords a more permanent and settling solution. This section would, in his view, drastically reduce obstructionist activities designed to reduce the effect of the act. Briefly and without due regard for the intricacies of Justice Douglas' position, the fourteenth amendment would prohibit state enforcement of trespass laws that are designated to perpetuate discrimination. An additional reason for favoring that amendment's usage is that the act prohibits state-supported discrimination.²³⁰

Justice Goldberg writes his concurring opinion for a two-fold reason.²³¹ First, he wishes to underscore the fact that the act is not a congressional plan for elevating the nation's economy, but is designed to vindicate human rights. Second, he agrees with Justice Douglas in that the commerce clause and the fourteenth amendment serve as the underpinnings of the Civil Rights Act of 1964.

VII. PRIVATE PROPERTY AND TITLE II

Having attempted to resolve the meaning of the act and interpret the cases thereunder, it is appropriate to answer the oft-heard lay critique of the act: "It is my property — why can't I do with it as I please?" The phrase is repeated so often and with so much conviction that the issue of private property versus public accommodations minimizes the other arguments both pro and con. And, until the question is satisfactorily resolved to a reasonable degree, even the normally fair-minded person will be grudging in his acceptance of Title II. The thesis of this portion of the Note is, simply, that

228. *Id.* at 279.

229. U.S. CONST. amend. XIV, § 5.

230. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 282-83 (1964) (concurring opinion).

231. *Id.* at 291-93.

while the right to acquire and hold property is a natural right, despotic control of use has never been a basic tenet of that right.

A. *Historically*

To the primitive nomadic people of the earth private property, except for personal belongings, was unknown.²³² In fact, common practice demanded that necessities be shared equally among other members of the tribe.²³³ Communism was practiced to a very high degree. But as the dusk of primitive society gave way to the dawn of civilization men began to acquire property and hold it for themselves. Durant advances the thesis that civilization required industry, and a communistic way of life was ill-suited to personal achievement, industry and thrift.²³⁴ And, as agriculture displaced hunting as a way of life, private interest in realty arose simply because no man was about to share the fruits of his labor with a fellow who refused to plant and work. Prior to this period, economic production was satisfactorily ensured by requiring the participation of tribal groups. But the decline of nomadic movement gave way to a developing agricultural economy which made the family the most efficient unit of production. And since the family needed a home and if the earth was good, the interloper became the settler. As the family developed and civilization grew, private ownership of land became the rule. When the young grew and looked for land of their own, they pushed out old boundaries and reclaimed the forest, jungle, and marsh. Such land was carefully guarded as belonging to the reclaimer. Society recognized this right thus giving impetus to further development.²³⁵ This organizational phenomenon spread rapidly throughout the early civilizations. And by the time of the Egyptian Fifth Dynasty the law of private property was highly developed.²³⁶ Private property was also the core of the early Jewish economy.²³⁷ In other words, the concept of private property is by no means of recent vintage. Unfortunately, the historical entrenchment of this concept has contributed to a calcification of an absolute principle without proper regard for the philosophical refinements that mitigate it. Historically and philosophically, the principle of private

232. 1 DURANT, *THE STORY OF CIVILIZATION* 16-20 (1954).

233. *Ibid.*

234. *Id.* at 18.

235. *Id.* at 19.

236. *Id.* at 161.

237. *Id.* at 336-37. Durant contends that the Eighth Commandment sanctified private property in the Jewish religion.

ownership has not been absolute in every respect. But, as is true with all matters that touch the pocketbook, concepts are interpreted to the benefit of the interpreter. And, despite self-serving interpretations, no major social philosopher or legal scholar has declared the right to private property absolute in all respects. All have recognized that the privilege or right to ownership is equally burdened with social responsibilities.

