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CONSTITUTIONAL DIALOGUE AND THE CIVIL RIGHTS ACT OF 1964

JOEL K. GOLDSTEIN*

I. INTRODUCTION

The Civil Rights Act of 1964¹ represented a seminal legislative accomplishment of the twentieth century. Its eleven titles addressed racial discrimination in voting (Title I), public accommodations (Title II), public facilities (Title III), public education (Title IV), publicly financed programs (Title VI) and employment (Title VII).² It sought to remedy legislatively the Jim Crow laws and practices that had long contributed to making blacks second-class citizens in America and it provided the Executive Branch tools, especially in Title III and VI, to help implement *Brown v. Board of Education*.³

In view of the bill's focus on racial discrimination, one would expect the legislative discussion to have centered around the injustice of segregation and the burden it imposed on American society. Much of it did. Yet legislators devoted a substantial portion of their attention to constitutional issues relevant to the bill.

Academic discussions of constitutional interpretation tend to focus on the work of the federal judiciary generally and the Supreme Court specifically. Constitutional law, especially at America's law schools but more universally, too, focuses on the pronouncements of the Supreme Court. In recent years, however, a number of scholars have noted that a significant body of constitutional interpretation does, and should, occur outside of the courts, in the executive and legislative branches of our federal government.⁴ Abundant

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964).

2. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237 (2001).

3. 347 U.S. 483 (1954).

4. See, e.g., NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL*

examples exist of constitutional discussion outside the judiciary. Yet it is hard to imagine an instance where constitutional interpretation so dominated discussion of proposed legislation as was the case with the Civil Rights Act of 1964. The executive and legislative branches engaged in an extensive dialogue that focused heavily on the constitutional issues, real and imagined, which the proposed legislation raised.⁵ The discussion was wide-ranging, touching on a number of areas of constitutional law. To be sure, some legislators and witnesses advanced dubious constitutional notions to serve political ends, yet much of the discussion was serious, informed, and thoughtful. It reflected different understandings of constitutional language and history, competing visions of key concepts of constitutional law, and an earnest effort to grapple with judicial precedents and past legislative activity. Congressional leaders held hearings, in part, to “produce a final record clarifying the constitutional powers of Congress to act in this field.”⁶ Whereas proponents found clear and pervasive constitutional authority, opponents labeled constitutional objections “insurmountable”⁷ and prophesied that passage would spell the end of constitutional government in America.⁸

Although Congress debated the constitutionality of several provisions of the Civil Rights Act of 1964, much of the debate focused on whether Title II, addressing discrimination in places of public accommodations, was constitutional. It was appropriate that it did. Title II addressed a pressing national problem. In the early 1960s, the second-class status of blacks in America was nowhere more evident than in the segregated patterns of service which persisted in Southern states. At restaurants, motels, and other businesses ostensibly open to the public, blacks were routinely denied service or served at separate facilities or areas.

Of the three branches of the national government, the Court had, of course, been the most progressive during the 1950s and early 1960s in addressing Jim

PROCESS (1988); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

5. See, e.g., *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. 1151 (1963) [hereinafter *Civil Rights—Public Accommodations*] (statement of Sen. Hubert H. Humphrey) (“A great deal of time has been expended . . . on the Commerce Clause. . .”).

6. *Id.* at 1 (statements of Sen. Warren G. Magnuson); *id.* at 180 (statement of Sen. Philip A. Hart) (“It is important that we have the most careful analysis of the appropriate constitutional powers which are available on which to base our legislative proposals.”).

7. *Id.* at 884 (testimony of Gov. Donald Russell).

8. *Civil Rights—The President’s Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong. 36 (1963) [hereinafter *Civil Rights—President’s Program*] (statements of Sen. Samuel J. Ervin, Jr.) (“[W]e might as well throw the Constitution out the window. . .”); see also *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong. 388 (1964) [hereinafter *Rules Committee*] (statement of Rep. William M. Tuck) (arguing that the Act “destroys our Constitution and shatters our Bill of Rights”).

Crow laws and practices. Under Chief Justice Earl Warren's leadership, the Court had struck down discriminatory practices, generally in unanimous decisions. Although the Court had declared "separate but equal" treatment a denial of equal protection in public schools⁹ and other state-operated facilities during the 1950s, it had not held that the Constitution precluded private entrepreneurs from discriminating based on race. By the early 1960s, the Court had gone about as far as it could go on that issue without splintering. A series of "sit-in" cases raised the constitutionality of private discrimination in places of public accommodation. The Court reached a constitutional impasse by the spring of 1963.¹⁰

At that same time, independently and coincidentally, the political branches commenced a "constitutional dialogue"¹¹ that ultimately resulted in a political resolution to the issue that stymied the Court. Much of the discussion centered on the scope of the Commerce Clause and the Fourteenth Amendment, potential sources of congressional power for the legislation, and the concepts of federalism and government regulation of private property. The constitutional debate involved two separate discussions. One addressed whether Title II was constitutional. Proponents argued that the Commerce Clause and section 5 of the Fourteenth Amendment gave Congress ample authority to pass Title II. Critics claimed the legislation would expand the power of the federal government at the expense of the states.¹² The Tenth Amendment to the Constitution reserved the police power to the states.¹³ If "the theory" behind Title II was valid, the Federal Government could "regulate and coerce every activity, whether State or individual, within the bounds of any and every State."¹⁴ The legislation would deprive of property those operating places of public accommodations without due process of law.¹⁵

The discussion did not, however, simply turn on whether the legislation was constitutional. A second debate, among proponents of the bill, turned on whether the Commerce Clause or the Fourteenth Amendment furnished the proper basis for Title II.

This Article presents a case study of the constitutional discussion regarding Title II. The legislative discussion of Title II provided a rich consideration of

9. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

10. See, e.g., Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 51 n.78 (2003) (discussing the Court's "ongoing internal dispute resulting from the sit-in movement").

11. I take the term from FISHER, *supra* note 4.

12. See *Civil Rights—Public Accommodations*, *supra* note 5, at 83–84 (statements of Sen. Strom Thurmond).

13. *Id.* at 85.

14. *Id.* at 88.

15. *Id.* at 84.

constitutional issues. Although officials of the executive branch did much of the heavy lifting, many legislators were heavily engaged, especially in expressing constitutional objections to the legislation and in formulating the case for using the Fourteenth Amendment. As such, the exchange represented an often ignored phenomenon—constitutional dialogue in the political branches. Legislators took seriously their duty to interpret the Constitution. They did so, though, with the understanding that the Supreme Court was the ultimate constitutional interpreter. They sought to craft legislation that would coincide with the Court's constitutional conclusions. The executive-legislative discussion of constitutional issues raised theories of constitutional interpretation that generally did not find a judicial voice. Moreover, the constitutional dialogue included the Supreme Court. The legislative discussion, and the decisions which flowed from it, profoundly influenced the constitutional issues the Court faced. Indeed, the political branches played a significant role in addressing and resolving the constitutional issues involved, and ultimately the Court was disposed to defer to it.

II. PROPOSING LEGISLATION: THE EXECUTIVE BRANCH

The Kennedy Administration had moved slowly regarding Civil Rights legislation in early 1963, offering very modest legislation in February of that year, which focused on voting rights. The Administration had concluded that there was little interest in civil rights, in Congress or the country.¹⁶ As Burke Marshall, Assistant Attorney General for the Civil Rights Division, put it, “the problem of the Negro was still invisible to the country at large until the spring of 1963.”¹⁷ As such, prospects for legislative success seemed unlikely.¹⁸ Senate Majority Leader Mike Mansfield thought a Democratic President could not produce civil rights legislation.¹⁹ Mansfield's predecessor, Vice President Lyndon B. Johnson, was also pessimistic.²⁰

16. Third Oral History, Interview by Anthony Lewis with Burke Marshall, at 65 (June 13, 1964) (transcript available in the John F. Kennedy Library, Oral History Program).

17. *Id.* at 61 (transcript available in the John F. Kennedy Library, Oral History Program) (proposing legislation would be “gesture”); Seventh recorded interview by Anthony Lewis with Robert F. Kennedy and Burke Marshall, at 549 (Dec. 22, 1964) (transcript available in the John F. Kennedy Library, Oral History Program) (stating no public demand for legislation before Birmingham).

18. *Civil Rights—President's Program*, *supra* note 8, at 110 (testimony of Atty. Gen. Robert F. Kennedy); *see also* Interview by Anthony Lewis with Burke Marshall, *supra* note 16, at 65.

19. Interview by Anthony Lewis with Burke Marshall, *supra* note 16, at 106; Seventh recorded interview by Anthony Lewis with Robert F. Kennedy and Burke Marshall, *supra* note 17, at 549–50; Fifth recorded Interview by Anthony Lewis with Burke Marshall, at 106–07 (June 20, 1964) (transcript available in the John F. Kennedy Library, Oral History Program).

20. Interview by Anthony Lewis with Burke Marshall, *supra* note 16, at 112.

Civil rights protests had placed on the Supreme Court's docket in the early 1960s the issue of racial discrimination in public places. Black students in a number of Southern states staged peaceful sit-ins at lunch counters or other segregated facilities. The students, having been routinely arrested and convicted, challenged these events as denials of their right to Equal Protection of the laws. Although petitioners asked the Court to find state action in the police conduct and judicial enforcement,²¹ the Court proceeded more cautiously, ruling for plaintiffs but on narrower grounds that avoided the constitutional issue. For instance, in *Garner v. Louisiana*,²² the Court struck down convictions of protestors for disturbing the peace but did so on the narrow grounds that the convictions were so lacking in evidentiary support that they violated Due Process.²³ Only Justice Douglas was prepared to reach the ultimate constitutional issue and find an Equal Protection violation. He argued that restaurants, though "private enterprises," were "public facilities in which the States may not enforce a policy of racial segregation."²⁴ Louisiana could not enforce through executive or judicial action²⁵ its "custom"²⁶ of segregation in private businesses affected with a public interest.

During the 1962 term, the Court considered six other "sit-in" cases.²⁷ In four of the cases,²⁸ state courts had convicted students, most of whom were African-Americans, of trespass for staging sit-ins at segregated lunch counters. In *Shuttlesworth v. Birmingham*, two African-American ministers were convicted of aiding and abetting a violation of Birmingham, Alabama's criminal trespass code by encouraging two college students to stage the sit-in at issue in *Gober*.²⁹ In *Wright v. Georgia*, six Negro youths were convicted for breach of the peace "for peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon of Monday, January 23, 1961."³⁰ In near unanimous decisions announced on May 20, 1963, the Court reversed the convictions in all of the cases.

21. See JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 307 (1994).

22. 368 U.S. 157 (1961).

23. *Id.* at 163.

24. *Id.* at 177 (Douglas, J., concurring).

25. *Id.* at 178, 179.

26. *Id.* at 181.

27. *Avent v. North Carolina*, 373 U.S. 375 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Petersen v. City of Greenville*, 373 U.S. 244 (1963).

28. *Avent*, 373 U.S. 375; *Gober*, 373 U.S. 374; *Lombard*, 373 U.S. at 268-69; *Petersen*, 373 U.S. at 245.

29. *Shuttlesworth*, 373 U.S. at 263.

30. *Wright*, 373 U.S. at 285.

In the five “sit-in” cases, petitioners claimed in part that their rights to Equal Protection of the laws were violated by their arrests. In three of the cases, local ordinances mandated racial segregation in restaurants.³¹ In these cases, the Court held that the presence of the ordinance foreclosed any defense that the entrepreneur was exercising private choice.

When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State’s criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.³²

No New Orleans ordinance prohibited the McCrory Five and Ten Cent Store from serving blacks.³³ Accordingly, the Court could not resolve the state action riddle so easily in *Lombard v. Louisiana*, a case in which students were arrested for sitting in at a whites-only lunch counter.³⁴ Yet a few days before the students were arrested, the Superintendent of Police and the Mayor of New Orleans had declared in widely publicized statements that the police would act to stop sit-in demonstrations.³⁵ The Court construed the statements as endorsing segregated service and, accordingly, deemed them to be the equivalent of local ordinances to that effect.³⁶ Similarly, in *Wright v. Georgia*, the Court found state action in the police conduct in arresting the Negro basketball players in a public park. The officers acted as they did “to enforce racial discrimination in the park.”³⁷

The presence of ordinances or constructive ordinances in the cases decided during the 1962 term allowed the Court to dodge the basic constitutional question: Did the Equal Protection Clause preclude a private entrepreneur from refusing services to blacks based on their race? In each case, the Court could plausibly attribute the refusal to serve blacks to public policy, not private choice. The near unanimous decisions on the narrow issues concealed a significant division in the Court on the basic constitutional issue that the “sit-in” cases raised.

Some, like Justice Black, believed that the Fourteenth Amendment did not preclude a private entrepreneur from refusing to serve blacks in his restaurant. During the Court’s conference on November 9, 1962, he said:

31. See, e.g., *Avent*, 373 U.S. at 257 n.8 (Harlan, J., dissenting); *Gober*, 373 U.S. at 255 n.4 (Harlan, J., dissenting); *Petersen*, 373 U.S. at 246–47.

32. *Petersen*, 373 U.S. at 248.

33. *Lombard*, 373 U.S. at 268.

34. *Id.*

35. *Id.* at 269–70.

36. *Id.* at 273.

37. *Wright v. Georgia*, 373 U.S. 284, 292 (1963).

We have a system of private ownership of property—we should not turn down these rights by constitutional construction. I believe that a store owner, the same as a home owner, has a right to say who can come on his premises and how long they can stay. A store owner, like a house owner, can tell a customer to leave. If he has that right, he cannot be helpless to call the police and get help to throw the customer out. One man on another man's property can be thrown off with force, if necessary. That rule is necessary if private property is to be protected. I would rank stores along with homes, although there is, of course, a difference in history and sentiment.³⁸

Justices Clark, Harlan, and Stewart agreed with Black's views.³⁹ On the contrary, Justice Douglas thought such segregation unconstitutional, a view with which Justice Goldberg sympathized.⁴⁰ Goldberg did not, however, join Douglas's concurrence in *Lombard*. Chief Justice Warren and Justice Brennan urged the ultimate strategy adopted in order to decide the cases in a near-unanimous fashion without reaching the basic, and divisive, constitutional issue.

As the Court reached an impasse on the constitutional issue, events at Birmingham changed the political landscape. The events there and elsewhere in the spring of 1963 transformed public opinion. National television audiences witnessed Bull Connor's police commit barbaric assaults on "defenseless schoolchildren," attacking them with clubs, fire hoses, and dogs during a Good Friday march.⁴¹ The brutal display was a national embarrassment. The events moved the Kennedy Administration to expand the legislative proposals it had offered earlier that year.⁴² On June 11, 1963, President Kennedy gave an eloquent nationally broadcast address in which he outlined the civil rights legislation he would propose. The "moral issue" involved was "as old as the scriptures and . . . as clear as the American Constitution,"⁴³ said Kennedy. The President followed his address with more sweeping legislative proposals which formed the basis of the Civil Rights Act of 1964.

38. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 712 (Del Dickson ed., 2001).

39. *Id.* at 714–16.

40. *Id.* at 714, 716.

41. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong. 907 (1963) [hereinafter *Civil Rights*] (statement of Rep. Emanuel Celler).

42. John F. Kennedy, The President's News Conference (May 22, 1963), in THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, JAN. 1–NOV. 22, 1963, at 423 (1964); John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), in THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, JAN. 1–NOV. 22, 1963, at 469 [hereinafter Radio and Television Report] ("The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them.").

