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## **Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?**

*Brian K. Landsberg*<sup>1</sup>

In 1964, for the first time since the end of Reconstruction, Congress enacted a law banning race discrimination in public accommodations, Title II of the Civil Rights Act of 1964. It is difficult today to understand why this law, which forbade hotels, restaurants, gas stations, and places of entertainment to discriminate based on race, color, or national origin, gave rise to such heated opposition and the longest filibuster in the history of the U.S. Senate. On its fiftieth anniversary, it seems appropriate to look at the origins and scope of this law anew and ask: What was the legal and cultural landscape that helped determine the content of the Act? What conditions warranted federal legislation governing public accommodations? What were the objections to the Act? Why were there such strong law enforcement concerns about compliance with the Act?

Pursuing these inquiries leads to further questions regarding the implementation of the Act. First, did Title II achieve desegregation in the areas it was supposed to address? [My answer is a slightly qualified yes.] Second, why did compliance come more readily to this law than to some other areas, such as school desegregation and fair housing? Today, Title II gets little attention, while other non-discrimination laws, such as fair employment, fair housing, and voting rights legislation continue to produce litigation and garner public attention; yet, in 1963 and 1964, Title II was considered a key provision, as well as a very controversial one. Should we be surprised at the success thus far of Title II? Looking

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<sup>1</sup> Distinguished Professor, Pacific McGeorge School of Law. The author thanks participants in a Pacific McGeorge workshop and the Hamline Journal of Public Law and Policy Spring 2014 Symposium for their helpful comments on an earlier draft. Thanks to Robert Mayville, my research assistant, for his outstanding assistance. Thanks also to Ryann Sparrow for able editing of the draft.

to the future, a third question arises from current controversies over state public accommodations laws, which have become a new battleground largely because of their application to sexual orientation discrimination; What, if any, lessons from Title II are transferable to the state context?

### I. THE ORIGINS, SCOPE, AND ANTICIPATED PROBLEMS OF TITLE II

When it was clear that the Civil Rights Act of 1964 would soon become law, Burke Marshall, the head of the Civil Rights Division, deployed his lawyers to key southern cities to survey restaurants. He sent me to Birmingham, Alabama, which had been the scene of demonstrations, police violence, and the death of four young girls when the Sixteenth Street Baptist Church was bombed.

Before I began work with the Civil Rights Division in January 1964, I had never been South of the Mason-Dixon line. I had some limited knowledge of race discrimination in public accommodations, because I had heard that a privately owned swimming pool in my hometown of Sacramento had turned away an African-American girl who had arrived for a birthday party. At this time, however, Alabama totally segregated public accommodations.<sup>2</sup> Pressure from the Kennedy Administration had resulted in desegregation of airports, but, landing at the recently opened Montgomery, Alabama airport, I noticed that there were two men's rooms and two ladies' rooms, all in close proximity to one another. Upon inquiry, I found out that one set had been built for whites and the other for African-Americans,

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<sup>2</sup> Racial discrimination in public accommodations was by no means limited to the South, but some northern states adopted laws banning such discrimination even before 1964. In the West people of Chinese, Japanese and Mexican origin often met discrimination in using public accommodations. See e.g. MARTHA MENCHACA, *THE MEXICAN OUTSIDERS: A COMMUNITY HISTORY OF MARGINALIZATION AND DISCRIMINATION IN CALIFORNIA* (1995), *A History of Japanese Americans in California: Discriminatory Practices*, HISTORY (Jan. 21, 2015, 8:00 am PDT), [http://www.cr.nps.gov/history/online\\_books/5views/5views4.htm](http://www.cr.nps.gov/history/online_books/5views/5views4.htm).

but pressure from the Kennedy administration had led to the removal of the racial designations.

For my work with the Civil Rights Division, I walked along the streets of downtown Birmingham, stopping in at every café, soda fountain, and restaurant, having a Coca Cola here, a cup of coffee there, and a visit to the Men's room in the next. I took notes on the layout and the menu of each establishment. Though I never did go off the beaten path to places like Ollie's Barbecue, and my extensive notes were never needed, I further observed segregation of public facilities. I noticed that in restaurants, African-Americans were served only at the take-out counter. African-Americans were sent to a balcony in movie theaters. Most hotels rented rooms only to men. I traveled with African-American attorneys or secretaries, we stayed in housing on military bases.<sup>3</sup>

By 1963, civil rights groups had established a right to desegregation of interstate transportation facilities and had pressed for stronger civil rights legislation. Maryland, stung by embarrassing denials of service to African diplomats travelling to Washington, had become the first Southern state to ban discrimination in public accommodations, (but only along the Highway 40 corridor.)<sup>4</sup> While some Southern public accommodations voluntarily opened their doors to African-Americans,<sup>5</sup> Attorney General Kennedy thought that there "was already a terrible problem with the sit-ins and everything and it was going to get worse and worse and worse and