Blackstone is erroneously credited as being the principal exponent of absolutism with respect to property. This interpretation of the venerable legal thinker's considerations on the nature of private property is due to incomplete scholarship. Those who cite Blackstone allude to his statement that the ownership of private property consists in the "*sole and despotic dominion* which one man claims and exercises over the external things of the world, *in total exclusion* of the right of any other individual in the universe."²³⁸ Nevertheless, the Commentaries are replete with what seems to be obvious inconsistencies. At one point, Blackstone so underscores the basic right to property that he states that even the greatest good of the entire community would not authorize the least violation of that right.²³⁹ But while expressing these thoughts, Blackstone also says, obliquely, that property cannot be taken without adequate compensation. Of course, this implies that the state can take property so long as the compensation is just. Also, he recognized and affirmed the common law obligation of the inn keeper to accept all who seek accommodation.²⁴⁰ These concessions are not consistent with claims of despotic control. In defense of his position, it is entirely possible that Blackstone recognized an unspoken distinction between the right to own private property and the right to use private property.

Essentially, there are two basic philosophies respecting the nature of private property. One view contends that private ownership stems from societal recognition. Apologists for this view would adhere to the principle that what the state gives the state may take away. Thus, no problem is encountered in considering Title II, since if the government bestows upon its citizens the right of possession, it may, *ipso facto*, delimit that right or even abolish it altogether. On the other hand, there is an equally recognized viewpoint that the right to private property stems ultimately from the nature and needs

238. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 329 (Cooley's ed. 1871). (Emphasis added.)

239. *Id.* at 129-39.

240. *Ibid.*

of man and as such cannot be compromised by the state. Nonetheless, devotees of this doctrine would impart an obligation on all owners of property to *use* that property in such a manner as not to offend or injure the common good. In either of these views, there seems to be no room for one who argues that Title II deprives or intrudes illegitimately upon the right of private ownership.

B. *Property as Co-extensive with the State*

Jeremy Bentham, for example, regarded the right to property as co-equal with its recognition by the state. It was his thesis that property and law come into being simultaneously and before laws were made, property did not exist.²⁴¹ Therefore, since private property exists at the pleasure of the state, the state can expand the burdens of ownership.²⁴² Walter Lippman has expressed similar views noting that it is error to regard the existing law of property as delineating an area in which the state may not enter.²⁴³ He contends that the law of property developed by laissez-faire theorists ignores the fact that title to property is a mere construction of law not unlike a contract or corporation.²⁴⁴ And that title is "a structure of rights and duties, immunities and privileges, built by custom, judicial interpretation, and statute, and *maintained by the coercive authority* of the state."²⁴⁵

It is readily apparent that under this view the owner of the Heart of Atlanta Motel cannot effectively argue that his right to private property is being infringed upon when he is required to accept Negro registrants. If his right to ownership depends upon the state, the state may logically restrict ownership and use. But even under a more absolute view of property, the motel operator does not fare any better — but for a different reason.

C. *Property Rights before the State*

The Scholastic approach to private property is two-fold. Man's right to ownership is derived from the natural law. By virtue of

241. BENTHAM, *THE THEORY OF LEGISLATION* 111-13 (London ed. 1931).

242. See also Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954). Cohen posits the state as a party whose presence and acquiescence is necessary to create a property right.

243. LIPPMAN, *THE GOOD SOCIETY, The Rule of Law and Regulation of Property* 354 (1937).

244. *Id.* at 351-52.

245. *Id.* at 354. Mr. Lippman seems to develop this viewpoint not so much out of a genuine belief that property is dependent upon the favor of the state, but it was, in 1937, much easier to justify New Deal legislation by ignoring the problem rather than grappling with age old doctrines.

man's reason and free will — possessed by none other — he has dominion over the earth.²⁴⁶ However, the right to private property is not a right derived directly from nature in the sense that common dominion by man is achieved. If this were the case, justice would be violated if each man did not own a piece of land. Yet, according to Thomas Aquinas, the institution of private property is so necessary to peace, order and prosperity that without it the economic order would suffer.²⁴⁷ Thus, the institution of property is a creature of the *jus gentium* and more immitigable than positive law since man's basic needs require it. Nonetheless, as part of the *jus gentium*, it is subject to modification as man's customs require.