43. Radio and Television Report, *supra* note 42, at 469.

Kennedy met on several occasions in June 1963 with legislative leaders to discuss the proposed legislation. The Administration's proposal won broad support from leadership except Republican Leader Everett Dirksen who initially balked at supporting Title II dealing with discrimination in places of public accommodations.⁴⁴ Ultimately, Senator Mike Mansfield introduced the Administration's bill, S. 1731, and he and Dirksen introduced S. 1750, the same bill without the public accommodations provision Dirksen was not prepared to support.⁴⁵ That section was introduced as S. 1732.⁴⁶ S. 1731 and S. 1750 were referred to the Senate Judiciary Committee; S. 1732 was referred to the Senate Commerce Committee.⁴⁷ In the House, Representative Emanuel Celler introduced the Administration's bill, H.R. 7152, which was referred to the Judiciary Committee that he chaired.⁴⁸

Much of the discussions addressed the constitutional basis of the public accommodations section of the proposed bill, Title II. To a great extent, it paralleled the 1875 Civil Rights Act.⁴⁹ The 1875 Act had rested on section 5 of the Fourteenth Amendment and had imposed criminal sanctions for anyone who prevented someone from using railroads, hotels, or theaters based on their race.⁵⁰ In *The Civil Rights Cases*, the Court held the Act unconstitutional because the Fourteenth Amendment reached only State, not private, action.⁵¹ Like its nineteenth-century predecessor, Title II prohibited owners of hotels, restaurants, and other places of public accommodations from discriminating based on race. Southerners insisted that precedent rendered Title II unconstitutional.⁵² The Court had not, however, ruled that Congress lacked power under the Commerce Clause to pass a public accommodations bill like Title II. *The Civil Rights Cases* had specifically not considered whether the Commerce Clause authorized the 1875 Act.⁵³

Not all thought the Constitution as clear as President Kennedy suggested. While opponents of civil rights legislation denied that the Federal Government had any power to act, those sympathetic to the cause divided between two theories of constitutional power. On the one hand, section 1 the Fourteenth Amendment forbade States from denying any person the equal protection of

44. See RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 15–16 (2001).

45. *Civil Rights—President's Program*, *supra* note 8, at 23–25 (statements of Sen. Everett Dirksen).

46. *Id.*

47. *Id.*

48. H.R. REP. NO. 88-914, at 18–19 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2413.

49. 18 Stat. 235 (1875).

50. *Civil Rights Cases*, 109 U.S. 3, 9–10 (1883).

51. *Id.* at 11.

52. See *Civil Rights—Public Accommodations*, *supra* note 5, at 473 (statement of Gov. George Wallace); *id.* at 500–01 (statements of Gov. George Wallace and Sen. Strom Thurmond).

53. *Civil Rights Cases*, 109 U.S. at 18, 19.

the law.⁵⁴ Section 5 empowered Congress to enforce the terms of the Amendment.⁵⁵ The Equal Protection Clause, which was designed largely to redress racial subordination of blacks, seemed to speak most directly to the “moral issue.” Some thought the Administration could best demonstrate its sincerity on the moral issue by relying on the Fourteenth Amendment.⁵⁶ Yet much discrimination arguably involved private action, and the Supreme Court in *The Civil Rights Cases* had held that Congress could only address “state action,” not private discriminatory conduct, under the Fourteenth Amendment. Alternatively, the Commerce Clause, which allowed Congress to regulate commerce among the states, had proved an efficacious instrument to address a host of problems, including some intrastate activities which affected the national economy. Yet the Commerce Clause’s main focus was not race, and some worried that its use would signal broader federal regulation.

The choice between the Commerce Clause and Fourteenth Amendment had partisan ramifications, too. History linked the Republican Party to the Fourteenth Amendment and the Democratic Party to the Commerce Clause.⁵⁷ Republican votes would be needed to pass legislation, especially in the Senate where a two-thirds vote was required to stop a filibuster; but in 1963, Republicans still associated the Commerce Clause with Franklin D. Roosevelt and were loath to use that provision as the constitutional basis for the bill.⁵⁸ Republicans might be more willing to support Kennedy’s legislation if it rested on the Fourteenth Amendment.

The discussion regarding the proper basis for the Civil Rights bill extended to the highest levels of the executive branch. President Kennedy “raised a question” regarding the constitutional basis of the proposed legislation that resulted in “quite a number of conversations.”⁵⁹ Indeed, Robert F. Kennedy recalled more time being spent on the constitutional issue than on any other facet of the proposal.⁶⁰ The Kennedys had doubts regarding the issue and initially favored using the Fourteenth Amendment. The Commerce Clause had important Justice Department advocates, too, namely Burke Marshall and

54. U.S. CONST. amend XIV, § 1.

55. *Id.* § 5.

56. See, e.g., Arthur Krock, *Rights Bill Strategy: Sidestepping of the 14th Amendment in Kennedy Proposal Examined Bright Light ‘Narrow’ Grounds*, N.Y. TIMES, June 30, 1963, at 115.

57. *Civil Rights*, *supra* note 41, at 1870 (statement of Joseph D. Rauh); *id.* at 1947 (statement of Walter Reuther).

58. Interview by Larry J. Hackman with Burke Marshall, as Assistant Attorney General for the Civil Rights Division, at 4–5 (Jan. 19–20, 1970) (transcript available in the John F. Kennedy Library, Robert F. Kennedy Oral History Program).

59. Interview by Anthony Lewis with Robert F. Kennedy, at 498 (Dec. 1964) (transcript available in the John F. Kennedy Library, Oral History Program).

60. *Id.*

Archibald Cox.⁶¹ Ultimately Marshall's arguments apparently convinced the Kennedys.⁶²

Strategic considerations also shaped the Administration's approach. A bill resting on the Commerce Clause would come under the jurisdiction of the Senate Committee on Commerce, which progressive Senator Warren Magnuson chaired. A bill predicated on the Fourteenth Amendment would have fallen under the jurisdiction of the Judiciary Committee chaired by arch segregationist Senator James Eastland of Mississippi.⁶³

III. CONGRESS AND CONSTITUTIONAL ISSUES

A. *The Commerce Clause*

Congressional proponents of Title II divided over the constitutional basis for the legislation. Some emphasized the Commerce Clause,⁶⁴ others the Fourteenth Amendment.⁶⁵ A third group declined to choose between the two approaches⁶⁶ or thought it prudent to rely on both.⁶⁷ The Kennedy Administration relied on both provisions, but placed principal emphasis on the Commerce Clause.⁶⁸ During the course of the summer of 1963, the Administration's emphasis on the Commerce Clause increased. The Administration's reliance on the Commerce Clause as the constitutional basis for Title II turned largely on its conclusion that it clearly gave Congress authority to legislate.⁶⁹ Robert Kennedy thought "[t]here is no question but

61. *Civil Rights—Public Accommodations*, *supra* note 5, at 28 (testimony of Atty. Gen. Robert F. Kennedy).

62. ROBERT KENNEDY: IN HIS OWN WORDS 174 (Edwin O. Guthman & Jeffery Shulman eds., 1988).

63. *Civil Rights—Public Accommodations*, *supra* note 5, at 838 (comments of Sen. John Pastore).

64. *Civil Rights—President's Program*, *supra* note 8, at 96 (testimony of Atty. Gen. Robert F. Kennedy) (stating that the Administration bill "relies primarily on the commerce clause").

65. See, e.g., *Civil Rights—Public Accommodations*, *supra* note 5, at 795–96 (statement of Sen. John Sherman Cooper); *Civil Rights*, *supra* note 41, at 2586 (testimony of Rep. Richard S. Schweiker).

66. See, e.g., *Civil Rights—Public Accommodations*, *supra* note 5, at 776 (testimony of Dean Erwin Griswold) (calling both approaches "strong and embracing" and advocating use of both); *Civil Rights*, *supra* note 41, at 1874 (testimony of Joseph Rauh).

67. See *Civil Rights—Public Accommodations*, *supra* note 5, at 1152 (statement of Sen. Hubert H. Humphrey); *id.* at 273–74 (letter from Prof. Louis H. Pollak).

68. *Civil Rights*, *supra* note 41, at 1376 (testimony of Atty. Gen. Robert F. Kennedy) ("rely[ing] primarily upon the commerce clause"); *id.* at 1387–88 (testimony of Atty. Gen. Robert F. Kennedy).

69. *Civil Rights—Public Accommodations*, *supra* note 5, at 26 (statement of Atty. Gen. Robert F. Kennedy); *id.* at 28 (statement of Atty. Gen. Robert F. Kennedy); *Civil Rights*, *supra* note 41, at 1376 (statement of Atty. Gen. Robert F. Kennedy) (stating that there can be "no real question" about Congress's authority under Commerce Clause).

that the Supreme Court would uphold the constitutionality” of Title II.⁷⁰ To be sure, the bill addressed a “moral issue,” but Congress had attacked other moral issues—child labor, prostitution, gambling—under the Commerce Clause.⁷¹

The Kennedy Administration made the opening pitch as Congress debated the scope of the Commerce Clause. Robert Kennedy testified before a subcommittee of the House Judiciary Committee and before the Senate Committees on Commerce and on the Judiciary. Much of his testimony addressed constitutional issues as did that of his associate, Burke Marshall. Kennedy first appeared before the House subcommittee on June 26, 1963, and his approach there was illustrative. Although much of his presentation outlined the proposed legislation and its moral justifications, Kennedy devoted fourteen paragraphs to the constitutional issues.⁷² Kennedy pointed out that two constitutional provisions related to Title II: the Commerce Clause and the Fourteenth Amendment.⁷³ The former granted Congress “extensive power” to address “practices which burden the free flow of interstate commerce or otherwise affect national trade.”⁷⁴ “There can be no real question about the authority of the Congress to deal with discriminatory practices by enterprises whose business affects interstate commerce or interstate travel.”⁷⁵

Discrimination at places of public accommodation clearly affected interstate commerce and travel. The restrictions imposed on Negro travelers burdened interstate travel. “Our whole economy suffers,” said Kennedy, and “the Nation’s business is impaired.”⁷⁶ Business did not move into areas that practiced discrimination. Travel and commerce were reduced. Even local discrimination imposed a “squeeze” on commerce.⁷⁷

Kennedy offered the Equal Protection Clause as an alternative basis.⁷⁸ Much had changed since the Court decided *The Civil Rights Cases*, said Kennedy.⁷⁹ Changes in social facts might cause the Court to view Congress’s powers under section 5 of the Fourteenth Amendment differently.⁸⁰ Kennedy thought, on June 26, 1963, at least, that the contemporary Court would reverse *The Civil Rights Cases* and uphold Title II.⁸¹ Still, the Commerce Clause was a safer, less controversial basis.

70. *Civil Rights—Public Accommodations*, *supra* note 5, at 156; *see also id.* at 166–67.

71. *Civil Rights—President’s Program*, *supra* note 8, at 96 (testimony of Atty. Gen. Robert F. Kennedy).

72. *Civil Rights*, *supra* note 41, at 1375–77.

73. *Id.* at 1375–76.

74. *Id.*; *see also id.* at 1389.

75. *Id.* at 1376.

76. *Id.* at 1374.

77. *Civil Rights*, *supra* note 41, at 1374 (testimony of Atty. Gen. Robert F. Kennedy).

78. *Id.* at 1387–88.

79. *Id.* at 1376.

80. *Id.* at 1376, 1387.

81. *Civil Rights*, *supra* note 41, at 1395, 1410, 1415, 1417.

Five days later, Kennedy began similar testimony to the Senate Commerce Committee, which he gave over a three-day period.⁸² Again, in his opening statement, he emphasized the Commerce Clause as the safest basis for Title II while opining that section 5 of the Fourteenth Amendment provided a suitable, but more constitutionally controversial, alternative.⁸³ He added an important wrinkle to his presentation. To rebut the contention that Title II infringed on rights of private property, he presented thirty-six federal statutes in which Congress had regulated private business under the Commerce Clause.⁸⁴ He also offered a list of statutes and ordinances in nine Southern states that required private businesses to segregate.⁸⁵ Private business could hardly claim regulatory immunity if Congress and state legislatures had been subjecting it to such measures for so long. Much of Kennedy's testimony related to constitutional issues raised by questions from Committee members. For instance, Senators John Pastore, Norris Cotton, Thruston Morton, and Frank Lausche quizzed the Attorney General regarding the Fourteenth Amendment.⁸⁶ Senator Mike Monroney focused on the scope of the Commerce Clause.⁸⁷ Senator Strom Thurmond questioned Kennedy on a range of constitutional issues relating to Title II, which covered more than thirty-five pages of the hearings on July 1.⁸⁸

Burke Marshall followed Kennedy to the witness stand before the Senate Commerce Committee after the July 4 break. While the first half of his opening statement addressed the moral basis of Title II, the second half addressed constitutional issues.⁸⁹ He discussed "additional aspects" of the Commerce Clause rationale that supported the Administration's "belief that legislation enacted pursuant to that clause would be clearly constitutional."⁹⁰ His statement was apparently designed to fill gaps in Kennedy's testimony and to address subjects committee questions had raised. For instance, he began by stating reasons why "discrimination itself . . . adversely affects interstate commerce."⁹¹ He explained:

Section 2 of the bill describes in detail the effect of racial discrimination on national commerce. Discrimination burdens Negro interstate travelers and thereby inhibits interstate travel. It artificially restricts the market available for interstate goods and services. It leads to the withholding of patronage by

82. *Civil Rights—Public Accommodations*, *supra* note 5, at 17.

83. *Id.* at 23, 27–28.

84. *Id.* at 19.

85. *Id.* at 20–21.

86. *Id.* at 25–28, 57–58, 73–75, 76–78.

87. *Civil Rights—Public Accommodations*, *supra* note 5, at 66–71.

88. *Id.* at 83–120.

89. *Id.* at 205–07.

90. *Id.* at 206.

91. *Id.*

potential customers for such goods and services. It inhibits the holding of conventions and meetings in segregated cities. It interferes with businesses that wish to obtain the services of persons who do not choose to subject themselves to segregation and discrimination. And it restricts business enterprises in their choice of location for offices and plants, thus preventing the most effective allocation of national resources.⁹²

He also cited substantial precedent to support the proposition that Congress could regulate intrastate activity that affected interstate commerce.⁹³

Finally, Kennedy testified before the Senate Judiciary Committee for nine days beginning July 18, 1963.⁹⁴ Much of the testimony related to Title II and constitutional issues pertaining to it. Kennedy again noted the Administration's primary reliance on the Commerce Clause.⁹⁵ The Fourteenth Amendment raised "very far-reaching and grave issues" that Kennedy outlined, especially relating to the licensing theory of state action which was the basis of legislation Senator John Sherman Cooper and Senator Thomas Dodd had introduced.⁹⁶ Still, the Administration was prepared to draw upon the Fourteenth Amendment to attack conventional forms of state action.⁹⁷ Senator Sam Ervin interrogated Kennedy at length for the nine days, often on constitutional issues.

Kennedy and Marshall were by no means the sole spokespersons for the Commerce Clause approach. Other Democrats also noted the capacious nature of the Commerce Clause. Congress had used this "most sweeping and significant direct source of power available to the National Government" in "many and varied ways to meet the changing nature of our Nation's life and economy."⁹⁸ Senator Philip Hart explained that the clause helped promote the movement of goods in interstate commerce, remove obstacles to commerce, stimulate commerce, and even to prohibit intrastate activities "which interfere or obstruct in a substantial way the freedom of commerce between the States."⁹⁹ Senator Warren Magnuson also articulated an expansive view of the black letter law relating to the clause that was articulated more than two decades earlier:

The Court has held over and over again that the power of Congress over interstate commerce is not confined to the regulation of commerce between

92. *Civil Rights—Public Accommodations*, *supra* note 5, at 206–07.

93. *Id.* at 207.

94. Kennedy also testified on July 24, 25, 30, 31, August 1, 8, 23, and September 11, 1963. See *Civil Rights—President's Program*, *supra* note 8.

95. *Id.* at 96.

96. *Id.*

97. *Id.*

98. *Civil Rights—Public Accommodations*, *supra* note 5, at 181 (statement of Sen. Phillip Hart).

99. *Id.*

States; it extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.¹⁰⁰

Congressmen repeatedly challenged witnesses regarding the scope of the Commerce Clause. In response to questions from Senator Thurmond, Marshall also offered a broad test. Commerce, he said, “encompasses all matters that affect the national economy, that involve more than one State.”¹⁰¹ Marshall elaborated in the following exchange with Senator Winston Prouty:

Senator Prouty. By the standards you have set forth in your statement, is there any form of commerce which does not have an impact or influence on interstate commerce, and which is outside of the scope of congressional power of regulation?

Mr. Marshall. Senator, I think Congress has the power under the commerce clause to deal with any practice, any commercial practice, which is engaged in any large numbers of businesses and which in a total sense affects the economy and interstate commerce. And I think that power, in dealing with that kind of a problem, gives Congress the power to deal, to regulate very small businesses.

Senator Prouty. In effect the answer to my question then in “No”?

