Public Accommodations and the Civil Rights Act of 1964

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I. INTRODUCTION

Throughout this comment repeated references are made to "civil rights" and "public accommodations;" thus these terms require a definition which will allow the reader to place his views in perspective with those expressed in this comment.

Various theories have been promulgated as to what are "civil rights," if such rights do exist. "Civil rights" have been referred to as "absolute rights" which are the outgrowth of civilization; as those rights of positive law not existing at common law, but enforceable only under statutory law; and, as those rights which might better be termed "moral" or "natural rights."

Since legislation is the primary concern of this comment, "civil rights" can be said to be those human rights, which can be found in federal statutes enacted in the spirit of the Federal Constitution, and in

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1. This comment is limited to the public accommodations portion of the Civil Rights Act of 1964. It is noted that the 1964 Act encompasses many more areas, but they could not be adequately covered in a comment of this length.
2. It is arguable that civil rights as such did not exist at common law and did not come into existence until recognized by statutory enactments. See Riggs, The Existence of Civil Rights at Common Law, 5 S.C.L.Q. 449 (1952).
3. People v. Washington, 36 Cal. 658 (1869); Grooms v. Thomas, 93 Okla. 87, 219 Pac. 700 (1923); Byers v. Sun Savings Bank, 41 Okla. 728, 139 Pac. 948 (1914).
state statutes enacted under state constitutional provisions. Thus only
those interpretations of "civil rights" which uphold the constitutionality
of the legislation guaranteeing them are legally sanctioned.

In view of the private property rights of individuals, public ac-
commodations is an often debated concept. It is argued that these estab-
ishments are not "public" in the sense of requiring admission of all per-
sons who wish to patronize them.6 "Public accommodations" can be
defined as businesses offering lodging, food and entertainment to the
general public. Although it is impossible to compile a complete list of
all "public accommodations," the Civil Rights Act of 1964 includes the
following:

(1) any inn, hotel, motel, or other establishment which
provides lodging to transient guests . . .
(2) any restaurant, cafeteria, lunchroom, lunch counter,
soda fountain, or other facility principally engaged in selling
food for consumption on the premises . . .
(3) any motion picture house, theater, concert hall, sports
arena, stadium or other place of exhibition or enter-
tainment . . . .

For purposes of analysis of these accommodations, it is essential to de-
termine whether the establishments in question are state supported or
privately owned.8 This is also a meaningful distinction for purposes of
applying the fourteenth amendment.9

The enjoyment of "public accommodations" by Negroes is a chapter
of American history which has been frustrating, confusing and wrought
with mixed emotions. Both federal and state legislation have been passed
only to have their purposes frustrated by individual as well as judicial
action.10 Thus, the "civil rights" struggle, in the absence of effective
legislation, has often succumbed to the unfortunate remedy of self-help
on the part of both proponents and opponents of the movement.11

The constitutions guarantee "life, liberty and property." The first two are of little
avail without protection in the enjoyment of enough of the third to make life
fairly secure and liberty worth having.
(July 2, 1964).
8. The Civil Rights Act of 1964 contains Title III which pertains to the desegregation of
"any public facility which is owned, operated, or managed by or on behalf of any State . . . ."
§ 301(a).
9. The concept of "state action" must be dealt with when attempting to regulate
"public accommodations" through the implementation of the fourteenth amendment. At the
present time the actions of the operators of privately owned public accommodations are not
considered state action. However, contrary views were expressed in Harlan's dissent in the
Civil Rights Cases, 100 U.S. 3 (1883), and in Douglas' concurring opinion in Heart of
10. See generally, section II, B, 1-2 of this comment.
11. A few names like Little Rock, Birmingham, Jackson, Montgomery, St. Augustine,
and Selma quickly recall the disconcerting evils of self-help.
A span of a hundred years has passed since the Civil War and the Emancipation Proclamation, and approximately ninety years has passed since the last significant federal attempts at public accommodations legislation. Although there have been many relatively unsuccessful state efforts in this area, the Civil Rights Act of 1964 was the first federal attempt of this century.

Discussion of the Civil Rights Act of 1964 has generated controversy over whether an individual civil right should be preferred over another's property right. The new law has raised innumerable questions: will the Act effectuate the Negro goals; are the Negro demands proper ones; was the passage of the Act a proper exercise of Congressional power; what are the Constitutional ramifications of the Act; and, should such legal endeavors have been left to the states?

When the various segments of the country disagree on the fundamental principles underlying the civil rights movement, they must necessarily disagree on the means which should or should not be used to effectuate any right which the Negroes claim. This comment attempts to place the area of public accommodations in its proper historical context and define the present status of public accommodations under Title II of the Civil Rights Act of 1964.

II. HISTORY OF PUBLIC ACCOMMODATIONS

A. Public Accommodations at Common Law

At common law certain businesses were required to serve the general public. For example, innkeepers were considered to have impliedly given a general invitation to the public to enter the inn and to use its facilities. Other decisions gave the innkeeper the prerogative of refusing service to someone for good cause. Of course, questions arose as to what constituted an inn; who was a guest and when did he achieve such status?