Thomas argues that with respect to the things of the earth, man must possess property and secondly use that property. Now insofar as possession is concerned, it is necessary for three reasons. First, man strives harder and contributes more to the community in general if he works to procure for himself and his family as opposed to working for goods which would be common to all.²⁴⁸ Second, human affairs are conducted in a more orderly fashion when each man is charged with caring for particular things, whereas disorder would prevail if everyone had indeterminate chores.²⁴⁹ Third, a more peaceful state is ensured when each man possesses what he owns and owns what he possesses. Thomas believed that quarrels arise more frequently when there is no division of things possessed.²⁵⁰

With respect to the use of external things, Thomas taught that, although each man ought to own property, he ought to own it in such a manner as to be able to communicate it to others in their need.²⁵¹ Therefore, it seems that while individual ownership is an absolute right, its use is encumbered by social obligations. These social obligations are derived according to Thomas Aquinas, from two distinct sources: (1) the common good; and (2) divine and

246. CRONIN, *CATHOLIC SOCIAL PRINCIPLES* 477 (1955).

247. *Ibid.*

248. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, Q.66, ad. 2. This point seems to be well-taken in that the Soviet system is undergoing a minor revolution in an attempt to provide the workers with profit incentives. Without individual incentives, workers in a communist state do not perform at a level of efficiency comparable to workers in a free enterprise system.

249. *Ibid.*

250. *Ibid.*

251. *Ibid.* The point of this organization is that man in a state of innocence would have the altruism necessary for common ownership. CRONIN, *op. cit. supra* note 246, at 480.

human positive law. It is to the latter that attention is directed. In the scheme of ordered rights and consequent obligations, the state, in the absence of natural or divine law, may ascribe to property certain social obligations. The sole restriction on the state's right to legislate social obligations is that government must take care not to destroy private ownership under the guise of taxation or regulation.²⁵² As a guideline, Thomas stated that the social aspect of property increases as it affects other individuals. Those possessions which do not normally affect other individuals should not be state regulated. However, as those possessions became affected with greater social impact, the state's right to regulate becomes clear.²⁵³ This concept is not entirely foreign to the common law. Riparian rights are jealously guarded and the right to despoil the water upstream, even though that portion belongs to the owner, is abridged by the state. The same is true with respect to public accommodations. Mrs. Murphy's boarding house, without much importance to society, is not regulated and properly so. But a motel with 216 rooms²⁵⁴ imports a greater effect on society than a five room boarding house. And that effect is significant enough to be regulated by positive law. Thus, according to the Scholastic viewpoint, Title II of the Civil Rights Act is entirely consistent with the nature of private property and that legislation is simply the result of positive law defining social obligations.

Locke, is perhaps, more adamant in his approach to private property.²⁵⁵ He was convinced that man's possession of and right to private property preceded the formation of government.²⁵⁶ This right is derived from man's labor with respect to a certain piece of property. That is, when a man toils in the field, he has mixed his labor with that field and given that field something of himself. "It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men."²⁵⁷ In order to ensure that a superior force would not rob man of his property, man decided, according to Locke, to enter into a relationship with a community whereby the united strength of all would secure property

252. CRONIN, *op. cit. supra* note 246, at 483.

253. *Id.* at 484.

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

255. LOCKE, II OF CIVIL GOVERNMENT, *of Property* 129 (Rhys ed. 1924). See RHINEHART, *MAN AND THE STATE* 327 (Ebenstein ed. 1948).

256. *Ibid.*

257. *Id.* at 130.

rights.²⁵⁸ And Locke argues that the legislative power cannot defeat what was possessed in a state of nature.²⁵⁹ This is so since protection of property was a condition precedent of entry into society. If society performs an act which would lessen that property right, the owner ought to first give his consent.²⁶⁰ But Locke does seem to provide for a taking by a legislative body that is truly representative of the people governed.²⁶¹ Also, it seems that Locke would not object to reasonable regulation of property for he warns only against an *arbitrary* use of power by a legislature.²⁶²