Mr. Marshall. Well, Senator, I think there has to be a substantive problem that Congress is dealing with. I don’t think Congress can use the power of the commerce clause to deal with a problem that has nothing to do with commerce as such, that is it can’t use the power of the commerce clause to deal with something totally unrelated to commercial realities of our national economy.¹⁰²

The Administration argued that Congress could use the Commerce Clause to regulate any activity that affected interstate commerce; there was no requirement of a substantial effect.¹⁰³ Although Marshall had told Senator Prouty that Congress could regulate “any commercial practice,” in the same exchange, he adopted the broader formulation which allowed Congress to address activities related to “commercial realities of our national economy.”¹⁰⁴

100. *Id.* at 155.

101. *Id.* at 239.

102. *Id.* at 216–17.

103. *Civil Rights—Public Accommodations*, *supra* note 5, at 173 (testimony of Atty. Gen. Robert F. Kennedy); *see also id.* at 241 (testimony of Asst. Atty. Gen. Burke Marshall); *id.* at 771 (testimony of Dean Erwin Griswold) (citing *United States v. Darby*, which extended federal power to intrastate activities which “so affect” interstate commerce); *Civil Rights—President’s Program*, *supra* note 8, at 106 (testimony of Atty. Gen. Robert F. Kennedy) (stating that court decisions make it “quite clear” that the test is “affect interstate commerce”).

104. *Civil Rights—Public Accommodations*, *supra* note 5, at 216–17; *see also id.* at 1183, 1190 (Brief of Prof. Paul A. Freund) (referring not only to Congress’s ability to regulate

The Administration conceded that human dignity, not economic concerns, motivated the legislation. That did not, however, counsel against invoking the Commerce Clause. Senator Thurmond asked Kennedy rhetorically whether the acts he cited “were primarily designed to regulate economic affairs of life and that the basic purpose of this bill is to regulate moral and social affairs?”¹⁰⁵ Kennedy replied:

Well, Senator, let me say this: I think that the discrimination that is taking place at the present time is having a very adverse effect on our economy. So I think that it is quite clear that under the commerce clause even if it was just on that aspect and even if you get away from the moral aspect—I think it is quite clear that this kind of discrimination has an adverse effect on the economy. I think all you have to do is look at some of the southern communities at the present time and the difficult time that they are having.¹⁰⁶

The Administration meticulously laid out the case that discrimination impacted interstate commerce. “Our whole economy suffers” from racial discrimination, said Kennedy.¹⁰⁷ Others expounded upon the effect of discrimination on commerce.¹⁰⁸ Under Secretary of Commerce Franklin D. Roosevelt, Jr. devoted his statement to “the adverse effect of racial discrimination in public accommodations on interstate commerce.”¹⁰⁹ Roosevelt reiterated the “effects” that Marshall had identified on July 8, 1963, that focused on the way in which “segregation imposes unnatural limitations in the conduct of business which are injurious to the free flow of commerce.”¹¹⁰ He also introduced a new theory regarding the effects of discrimination on interstate commerce. In essence, Roosevelt suggested that racial discrimination gave rise to sit-ins, demonstrations, and boycotts, which affected interstate commerce. He argued that “the current instability and unrest swirling about various places of public accommodation from time to time is directly injurious to interstate commerce.”¹¹¹ Roosevelt devoted

“practices” substantially affecting commerce but also Congress’s ability to regulate “commercial activities”).

105. *Id.* at 95.

106. *Id.*; see also *Civil Rights—President’s Program*, *supra* note 8, at 424 (Justice Department Memorandum stating that Congress can reach conditions which “adversely affect” allocation of resources).

107. *Civil Rights*, *supra* note 41, at 1374.

108. See *Civil Rights—Public Accommodations*, *supra* note 5, at 262 (comments of Sen. Jacob Javits) (stating that discrimination reduces interstate travel); see also *id.* at 770–72 (comments of Dean Erwin Griswold). But see *id.* at 851–52 (comments of Sen. Strom Thurmond) (denying any burden on commerce).

109. *Id.* at 689.

110. *Id.* at 691.

111. *Id.*; see also *Civil Rights—President’s Program*, *supra* note 8, at 216 (testimony of Atty. Gen. Robert F. Kennedy) (stating that the demonstrations have had “an extremely adverse effect on interstate commerce”); *id.* at 424–25 (Justice Dep’t Mem.) (“Disputes involving the racially

fourteen paragraphs of his statement to providing evidence of this phenomenon.¹¹²

The Administration relied heavily on *Wickard v. Filburn*,¹¹³ a case it and its allies cited often¹¹⁴ to demonstrate the broad scope of the commerce power. When Thurmond suggested that refusal to serve an intrastate traveler was not a burden on interstate commerce, Kennedy argued that “innumerable court decisions” support the view that local or intrastate activities can affect commerce because “we are talking about a cumulative situation,”¹¹⁵ a reference he attributed to *Wickard*’s cumulative effects principle.¹¹⁶ Those who opposed Title II criticized *Wickard*.¹¹⁷ When Dean Griswold indicated he supported *Wickard* although it was “very close to the borderline,” Senator Norris Cotton withdrew a comment he had just uttered that he wished Griswold was on the Supreme Court.¹¹⁸

Opponents of the legislation complained that protection of commerce was not its principal motive but simply “a convenient peg on which to hang this particular hat.”¹¹⁹ The Commerce Clause addressed interstate business transactions. It did not license the federal government to pursue a moral vision. Moreover, they claimed the bill rested on a vision of the Commerce Clause that would erase all limits on federal power. Governor Donald Russell of South Carolina testified:

If this proposed legislation should be sustained, there is no activity of our citizens which may not be subjected to direct control by Federal legislation,

discriminatory practices of places of public accommodation give rise to picketing and other demonstrations. The picketing and the demonstrations interfere with the sale of goods and thus affect interstate commerce in precisely the same manner as would labor disputes involving such establishments.”).

112. *Civil Rights—Public Accommodations*, *supra* note 5, at 699–700.

113. 317 U.S. 111 (1942).

114. *See, e.g., Civil Rights—Public Accommodations*, *supra* note 5, at 80, 86 (testimony of Atty. Gen. Robert F. Kennedy); *id.* at 181 (comments of Sen. Philip A. Hart); *id.* at 775 (testimony of Dean Erwin Griswold); *see also Civil Rights—President’s Program*, *supra* note 8, at 216, 223 (testimony of Atty. Gen. Robert F. Kennedy); *id.* at 422 (Justice Dep’t Mem.); *Civil Rights*, *supra* note 41, at 1420 (testimony of Atty. Gen. Robert F. Kennedy); *id.* at 1885 (testimony of Joseph Rauh).

115. *Civil Rights—Public Accommodations*, *supra* note 5, at 105; *see Civil Rights—President’s Program*, *supra* note 8, at 193 (testimony of Atty. Gen. Robert F. Kennedy).

116. *Civil Rights—Public Accommodations*, *supra* note 5, at 106; *see also id.* at 190 (comments of Sen. John Sherman Cooper) (“It can regulate even intrastate commerce where a single transaction does not substantially affect interstate commerce, but where the accumulation of like transactions throughout the country would substantially affect interstate commerce.”); *id.* at 210 (testimony of Asst. Atty. Gen. Burke Marshall).

117. *See, e.g., Civil Rights—President’s Program*, *supra* note 8, at 220 (statement of Sen. Sam J. Ervin, Jr.).

118. *Civil Rights—Public Accommodations*, *supra* note 5, at 776.

119. *Id.* at 919 (testimony of Fla. Gov. Farris Bryant).

and no individual who may not be directly dealt with in relation to any and all of his affairs. Congress would no longer have to find its authority in any other part of the Constitution; the commerce clause would authorize anything it might choose to do. Such, we submit, is not our constitutional system.¹²⁰

The vision behind the Administration's bill would leave no role for states,¹²¹ opponents such as Thurmond and others claimed. Representative Joe D. Waggoner, Jr. put the argument most forcefully: "To concede such power to the Federal Government is to relegate State and local government to the ashcan of history and reduce city halls and State capitols to nothing more than concrete monuments to a system of government we once enjoyed."¹²² Senator Sam Ervin particularly worried over the suggestion that Congress could regulate discrimination at restaurants that served food which had moved in interstate commerce. Such a theory would lead to a parade of horrors as Congress could regulate marriage ("because the groom gives the bride a ring that has moved in interstate commerce"), birth "and all that precedes birth" ("because babies stimulate interstate commerce by using safety pins and diapers, which have moved in interstate commerce") and death ("because corpses are buried in coffins and caskets which have moved in interstate commerce").¹²³ Similarly, Ervin thought allowing the commerce power to reach activities of travelers would expand federal power. "Congress could get some people traveling in interstate commerce to go around and deal with everybody. Then Congress could regulate everything," he predicted.¹²⁴

Others echoed some of Ervin's concerns regarding the implications of the Administration's theory for federal constitutional power. Senator Mike Monroney, for instance, worried that the Commerce Clause might authorize legislation "in almost every walk of life. . . . [W]here is the stopping place? Where is the cutoff?"¹²⁵ Monroney did not think the Commerce Clause should "take in every hamburger stand and every 10-room motel and every guesthouse and things of that kind."¹²⁶ He feared that the Commerce Clause "would put every single line of business that a man can imagine under Federal control from now on, not just on bias or prejudice but on anything else the

120. *Id.* at 885.

121. *See id.* at 176 (comments of Sen. Strom Thurmond); *see also id.* at 367 (testimony of Miss. Gov. Ross R. Barnett).

122. *Civil Rights*, *supra* note 41, at 1733.

123. *Civil Rights—President's Program*, *supra* note 8, at 37; *see also id.* at 232, 236.

124. *Id.* at 194.

125. *Civil Rights—Public Accommodations*, *supra* note 5, at 154; *see also id.* at 417 (stating concern about stretching the Constitution by use of the Commerce Clause); *id.* at 446 (raising "a number of constitutional objections" to the Commerce Clause rationale); *id.* at 800 (stating that a number of committee members were concerned about expansion of the Commerce Clause); *id.* at 801 (concurring regarding boundaries on the Commerce Clause).

126. *Id.* at 921.

Government would choose to go and do, whether it be licensing or price control or otherwise.”¹²⁷ The Commerce Clause should not apply to “purely local matters.”¹²⁸ Although Southerners were most vocal in raising federalism arguments, Northern Republicans voiced similar concerns, though in somewhat more restrained language.¹²⁹

The Administration dismissed the notion of an infinite Commerce Clause. “Of course, there are limits on congressional power under the commerce clause,” said a Justice Department Memorandum Robert Kennedy submitted on August 9, 1963.¹³⁰ Congress did not “hold the power to regulate all of a man’s conduct solely because he has [a] relationship with interstate commerce.”¹³¹ Congress could only regulate if there was “a relationship between interstate commerce and the evil to be regulated.”¹³² Similarly, Professor Paul A. Freund rejected the argument that the Administration’s approach would “obliterate the limits” on Commerce Clause power.¹³³ There must be “a functional relationship between the facilities of interstate commerce and the abuse or evil” targeted.¹³⁴

The opponents’ complaint rested on an archaic view of federalism that conceived federal and state governments as acting in distinct, rather than overlapping spheres. Marshall suggested that the states were not rendered powerless even though no “clear-cut division” separated federal and state domains.¹³⁵ He said:

I think that the States have a reservoir of power that goes beyond simply and purely intrastate commerce, and that they can regulate matters that affect interstate commerce, just like the Federal Government can, in its turn, regulate matters that affect intrastate commerce, when that is necessary to effective regulation of interstate commerce, which is appropriate.¹³⁶

Moreover, absent a conflict or federal preemption, Kennedy argued that states would retain vast regulatory authority, particularly because the proposed legislation contained a non-preemption clause.¹³⁷ Of course, the Southerners’

127. *Id.* at 922.

128. *Id.* at 1119 (comments of Sen. Mike Monroney); *see also Civil Rights—President’s Program*, *supra* note 8, at 192 (comments of Sen. Sam J. Ervin, Jr.) (Congress cannot reach “local activities”); *Civil Rights*, *supra* note 41, at 1732 (testimony of Rep. Joe D. Waggoner, Jr.) (Commerce Clause “carried to arbitrary extremes that were never contemplated by the Nation’s founders”).

129. *See, e.g., Civil Rights*, *supra* note 41, at 1606 (comments of Rep. John V. Lindsay).

130. *Civil Rights—President’s Program*, *supra* note 8, at 422.

131. *Id.*

132. *Id.*

133. *Civil Rights—Public Accommodations*, *supra* note 5, at 1185.

134. *Id.*

135. *Id.* at 240.

136. *Id.*

137. *Id.* at 176–77 (testimony of Atty. Gen. Robert F. Kennedy).

problem was that the Jim Crow state legislation they would have preferred would have conflicted with the entire premise of Title II.

Finally, some challenged the Commerce Clause rationale on the grounds that it violated the text of the Clause or exceeded the bounds of judicial doctrine. Senator Sam Ervin articulated perhaps the most comprehensive critique of Title II. He argued that Congress could not require hotels, motels, or other places of public accommodation to serve those traveling in interstate commerce because their travel was interrupted when they stopped to sleep.¹³⁸ Ervin criticized Title II as an effort:

to regulate the use of privately owned property and personal activities within the borders of a State after interstate commerce has ceased merely because the persons using such privately owned property or rendering such personal services may use some goods which at some time in the past have moved in interstate commerce or may serve some travelers who have journeyed in time past from one State to another.¹³⁹

Ervin interpreted the Commerce Clause to authorize Congress to regulate “the movement of persons, goods, or information from one State to another” and to reach intrastate activities only to the extent “necessary or appropriate to its effective execution” of its power to regulate interstate movement.¹⁴⁰ Ervin distinguished three acts the Court had upheld: the Fair Labor Standards Act, National Labor Relations Act, and the Agriculture Adjustment Act. They regulated activities “relating to future shipments in interstate commerce[,]” not “the use of privately owned property and personal activities within the borders of States under the commerce clause after all possible interstate commerce has ended.”¹⁴¹ Similarly, Representative Richard Poff argued that neither Congress nor the Court had previously “regulate[d] service establishments under the interstate commerce clause or . . . establish[ed] what might be called a requirement to serve.”¹⁴²

B. The Fourteenth Amendment

The Kennedy Administration did the heavy lifting with respect to the Commerce Clause with support from sympathetic legislators. Legislators, however, largely developed the constitutional argument for relying on the Fourteenth Amendment. The Administration provided some help in that respect, but it also offered critiques.

The case for using the Fourteenth Amendment as the basis of the act rested in large part on the fact that the same general purpose animated that

138. *Civil Rights—President’s Program*, *supra* note 8, at 31, 36.

139. *Id.* at 213; *see also id.* at 207–08.

140. *Id.* at 212.

141. *Id.* at 215.

142. *Rules Committee*, *supra* note 8, at 372–73.

constitutional text and the proposed legislation. Both were conceived to address racial inequality. As Senator John Sherman Cooper argued:

I do not suppose that anyone would seriously contend that the administration is proposing legislation, or the Congress is considering legislation, because it has been suddenly determined, after all these years, that segregation is a burden on interstate commerce. We are considering legislation because we believe, as the great majority of the people in our country believe, that all citizens have an equal right to have access to goods, services, and facilities which are held out to be available for public use and patronage.¹⁴³

Some argued that the Fourteenth Amendment approach would avoid problems inherent in the Commerce Clause.¹⁴⁴ Proponents of the Fourteenth Amendment approach argued that it would reach a broader array of businesses. Under prevailing doctrine, the Commerce Clause would apply only to acts that affected commerce. Legislation based on the Commerce Clause would tolerate discrimination in public accommodations that did not affect interstate commerce.¹⁴⁵ Some intrastate discrimination would theoretically escape regulation.

The Fourteenth Amendment approach would be able to prohibit all discrimination without regard to degree.¹⁴⁶ Although the Fourteenth Amendment approach hardly thrilled die-hards who sought to preserve segregated public places, it was more palatable to some who worried that the Commerce Clause distorted federalism. Senator John Sherman Cooper argued that the interstate commerce clause had traditionally been used to break down state lines and relieve states of responsibilities, whereas the Fourteenth Amendment was used to hold states to their responsibilities and give them incentive “to adhere to the law.”¹⁴⁷ And Senator Mike Monroney argued:

Many of us, I think, are disturbed that this will set a precedent which could ultimately result in the Federal Government licensing all types of business by making the commerce clause apply to matters far removed from bias or discrimination. If reliance were placed on the 14th amendment, it would be aimed strictly at bias and discrimination and would not enlarge upon the vast powers that would affect other types of commerce and change our whole pattern of State regulation for intrastate business contrary to the true concept of goods moving in interstate commerce.¹⁴⁸

143. *Civil Rights—Public Accommodations*, *supra* note 5, at 190.