13. The Civil Rights Act of 1875, 18 Stat. 335 (1875), was the last "public accommodation" act enacted by Congress.
14. See generally, section II, B, 2 of this paper.
17. See BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 3, Ch. IX (10th ed. 1787); 1 A.L.R.2d 1165 (1948):
[At common law a person engaged in a public calling, such as an innkeeper or common carrier, was under an obligation to serve, without discrimination, all who sought service . . . .]
20. Hall v. State, 4 Harr. 132, 147 (Del. 1844):
"[E]very inn is not an ale-house, nor every ale-house an inn," but if an inn uses common selling of ale, it is also then an ale-house; and if any ale-house lodges and entertains travelers it is also an inn.
status;[21] and, what should constitute good cause for refusal of service to any particular individual.[22]

Later the innkeeper rule was extended to include common carriers.[23] These two categories of proprietors were considered to be public servants.[24] Thus, although the position and responsibilities of the inn and common carrier were firmly established at common law, the other forms of accommodation and amusement were not held to the same standards.[25] It should be kept in mind that the early common law cases involving these establishments did not involve racial situations, since, until after the Civil War, Negroes were considered to be property and the courts never considered their status under these common law rights.

B. Prior Civil Rights Acts and Public Accommodations Legislation

1. FEDERAL LEGISLATION AND CASES

For a thorough understanding of the present status of public accommodations it is necessary to survey early federal legislation. During the period of reconstruction after the Civil War, remedial legislation was passed to insure the political, social, and economic status of the recently emancipated Negroes.[26]

In order to give binding legal effect to Lincoln’s Emancipation Proclamation,[27] Congress, in 1865, proposed the Thirteenth Amendment which proclaimed that “neither slavery nor involuntary servitude . . . shall exist within the United States.” Upon ratification by the states, Congress was given the power to enforce this amendment by appropriate legislation and subsequent interpretation has applied the amendment to inhibit not only state action[28] but also actions of private individuals.[29]

If a person puts up at an inn as a traveler, and he is received as such, the relation of innkeeper and guest is immediately established, with all its rights and liabilities . . . .

22. In Regina v. Rymer, 13 Cox Crim. Cas. 378 (1877), just cause for refusal of service was sustained when the patron attempted to bring his two St. Bernard dogs into the inn with him.


24. BNA OPERATIONS MANUAL, CIVIL RIGHTS ACT OF 1964, 79 (1964):
The reasoning back of the rule seems to be that innkeepers and common carriers are in a sense servants of the public, in return for which they are permitted, in the conduct of their businesses, to exercise certain privileges not enjoyed by the public in general.

25. 1 A.L.R.2d 1165 (1948):
[1] It appears that proprietors of privately operated places of public amusement and entertainment were under no such obligation and could deny admission to whomsoever they pleased.


27. 12 Stat. 1268 (1863).


29. Since there is no reference to states in the thirteenth amendment it can be used
In the Spring of 1866, the fourteenth amendment passed Congress subject to ratification by the states, but it was rejected by all the Southern states prior to the time when the reconstruction governments came into power.\textsuperscript{80} Congress' next action was the passage of the Reconstruction Act of 1867\textsuperscript{81} which made readmission of southern congressmen to Congress contingent upon state ratification of the fourteenth amendment. Thus, southerners refer to the fourteenth amendment as being "more or less ratified in 1868 . . . ."\textsuperscript{82}

The fourteenth amendment, passed to secure the position of the Civil Rights Act of 1866,\textsuperscript{3} which insured Negroes all the rights enjoyed by white citizens, soon caused construction problems in the courts because of its specific references to the states:

\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)
\end{quote}

Meanwhile, racial discriminations in the social, political and economic areas were being perpetrated by individual whites under the guise of state laws.\textsuperscript{84} The problem was to determine the intent of the framers of the fourteenth amendment. Some jurists thought that its power clause, which authorized Congress to carry out the amendment's provisions by appropriate legislation, could be construed to reach discriminatory actions on the part of individuals as well as states.\textsuperscript{85}

In 1869, the fifteenth amendment, which guaranteed the voting rights of Negroes, was passed by Congress and ratified by the states. The fifteenth amendment stated that "[t]he right of citizens of the
United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Voting rights of Negroes were further protected by the passage of another Act in 1871.

In its final effort to insure equal rights and privileges to the freed Negroes, Congress passed the Civil Rights Act of 1875. This act was the last congressional attempt at civil rights legislation for eighty-two years. The most significant provisions of the Act were those relating to public accommodations and the civil and criminal penalties enforceable in the federal courts for infringement upon these rights.

Obtaining Congressional approval of the 1875 Act to insure its eventual passage by Congress was not an easy task. In fact, the Civil Rights Act of 1875 was passed five years after its original introduction in Congress in 1871 by Senator Charles Sumner of Massachusetts. Congress debated extensively on the question of whether or not this Act was an attempt to legislate social equality for Negroes. A provision regarding integration of the schools was also considered but deleted to insure the final passage of the bill.

The public accommodations section of the 1875 Act, closely parallels the Civil Rights Act of 1964:

That all persons within the jurisdiction of the United States shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The significance of this provision of the Act was that it was applicable to individual offenders and was not dependent upon state action.

38. 18 Stat. 335 (1875). The preamble of the Act illustrates the purpose underlying it: Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law . . . .
39. The next federal attempt at civil rights legislation came in 1957 with the civil rights act of that year, 71 Stat. 634.
40. 18 Stat. 335 (1875); § 2, pertains to civil suits; § 3, pertains to criminal prosecutions.
42. 3 Cong. Rec. 944-45, 960 (1875).
43. Id. at 944-45.
44. See text, pp. 466-472 infra.
45. 18 Stat. 335 (1875).
46. Its applicability to individuals in the absence of state action brought about the destruction of the Act in the Civil Rights Cases, 109 U.S. 3 (1883).
Thus, the American Negro emerged from the Civil War with constitutional and statutory guarantees of full citizenship, equal protection of the laws, and enjoyment of all the rights and privileges of white citizens.\textsuperscript{47} However, the Supreme Court of the United States, apparently reflecting prevailing racial views, began to restrict the sweeping scope of the federal legislation.