John Stuart Mill declares that no exclusive right should be granted to individuals in land unless that right is productive of positive good. In a persuading fashion, he argues that the rights flowing from private property are coextensive with the purpose or reason for private property.²⁶³ And these rights go no further than the purpose for them. In this context, the primary reason for operating a place of public accommodation is profit. The rights flowing from that purpose do not extend to accepting or rejecting Negro applicants. It has not yet been demonstrated that the integration of public accommodations results in a decline in business. In fact, the converse is true. For instance, the Dallas Chamber of Commerce manager stated that "this year we've probably added \$8 to \$10 million of future bookings *because we're integrated.*"²⁶⁴

In summary, no major social philosopher adheres rigidly to an absolutist viewpoint with respect to the use of private property. While there is a considerable difference of opinion regarding the right to private property, there is little difference regarding the right of use. In this respect the consensus of opinion clearly demonstrates that the right to use private property is impressed with a societal in-

258. *Id.* at 186.

259. *Ibid.*

260. *Id.* at 187.

261. *Id.* at 189.

262. *Id.* at 184.

263. MILL, *SOCIALISM* 56 (Bliss ed. 1891).

264. U.S. CODE CONG. & AD. NEWS 1743 (July 20, 1964). (Emphasis added.) Atlanta, Georgia experienced an increase in convention guests within one day after Atlanta hotels announced an integrated policy. *Ibid.* The opponents of the measure contend that "a host follows the customs of his community else he suffers, economically. To force him to abandon his practice, to run counter to prevailing opinion, is to injure his business and his property. He does not, and he cannot, set custom. He follows it or suffers." *Id.* at 1813. Unfortunately, as is the case with many opponents of the bill, generalities abound. There are no *facts* available relating integration to a decline in business.

terest. It is fair to conclude, therefore, that Title II does not infringe upon those vested rights.

VIII. THE IMPACT OF TITLE II ON STATE PUBLIC ACCOMMODATION LAWS

Initially, any discussion of the impact of Title II on existing state laws is necessarily limited to those states having public accommodation laws. Of course, those states which have laws designed to promote segregation will lose control of their local situations. On the other hand, states with public accommodation laws will not completely lose control over racial discrimination in their own states. But whether control is fully maintained on a local level will depend on the state statute as well as the attitude of local law enforcement agencies. At this point, it would be redundant to re-define the "state's rights" safeguard built into the act in section 204(c) and (d);²⁶⁵ this has been discussed fully.²⁶⁶ It would be helpful, however, to contrast a typical state statute with the act.

A. *The Ohio Public Accommodations Statute*

The Ohio statute enumerates as places of public accommodation inns, restaurants, barber shops, public transportation, theaters, and retail establishments.²⁶⁷ The statute provides specifically that the enumerated list is not exclusive. The principle of *ejusdem generis* has been applied to the statute in order to bring within its purview, among other establishments, an ice cream parlor²⁶⁸ and an amusement park.²⁶⁹ The Civil Rights Act of 1964 is not as detailed as the Ohio statute and the principle of *ejusdem generis* would not seem generally applicable. It should be noted, nevertheless, that under certain circumstances the act would cover all establishments named in the Ohio statute. Section 201(b)(4)²⁷⁰ provides that if an establishment is located within the premises of a named establishment, or vice-versa, it too will be covered. In this regard, a barber-shop or beauty salon would, if located in a transient hotel, be within

265. 78 Stat. 244, 42 U.S.C.A. §§ 2000a-3(c)(d) (1964).

266. See text at pp. 686-88 *supra*.

267. OHIO REV. CODE § 2901.35.

268. *Fowler v. Benner*, 13 Ohio N.P. (n.s.) 313 (C.P. 1912). *Contra*, *Deuwell v. Foerster*, 12 Ohio N.P. (n.s.) 329 (C.P. 1912).

269. *Johnson v. Humphrey Pop Corn Co.*, 4 Ohio C.C.R. (n.s.) 49 (C.C. 1902), *aff'd*, 70 Ohio St. 478, 72 N.E. 1160 (1904); *Guy v. The Tri-State Amusement Co.*, 7 Ohio App. 509 (1917).

270. 78 Stat. 243, 42 U.S.C.A. § 2000a(b)(4) (1964).

the act. But no technicalities of this nature encumber the Ohio law. No matter where a barbershop is located in Ohio, it is within the statute. Thus, as the statute is drawn, federal intervention in Ohio would not seem to be probable.