144. *See id.* at 57 (comments of Sen. Norris Cotton).

145. *Id.* at 190 (comments of Sen. John Sherman Cooper).

146. *Civil Rights*, *supra* note 41, at 1604–05 (comments of Reps. John V. Lindsay & William H. McCulloch).

147. *Civil Rights—Public Accommodations*, *supra* note 5, at 194; *see also Civil Rights*, *supra* note 41, at 1603 (comments of Rep. John V. Lindsay).

148. *Civil Rights—Public Accommodations*, *supra* note 5, at 220; *see also id.* at 804–05, 807 (comments of Sen. Mike Monroney).

Indeed, Monroney was so intent on avoiding the Commerce Clause that he repeatedly suggested a constitutional amendment to clarify the Fourteenth Amendment to eliminate the state action requirement.¹⁴⁹ A chorus of others joined Monroney's proposal.¹⁵⁰ Of course, that approach would have delayed any legislative solution for years.

Clearly, the Fourteenth Amendment approach faced several obstacles. The *Civil Rights Cases* required state action as a prerequisite to a violation under the Fourteenth Amendment or legislation pursuant to it. It had struck down portions of the Civil Rights Act of 1875 on the grounds that section 5 of the Fourteenth Amendment limited Congress to addressing state action to enforce its provisions. Congress could not address discrimination that private choice produced. The state action doctrine had eroded as the Court had flexed it to apply the Equal Protection Clause to some private activity.¹⁵¹ Yet the doctrine was not defunct. The "sit-in" cases during the 1962 term had found some relatively conventional form of state action through legislative or executive action.¹⁵² The Court did not hold that the Equal Protection Clause required a private entrepreneur to serve people of all races. Only Justice Douglas endorsed that proposition.¹⁵³

Still, in 1963 the decision in *The Civil Rights Cases* was not quite the impediment it had once seemed. Harvard Dean Erwin Griswold argued that "much of the force of that decision ha[d] diminished and the premises on which it was based ha[d] been undermined."¹⁵⁴ The Court had more recently recognized an expanded concept of state action.¹⁵⁵ States regulated businesses to a far greater extent in 1963 than was true four score years earlier.¹⁵⁶ Beginning in the 1930s, courts had permitted regulation of private property devoted to a public interest to a much greater degree than was true in 1883.¹⁵⁷

149. See, e.g., *id.* at 220.

150. See, e.g., *id.* at 789–90 (comments of Sen. Clair Engle) (proposing constitutional amendment of Fourteenth Amendment to eliminate state action requirement); *id.* at 802 (comments of Sen. Mike Monroney); *id.* at 970–71 (comments of Sen. Norris Cotton and Gov. Carl E. Sanders).

151. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

152. See *supra* notes 27–37 and accompanying text.

153. *Lombard v. Louisiana*, 373 U.S. 267, 281 (1963) (Douglas, J., concurring) ("When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to become engrained in our public places.").

154. *Civil Rights—Public Accommodations*, *supra* note 5, at 772.

155. *Id.* at 772 (testimony of Dean Erwin Griswold citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)); see also *Civil Rights*, *supra* note 41, at 1876 (testimony of Joseph Rauh).

156. *Civil Rights—Public Accommodations*, *supra* note 5, at 230–31 (statements of Asst. Atty. Gen. Burke Marshall); *id.* at 772 (testimony of Dean Erwin Griswold).

157. *Civil Rights*, *supra* note 41, at 1876 (testimony of Joseph Rauh).

The Civil Rights Cases were “a shell that is only waiting for its obituary notice.”¹⁵⁸

Alternatively, others thought *The Civil Rights Cases* could be distinguished. Three theories were offered. The Court had decided the case before the proliferation of Jim Crow laws.¹⁵⁹ State laws since 1883 had encouraged some of the discrimination that subsequently occurred and the practices that remained in force.¹⁶⁰ In some areas, “customs having the force of law have operated to establish a uniform community policy of segregation in public places.”¹⁶¹ Thus, discrimination might be traceable to state action. Moreover, police, executive, and judicial action often enforced private discriminatory practices.¹⁶² An extension of *Shelley v. Kraemer*¹⁶³ might find state action here as well. Finally, some argued that state licensing of businesses might provide the required state action. The “public accommodations” bill, S. 1591, which Senators John Sherman Cooper and Thomas Dodd introduced, rested on this concept. Senator Cooper argued:

The point I make is that the bill which Senator Dodd and I have introduced is based on the premise that in the licensing of a business which is held out to the public, the State has manifested its interest significantly and in such a way as to bring discrimination in such private businesses under the prohibition of the 14th amendment. When a State licenses, it has then the power to enforce safety regulations, health and sanitation regulations, fire regulations, and all other police power regulations, and thereby asserts the public interest. I would go further and say that when it gives a license to a company or private business which holds itself out to public use, it confers upon that business the opportunity to discriminate. I believe that it would be found that a business which is licensed and which is held out to the public comes within the purview of the 14th amendment.¹⁶⁴

Representative John V. Lindsay thought Congress could reach, under section 5 of the Fourteenth Amendment, any places of accommodation the state “authorized” or “regulated” that were open to the public,¹⁶⁵ an approach similar to,¹⁶⁶ yet broader than,¹⁶⁷ the Cooper–Dodd measure. Representative

158. *Id.* at 1877.

159. *See, e.g.,* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

160. *Civil Rights—Public Accommodations*, *supra* note 5, at 224 (testimony of Asst. Atty. Gen. Burke Marshall); *id.* at 772 (testimony of Dean Erwin Griswold).

161. *Id.* at 772 (testimony of Dean Erwin Griswold).

162. *Civil Rights*, *supra* note 41, at 1376 (testimony of Atty. Gen. Robert F. Kennedy).

163. 334 U.S. 1 (1948).

164. *Civil Rights—Public Accommodations*, *supra* note 5, at 192.

165. *Civil Rights*, *supra* note 41, at 1608–10.

166. *See id.* at 1416 (comments of Rep. John V. Lindsay).

167. *Id.* at 2262–64 (testimony of Rep. Clark MacGregor).

Lindsay argued that Congress should pass broad legislation predicated on his authority-to-do-business approach and test each case through the courts.¹⁶⁸

All were not convinced that state licensing was tantamount to state action. Licensing, they said, was a neutral way to further private enterprise that did not involve state operation or state endorsement.¹⁶⁹ Robert Kennedy acknowledged that “a very strong argument” could be made that licensing was not state action.¹⁷⁰ Justice Douglas had endorsed the idea that licensing was a mode of state action in his *Lombard* concurrence,¹⁷¹ but no other justice had joined his opinion. Professor Herbert Wechsler, a leading constitutional scholar, ridiculed the argument. He wrote:

One need not be a lawyer to perceive that the fact that a State requires a lunchroom to obtain a license as a means of protecting the public health does not make the lunchroom a State agency. Are all private corporations to be viewed as organs of the State because their corporate existence is conferred by their State charters? It puts the matter with excessive charity to say that this is a submission which is most unlikely to persuade the Supreme Court and, what is more important, should not do so. In the entire history of the judicial interpretation of the 14th amendment, only Justice Douglas has accorded the position color of support in an opinion.¹⁷²

Moreover, the Cooper–Dodd licensing approach posed dangers of its own. Some businesses might escape coverage if they were not licensed.¹⁷³ Licensing requirements varied state to state. Department stores, supermarkets, bowling alleys, and amusement parks would be covered in some states but not others.¹⁷⁴ Because different states licensed different activities, such a law would not apply uniformly.¹⁷⁵ The licensing approach would also have constitutional impacts beyond the field of racial discrimination. If the Court adopted the licensing approach as state action, Senator Hart suggested that any licensed business activity would be imputed to the states.¹⁷⁶ Such an approach, Marshall said, “might have a very, very far-reaching effect on what business

168. *Id.* at 1395.

169. *See, e.g., Civil Rights—President’s Program*, *supra* note 8, at 41–42 (comments of Sen. Sam J. Ervin, Jr.).

170. *Civil Rights*, *supra* note 41, at 1419.

171. *Lombard v. Louisiana*, 373 U.S. 267, 282–83 (1963) (Douglas, J., concurring) (licensing makes a restaurant an instrumentality of the State).

172. *Civil Rights—Public Accommodations*, *supra* note 5, at 309; *see also id.* at 270 (letter of Prof. Paul G. Kauper); *id.* at 275 (letter of Prof. Arthur E. Sutherland); *id.* at 1188 (Brief of Prof. Paul A. Freund).

173. *Id.* at 253 (testimony of Asst. Atty. Gen. Burke Marshall).

174. *Civil Rights—President’s Program*, *supra* note 41, at 428 (Justice Dep’t Mem.).

175. *Id.* at 96–97 (testimony of Atty. Gen. Robert F. Kennedy).

176. *Id.* at 224.

establishments could and could not do.”¹⁷⁷ For instance, efforts to limit speech in department stores might raise First Amendment issues.¹⁷⁸

Some worried that relying on some theory of state action might play into the hands of segregation’s supporters. Kennedy worried that states might circumvent legislation based on the Fourteenth Amendment “by removing all State action.”¹⁷⁹ If the state action were discriminatory legislation, it might eliminate it from the books. If it were licensing requirements, it might “remove the licensing requirement.”¹⁸⁰ Not all viewed these contingencies as likely. Senator Cooper thought it “absolutely foolish” to think states would abandon their licensing powers; if they did, he doubted the Court would allow them “to escape or avoid the law.”¹⁸¹

Kennedy thought relying exclusively on the Fourteenth Amendment would assume “an extra burden”¹⁸² because the Court had declared similar legislation unconstitutional eighty years earlier in *The Civil Rights Cases*.¹⁸³ Although the Administration relied principally on the Commerce Clause, it did not totally disregard the Fourteenth Amendment as a possible source of legislative power.¹⁸⁴

As the various hearings progressed, however, Kennedy’s enthusiasm for the Fourteenth Amendment approach cooled. Initially, Kennedy thought the Fourteenth Amendment provided an alternative basis for the legislation. Though controversial, he thought the Court would recognize it.¹⁸⁵ By the time he testified before the Senate Judiciary Committee on July 18, 1963, he was less positive. Kennedy believed that relying solely on the Fourteenth Amendment would raise “very far-reaching and grave issues.”¹⁸⁶ Finding state action in private businesses because they were licensed “would impose on the legislation very heavy burdens which it need not carry.”¹⁸⁷ The Court would need to overturn *The Civil Rights Cases*, an action that “would have vast

177. *Id.*

178. *Id.*; see also *id.* at 247 (testimony of Asst. Atty. Gen. Burke Marshall).

179. *Civil Rights—Public Accommodations*, *supra* note 5, at 167; see also *Civil Rights—President’s Program*, *supra* note 8, at 428 (Justice Dep’t Mem.).

180. *Civil Rights—Public Accommodations*, *supra* note 5, at 167 (statement of Atty. Gen. Robert F. Kennedy); see also *Civil Rights*, *supra* note 41, at 1881 (comments of Rep. James C. Corman); *Civil Rights—Public Accommodations*, *supra* note 5, at 1188 (Brief of Prof. Paul A. Freund).

181. *Civil Rights—Public Accommodations*, *supra* note 5, at 193.

182. *Id.* at 28.

183. 109 U.S. 3 (1883).

184. *Civil Rights—Public Accommodations*, *supra* note 5, at 74 (testimony of Atty. Gen. Robert F. Kennedy).

185. *Id.* at 28, 132–33, 166–67.

186. *Civil Rights—President’s Program*, *supra* note 8, at 96.

187. *Id.*

constitutional implications” and pose considerable practical difficulties.¹⁸⁸ Still, the Fourteenth Amendment might provide support to the extent Title II addressed state legislative, executive, or judicial action promoting discrimination.¹⁸⁹

By July 24, 1963, Kennedy essentially rejected the licensing theory by itself, agreeing that his views on that subject paralleled Ervin’s.¹⁹⁰ The Justice Department thought it doubtful that the state was responsible for every person it licensed. Licenses were issued to produce revenue or to maintain health or safety standards, not to transform private actors into public bodies. “[T]reating licensees as State agencies would raise substantial and troublesome questions as to the applicability of other 14th amendment inhibitions, such as the due process clause, to establishments heretofore regarded as generally immune from such strictures.”¹⁹¹ The Administration’s narrower approach to the Fourteenth Amendment stressed the argument that Congress could remedy the effects of state-created discrimination.¹⁹² State action might be found in state Jim Crow laws or “encouragement and fostering and toleration” of such practices.¹⁹³ The effects of the Jim Crow laws continued to be felt, justifying use of the Fourteenth Amendment as an additional basis.¹⁹⁴ The Fourteenth Amendment authorized Congress to “sweep away” state legislative, executive, and judicial action “promoting discrimination.”¹⁹⁵ This approach avoided the broad implications of the licensing approach, yet might prove vulnerable where segregation traced to private preference,¹⁹⁶ an increasingly common phenomenon since the Court had invalidated state discriminatory laws.

The Administration argued that the Fourteenth Amendment approach would complicate passage¹⁹⁷ because *The Civil Rights Cases* constituted an adverse precedent that would afford opponents a constitutional argument to advance.¹⁹⁸ Republicans initially insisted the contrary was true. The Commerce Clause would encounter resistance because it would present the spectre of a more encompassing federal role.¹⁹⁹ Some Republicans, however,

188. *Id.*

189. *Id.* at 96–97.

190. *See id.* at 153.

191. *Civil Rights—President’s Program*, *supra* note 8, at 426 (Justice Dep’t Mem.).

192. *Civil Rights—Public Accommodations*, *supra* note 5, at 250 (statements of Asst. Atty. Gen. Burke Marshall).

193. *Id.* at 248 (testimony of Asst. Atty. Gen. Burke Marshall).

194. *Civil Rights—President’s Program*, *supra* note 8, at 166–67, 183, 186 (testimony of Atty. Gen. Robert F. Kennedy).

195. *Id.* at 96.

196. *Id.* at 251, 253 (statement of Asst. Atty. Gen. Burke Marshall).

197. *Civil Rights*, *supra* note 41, at 1395–96, 1414–15 (statements of Atty. Gen. Robert F. Kennedy).

198. *Id.* at 1416.

199. *Id.* at 2271–72 (statement of Rep. Clark MacGregor).

suggested that “a combination of some kind” that relied on the Fourteenth Amendment as well as the Commerce Clause might be the price of their support.²⁰⁰

C. *Additional Supports*

Congressional hearings also served as a forum to float two additional, rather novel, theories to support Title II. Kennedy also raised the Thirteenth Amendment as a possible constitutional basis for Title II. Indeed, he said it might provide a stronger foundation than the Fourteenth because it did not require state action.²⁰¹ Kennedy suggested that “all of this effort to keep the Negro from obtaining really a decent and reasonable life in the United States—it is all part of a system.”²⁰² The Thirteenth Amendment empowered Congress, said Marshall, to address “the remaining badges left over from the previous condition of servitude.”²⁰³ Title II addressed a “vestige of slavery.” Thus, the Thirteenth Amendment was a source of legislative power.²⁰⁴

The argument had a certain appeal. Jim Crow laws may not have been slavery’s immediate successors, but they certainly were badges of second-class status that the Thirteenth Amendment addressed in the private sphere. Indeed, a few years later, in *Jones v. Alfred H. Mayer Company*, the Court held that the Thirteenth Amendment authorized Congress to outlaw private discrimination in the sale of real estate.²⁰⁵ Congress could determine “the badges and incidents of slavery” and act to redress them.²⁰⁶ Yet *The Civil Rights Cases* had rejected the Thirteenth Amendment as a basis for the Civil Rights Act of 1875. Accordingly, some of the same problems that disqualified the Fourteenth Amendment applied to it.