The initial blows to the fourteenth amendment, the primary basis of the Civil Rights Act of 1875, were dealt by the Supreme Court in 1873 in the \textit{Slaughterhouse Cases}.\textsuperscript{48} These cases held that the purpose of the equal protection clause of the fourteenth amendment was to protect Negroes from \textit{state} governmental action and since no state action was found nor was a racial context presented to the court, the fourteenth amendment could not be applied.\textsuperscript{49} Next came \textit{United States v. Cruikshank}\textsuperscript{50} in 1876, which held that the only obligation resting upon the United States was to see that the \textit{states} did not deny their citizens the enjoyment of an equality of rights. The \textit{Virginia v. Rivers}\textsuperscript{51} case of 1879 again restricted the force of the fourteenth amendment when the Court held "[t]he provision of the Fourteenth Amendment of the Constitution... all have reference to State action exclusively, and not to any action of private individuals."\textsuperscript{52}

Finally in 1883, the \textit{Civil Rights Cases}\textsuperscript{53} were considered and the death of the Civil Rights Act of 1875 seemed inevitable. The cases, consolidated for trial, involved indictments for denying Negroes the accommodations and privileges of an inn; refusing Negroes full enjoyment of a theater; and, for denying a Negress the privilege of riding in the ladies' car on a train. In a decision in which only one justice dissented, the Supreme Court held that Congress has no power to legislate upon subjects which are within the domain of the state legislatures, but only to provide modes of redress against the operation of state laws and state officers when they subvert the fundamental rights specified in the Constitution.

In writing the majority opinion, Justice Bradley noted that the Act was directed not only at state action but at the actions of private individuals. With the fourteenth amendment as its power source, continued Bradley, only actions by states, their officers or instrumentalities could be reached and thus the Act was unconstitutional.

\textsuperscript{47} The passage of the previously enumerated statutes indicates Congressional intent to give the freed Negroes full citizenship and equal enjoyment of all rights and privileges possessed by white citizens.

\textsuperscript{48} 83 U.S. (16 Wall.) 36 (1873).

\textsuperscript{49} For a discussion of the case, see Franklin, \textit{The Foundations and Meaning of the Slaughterhouse Cases}, 18 Tul. L. Rev. 1 (1943).

\textsuperscript{50} 92 U.S. 542 (1876).

\textsuperscript{51} 100 U.S. 313 (1879).

\textsuperscript{52} Id. at 318.

\textsuperscript{53} 109 U.S. 3 (1883).
The majority opinion recognized that the thirteenth amendment is not limited to state action and could be applied to individuals, but indicated that denying Negroes public accommodations is not equivalent to subjecting them to conditions of involuntary servitude. The Supreme Court concluded that:

[N]o countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendments of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.\(^{54}\)

Only twice in the history of the Supreme Court had federal legislation been declared unconstitutional: in 1803 in *Marbury v. Madison*\(^{55}\) and in 1857 in the *Dred Scott* case.\(^{56}\) Now the 1883 *Civil Rights Cases* could be added to this list.

In spite of the majority opinion, Justice Harlan was undaunted in his dissent. He stated that he could not "resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."\(^{57}\) Harlan contended that adequate authority for the 1875 Act could be found in the thirteenth amendment, which did more than just prohibit slavery, but decreed universal civil freedom throughout the United States. Harlan also explored the "quasi-public concept" within the framework of the majority's contention that the fourteenth amendment only applied to state action. He indicated that since public accommodations are charged with duties to the public and are subject to governmental regulation and licensing, they are agents or instrumentalities of the state. Thus, asserted Harlan, a denial of accommodations in these facilities is a denial of rights by the state and thus these establishments are subject to federal regulation under the fourteenth amendment.\(^{58}\)

Prior to the present Civil Rights Act of 1964,\(^{59}\) it was speculated that the *Civil Rights Cases* did not obstruct the application of the Act of 1875 to the field of interstate and maritime traffic, or in the District of Columbia and federal territories.\(^{60}\) However, from a practical standpoint, it could be safely said that "[t]he great fervor with which the

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54. *Id.* at 25.
55. 5 U.S. (1 Cranch) 137 (1803).
56. 60 U.S. (19 How.) 393 (1857).
58. See Douglas’ concurring opinion in the *Heart of Atlanta Motel* case in section III, C, 1 of this comment.
elected representatives of the people decided to nationalize civil rights [had] been cooled by the breath of judicial construction.\textsuperscript{61}

\section*{2. STATE LEGISLATION AND CASES}

Prior to 1883 and the \textit{Civil Rights Cases} decision, only a few states had passed statutes prohibiting racial discrimination in public accommodations. In 1865 Massachusetts was the first state to enact such legislation.\textsuperscript{62} The only other state civil rights acts, prior to the ill-fated federal act of 1875, were those passed by New York\textsuperscript{63} and Kansas\textsuperscript{64} in 1874.