B. *Conflicting Court Decisions*

The real difficulty in maintaining local control centers about judicial construction of state statutes; unfortunately, decisions in this area are quite dated. Perhaps the lack of current disputes in Ohio stands as silent attestation to two unrelated factors. Initially, it could be fairly concluded, from common experience, that Negroes are reluctant to enter white personal service establishments such as barber shops or beauty salons. Secondly, Negroes have patronized theaters, restaurants, amusement parks, and public conveyances, in some locales, to such an extent that their presence is unnoted. However, when Negroes move beyond customary habitats, resentment still greets the prospect of their patronage.

In *Harvey, Inc. v. Sissle*,²⁷¹ for example, the court decided *sua sponte*, that retail establishments selling wearing apparel to women are not within the statute. The court, in an irrelevant non-sequitur, indulged in the following judicial fairy tale.

In olden times we were taught that the right of private contract was a constitutional guaranty. If a farmer had grain or cattle to sell or a manufacturer had machinery to sell, or a merchant had merchandise to sell, *we were told* that he could sell it whenever, to whomsoever, and upon whatever terms he chose. He could refuse to sell to a German, Irishman, Negro, Jew or any other person for any or no reason.²⁷²

On the basis of the foregoing opinion, it would not be difficult to envisage federal intervention if the case indicated Ohio's position. But to illustrate the conflict, contrast *Sissle* with *The Puritan Lunch Co. v. Forman*.²⁷³ In *Forman*, the court regarded separate accommodations in a restaurant as violative of the statute. In a remarkably enlightened opinion, the court²⁷⁴ condemned discrimination of all forms. And the court summarized the purpose of the Ohio statute in the following manner.

271. 53 Ohio App. 405, 5 N.E.2d 410 (1936).

272. *Id.* at 408-09, 5 N.E.2d at 411. (Emphasis added.)

273. 29 Ohio Ct. App. 289 (1918).

274. Both the court in *Sissle* and the court in *Forman* were courts of common pleas.

Its purpose was to contradict the pitiless affront to a being created in the image of a common and impartial Maker, embodied in the rather coarse but still accurate translation which a large and influential section of the country made of Judge Taney's dictum — 'A nigger ain't a man.' The unthoughtful design, the perhaps unconscious purpose, of this discrimination — and certainly its effect — is to constantly remind the black man that his is an inferior race, whereas our constitutions, our legislation, our avowed public policy, all say it is an equal race in the eye of the law.²⁷⁵

This dichotomy of result and philosophy is effused throughout state judicial pronouncements in the area of public accommodations. Unless the resolution of these conflicting decisions is harmonized with the temper of the day, federal intervention via Title II is a certainty.

IX. CONCLUSION

The total effect of Title II is not as broad as was hoped for nor as broad as was feared. Substantially, the act leaves untouched vast areas of local business. But it does extend to a large segment of accommodations and amusements that, but for the act, would still be following a course of discrimination. Now a hungry and tired Negro may stop traveling when *his* needs demand, not when the *locale* dictates. The cold hand of rebuff has been lowered, but probably to be replaced by an unfortunate but tolerable glower. Ignorance cannot be legislated away. Tolerance cannot be embued by congressional action. And, Negroes cannot be insulated from insult. Nevertheless, the soul-searing reaction to prejudice can be eased. Perhaps years of reluctant obedience will eventually give way to a national attitude more compatible with this nation's professed standards.

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 "red-necked" 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.

Unfortunately, the act leaves a gray area of confusion that must be judicially resolved before all concerned will be fully apprised

275. *The Puritan Lunch Co. v. Forman*, 29 Ohio Ct. App. 289, 298 (1918).

of the standards governing application of the act. There are also portions of the act that can be construed to severely delimit the effectiveness of the act as well as areas that can be expanded beyond reasonably justifiable limitations. It is indeed distressing that states are not better able to cope with what is essentially a local problem. Perhaps the fear of federal intervention will adduce a favorable response from local political institutions. In any event, the worth or failure of the act will be apparent before half a decade has elapsed.

HARRY T. QUICK

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