The Citizenship Clause in section 1 of the Fourteenth Amendment provided yet another possible basis for the legislation. Republican Senator Winston L. Prouty suggested it, no doubt as a way to avoid relying on the Commerce Clause or encountering the state action obstacle. Dean Griswold, though confessing to having never considered the clause as authority for Title

200. See, e.g., *id.* at 1415 (comments of Rep. John V. Lindsay).

201. *Civil Rights—Public Accommodations*, *supra* note 5, at 74.

202. *Id.* at 118; see also *Civil Rights—President’s Program*, *supra* note 8, at 152 (relating treatment of Negro as “inferior” to slavery prohibited by the Thirteenth Amendment); *id.* at 164–65 (stating that Negro’s were treated as second-class citizens).

203. *Civil Rights—Public Accommodations*, *supra* note 5, at 231–32; see also *Civil Rights*, *supra* note 41, at 1607 (comments of Rep. John V. Lindsay); *Civil Rights—President’s Program*, *supra* note 8, at 429 (Justice Dep’t Mem.).

204. *Civil Rights—Public Accommodations*, *supra* note 5, at 776, 787, 793 (testimony of Dean Erwin Griswold); see also *id.* at 798 (statement of Sen. Winston L. Prouty read by Sen. Thurston Morton).

205. 392 U.S. 409, 438–39 (1968).

206. *Id.* at 440.

II, conceded that “the more I think of it, in the few seconds since you first suggested it, the more potentialities it seems to me to have.”²⁰⁷ The Prouty–Griswold interpretation expanded the conventional meaning of the Citizenship Clause. The Clause was designed to reverse the infamous *Dred Scott* decision; it had not been used as a basis to grant equal rights to African-Americans. The Equal Protection Clause seemed a more natural means to achieve that end. Yet Senator Prouty’s impulse, that citizenship should confer a right not to be denied service based on race, had intuitive appeal. Indeed, eminent scholars have recently suggested the Clause would have provided an appealing basis to support the Court’s decision in *Bolling v. Sharpe*²⁰⁸ that Congress could not create racially separate schools in the District of Columbia.²⁰⁹ In 1963, however, it appeared a less developed theory than the Commerce Clause or Fourteenth Amendment.

D. The Private Property Argument

Opponents of the public accommodations provisions attacked such governmental regulation as an infringement of private property rights protected by the Due Process Clause of the Fifth Amendment.²¹⁰ For instance, Governor Ross Barnett of Mississippi testified:

The right to do business or to decline to do business with any individual is an inseparable part of said citizen’s right to operate and control his privately owned business. If this right is destroyed by the Federal Government, the citizen has been deprived of one of his inalienable rights just as surely as though the Federal Government had confiscated his physical personal property.²¹¹

Governor George Wallace thought proposed Title II “would strike the death knell of the private property ownership in this country.”²¹² Governor Farris Bryant argued that the Ninth Amendment protected the freedom to own

207. *Civil Rights—Public Accommodations*, *supra* note 5, at 791; *see also id.* at 796 (statement of Dean Erwin Griswold); *id.* at 798 (statement of Sen. Winston L. Prouty).

208. 347 U.S. 497 (1954).

209. *See* Professor Drew S. Days, III, *Revised Opinions in Brown v. Board of Education: Drew S. Days (concurring)*, in JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (2001) 92, 97–98.

210. *See, e.g., Civil Rights—Public Accommodations*, *supra* note 5, at 160, 423, 426 (comments of Sen. Strom Thurmond); *id.* at 392 (statements of Gov. Ross R. Barnett).

211. *Id.* at 363.

212. *Id.* at 493; *see also id.* at 755–56 (comments of Sen. Strom Thurmond); *id.* at 919 (comments of Gov. Farris Bryant); *id.* at 964 (comments of Gov. Carl E. Sanders); *id.* at 976–77 (comments of Sen. Thurmond and Gov. Carl E. Sanders); *Civil Rights—President’s Program*, *supra* note 8, at 42 (statement of Sen. Sam J. Ervin, Jr.) (stating that the legislation would end the right to own personal property); *Civil Rights*, *supra* note 41, at 1713 (comments of Rep. Albert Watson).

property.²¹³ Strom Thurmond castigated Title II as an uncompensated taking.²¹⁴

These notions of private property, preposterous as they now seem, and extreme even when voiced, were not in 1963 totally implausible. During the Court's conference on the "sit-in" cases on November 9, 1962, several Justices expressed views sympathetic to the right of a private restaurant to exclude persons based on race.²¹⁵ One year later, when the Court considered a second set of sit-in cases in October 1963, the picture was not much different. Although some of the cases might contain sufficient hints of police or legislative action to constitute plausible cases of state action,²¹⁶ *Bell v. Maryland*²¹⁷ presented the issue squarely. Whereas Chief Justice Warren and Justices Douglas and Brennan were prepared to hold that places of public accommodations, unlike homes, could not exclude persons based on race, Justices Black, Clark, Harlan, Stewart, and White thought the Constitution did not bar private entrepreneurs from so doing because their conduct was not state action.²¹⁸

Nonetheless, the Justices' argument regarding private property was significantly different from the one Barnett and others urged. While some of these Justices did not think the Constitution itself precluded discrimination in places of public accommodations, they also did not think the Constitution precluded Congress from banning it. Thus, Justice Black thought "Congress can pass a law making it a duty for a storekeeper to sell to all comers,"²¹⁹ a position many of his colleagues apparently shared.²²⁰

The argument the Southerner politicians raised was essentially a "smokescreen."²²¹ It gave private property an inviolability that would preclude commonly accepted forms of governmental regulation. Congress typically regulated use of private property that was reasonably related to a problem within its power to address.²²² Some thirty-two states had enacted laws

213. *Civil Rights—Public Accommodations*, *supra* note 5, at 920, 923–24.

214. *Id.* at 493.

215. See THE SUPREME COURT IN CONFERENCE (1940-1985), *supra* note 38, at 712–13 (Black, J.); *id.* at 714 (Clark, J.); *id.* at 714–15 (Harlan, J.); *id.* at 715–16 (Stewart, J.).

216. *Id.* at 718–19 (Warren, C.J.) (recommending disposition of cases).

217. 378 U.S. 226 (1964).

218. THE SUPREME COURT IN CONFERENCE (1940-1985), *supra* note 38, at 717–23.

219. *Id.* at 720.

220. *Id.* at 717–23.

221. *Civil Rights—Public Accommodations*, *supra* note 5, at 22 (statement of Atty. Gen. Robert F. Kennedy).

222. See John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), in THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, JAN. 1–NOV. 22, 1963, at 485 (1964); see also *Civil Rights—Public Accommodations*, *supra* note 5, at 245 (testimony of Asst. Atty. Gen. Burke Marshall); *id.* at 264–65 (comments of Sen. Jacob Javits); *id.* at 773, 775 (testimony of Dean Erwin Griswold).

outlawing discrimination in private businesses.²²³ Moreover, concerns regarding the sanctity of private property had not stopped Southern states from adopting Jim Crow laws forbidding entrepreneurs from serving blacks. If private property owners' rights were not offended by laws *forbidding* service, why would they be breached by laws *requiring* service? As Robert F. Kennedy put it, "[s]urely it is no greater an infringement to compel nondiscrimination than it has been to compel discrimination."²²⁴

When challenged with the incongruity in his position, Governor George Wallace recast the issue as involving an assault on federalism, not on private property. "That is what we are saying, let the States handle this matter. . . ."²²⁵ Local officials, unlike Washington bureaucrats, were accessible to aggrieved citizens.²²⁶ Regardless of the merits of the federalism argument, the retreat exposed a weakness in the Southern position. They championed the sanctity of private property only when Washington was the regulator. They were happy to allow local government to regulate away. As such, the private property argument collapsed into one about federalism or about the propriety of segregation.

E. *The Briefs*

In addition to the oral testimony regarding constitutional issues, Congress received written submissions discussing those issues from a range of interested parties—scholars, political leaders, citizens. Two were particularly noteworthy—a brief by Professor Paul A. Freund of Harvard Law School and one the Justice Department submitted on August 9, 1963, to the Senate Judiciary Committee.

Circumstantial evidence suggests that the Freund brief had some impact.²²⁷ Freund enjoyed uncommon stature in American legal circles. *The New York*

223. *Civil Rights—President's Program*, *supra* note 8, at 94–95 (testimony of Atty. Gen. Robert F. Kennedy).

224. *Civil Rights—Public Accommodations*, *supra* note 5, at 21, 160; *see also id.* at 264–65 (comments of Sen. Jacob Javits); *id.* at 268 (letter of Prof. Edmond Cahn and Prof. Robert B. McKay); *id.* at 269 (letter of Prof. Norman Dorsen); *id.* at 270 (letter of Prof. Paul Freund); *Civil Rights*, *supra* note 41, at 1376 (testimony of Atty. Gen. Robert F. Kennedy). Indeed, conservative journalist James Kirkpatrick, who opposed the Civil Rights Act, conceded that the Jim Crow laws were unconstitutional on this basis. *Civil Rights—Public Accommodations*, *supra* note 5, at 427–28.

225. *Civil Rights—Public Accommodations*, *supra* note 5, at 516.

226. *Id.*

227. *See, e.g.,* RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 25 (2001) (finding Freund's brief effective in persuading Republicans).

Times described him as “a revered figure in the constitutional law field”²²⁸ in quoting his opinion; Senators gushed about him.²²⁹

Freund argued that the Commerce Clause was “clearly adequate and appropriate” to support Title II.²³⁰ Congress had frequently used it to regulate local practices that “substantially affect” interstate commerce.²³¹ In regulating such activities, the aggregate effect of all similar practices on a national scale, not just those of the establishment being regulated, were counted.²³² The fact that Congress’s real motive was to redress a moral wrong did not render the Commerce Clause irrelevant. “Where social injustices occur in commercial activities[,] the commerce power is a natural and familiar means for dealing with them,” he wrote.²³³

Freund also cautioned against relying on the Fourteenth Amendment. *The Civil Rights Cases* presented an impediment. The difficulty, Freund said, was that “to state the principle that would underlie an overruling is far from easy.”²³⁴ Overruling *The Civil Rights Cases* would “have a momentum of principle that might carry it far beyond the issues of racial discrimination or public accommodations.”²³⁵ Whereas Congress could determine how much of its Commerce Clause power to use on a case-by-case basis, overruling *The Civil Rights Cases* might expand rights under the Fourteenth Amendment in ways not anticipated.²³⁶

The Justice Department memorandum also argued that Congress clearly had power under the Commerce Clause to pass Title II.²³⁷ Relying on the Fourteenth Amendment alone was more treacherous. Congress need not choose between the two theories.²³⁸ Under the Commerce Clause, Congress could regulate local activities and moral wrongs that affected interstate commerce alone or when aggregated with other such activities. Title II addressed the sort of effects Commerce Clause legislation often targeted—artificial restraints on markets, restrictions on travel, conditions that adversely

228. Anthony Lewis, *Issue in Rights Debate: Reliance on 14th Amendment or Commerce Clause in Public Accommodations Section is Examined*, N.Y. TIMES, July 14, 1963, at 4E.

229. See, e.g., *Civil Rights—Public Accommodations*, *supra* note 5, at 265 (comments of Sen. Jacob Javits, referring to Freund as law professor “of very great respect”); (comments of Sen. Warren Magnuson calling Freund “one of the outstanding authorities in this field”).

230. *Id.* at 1190.

231. *Id.* at 1183.

232. *Id.* at 1184.

233. *Id.* at 1190.

234. *Civil Rights—Public Accommodations*, *supra* note 5, at 1187.

235. *Id.*

236. *Id.*

237. *Id.* at 1295.

238. *Civil Rights—President’s Program*, *supra* note 8, at 421 (Justice Dep’t Mem.).

affect allocations of resources, demonstrations and protests which interfere with commerce.²³⁹

The Justice Department, like Freund, viewed *The Civil Rights Cases* as a formidable obstacle to the Fourteenth Amendment theory.²⁴⁰ To sustain Title II based solely on the Fourteenth Amendment, the Court would need to overrule or distinguish that precedent. The Justice Department did not think the licensing theory likely to succeed, nor was it optimistic that a coherent theory could simply address businesses affected with a public interest.²⁴¹ The Justice Department thought a more promising theory would begin from the premise that public segregation was “the product of and supported by State action.”²⁴² In remedying such practices, Congress was not confined to address only the actions of state officials. To end state support for discrimination, it could go beyond the substantive prohibitions of the Equal Protection Clause to outlaw discrimination itself.²⁴³ Section 5, like the Necessary and Proper Clause, allowed Congress to use reasonable means to achieve constitutional ends.²⁴⁴ Still, the questions and controversy regarding the Fourteenth Amendment, juxtaposed with the certain applicability of the Commerce Clause, compelled reliance on both.

F. *The Committees*

Congressional committees had little trouble finding that the proposed legislation was constitutional. Although the Senate Judiciary Committee never acted on the proposed legislation, the Commerce Committee reported S. 1732.²⁴⁵ It concluded that *The Civil Rights Cases* were not an impediment to passage of Title II. The 1875 law rested on section 5 of the Fourteenth Amendment, not the Commerce Clause. A “large body of legal thought” believed the present Court would reverse its 1883 decision or that “changed circumstances” would suggest a distinction.²⁴⁶ Ultimately, the merits of that debate were irrelevant because S. 1732, unlike the 1875 act, rested on the Commerce Clause, not section 5. The Commerce Committee attached and relied upon Professor Freund’s analysis. It quoted his conclusion that “[t]he

239. *Id.* at 422–25.

240. *Id.* at 425; see also *Civil Rights—Public Accommodations*, *supra* note 5, at 1299.

241. *Civil Rights—President’s Program*, *supra* note 8, at 426; *Civil Rights—Public Accommodations*, *supra* note 5, at 1300.

242. *Civil Rights—President’s Program*, *supra* note 8, at 425–26; *Civil Rights—Public Accommodations*, *supra* note 5, at 1299–1300.

243. *Civil Rights—President’s Program*, *supra* note 8, at 425; *Civil Rights—Public Accommodations*, *supra* note 5, at 1299.

244. *Civil Rights—President’s Program*, *supra* note 8, at 426; *Civil Rights—Public Accommodations*, *supra* note 5, at 1299–1300.

245. See generally S. REP. NO. 88-872 (1964).

246. *Id.* at 12.

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.”²⁴⁷ Congress could “regulate commerce or that which affects it for other than purely economic goals,” the Committee concluded.²⁴⁸

The Committee thought the legislation necessary primarily to address the deprivation of human dignity segregation caused. The measure also addressed “economic burdens created by discrimination in public establishments.”²⁴⁹ The Committee thought this nation’s economy suffered “when the discriminatory practices employed by such establishments lead to demonstrations or boycotts.”²⁵⁰ This effect on commerce was the first, but not the only, one the Committee cited. The Committee also found that discrimination reduced convention business and decreased travel, that industry was reluctant to locate in segregated areas, and that professional life was discouraged.²⁵¹

Three Committee members appended their individual views to the report, and each emphasized constitutional issues. Senator Monroney favored civil rights legislation, including a public accommodations provision. He thought S. 1732 went beyond constitutional limits in regulating “purely local matters.”²⁵² The clause should be limited to regulating interstate travellers and interstate businesses to avoid compromising “our dual system of government.”²⁵³

Senator Strom Thurmond also emphasized federalism issues, which he mislabelled “separation of powers.” The Tenth Amendment, he said, was intended to preserve “the separation of powers doctrine.”²⁵⁴ The Tenth Amendment “was intended to be a bulwark against the eroding effects of the passage of time, faulty memories and an ever-grasping Central Government.”²⁵⁵ The legislation was not authorized by the Fourteenth Amendment due to the absence of state action, by the Thirteenth Amendment because segregation was not slavery, or by the Commerce Clause because it was not intended to allow regulation of “the use of purely private property at rest within the confines of any particular State.”²⁵⁶ Moreover, S. 1732 interfered with private property rights in violation of the Fifth Amendment.²⁵⁷

247. *Id.* at 13 (quoting *Civil Rights—Public Accommodations*, *supra* note 5, at 1190).

248. S. REP. NO. 88-872, at 13.

249. *Id.* at 17.

250. *Id.* at 17.

251. *Id.* at 17–20.

252. *Id.* at 40.

253. S. REP. NO. 88-872, at 41.

254. *Id.* at 43.