Following the \textit{Civil Rights Cases} decision, states took the initiative and passed civil rights legislation aimed at preventing discrimination in public accommodations. By 1900 approximately eighteen states had passed civil rights acts.\textsuperscript{65} At the present time, thirty-one states have anti-discrimination laws in the public accommodations area.\textsuperscript{66}

No significant constitutional impediments have been presented by the great number of state civil rights statutes.\textsuperscript{67} In effect, the \textit{Civil Rights Cases} implied that in view of the tenth amendment this was an area which could only be dealt with by the state legislatures.\textsuperscript{68} Apparently

\textsuperscript{63} N.Y. Stat. at Large, vol. IX, at 583 (1874).
\textsuperscript{64} Laws of Kan., ch. 49, § 1 (1874).
\textsuperscript{65} By 1900, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin had civil rights statutes with provisions relating to public accommodations. For a complete list of all states with public accommodations laws now in force see the statutes cited note 66 infra.
\textsuperscript{67} E.g., Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948); Kelley v. State, 25 Ark. 392 (1869); Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898); Donnell v. State, 48 Miss. 661 (1873); People v. King, 110 N.Y. 418, 18 N.E. 245 (1888). See also 49 A.L.R. 505 (1927).
\textsuperscript{68} Civil Rights Cases, 109 U.S. 3, 14 (1883):

The truth is, that the implication of a power to legislate in this manner is based
attacks on these statutes have not been successful in either the state or federal courts. Objections have been made alleging that state civil rights statutes violate the Equal Protection and Due Process Clauses of the United States Constitution, but the Supreme Court has disposed of these arguments and upheld their constitutionality.

In spite of the constitutionality of the state public accommodations statutes, many of the acts have fallen into disuse and strict construction by the state courts has severely limited their effectiveness. Several theories have been advanced to justify the state court's strict construction of their state statutes. One such argument is that these statutes are in derogation of the common law and therefore must be strictly construed. However, as previously indicated, at common law innkeepers and common carriers were held to have a public duty to furnish their facilities to the general public. Another reason for strict and narrow construction of these acts is that many of them provide for penal sanctions, and, therefore, in the interests of the accused the statute must be construed strictly. A third, and perhaps most often debated argument for strict construction, is that often one person's common law property right would be infringed upon in the enforcement of the civil rights of another. Thus:

the general proposition has been that, to deprive a person of a common law right, such as the right to conduct a business or use one's property as one pleases, the person claiming discrimination must point to a statute expressly covering the situation.

upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment.

As we have pointed out, 32 States now have such [public accommodations] statutes and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts.

See statutes cited note 66 supra.


71. For example in 1953 the Supreme Court rejected an argument that public accommodations legislation of the 1870's for the District of Columbia had been impliedly repealed by non-use. District of Columbia v. John R. Thompson, Co., 346 U.S. 100 (1953).

72. See Riggs, The Existence of Civil Rights at Common Law, 5 S.C.L.Q. 449 (1952) which illustrates the narrow construction given state statutes.

73. E.g., People ex rel. Barnett v. Bartlett, 169 Ill. App. 304 (1912); Brown v. J. H. Bell Co., 146 Iowa 89, 123 N.W. 231 (1909); Rhone v. Loomis, 74 Minn. 200, 77 N.W. 31 (1898).

74. See notes 17-25 supra.


77. Id. at 457.
In an attempt to counteract some of the judicial devastating construction of purported legislative intent, some states have amended their statutes and enlarged the list of covered accommodations.\(^\text{78}\) Other states have tried the opposite approach and have merely stated in their statutes that any business or establishment which offers public accommodations to the general public shall be under the statute.\(^\text{79}\) Probably the most favorable argument that could be pressed upon the courts, is that these statutes are remedial in nature and should be given a more liberal construction to effectuate the legislative intent.\(^\text{80}\)

It is significant that none of the southern states have any statutes relating to racial discrimination in public accommodations.\(^\text{81}\) Thus, the areas where the incidence of racial discrimination is presumably highest, do not have any statutes aimed at remedying the situation. Of course, the most obvious argument against the passage of such statutes is that the individual's property rights should not be infringed upon. As one author has indicated:

> Since contractual and property rights are part and parcel of personal rights, it is futile to ask whether property rights are or should be subservient to personal rights. They are themselves personal rights. Often they properly give way to other human rights; such is to the best interest of society. But still they are personal rights.\(^\text{82}\)

Prior to the Civil Rights Act of 1964, state statutes were relatively ineffectual against racial discrimination in public accommodations. If an end to racial discrimination in public accommodations was desirable, it was apparent to those who believed in its elimination that the impetus would never come from the states.

### III. Public Accommodations and the Civil Rights Act of 1964

Following the fiasco of the Civil Rights Act of 1875, the federal government made no additional attempts at any form of civil rights legislation until the passage of the Civil Rights Act of 1957,\(^\text{88}\) which established the Civil Rights Commission and was concerned with insuring

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78. Konvitz & Leskes, A Century of Civil Rights 164 (1961): The tendency of the courts to construe the acts strictly has necessitated frequent amendments of the civil rights laws by the state legislatures in order to overcome restrictive decisions; these amendments, in turn, are used by the courts as an argument against liberal construction.


81. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia do not have state public accommodations statutes.


Negroes effective voting rights. Then in 1960 the Civil Rights Act of that year was passed.\textsuperscript{84} It contained penalties for the destruction of churches, interstate transportation of explosives, and additional provisions for guaranteeing the rights of Negroes to vote. Neither of these Acts bore any direct relationship to discrimination in the area of public accommodations.

Then, in 1964, Congress passed the now famous (to some "infamous") Civil Rights Act\textsuperscript{85} dealing with almost the identical public accommodations subject matter as that covered in the Civil Rights Act of 1875.

\section*{A. Constitutional Basis}

Although the past ninety years have reflected changing racial views in this country, the framers of the Civil Rights Act of 1964 realized that constitutional basis for the Act must be predicated upon a more effective power source than the fourteenth amendment and Congress' power to implement its provisions. Congress, therefore, based the 1964 Act on the Interstate Commerce Clause and attendant Congressional power to regulate interstate commerce, as well as its power to implement the equal protection clause of the fourteenth amendment.

Its own provisions reflect the constitutional basis for the Act:

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action....\textsuperscript{86} (Emphasis added.)

The Act defines and delineates which types of "operations affect commerce." "[A]ny inn, hotel, motel, or other establishment" \cite{467.86} affects commerce if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves... has moved in commerce."\textsuperscript{89} "[A]ny motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment\textsuperscript{90} affects commerce if "it customarily presents films, performances, athletic teams, exhibition, or other sources of entertainment which move in com-

\begin{itemize}
\item \textsuperscript{84} 74 Stat. 86 (1960).
\item \textsuperscript{85} Pub. L. No. 352, 88th Cong., 2d Sess. (July 2, 1964). Future references to the Civil Rights Act of 1964 in the footnotes will be to the pertinent section of Title II, the public accommodations portion of the Act.
\item \textsuperscript{86} Section 201(b).
\item \textsuperscript{87} Section 201(b)(1).
\item \textsuperscript{88} Section 201(b)(2).
\item \textsuperscript{89} Section 201(c)(2).
\item \textsuperscript{90} Section 201(b)(3).
\end{itemize}
merce . . . .91 " 'Commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States . . . ."92

The Act also delineates when discrimination or segregation is supported by state action:

Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of statute, ordinance or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.93

Turning to the arguments relating to the constitutional bases, the courts have, on various occasions, invoked the commerce clause94 and the Interstate Commerce Act95 to prohibit acts of racial discrimination against persons moving in interstate commerce.96 It should be noted, however, that in these cases there was a state statute requiring separation of the races or racial discrimination on interstate carriers.97 These state statutes have been invalidated as imposing an undue burden on interstate commerce.98

The "commerce clause approach" in conjunction with Congressional testimony indicating that private discrimination had resulted in impairment of the interstate movement of Negroes, apparently influenced the framers of the Civil Rights Act of 1964.99 However, the inclusion of establishments which do not serve transient guests but who serve food or sell a product, "a substantial portion of . . . which . . . has moved in commerce"100 would seem to be on a less substantial constitutional footing. Not all jurists agree with the "commerce clause approach" as the

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91. Section 201(c)(3).
92. Section 201(c).
93. Section 201(d).
94. U.S. Const. art. I, § 8, cl. 3: "Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states . . . ."
95. The Interstate Commerce Act was originally enacted as 24 Stat. 379 (1887).
97. See note 95, supra.
98. A good example is Morgan v. Virginia, 328 U.S. 373 (1946), in which the Supreme Court invalidated a state statute requiring segregation of races on buses moving interstate as an undue burden on interstate commerce. For an excellent discussion of these cases, see Williams, The Commerce Clause in Civil Rights Cases, 7 N.Y.U. INTRA. L. REV. 275 (1952).
100. Section 201(c)(2). The impact on commerce would seem to be questionable on the mere basis that food had moved in commerce, but the Court in Katzenbach v. McClung, 85 Sup. Ct. 377 (1964) validated this section of the act.
proper basis for the Civil Rights Act, as indicated by the views of Justice Simpson of the Alabama Supreme Court:

[T]he administration's bill places primary reliance upon the Commerce Clause of the Constitution. The theory here is that acts of private discrimination substantially affect the flow of commerce, and because the Constitution vests in Congress a power to regulate commerce among the several States, the Congress has power to prohibit such acts of private discrimination. Many fine constitutional lawyers disagree entirely with this far-fetched construction of the Commerce Clause. . . .

In regard to discrimination or segregation supported by state action, no great constitutional impediment arises. The fourteenth amendment has been interpreted to apply to "state action," and numerous decisions essentially cover the three specific references to requisite state action in the Act.

B. Analysis of Title II

Section 201(a) states the purpose of Title II which is the heart of the public accommodations portion of the Act:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin. (Emphasis added.)

An analysis of the public accommodations sections of the act necessitates determining the applicability of the Act to the various types of public accommodations.

1. Establishments Which Provide Lodging

"[A]ny inn, hotel, motel, or other establishment which provides lodging to transient guests" is within the scope of the Act with the following exception: "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence."
Thus any establishment, including establishments with more than five rooms, can be exempt from the operation of this section of the Act if it does not provide lodging for "transient guests." In addition, any establishment which contains not more than five rooms for rent and the proprietor actually lives in the same building in which the rooms are located would be exempted from the Act's operation even though the establishment provided lodging for transient guests.

It should be noted that, even though the establishment with five rooms may be exempted from the lodging provisions of the act, if it serves food it must satisfy the food requirement specified below.

2. ESTABLISHMENTS WHICH PROVIDE FOOD

"[A]ny restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises" is within the provisions of the Act if the business' operations affect commerce. Any one of the above mentioned businesses are said to affect commerce if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves... has moved in [interstate] commerce..."

The preceding section of the Act also includes food facilities which are "located on the premises of any retail establishment; or any gasoline station." These retail establishments or gasoline stations "affect commerce" if "a substantial portion of the... gasoline or other products which it sells, has moved in commerce." Thus, the service of food on the premises of gasoline stations or retail establishments, such as department stores, can be brought under the Act, even though they do not serve transients and buy all their food locally. The only requirement for application of the Act to these establishments is the requisite movement of a "substantial portion" of gasoline or products which they sell in commerce.