255. *Id.*

256. *Id.* at 55.

257. *Id.* at 62–65.

Finally, Senator Norris Cotton thought S. 1732 distorted the Commerce Clause “dangerously” and expanded it “enormously.”²⁵⁸ A constitutional amendment was needed to address racial discrimination. In the meantime, he would limit legislation to banning segregation in publicly owned establishments and based on state or local law.

The House Committee on the Judiciary reported the full bill (H.R. 7152).²⁵⁹ It limited its constitutional discussion to some conclusory statements. A few members, however, raised constitutional concerns in their individual comments. Representative George Meader, for instance, thought H.R. 7152, as well as the Administration’s bill, stretched the Commerce Clause and Equal Protection Clause.²⁶⁰ Because the Court would not enforce constitutional limits, Congress must.²⁶¹ A minority report for six representatives claimed Title II violated the Fifth and Tenth Amendments and found no support from the Commerce Clause or the Thirteenth or Fourteenth Amendments.²⁶² Representative William McCulloch, for himself and six Republican colleagues, presented a supplemental report defending H.R. 7152 on the Commerce Clause and Fourteenth Amendment.²⁶³ Congress had ample power to remove burdens on the free flow of commerce.²⁶⁴ The Republicans relied on *Wickard* and other precedents for showing the breadth of the clause.²⁶⁵ There was ample evidence that discrimination had an “adverse effect” on commerce—travel was impeded, business discouraged, and demonstrations had a chilling impact.²⁶⁶

G. *The Floor Debates*

Constitutional issues relating to Title II did not command so great a percentage of the floor discussion in the House and Senate as they had in earlier stages. Several factors account for this change. Both bodies addressed the entire legislation, not simply Title II, so attention was divided; previously the Senate Commerce Committee at least had addressed only Title II. The debate between the Commerce Clause and Fourteenth Amendment had been

258. S. REP. NO. 88-872 at 78.

259. H.R. REP. NO. 88-914 (1963).

260. *Id.* at 50–52.

261. *Id.* at 51–52.

262. *Id.* at 91–94.

263. H.R. REP. NO. 88-914 (Part 2) at 1–32 (1963).

264. *Id.* at 13.

265. *Id.*

266. *Id.* at 7–15. The House Committee on Rules held nine days of public hearings on H.R. 7152 in January 1964. The Committee was chaired by Representative Howard W. Smith, an ardent segregationist. Other than a few proponents of the bill, most testifying were foes, many of whom raised constitutional objections. See generally Rules Committee, *supra* note 8. For an excellent account of strategic issues, see CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 85–100 (1985).

resolved and so was no longer pertinent. Much floor time in the Senate related to procedural matters and to the Southerners' filibuster. Although some of the latter related to the Constitution, it was rambling and not particularly germane to Title II. Finally, many legislators were talking to their electorates and, accordingly, esoteric discussions of the Commerce Clause may have seemed unappealing.

Yet constitutional issues were not ignored during floor debates. The discussion followed the lines of committee hearings. In the House, proponents made general assertions of the constitutionality of Title II.²⁶⁷ Opponents were more expressive in raising constitutional issues as a reason to oppose the legislation. Representative Edwin E. Willis condemned Title II for going beyond prior Court rulings.²⁶⁸ Title II improperly regulated "intrastate" commerce while destroying property rights that the Constitution protects.²⁶⁹ The legislation violated the text of the Commerce Clause and Equal Protection Clause and ignored prevailing precedent, namely *The Civil Rights Cases*.²⁷⁰ Others thought Title II would "destroy" the Constitution.²⁷¹ To Representative Arthur Winstead, Title II was "the most glaringly unconstitutional piece of legislation ever introduced in the Congress."²⁷² Representative Richard Poff thought the Commerce Clause had been "distorted by expansion."²⁷³

Senator Hubert H. Humphrey, Democratic floor leader for the bill, provided the most significant discussion of constitutional issues relating to

267. See, e.g., 110 CONG. REC. 1512 (1964) (remarks of Rep. Madden) (Title II "clearly consistent" with Constitution); *id.* at 1522–26 (remarks of Rep. Celler) (Title II constitutional); *id.* at 1529 (remarks of Rep. McCulloch) (Title II constitutional); *id.* at 1540 (comments of Rep. Lindsay) (Title II constitutional); *id.* at 1592 (remarks of Rep. MacGregor) (Title II constitutional); *id.* at 1592 (remarks of Rep. Corman) (Title II constitutional); *id.* at 1593 (Remarks of Rep. Farbstein) (Title II constitutional); *id.* at 1594 (remarks of Rep. Dwyer) (Title II constitutional under Equal Protection Clause); *id.* at 1599 (remarks of Rep. Minish) (Title II constitutional under Commerce Clause); *id.* at 1600 (Remarks of Rep. Daniels) (Title II constitutional); *id.* at 1602 (remarks of Rep. Mathias) (Title II constitutional under Commerce Clause); *id.* at 1666 (remarks of Rep. Griffin) (Title II constitutional under Commerce Clause).

268. *Id.* at 1533.

269. *Id.* at 1533–34.

270. *Id.* at 1534.

271. *Id.* at 1537 (remarks of Rep. Whitener); *id.* at 1545 (remarks of Rep. Forrester) (Title II "mak[es] shambles of our Constitution"); *id.* at 1606 (remarks of Rep. Dorn) (Title II destroys Constitution); *id.* at 1606–07 (remarks of Rep. Jones) (Title II makes "mockery" of Constitution); *id.* at 1617 (remarks of Rep. Roberts) (Title II "stretch[es] the commerce clause to the breaking point").

272. 110 CONG. REC. 1702 (1964); see also *id.* at 1515 (remarks of Rep. Colmer) (calling certain provisions "vicious assaults upon the Constitution"); *id.* at 1540 (remarks of Rep. Bennett) (Title II unconstitutional); *id.* at 1604 (remarks of Rep. Selden) (Title II unconstitutional); *id.* at 1605 (remarks of Rep. Huddleston, Jr.) (Title II unconstitutional); *id.* at 1618 (remarks of Rep. Abernathy) (Title II unconstitutional).

273. *Id.* at 1585.

Title II. The bill found firm support in the Commerce Clause and Fourteenth Amendment. The fact that Title II raised “a moral question” did not disqualify the Commerce Clause as a source of legislative power. Moreover, racial discrimination had “clear economic consequences.”²⁷⁴

Humphrey outlined prevailing Commerce Clause doctrine with ample citations to precedents. Congress had power to regulate matters affecting commerce. Congress could reach local businesses affecting commerce, including small ones. He repeated the effects Marshall had identified months earlier.²⁷⁵ *The Civil Rights Cases* had not addressed Congress’s authority to regulate under the Commerce Clause. The case did limit Congress under the Fourteenth Amendment to addressing state action and the bill, to the extent it relied on the Fourteenth Amendment, was so limited.

III. A CONSTITUTIONAL DIALOGUE

A. *Congress as Moot Court*

Congress’s consideration of Title II presented a dialogue on constitutional principles in several respects. The Department of Justice presented a forceful case for the constitutionality of Title II with supporting constitutional arguments from sympathetic legislators like Senators Magnuson, Hart, Javits, and Humphrey and Representatives Celler and McCulloch. Those preferring to rely on the Fourteenth Amendment, such as Senators Cooper and Monroney and Representative Lindsay, presented an alternative constitutional theory. The Administration was called to respond to their positions. Finally, die-hard foes of Title II cast their arguments in constitutional terms, invoking structural ideas related to federalism and rights of private property and free association. These and other constitutional issues were debated at length before those congressional committees.

In many respects, the congressional debate followed the pattern of a Supreme Court case. Advocates on competing sides (e.g., Kennedy vs. Ervin and Thurmond) argued the constitutional issues. They had opportunity to respond to each other’s points and questions. At times, they were helped by sympathetic colleagues who threw them life-lines to rescue them from hostile questions. The principals filed legal memoranda (e.g., Justice Department memoranda) that were supplemented by amicus filings by allies (e.g., Freund’s brief). They relied on conventional arguments of the sort used in court—arguments from the Constitution’s text, the framers’ intent, constitutional structure, precedent, morality, sociological evidence.

274. 110 CONG. REC. 6535 (1964).

275. *Id.* at 6536.

In some respects, the congressional hearings served as almost a moot court for arguments the Administration later presented to the Court. Many of those on the committees had backgrounds not too different from those on the Supreme Court.²⁷⁶ Their reactions might herald those of some Justices.

The Administration's constitutional position evolved over time. Although it always emphasized the Commerce Clause, its reliance on the Fourteenth Amendment diminished as the legislative discussion continued. Whereas initially Robert Kennedy predicted that *The Civil Rights Cases* would be overturned, he gradually adopted a narrower view of the Fourteenth Amendment. He rejected the licensing theory and adopted a relatively narrow state-action theory. Title II was drafted to accommodate, rather than test, *The Civil Rights Cases*, by incorporating, not stretching, the state action concept.

Although the Administration adhered to a broad vision of the Commerce Clause, its articulation of that theory changed as the legislative process progressed. For instance, it modified what it identified as adverse effects on commerce as the legislative proceedings continued. Initially, it did not emphasize protests against discrimination as an adverse effect on commerce that justified Title II. After Kennedy extemporaneously raised that issue in response to a question, the Justice Department began to cite it as a principal effect. By the time it argued the *Heart of Atlanta* and *McClung* cases, this point had become its main theory.

B. *Shaping Constitutional Choices*

Yet the congressional hearings were not simply spring training for the judicial challenge that followed. They were much more than an opportunity for the Administration to test drive its constitutional theories. Rather, they represented Congress discharging its duty to interpret the Constitution.²⁷⁷ This essential stage of the legislative process represented the time when crucial constitutional choices were shaped and made.

Opponents of the bill deployed constitutional arguments to justify their position. To them, Title II represented an assault on federalism that ignored the notion of limited government and gave no weight to the Tenth Amendment. It disregarded limitations in constitutional text (e.g., Congress could only regulate interstate commerce and could only reach state action) and precedent (e.g., the *Civil Rights Cases*). It gave no deference to private property contrary to the Fifth Amendment.

Proponents of the Act answered these, and other, assaults. Notwithstanding the public outcry after Birmingham, Title II would not have

276. The Court consisted of two successful politicians (Chief Justice Warren and Justice Black), four who had served in Cabinet or subcabinet posts (Justices Douglas, Clark, White, and Goldberg), and three former judges (Justices Harlan, Brennan, and Stewart).

277. See generally FISHER, *supra* note 4, at 231–34.

emerged from committee, or would have done so in a weakened state, had the Administration and its legislative allies not made a convincing case that the measure was constitutional and offered a theory to support its proposal.

By the time Title II had cleared committees, the Administration and legislative leaders had made crucial constitutional choices. For instance, they elected to rely primarily on the Commerce Clause. They jettisoned the licensing theory. The breadth of the Commerce Clause allowed them to rely on a relatively uncontroversial concept of state action. These decisions shaped the constitutional issues later presented to the Court.

C. Congress as Constitutional Interpreter

Congressmen took seriously their duty to consider the constitutional arguments. Their attention to constitutional interpretation was evident in their exhaustive discussion of constitutional clauses and in questions they raised regarding constitutional theory. Their conduct signified that they did not believe the Supreme Court was the exclusive constitutional interpreter.

Moreover, many legislators discussed their duty to consider constitutional issues. One of the most outspoken proponents of legislative constitutional interpretation was Senator Strom Thurmond. Thurmond argued that a Congressman's oath required that "the very first step that he must or should take is to determine, Is this legislation constitutional? And if he decides it is not, then he shouldn't go any further."²⁷⁸ Similarly, Senator John McClellan said legislators were "personally abdicating the responsibility with which we are charged . . . we are failing to do our duty if we do not ascertain . . . whether proposed legislation is constitutional according to our lights before it is enacted. . . ."²⁷⁹ The view Senators Thurmond and McClellan expressed of their duty to uphold the Constitution as they saw it certainly served their political purposes because it justified their predisposition to oppose the legislation. Yet their comments regarding legislative interpretation should not be dismissed as opportunistic. Leading supporters of the bill also championed legislative interpretation.²⁸⁰

278. *Civil Rights—Public Accommodations*, *supra* note 5, at 849; *see also* 110 CONG. REC. 10,381 (1964) (remarks of Sen. Thurmond) ("It is our first duty, before we vote on a bill in the Senate, to decide whether a proposed bill is constitutional. . . .").

279. 110 CONG. REC. 10381 (1964); *see also id.* at 2767 (remarks of Rep. Dowdy) (stating that Oath Clause requires congressmen to consider constitutional issues); *id.* at 2801 (remarks of Rep. Fisher) (stating that constitutional government requires legislators assess constitutionality of proposed bills).

280. *See, e.g., Civil Rights—Public Accommodations*, *supra* note 5, at 84.

Senator Thurmond. Mr. Attorney General, do you feel Congress has the right to pass on the constitutionality of legislation before it votes?

Mr. Kennedy. I think it certainly should consider that, Senator. I think each individual Senator and Member of the House of Representatives should certainly consider that.

Some wondered whether they could properly offer legislation at odds with prevailing Court precedent. For instance, Senator John Pastore sought reassurance that if he thought *The Civil Rights Cases* misconstrued the Constitution he “would not be violating any law or violating the oath of office if I passed or voted for another law identical to the one that was overruled in 1883, in the hope that the new Supreme Court would hold it constitutional.”²⁸¹ Similarly, Senator Claire Engle asked Marshall:

Now, we all take an oath to support the Constitution, and the Constitution is what is written in it, plus what the Supreme Court says it is.

Now, the Supreme Court, in 1883, said that a bill on all fours with what is intended to be done here, was unconstitutional. How do we stand up and vote for it and not violate our oaths?

Mr. Marshall. I think you would have to come to the conclusion, as a personal matter, that the Supreme Court would not decide that case the same way now.²⁸²

Witnesses and legislators freely discussed constitutional issues and recognized a duty to consider constitutionality in deciding how to legislate. Yet, most implicitly accepted the notion of judicial supremacy regarding constitutional interpretation.²⁸³ Look again at the preceding exchanges. Senator Pastore qualified his rhetorical question regarding his right to act at odds with the Court’s decision in *The Civil Rights Cases* with the condition “in the hope that the new Supreme Court would hold it constitutional.”²⁸⁴ He implicitly conceded the Court interpretive supremacy. Senator Engle thought the Constitution “is what is written in it, plus what the Supreme Court says it is.”²⁸⁵ Finally, Marshall, one of the most learned participants in the discussions, thought a legislator could support such legislation if he thought the Court would not again reach the same conclusion.²⁸⁶

Senator Thurmond. In the oath we take as Members of Congress to support and defend the Constitution, do you not feel we have an obligation as the very first question to ask ourselves, “Is this legislation constitutional?” And if we conclude it is not, if any Member concludes it is not, then we should go no further, even though the goals desired to be obtained might be laudatory.

Mr. Kennedy. Well, I think it is certainly an important question for every Member of Congress to consider, as I have said.

Id.

281. *Id.* at 252.

282. *Id.* at 248.

283. *See, e.g., id.* at 28 (statement of Atty. Gen. Robert F. Kennedy) (predicting the Court would uphold Title II under Fourteenth Amendment).

284. *Id.* at 252.

285. *Civil Rights—Public Accommodations*, *supra* note 5, at 248.

286. *Id.*

Others expressed similar sentiments. “Congress doesn’t determine what is under the interstate commerce clause. The Constitution and court decisions determine that,”²⁸⁷ declared Senator Warren Magnuson. “Regardless of what we say the Supreme Court still has the final word to declare which provision of the Constitution allows or disallows this legislation,” said Senator Frank Lausche.²⁸⁸

There was one group that rejected the idea that the Court had the final say: the Southern foes of the legislation. In the aftermath of *Brown v. Board of Education*,²⁸⁹ some had denied that Supreme Court decisions bound officials who read the Constitution differently. Governor Barnett, for instance, denied that the Supreme Court’s decisions were “the law of the land.”²⁹⁰

Of course, those denying that the Court was the ultimate constitutional interpreter were not consistent in their position. Although prepared to challenge *Brown* or expansive Commerce Clause decisions, they embraced *The Civil Rights Cases*. Supporters of the Civil Rights Act tended to take a more nuanced position. They accepted the Court as the ultimate interpreter and agreed *The Civil Rights Cases* were law. Still, they thought Congress had grounds to believe the Court would not follow that old precedent and, accordingly, Congress could pass inconsistent legislation.