3. ENTERTAINMENT FACILITIES

Establishments engaged in providing entertainment are also subject to the Act and must avoid "discrimination or segregation on the ground of race, color, religion, or national origin." "[A]ny motion picture house, theater, concert hall, sports arena, stadium or other..."

105. The Supreme Court in dealing with the lodging section of the Act in Heart of Atlanta Motel, Inc. v. United States, 85 Sup. Ct. 348 (1964), has not determined what constitutes a "transient guest," but since the commerce clause provides the constitutional basis for the Act, it would seem that the "transient" must move among the states.

106. Section 201(b)(2).

107. Section 201(c)(2).

108. Section 201(b)(2).

109. Section 201(c)(2).

110. Section 201(a).
place of exhibition or entertainment”111 comes within the purview of the Act if “it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce.”112

In this subsection, the reference to “substantial portion” found in the lodging and food sections of the Act113 has been deleted and the Act’s applicability to entertainment facilities is based upon whether the establishment “customarily” presents entertainment which has moved in commerce. The courts have not yet judicially determined exactly what portion of an establishment’s entertainment must move in commerce, before it can be said that the establishment “customarily” presents such entertainment.

4. THE PUBLIC ACCOMMODATIONS EXPANSION CLAUSE

Subsection 201(b)(4) which follows the three previously noted public accommodations sections relating to lodging, food and entertainment, greatly expands the scope of the Act. This subsection forbids “discrimination or segregation” in any establishment which is physically located within the premises of any establishment already covered by the Act or by any establishment which has any establishment already covered by the Act “physically located” within its premises. The additional requirement for the operation of this subsection is that the establishment not covered by the lodging, food or entertainment section of the Act hold itself out as “serving patrons” of the already covered establishment.114

This subsection would bring the facilities found within hotels and motels, such as clothing stores, barber shops and newsstands under the Act. The hotel or motel would probably be covered by prior sections of the Act, but, absent this subsection, the service establishments in the same building would be exempt. Particularly noteworthy is the fact that there is no need to connect these service establishments with commerce or state action as long as the hotel or motel housing the establishment comes under the original provisions of the Act.115

5. PRIVATE CLUB EXEMPTION

Subsection 201(e) provides that lodging, food and entertainment provisions of the Act “shall not apply to a private club or other establishment not in fact open to the public . . . . [However, private clubs are not excluded] to the extent that the facilities of such establishment are

111. Section 201(b)(3).
112. Section 201(c)(3).
113. Section 201(c)(2).
114. Section 201(b)(4).
115. Section 201(c)(4).
made available to the customers or patrons of a place of public accommodation as defined by the Act.

The crucial terminology in this section is that a private club must "in fact" be private, as evidenced by Senator Long's statement:

Its purpose is to make it clear that the test of whether a private club, or an establishment not open to the public, is exempt from Title II, relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence. (Emphasis added.)

Thus, a private club must be private. This clause indicates the intent of Congress to prevent a facade, under which a private club could be organized to insure the patronage of the general public of white customers to the exclusion of Negro clientele. The final clause of this subsection indicates that "a private club" may not discriminate or segregate if it serves the same patrons as those served under the food, lodging and entertainment section of the Act.

6. SWEEPING IMPLEMENTATION OF THE FOURTEENTH AMENDMENT

Section 202 implements the fourteenth amendment of the United States Constitution in its fullest capacity by its references to state action:

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

The above language indicates that without exception any establishment which is required by law to discriminate or segregate on the grounds of race, color, religion, or national origin will come within the prohibitions of the Act. The nature of the facility, be it publically owned and operated, privately owned and operated, or in fact, a private club, is immaterial. The only apparent saving provision was the Congressional determination that licensing of the establishment was not enough to constitute the state action needed to bring it under the provisions of Title II.

7. ENFORCEMENT OF TITLE II

Section 203 prohibits any person from (1) withholding or denying to any person; (2) threatening or coercing any person, or (3) punishing

116. Section 201(e).
117. BNA OPERATIONS MANUAL, CIVIL RIGHTS ACT OF 1964 349 (1964).
or attempting to deny to any person, any rights or privileges under the "public accommodations" provision of the Act. Section 204 provides for "a civil action for preventive relief" to be instituted by the "person aggrieved" against any offender of the provisions of section 203. Section 204 further provides that "the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance."\(^{110}\)

Section 204(c) allows cooperation by state and local authorities where the state or local authority has a law prohibiting practices similar to those prohibited in Title II. Thus, where criminal proceedings have been instituted under a state or local law, no civil suit may be brought under Title II until thirty days have elapsed from the notification of state authorities of the infraction.\(^{120}\)

In states where no state or local law prohibiting practices similar to those contained in the Act are found, a civil suit as provided for in section 204(a) may be instituted. However, the court may refer the case to the Community Relations Service (established by Title X of the Act\(^{121}\)) if there seems to exist a possibility of voluntary compliance with the Act's provisions. The Community Relations Service has a period of sixty days in which to consider the case, but this time can be extended (not to exceed a hundred and twenty days) if there appears to be a possibility of settlement. Under section 205, the Community Relations Service is authorized to conduct investigations, hold hearings and in all ways "endeavor to bring about a voluntary settlement between the parties."

Section 206 provides that the Attorney General may bring a civil suit by filing a complaint in "the appropriate district court of the United States" whenever he has:

reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described.\(^{122}\)

In these proceedings the Attorney General can request the chief judge of the circuit where the action is pending to empanel a three judge bench.

\(^{119}\) Section 204(a).
\(^{120}\) Section 204(c).
\(^{121}\) Title X, establishes the Community Relations Service. Its purpose is stated in § 1002:

It shall be the function of the Service to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.

\(^{122}\) Section 206(a).
At least one judge is to be a circuit judge, and at least one judge is to be a district judge of the court in which the action is pending. "An appeal from the final judgment of such court will lie to the Supreme Court."\(^{123}\)

Section 207(a) relates to the jurisdiction of the United States district courts and states that they "shall have jurisdiction of the proceedings instituted pursuant to this title." This section further states that this jurisdiction shall be exercised regardless of whether or not the aggrieved party has "any administrative or other remedies that may be provided by law." Civil suits for injunctive relief are to be the exclusive means of enforcing Title II. But Title II does not preclude any "State or local agency from asserting any right based on any other [consistent] Federal or State law."\(^{124}\)

The sections of Title II relating to enforcement of the Act do not provide for the imposition of criminal prosecutions or sanctions if a substantive right has been violated. The Act only provides for bringing a civil suit, and criminal sanction would only be imposed in the event of a contempt citation for refusal to obey an injunctive order emanating from such a suit.\(^{125}\)

C. Testing the Constitutionality of Title II

Three recent United States Supreme Court cases have tested the constitutionality and effect of Title II of the Civil Rights Act of 1964.

1. Testing § 201(b)(1) Establishments Which Provide Lodging

The first case to test the constitutionality of Title II was *Heart of Atlanta Motel, Inc. v. United States*\(^{126}\) in which a motel, which had refused to accept Negro patronage, brought a declaratory judgment action attacking the constitutionality of Title II of the Civil Rights Act of 1964 and sought injunctive relief restraining the enforcement of the Act. A three-judge bench was empaneled pursuant to section 206(b), and the motel was restrained from further violating the Act.

On appeal the motel contended that Congress had exceeded its power to regulate commerce under the Commerce Clause, that it was being deprived of its property without due process of the law and without just compensation, and that forcing the motel to rent to Negroes against its will, contravened the thirteenth amendment and imposed a form of involuntary servitude upon the motel owner. The government countered by asserting that the unavailability of accommodations for Negroes moving interstate interfered with interstate travel, that Congress under

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123. Section 206(b).
124. Section 207(b).
125. Section 204(a).
the commerce clause had the power to regulate such restraints, that the fifth amendment does not forbid reasonable regulation and that the damage resulting from such regulation need not be compensated, and, that the thirteenth amendment which was passed to abolish slavery cannot be said to place discrimination in public accommodations beyond the reach of federal and state law.

Because approximately seventy-five percent of the motel's guests were out of state transients, the application of section 201(b)(1) of the Act was not contested. Only the constitutionality of Title II was in issue. The decision considered the Civil Rights Cases\(^{127}\) of 1883 but found that the commerce clause had not been considered as a power source for the 1875 Act. Moreover, the 1875 Accommodations Act applied to all public accommodations and was not limited to accommodations affecting interstate commerce.

After noting the Congressional testimony which indicated that racial discrimination had a direct impact on interstate commerce,\(^ {128}\) the court applied the following test to determine whether Congress had properly exercised its power over commerce:

\[\text{[T]he deterministic test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more than one state" and has a real and substantial relation to the national interest.}\] \(^ {129}\)

The opinion stated that "Congress was not restricted by the fact that the particular obstruction to interstate commerce" was also "a moral . . . wrong."\(^ {130}\)

Turning to the motel's claim that it had been deprived of liberty or property under the fifth amendment, the Court stated that only two questions need be asked:

(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.\(^ {131}\)

The opinion states that Congress had a rational basis for determining that racial discrimination affected commerce (in view of Congressional testimony) and that the means selected were appropriate.

In conclusion, the Court discarded the motel's thirteenth amend-

127. 109 U.S. 3 (1883).
128. See note 99 supra.
130. Id. at 358.
131. Ibid.
ment argument and upheld the constitutionality of Title II. Although "Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination," that was a matter of policy that rests with Congress and not with the courts.

Justice Douglas in a concurring opinion expressed the view that he would rather have seen the Act based upon the fourteenth amendment than primarily upon the commerce clause, "for the former deals with the constitutional status of the individual not with the impact on commerce of local activities or vice-versa." Douglas concluded by stressing two points: (1) that the definition of state action within the Act is in concurrence with the *Shelley v. Kraemer* case; and (2) that founded upon the fourteenth amendment, individuals would have "the right to be free of discriminatory treatment (based on race) in places of public accommodations—whether intrastate or interstate . . . ."

2. TESTING § 201(b)(2) ESTABLISHMENTS WHICH PROVIDE FOOD

In *Katzenbach v. McClung*, a companion case to *Heart of Atlanta Motel*, the Supreme Court reviewed the constitutionality of Title II as applied to the provisions prohibiting discrimination in restaurants if it serves interstate travelers or if a "substantial portion" of the food it serves has moved in commerce. McClung, the owner of Ollie's Barbeque, would not serve Negroes. However, although McClung served almost exclusively local patrons, he purchased meat which had come from out of state. This meat amounted to forty-six percent of the food McClung sold. The United States district court held that "there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce."

McClung admitted that the Act applied to him, but argued that the Act was not a valid exercise of Congress' power over interstate commerce. The Government contended that "Congress had ample basis upon which to find that racial discrimination at restaurants" which receive a substantial portion of their food from other states imposes "commercial burdens of national magnitude upon interstate commerce."