The Administration’s emphasis on the Commerce Clause rather than the Fourteenth Amendment reflected an acceptance of judicial supremacy, at least

287. *Id.* at 71; *see also id.* at 72 (meaning of interstate commerce clause “depends on the interpretation by the courts of the Constitution”). Senator Magnuson and journalist James J. Kilpatrick discussed this issue in the following exchange:

The Chairman. Actually we can’t stretch the Constitution and we can’t condense it. The Constitution is there. The Court interprets it. We can’t stretch it. There is nothing we can do to change the Constitution except through an amendment.

We can pass a bill that might look like it. Somebody might interpret that we are stretching it a little too much or we are condensing it too much. But there isn’t a thing we can do about the Constitution. It is there. It is as solid as that granite. It depends on how the Court interprets it.

So when you say we can stretch it or we can condense it, that is not true. We have no authority to do one or the other.

Mr. Kilpatrick. Yes; your authority is to pass laws pursuant to the Constitution, and the Constitution is what our nine friends say it is.

Id. at 430.

288. *Civil Rights—Public Accommodations*, *supra* note 5, at 72; *see also id.* at 447 (statement of Sen. Monroney) (referring to Court as “final interpreter of our laws”); *id.* at 1152 (Sen. Humphrey) (predicting Supreme Court decision would uphold Title II if passed pursuant to the Commerce Clause and the Fourteenth Amendment); *id.* at 248 (Marshall agreeing with Senator Pastore’s statement that “[w]e have drifted into the habit here of speaking of decisions of the Supreme Court as being sacrosanct, as being irreversible and irrevocable. There have been instances where the Supreme Court overruled itself on all fours, haven’t there?”).

289. 347 U.S. 483 (1954).

290. *Civil Rights—Public Accommodations*, *supra* note 5, at 393.

as a fact of life. It recognized that *The Civil Rights Cases* made reliance on the Fourteenth Amendment strategically treacherous. This decision itself reflected a realization that many congressmen would defer to Supreme Court precedent, even one eighty years old. The belief that the Fourteenth Amendment approach “adds a very heavy burden to the bill”²⁹¹ was implicitly based upon the Administration’s appreciation of the power of the belief of the Court as the ultimate constitutional interpreter. Moreover, the Administration relied heavily on judicial precedent in justifying reliance on the Commerce Clause.²⁹²

Congress’s deference to the Court extended to the manner in which it relied on the Fourteenth Amendment. Ultimately, Title II did not follow the Cooper–Dodd–Lindsay approach of viewing licensing or regulating as state action because only Justice Douglas seemed disposed to embrace that position. Instead, Congress essentially incorporated a narrow state-action concept consistent with judicial precedent.

Yet Congress’s deference to judicial precedent was reciprocated in the Court’s deference to Congress. Regardless of whether one viewed the Court as the ultimate constitutional interpreter or not, Congress clearly had a significant role in constitutional interpretation in passing the Civil Rights Act of 1964. The Court, particularly under the Commerce Clause, had accepted congressional legislation for close to thirty years after subjecting it to a relaxed standard of review. *United States v. Darby*²⁹³ and *Wickard v. Filburn*²⁹⁴ had defined the Commerce Clause to afford little judicial scrutiny of legislative choice. By resting the Civil Rights Act on the Commerce Clause, the political branches legislated in an area where their conduct enjoyed a generous presumption of validity.²⁹⁵

D. *The Court Defers to Congress: Bell v. Maryland*

The Court’s deference to Congress in making constitutional choices became evident as the Civil Rights Act moved to passage in late 1963 and early 1964. While Congress addressed the Civil Rights legislation in the summer and fall of 1963, the Court considered *Bell v. Maryland*²⁹⁶ and four related “sit-in” cases, some of which raised the issue of whether the Equal Protection Clause prohibited the owner of a private restaurant from excluding customers based on their race. The sit-in cases decided during the prior term

291. *Id.* at 222 (comments of Asst. Atty. Gen. Marshall).

292. *See, e.g., id.* at 422 (Justice Dep’t Mem.) (“Supreme Court decisions have many times sustained the power of Congress. . .”); *see also id.* at 423 (identifying provisions “authoritatively construed” and citing cases only).

293. 312 U.S. 100 (1941).

294. 317 U.S. 111 (1942).

295. Opponents complained of this fact. *See, e.g.,* 110 CONG. REC., 6668 (1964) (remarks of Sen. Thurmond).

296. 378 U.S. 226 (1964).

had strained the Court. Several justices—Black, Harlan, Stewart, Clark—thought the Fourteenth Amendment did not, standing alone, prohibit places of public accommodations from declining to serve blacks based on their race. They reasoned that a restaurant, like a home, was private property; the proprietor was entitled to exclude persons based on race. In enforcing trespass laws against those he wished to exclude, he was entitled to help from police, prosecutors, and courts, and their activity in enforcing private choice was not state action. Justices Douglas and Goldberg, however, distinguished between the home (where the owner could exclude based on race) and places serving the public (where he could not). The Court had been able to finesse the issue during the 1962 term by deciding on narrower grounds. The decision had camouflaged the degree of division on the Court. In the sit-in cases heard during the 1963 term, as Charles A. Miller put it, “the Court fell apart.”²⁹⁷

Several of the cases lent themselves to resolution on narrower grounds based upon, for instance, police activity, which arguably set a policy of discrimination. In *Bell*, however, the Court “hit hard bottom,” where, according to Chief Justice Warren, the Court got “to the raw of the problem.”²⁹⁸ Bell and eleven other Negro students were convicted of trespassing following a sit-in at Hooper’s segregated restaurant in Baltimore. The hostess, on behalf of the owner, told the students the restaurant would not serve them based upon their race. The owner swore out warrants and the police arrested the students. A Maryland court convicted them of criminal trespass.²⁹⁹

After discussing the case at two conferences in late October, 1963, the Court voted, 5-4, to affirm the convictions in *Bell v. Maryland*. Following Justice Black’s lead, a majority at conference did not regard state enforcement of trespass laws at private businesses as the state action, which would bring the case within the Fourteenth Amendment. Yet some Justices worried that such a ruling would impair Congress’s ability to pass civil rights legislation. Justice Goldberg reminded his colleagues that “[t]here is legislation pending” and argued that such a ruling would “set back legislation indefinitely.”³⁰⁰ Justice Brennan, too, observed that a ruling that criminal law could enforce a private entrepreneur’s discriminatory choice would mean that “neither Congress nor the states [could] legislate otherwise.”³⁰¹ Brennan feared that such a decision

297. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 100 (1969).

298. *THE SUPREME COURT IN CONFERENCE* (1940-1985), *supra* note 38, at 719.

299. *Bell*, 378 U.S. at 227–28.

300. *THE SUPREME COURT IN CONFERENCE* (1940-1985), *supra* note 38, at 722.

301. *Id.* at 721; *see also* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 511 (1983) (citing Douglas’s concern that adverse rulings would deprive Congress of the ability to pass civil rights legislation except under the Commerce Clause); *id.* at 512 (noting Warren and Brennan’s concern that an adverse ruling would impact Kennedy legislation).

would strengthen the hand of those opposed to civil rights legislation with the imprimatur of a favorable Court ruling.³⁰²

Ultimately, Justice Brennan circulated a dissent from Justice Black's planned majority opinion in which he suggested a narrow state-law ground to decide *Bell* and thereby avoid the constitutional issue. In his draft dissent, Justice Brennan referred to Title II and predicted that the proposed majority ruling would "inevitably enter into and perhaps confuse that debate."³⁰³ Justice Black circulated a revised draft of his own on May 15, 1964, to meet Justice Brennan's concern. It said that *Bell* did not "involve the constitutionality of any existing or proposed state or federal legislation requiring restaurant owners to serve people without regard to color."³⁰⁴

During the fall of 1963 and spring of 1964, as Title II faced its course of legislative hurdles, the Justices maneuvered in *Bell* with the legislation in mind. The Court's internal discussions reflected a desire not to prejudice the congressional debate against Title II. The crisis was averted when Justice Clark switched his position to abandon Justice Black's opinion only days before *Bell* was to be announced, thereby creating an apparent majority to reverse on constitutional grounds. The case was ultimately decided,³⁰⁵ however, on narrow grounds which avoided the constitutional issue only ten days before the Civil Rights Act passed.

Even so, the Court's published opinions made clear that it had decided *Bell* with an eye on Capitol Hill. Justice Brennan's majority opinion did not reach the Fourteenth Amendment issues or speak to the scope of Congress's legislative power. Ostensibly, he followed the "Court's settled practice"³⁰⁶ to give state courts first crack at assessing the impact of intervening changes in state law. Yet this federalism rationale was not truly the animating spirit behind the opinion. Rather, Justice Brennan sought to give Congress an open

302. See HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 230-31 (1996).

303. SCHWARTZ, *supra* note 300, at 517.

304. *Id.* at 518.

305. A memorandum Justice Douglas prepared suggests that Justice Brennan may have adopted the non-constitutional approach when it appeared he lacked the votes to produce a constitutional ruling in favor of reversing the convictions on the grounds that they denied Equal Protection. Justice Brennan had originally indicated he would reverse "on *Shelley v. Kraemer* or on more limited grounds." THE SUPREME COURT IN CONFERENCE (1940-1985), *supra* note 38, at 721. He then conceived of a plan to vacate the lower court ruling and remand the case for the state court to consider whether a subsequent state law applied. When Justice Clark switched positions, a Court majority to reverse on constitutional grounds existed, yet Justice Douglas speculated that Justice Brennan felt unable to return to his original position (reverse on constitutional grounds) for to do so would reveal his vacate and remand approach to be one based on expediency. See *id.* at 723-25 (producing Douglas's Mem. on *Bell*); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 274-79 (1991).

306. *Bell v. Maryland*, 378 U.S. 226, 228 (1964).

field to legislate without the distorting influence of a constitutional ruling likely to confuse its deliberations.

Ironically, Justice Black shared a similar sentiment. He began his dissent for himself and two others with a disclaimer asserting that the case “does not involve the constitutionality of any existing or proposed state or federal legislation requiring restaurant owners to serve people without regard to color.”³⁰⁷ Justice Black, carefully and repeatedly, distinguished between the limits of section 1 of the Fourteenth Amendment and those of section 5. *Bell* involved only the former. It did not involve “the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end.”³⁰⁸ Although section 1 only proscribed state action, Justice Black suggested that Congress could address private action under other constitutional provisions, including section 5. “This section [1] of the Amendment, unlike other sections, is a prohibition against certain conduct only when done by a State. . . .”³⁰⁹ Justice Black added a footnote following the words “unlike other sections,” which referred only to section 5.³¹⁰ Clearly, the dissent’s message to Congress was that constitutional limits under section 1 might not limit Congress’s section 5 remedial power.

Justice Goldberg’s concurrence also signalled his willingness to defer to Congress. While joining Justice Brennan’s opinion, he reached the constitutional issues only to express disagreement with Justice Black’s conclusion.³¹¹ Justice Goldberg thought, too, that section 1 afforded a right to all Americans to be treated equally regarding access to public accommodations including inns, restaurants, lunch counters, and soda fountains. This right did not preclude Congress from acting to implement section 1 under section 5 or the Commerce Clause,³¹² he hastened to add. Congress could “fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations.”³¹³ That was, of course, exactly what Congress had done to Title II. The Court’s mandate was more limited. It could “pass only on justiciable issues coming here on a case-to-case basis.”³¹⁴

Only Justice Douglas sought to claim broad grounds for the Court in setting the boundaries. Congress was “conscientiously considering” the issue

307. *Id.* at 318.

308. *Id.* at 343.

309. *Id.* at 326.

310. *Id.* at 326 n.11.

311. *Bell*, 378 U.S. at 286. Chief Justice Warren joined Justice Goldberg’s opinion in full; Justice Douglas did in part.

312. *Id.* at 317.

313. *Id.*

314. *Id.*

of access to public accommodations *Bell* raised, yet the Court stood “mute, avoiding decision of the basic issue by an obvious pretense.”³¹⁵ The Court should not “leave resolution of the conflict to others” but should clarify “the issues for the Congress and for the public.”³¹⁶ He, too, would find state action in the use of the judicial machinery to enforce racial discrimination at places of public accommodations.

In all, eight of the nine Justices (all but Justice Douglas) in *Bell* preferred to allow Congress to make the initial constitutional judgments. Five of the nine³¹⁷ so expressed themselves.

E. Shaping Judicial Choice

The constitutional analysis that the Administration and Congress made regarding Title II ultimately impacted the work of the Court. In deciding to rely primarily on the Commerce Clause, in rejecting the licensing theory, and in adopting a relatively safe interpretation of state action, Congress simplified the constitutional choices the Court faced in the litigation, which all recognized was inevitable. This outcome was not serendipitous. Just as the Administration embraced a constitutional approach likely to produce the maximum remedy consistent with political realities in Congress, so, too, did it seek a course most likely to resonate with at least five, and hopefully nine, Justices. Rather than asking the Court to overturn or distinguish *The Civil Rights Cases*, Congress essentially crafted Title II to minimize the relevance of that precedent. In so doing, it eliminated an issue that might have proven controversial for at least some Justices. Moreover, it avoided the licensing theory that had found little support at the Court and, which in *Moose Lodge No. 107 v. Irvis*,³¹⁸ the Court soon rejected.

The Court had little trouble upholding the constitutionality of Title II under the Commerce Clause when the question was presented in *Heart of Atlanta Motel, Inc. v. United States*³¹⁹ and *Katzbach v. McClung*.³²⁰ In *Heart of Atlanta*, a motel owner sought a declaratory judgment that Title II violated the Constitution.³²¹ He claimed Congress exceeded its power under the Commerce Clause, deprived the motel owner of liberty and property without due process of law, and subjected it to involuntary servitude in violation of the Thirteenth Amendment by making it serve African-Americans.³²² The Heart of Atlanta

315. *Id.* at 243.

316. *Bell*, 378 U.S. at 243; *see also id.* at 245.

317. Chief Justice Warren, and Justices Black, Harlan, White, and Goldberg. *See generally Bell*, 378 U.S. at 226.

318. 407 U.S. 163 (1972).

319. 379 U.S. 241 (1964).

320. 379 U.S. 294 (1964).

321. 379 U.S. at 242.

322. *Id.* at 243–44.

Motel was near two interstate highways and solicited interstate business.³²³ In *McClung*, Ollie's Barbeque sought to limit blacks to a takeout service while serving whites in its restaurant.³²⁴ The restaurant was located some distance from the interstate and presumably served a local clientele.³²⁵ About forty-six percent of its food had moved in interstate commerce.³²⁶ Thus, it came within the terms of Title II, which extended its coverage "to restaurants which serve food a substantial portion of which has moved in commerce."³²⁷

In *Heart of Atlanta Motel* and *Katzenbach v. McClung*, the Court essentially read the Constitution the way the Kennedy Administration and Congress had. In *Heart of Atlanta*, the Court concluded that Congress possessed ample powers under the Commerce Clause to enact Title II, thus making it unnecessary to consider other justifications.³²⁸ *The Civil Rights Cases* were inapplicable because the Court in 1883 had not deemed the 1875 Act to rest on the Commerce Clause.³²⁹ Moreover, increased mobility of persons and goods implicated the Commerce Clause in 1964 as it had not eighty years earlier.³³⁰

Although Congress made no specific findings regarding the adverse effects on interstate commerce, the Court found the record full of evidence that racial discrimination burdened commerce.³³¹ Congress could address such activity under the Commerce Clause if the regulated activity was commerce concerning more than one state and had "a real and substantial relation to the national interest."³³² The activity Title II regulated met these criteria. Congress could address "moral and social wrong[s]" under the commerce power especially because discrimination disrupted commerce.³³³ Congress could reach "purely local" activities if they impacted interstate commerce.³³⁴ Congress was free to use any means to remove obstructions to commerce that were "reasonably adapted to the end" the Constitution permitted.³³⁵

Similarly, in *McClung*, the Court had little trouble finding that discrimination chilled commerce. As applied to Ollie's Barbeque, the refusal to serve a portion of the population decreased the amount of food bought through interstate commerce to serve to customers. The diminished volume at

323. *Id.* at 243.