The Supreme Court took special notice of the Congressional hearings indicating that a burden was being placed on interstate commerce by

132. *Id.* at 360.
133. *Id.* at 369.
134. Sections 201(d), 202. See also, Section III, A and III, B, 6 of this comment.
135. 334 U.S. 1 (1948).
140. *Id.* at 381.
discrimination in restaurants. The fewer patrons a restaurant has, the less food it sells, and thus the less food it buys. The Court indicated that racial discrimination by a local restaurant such as McClung's, resulted in less food sold. Multiplying this decrease in sales by millions of similar restaurants, the interstate sale of food stuffs would be restricted resulting in an impact on interstate commerce. The decision further indicated that Congress has on previous occasions delved into local activities where there has been an impact on interstate commerce.

The Court concluded by reversing the District Court's decision and holding that Congress acted within its power in enacting Title II to "protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce."

3. STATUS OF CONVICTIONS UNDER STATE LAW PRIOR TO THE ADOPTION OF TITLE II

The third case before the Supreme Court dealing with the problems arising under Title II is *Hamm v. City of Rock Hill*. This case did not involve the constitutionality of Title II, but concerned the status of convictions under state law for "sit-in" demonstrations which were still pending in the courts at the time of passage of the Civil Rights Act. The local ordinances and statutes under which these convictions were rendered are now in conflict with the Civil Rights Act and are superseded by the Act.

The issue confronting the Court was whether the still pending convictions or conduct occurring prior to the passage of the Act were abated by its passage. The Court in a five to four decision held that:

future state prosecutions under the Act being unconstitutional and there being no savings clause in the Act itself, convictions for pre-enactment violations [will] be equally unconstitutional and abatement necessarily follows.

The majority opinion relied on three principles: (1) enforcement of penalties under state laws now invalid would only serve vindictive purposes; (2) since federal prosecutions would be abated under similar

141. The Court analogized this situation to the case of *Wickard v. Filburn*, 317 U.S. 111 (1942). In the *Wickard* case a wheat farmer refused to conform to the federal acreage allotments, contending that he was only growing the extra wheat for his personal consumption. The Court compelled the farmer to adhere to the federal regulations indicating that if millions of farmers raised extra wheat for their own consumption, it would have a tremendous effect on the wheat market.


144. 85 Sup. Ct. 384 (1964).

145. *Id.* at 391.
circumstances, state convictions should also be abated under the supremacy clause; and (3) since future state prosecutions could not be had, and since there was no saving clause in the Act, the state convictions should be abated.

The four dissenting Justices strongly objected to the majority's interpretation of the law. The dissenters argued that the Congress never intended to abate prior state convictions by passage of the Act, that the intent of the "Saving Statute" was to deter the courts from imputing Congressional intent to abate prior convictions, and that these were not federal convictions, but state convictions and no federal doctrine should be used to abate them.

IV. CONCLUSION

The future of civil rights is difficult to envision, but it is apparent that the Civil Rights Act of 1964 will be a strategic force in the molding of future human relations. In many respects the tables of racial conflict have been turned by the Act:

where segregation had the support of local and state law, minority groups now enjoy support of federal laws; where protesters of segregation were law violators, segregators are now guilty of a civil or criminal offense.

At first blush the constitutional basis of the Act seems questionable, when considering the impact on interstate commerce of a restaurant which does not serve transients but merely buys food out of state. Yet, in view of the trend of Supreme Court decisions involving racial discrimination, there can be no doubt but that the courts will continue to sustain the constitutionality of the Act.

The next few years will bring about a great many interpretations of the 1964 Act since many of its terms have not yet been defined by the

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146. 16 Stat. 432 (1871).
149. E.g., NAACP v. Button, 371 U.S. 415 (1963) (upheld right of NAACP and its lawyers to meet to aid individuals denied constitutional rights); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (NAACP President could not be compelled to divulge names on a membership list in his possession at the time of committee investigation); Edwards v. South Carolina, 372 U.S. 229 (1963) (reversed criminal conviction of Negroes picketing on state capitol grounds protesting discrimination); Bailey v. Patterson, 369 U.S. 31 (1962) (no state may require segregation of inter or intra state transportation facilities); United States v. Alabama, 362 U.S. 602 (1959) (district court could entertain action against state when voting rights were restricted on racial basis); NAACP vs. Alabama, 357 U.S. 449 (1958) (state could not require production of NAACP membership list); Brown v. Board of Educ., 349 U.S. 294 (1955) (segregation of public schools declared unconstitutional); Barrows v. Jackson, 346 U.S. 249 (1953) (state action enforcing racially restrictive covenants was unconstitutional).
courts. Nevertheless, it is extremely doubtful if the "racial pendulum" will reverse its swing in the near future.

In view of the present racial situation, it is necessary to determine whether the course pursued by Congress was a proper one from the viewpoint of purpose rather than means. The Civil Rights Act of 1964 is no panacea for racial conflict. Many persons feel that this type of forced integration engenders greater animosity between the races. However, it could be contended that widespread integration in public accommodations is accomplished more easily and with less animosity than a token change. The argument against voluntary integration as a cause of economic injury is eliminated by the terms of the Act which place all establishments on an equal footing. White patrons cannot legitimately prefer one establishment over another because of a lack of colored customers.

Perhaps the loudest protest of those opposing the Civil Rights Act (with the possible exception of the cry that federal power is again encroaching upon the states) is that social change cannot be legislated and that only a change in thinking can bring about effective integration. However, solutions for major social problems can and must be guided by changing institutional patterns. The Civil Rights Act of 1964 is destined to make its imprint on these patterns.

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