324. 379 U.S. at 296–97.

325. *Id.* at 296.

326. *Id.*

327. *Id.* at 298.

328. 379 U.S. at 250.

329. *Id.* at 250–52.

330. *Id.* at 251.

331. *Id.* at 252–53.

332. *Id.* at 255.

333. *Heart of Atlanta*, 379 U.S. at 257.

334. *Id.* at 258.

335. *Id.* at 262.

Ollie's Barbeque may have been trivial, but when aggregated with others similarly situated, as *Wickard* allowed,³³⁶ it was substantial.³³⁷ Congress had a rational basis to find that "racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce."³³⁸ The lack of evidence linking discriminatory restaurant services with the flow of interstate food was immaterial given the more general proof. The Court was not going to look over Congress's shoulder to second-guess its choices in resolving what Congress thought to be "a national commercial problem of the first magnitude."³³⁹ Subject to any textual limit, Congress's power "in this field [was] broad and sweeping."³⁴⁰

Quite clearly, the Court deferred broadly to Congress in accepting its constitutional judgments. Yet the fact that the branches engaged in a constitutional dialogue did not mean they reached agreement on all points. The Court's rulings did not coincide perfectly with the Administration's theory as incorporated in the Act Congress passed. In part, the difference traced to the fact that the Government's argument in *Heart of Atlanta* and in *McClung* differed in certain particulars from the case it put before Congress. First, although the Act relied on both the Commerce Clause and section 5, the United States relied entirely on the Commerce Clause before the Court.³⁴¹ Second, whereas Robert Kennedy and Burke Marshall had argued that Congress could reach intrastate acts that "affected" commerce, Solicitor General Cox argued to the Court that Congress had power to reach interstate travel³⁴² and "local activities" that might exert "a substantial and harmful effect upon interstate commerce"³⁴³ alone or when aggregated with others of which it was representative.³⁴⁴ In *McClung*, the Government repeatedly referred to the power to regulate intrastate matters "substantially affecting"³⁴⁵ or which "substantially burden"³⁴⁶ commerce, or words to that effect. Finally, the Government's argument to demonstrate the requisite substantial effects took a surprising twist. Before Congress, the Administration had argued primarily that discrimination limited travel, impeded the movement of labor and capital, and made certain areas unattractive sites for business or conventions. The

336. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

337. *Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964).

338. *Id.* at 304.

339. *Id.* at 305.

340. *Id.*

341. Brief for Appellees at 15, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (No. 515).

342. *Id.* at 18.

343. *Id.* at 18-19.

344. *Id.* at 18-20.

345. Brief for the Appellants at 30, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (No. 543).

346. *Id.* at 32.

discrimination-leads-to-demonstrations-which-impact-commerce argument was something of an afterthought that the Administration introduced as an auxiliary point. Before the Court, that argument catapulted to the first rank. Racial discrimination in places of public accommodation burdened commerce in part because it triggered “a wide variety of protests including boycotts, picketing, mass demonstrations and other forms of economic warfare,”³⁴⁷ which discouraged business.³⁴⁸ Disputes which caused restaurants to close (and accordingly not buy products from other states) would diminish interstate commerce.³⁴⁹

The Court accepted Solicitor General Cox’s invitation to decide entirely on the Commerce Clause. All nine Justices joined the opinions of Justice Tom Clark in the two cases. The Justices had discussed whether to rest the decision on the Fourteenth Amendment.³⁵⁰ Justice Clark’s opinion concluded that “Congress possessed ample power” under the Commerce Clause and accordingly the Court did not reach the Fourteenth or Thirteenth Amendment arguments.³⁵¹ It hastened to add that its failure to discuss these provisions did not reflect a conclusion regarding their merits.³⁵² Justices Douglas and Goldberg would have also relied on the Fourteenth Amendment. In so stating, they relied on the legislative record.

The Court accepted the argument the Administration advanced, before Congress and in its brief, that Congress had broad power to regulate interstate travel, including but not limited to removing intrastate obstructions to it.³⁵³ Congress could reach the “local incidents” of interstate commerce, “including local activities in both the States of origin and destination” if they had “a substantial and harmful effect” upon interstate commerce, the Court held in *Heart of Atlanta*.³⁵⁴ In adopting the “substantial and harmful effect” formulation, the Court adopted the test Archibald Cox advanced in his Brief, a stricter measure than Robert Kennedy had suggested to Congress.³⁵⁵ In

347. Brief for Appellees at 23, *Heart of Atlanta Motel* (No. 515).

348. *Id.* at 23–29.

349. Brief for the Appellants at 38–48, *McClung* (No. 543).

350. Chief Justice Warren began the conference by arguing that the Court “should not concern [itself] with the Fourteenth Amendment.” *THE SUPREME COURT IN CONFERENCE* (1940–1985), *supra* note 38, at 726. Justices Black and Douglas indicated they would prefer to decide based on the Fourteenth Amendment and Justice Harlan agreed that “this is really *the* Fourteenth Amendment question, not a commerce clause question.” *Id.* at 727. Justice Goldberg was disposed to raise both points. *Id.* at 728.

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

352. *Id.*

353. *Id.* at 253–57.

354. *Id.* at 258.

355. Or than the Court articulated in *United States v. Darby*, 312 U.S. 100, 118 (1941), in a passage the Court quoted. *See Heart of Atlanta Motel*, 379 U.S. at 258 (Congress can regulate intrastate activities which “so affect” interstate commerce).

McClung, however, Justice Clark did not use the substantial effects formulation that the Solicitor General had urged.³⁵⁶ Instead, he repeatedly used formulations similar to that Kennedy and Marshall had urged in Congress.³⁵⁷

In determining whether the racial discrimination worked “a substantial and harmful effect” on interstate commerce, however, the Court largely departed from the path Solicitor General Cox recommended. It ignored his basic argument—that segregation gave rise to demonstrations and boycotts which chilled interstate commerce. In a long passage in *Heart of Atlanta*, the Court cited other types of evidence from the legislative record of the impact discrimination had on interstate travel. “We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.”³⁵⁸ In *McClung*, like *Heart of Atlanta*, Justice Clark found the effect on commerce in evidence the Administration presented to Congress, not that Cox argued to the Court, although it did contain one reference to the tendency of discrimination to create “wide unrest” which had “a depressant effect” on commerce.³⁵⁹ In conference, Chief Justice Warren had argued against relying “on any effect of demonstrations on commerce.”³⁶⁰

Presumably, the Chief Justice’s comment was sufficient to cause Justice Clark to find the substantial effect in arguments which had featured more prominently in the Administration’s case to Congress.

F. Roads Not Taken

Proponents of the Civil Rights Act failed to develop two constitutional arguments that might have helped shape later doctrine. Although Administration and legislative supporters invoked the Commerce Clause, they placed little reliance on the Necessary and Proper Clause, though that Clause expands Congress’s other constitutional powers. Under it, Congress can use means reasonably adapted to achieve constitutional ends.³⁶¹ On other occasions, the Court had recognized that the Necessary and Proper Clause augmented Congress’s commerce power.³⁶² The Clause was essentially neglected in discussions before Congress and in presenting the case to the Court.

356. He did quote *Wickard* to that effect. See *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964).

357. *Id.* at 302 (“directly or indirectly burden or obstruct interstate commerce”); *id.* at 303 (“affect commerce”); *id.* at 304 (“direct and adverse effect”).

358. *Heart of Atlanta*, 379 U.S. at 253.

359. *McClung*, 379 U.S. at 300.

360. THE SUPREME COURT IN CONFERENCE (1940-1985), *supra* note 38, at 726.

361. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

362. See, e.g., *United States v. Darby*, 312 U.S. 100, 118 (1941).

Nonetheless, Justice Black relied on this Clause in his concurrence in *Heart of Atlanta*. He noted that “it has long been held that the Necessary and Proper Clause . . . adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States.”³⁶³ He relied on both Article I powers in upholding the Act in *Heart of Atlanta* and *McClung*. Justice Clark also relied on it in *McClung*.³⁶⁴

Similarly, neither the Administration nor its legislative allies developed an argument it might have deployed under the Fourteenth Amendment. Much of the discussion focused on ways to flex the state action requirement to allow Congress to legislate regarding private choices. The argument assumed that the state action requirement applied to legislative action under section 5 as well as to the constitutional norm section 1 defined. That approach was certainly not preposterous. It was, of course, the position the *Civil Rights Cases* took. Yet neither was it inevitable. Unlike section 1, the text of section 5 did not refer to “state” action. Furthermore, substantial evidence suggested the framers of the Fourteenth Amendment intended Congress to have broad latitude to enforce the guarantees of the amendment.

In its August 9, 1963, memorandum, the Justice Department raised this argument. In order to combat “the evil of State action causing and supporting discrimination,” Congress under section 5 “may take in whatever additional area is necessary to make the prohibition of the evil effective.”³⁶⁵ If Congress concluded that the best way to eliminate “unconstitutional State support for nongovernmental discrimination” was to forbid private discrimination, it could do so without judicial review.³⁶⁶ Thus, section 5 operated like the Necessary and Proper Clause. It allowed Congress to “enact any measure suited to prevent or rectify unconstitutional State action even though it may have wider ramifications.”³⁶⁷

The Administration did not push this argument. Its position, after all, was that the Commerce Clause gave Congress all the power it needed. Why complicate matters by pushing a subtle, somewhat esoteric argument that was not needed to achieve legislative goals? Nor did legislators raise an argument that required an intimacy with constitutional law few had.

In *Bell v. Maryland*, Justice Black certainly flagged this argument. He repeatedly distinguished between section 1, which defined the constitutional norm vis a vis state action, and section 5, which authorized Congress to act more broadly. Might Congress, under section 5, have banned private

363. *Heart of Atlanta Motel*, 379 U.S. at 271 (citation omitted).

364. *McClung*, 379 U.S. at 301–02.

365. *Civil Rights—President’s Program*, *supra* note 8, at 425.

366. *Id.*

367. *Id.* at 426.

discrimination in places of public accommodation as a means to enforce the section 1 prohibition against state imposed denials of Equal Protection?

The Court may well have accepted the argument in 1964 had it been presented to it as a crucial basis behind the Act. Essentially the same Court decided two cases that recognized a broader province for section 5.³⁶⁸ In *United States v. Guest*, six justices in two separate opinions endorsed this theory.³⁶⁹ Justice Brennan, for himself, Chief Justice Warren, and Justice Douglas concluded that section 5 empowered Congress “to make laws that it concludes are reasonably necessary to protect a right created by and arising under” the Fourteenth Amendment even if no state actions were involved.³⁷⁰ Similarly, Justice Clark, for himself and Justices Black and Fortas, agreed that “there now can be no doubt” that Congress could use section 5 to address private action which interfered with rights under the Fourteenth Amendment.³⁷¹ Less than three months later, in *Katzenbach v. Morgan*, the Court, with only two dissenters, held that Congress could use section 5 to go beyond the constitutional norm set forth in the Equal Protection Clause.³⁷²

Had the Administration and Congress relied on such a theory of section 5, perhaps the Court would have, too. Furthermore, had the Court relied on section 5 to sustain the Civil Rights Act of 1964, perhaps later justices would have been reluctant to narrow their interpretations of section 5 for fear of jeopardizing the Act.

These constitutional surmises, however, are beside the point. With the benefit of hindsight, an expanded Necessary and Proper Clause and section 5 powers might have helped protect later congressional acts. Yet it is unfair to criticize the Administration or Congress for not leaning on these two theories before Congress. Passage of Title II and the rest of the Civil Rights Act of 1964 required a herculean effort. Southerners dominated important committees and congressional rules made it difficult to overcome their opposition. At various stages of the process, Southern legislative barons or a small number of foes could veto the bill. Proponents of the measure had little margin for error. They sought to reduce constitutional objections by acting within Congress’s recognized constitutional power rather than deploying new theories to expand that authority. In an ideal world, it would have been nice to have insulated such theories from attack by resting the Civil Rights Act of 1964 on them. Yet it is unlikely the measure would have passed if its proponents had tried to guarantee this constitutional expansion in addition to

368. Justice Fortas had replaced Justice Goldberg. *United States v. Guest*, 383 U.S. 745, 761 (1966).

369. *See generally id.*

370. *Id.* at 782.

371. *Id.* at 762.

372. 384 U.S. 641 (1966).

pursuing racial justice. The paramount goal was to pass Title II, not to create constitutional doctrine for the next century.

IV. CONCLUSION

Ultimately, the Civil Rights Act of 1964 represented the culmination of a constitutional dialogue involving all three branches. Whereas studies of constitutional interpretation typically focus on the Court, in this instance the political branches played the most conspicuous constitutional role. The predominant interpretive role of the executive and legislative branches in this battle may be due to several factors.

First, the Kennedy Administration pushed, and Congress accepted, a constitutional theory that rested on a power under which the Court gave Congress great latitude. After *Darby* and *Wickard*, the political branches could have expected judicial deference to their actions so long as they rested on some reasonable link to commerce.

Second, the political branches took a position regarding the Fourteenth Amendment that did not require the Court to fashion new constitutional law. They essentially extended the Act to the recognized limits of constitutional doctrine but no further. Because the commerce power supported Title II, they needed only modest help from section 5.

Finally, the executive branch, the majority in Congress, and the Court were all sympathetic to the Civil Rights Act. The political branches were not acting at odds with prevailing Court precedent. On the contrary, the Court had recognized civil rights claims under the Equal Protection Clause at a time when the executive and legislative branches were barely giving lipservice to such matters. The Court had struck down Jim Crow laws and had strained as far as it could to find state action in the “sit-in” cases in 1962 and 1963. It was eager for the political branches to do their part. As Joseph Rauh observed, the Court had “been the engine that has been moving this machinery toward a fairer treatment of the Negro.”³⁷³ It had been waiting for Congress to come aboard, and was not about to put it off.³⁷⁴ The handling of *Bell v. Maryland* testifies to the Court’s interest in facilitating passage of the Act. Justices weighed the impact of Congress’s deliberations on Title II as they crafted their positions, switched their votes, and wrote their opinions.

Still, the Court was not entirely submissive to the Administration’s direction. Whereas the Administration emphasized the impact-of-demonstration-on-commerce argument in its brief, the Court relied on the other effects on commerce it identified in congressional hearings. Had the Court accepted this argument, some of the arguments regarding effects it later

373. *Civil Rights*, *supra* note 41, at 1878.

374. *Id.*

rejected in *United States v. Lopez*³⁷⁵ and *United States v. Morrison*³⁷⁶ might have seemed less attenuated.

The constitutional discussion of the Civil Rights Act of 1964 also suggests some limitations of interpretive activity by political branches. First, Congress was heavily dependent on the executive branch and on outside experts for the constitutional theories that shaped the Act. The Administration and outside scholars provided the constitutional arguments regarding the Commerce Clause on which the Act rested. Sympathetic legislators provided important support but did not provide much aid in developing the argument. Other legislators were more active in articulating alternative theories, which were essentially rejected. Those most vociferous pressed the case that Title II violated the Constitution. In retrospect, those arguments seem frivolous and would attract no significant voice today. Of course, in a different context, one can imagine legislators providing the successful constitutional arguments. It just was not the case under the circumstances present here.

Second, the needs of the legislative process created incentives to rely on tried and true constitutional arguments rather than to push innovative positions. Arguments that challenged prevailing doctrine were likely to attract opposition. Thus, the Administration retreated from innovative arguments regarding the Thirteenth and Fourteenth Amendments.

The passage of Title II represented a triumph of constitutional dialogue. As the Court divided regarding the propriety of recognizing a constitutional right to service in places of public accommodation, Congress assessed and used its constitutional tools to confer such a right. Thirty years later, when the Court recognized some modest limits on Congress's commerce power in *United States v. Lopez*, it consciously did so in a way that protected Title II. *Wickard*, upon which Congress relied, was preserved;³⁷⁷ and *Heart of Atlanta* and *Katzenbach v. McClung* were favorably cited.³⁷⁸ The "economic activities" test that was introduced as the measure of when Congress could regulate intrastate activities clearly included Title II. A Constitution that did not preserve its essence had become inconceivable.

375. 514 U.S. 549 (1995).

376. 529 U.S. 598 (2000).

377. *Lopez*, 514 U.S. at 559–60.

378. *Id.* at 557.