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<sup>3</sup> African-Americans have their own memories of the Jim Crow practices. My colleague Carl Gabel recalls using a pay telephone in a bus station in Georgia to call a potential black witness; when he hung up, a police officer confronted him, "Did you know you were using a colored phone?" Sonny Hereford, an engineer who grew up in Huntsville, Alabama, recalls: "When I was about 4 or 5 years old, my father had to explain to me why we couldn't walk into Shoney's Big Boy restaurant and order a meal. I knew there was food inside because of the large statue outside of the boy holding a hamburger up high." Sonnie Wellington Hereford IV, *My Walk Into History*, NOTRE DAME MAGAZINE (Spring 2007), available at <http://magazine.nd.edu/news/9874-my-walk-into-history/>

<sup>4</sup> Renee Romano, *No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961-1964*, 87 J. AM. HIST. 546, 574 (2000).

<sup>5</sup> See Gavin Wright, *Sharing the Prize: The Economics of the Civil Rights Revolution in the American South*, HARV. U. PRESS, 2013, at 93.

had to be dealt with.”<sup>6</sup> As a result, when President Kennedy proposed a new Civil Rights Act in June of 1963, the act included a ban on race discrimination in Public Accommodations. Kennedy told the American people, “It ought to be possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street, and it ought to be possible for American citizens of any color to register to vote in a free election without interference or fear of reprisal.” He said racial discrimination detracted from our standing abroad, that it led to demonstrations at home, and that it was inconsistent with the ideals of the United States.

The President’s forceful words disguised concern about the Public Accommodations title of the bill. The title faced strong opposition, based on arguments (variously couched) against federal compulsion to desegregate public accommodations. Opponents argued that Title II violated the rights of owners of public accommodations to decide whom to serve, characterizing this as both an individual right of association and a property right. Relatedly, they maintained that desegregation would result in monetary loss, because white customers would no longer patronize businesses once they desegregated.<sup>7</sup> Opponents argued that the proposed law also deprived customers of the right to choose whom to associate with,<sup>8</sup> violated local custom, and i abridged the free exercise of religion.

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<sup>6</sup> Interview by Anthony Lewis with Burke Marshall, head of the Civil Rights Division, John F. Kennedy Library Oral History Program 105 (June 20, 1964).

<sup>7</sup> “A host follows the customs of his community else he suffers, economically.” MINORITY COMMITTEE REPORT, H.R. DOC. NO. 23-340, at 5 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2436, 2441.

<sup>8</sup> “I think if I did not want to go into a hotel that had mixed patronage, that was a publicly owned hotel, that I certainly should have the right to go in a privately operated place that furnished and solicited only those that I chose to associate with.” *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1919 (1963) (statement of Edgar S. Kalb, Manager, Beverly Beach Club).

Overall, opponents characterized the proposal as federal intrusion into state and local concerns.

Opposition came from several sources: Southern business people, politicians, and clergy; some Northern Republicans and business people; some legal scholars; and extremist groups. Southern opponents made a variety of arguments. The Attorney General of Virginia argued that the Ninth Amendment to the Constitution guaranteed “the right to discriminate in private business establishments such as those covered by the Civil Rights Law of 1964.”<sup>9</sup> The Attorney General of North Carolina argued that the Commerce Clause was not “designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination.”<sup>10</sup> Some Southern opponents tended to repeat arguments from the *Brown v. Board of Education* cases against overruling *Plessy v. Ferguson*. For example, the Fourth Circuit said that segregation “declares one of the ways of life in Virginia. Separation of white and colored ‘children’ in the public schools of Virginia has for generations been a part of the mores of her people.”<sup>11</sup> The court also observed that desegregation would lead to diminished support for public schools—analogous to the argument that desegregation of public accommodations would adversely affect white patronage. At a meeting with President Kennedy, a religious leader from Florida explained his view that “segregation is a principle of the Old Testament,” and that “racial integration that would lead to intermarriage is against the will of their Creator.”<sup>12</sup> He later testified

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<sup>9</sup> Brief for the Commonwealth of Virginia as Amici Curiae Supporting Appellant at 7, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (No. 515), 1964 WL 81385.

<sup>10</sup> Brief for the State of North Carolina as Amici Curiae Supporting Respondent at 2, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (No. 543), 1964 WL 81102.

<sup>11</sup> *Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., Va.*, 103 F.Supp. 337, 339 (E.D. Va. 1952), *rev’d* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

<sup>12</sup> Rev. Albert Gorner [sic], transcript of Meeting of the President with Religious Leaders (June 17, 1963), in *CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT*, vol. 9, 106, 115 (Michal R. Belknap ed. 1991) [hereinafter

before a Congressional committee “that Federal efforts to force integration as a new social pattern of life is morally wrong, un-Christian, and in conflict with the word and will of God as well as historic Christianity.”<sup>13</sup> Other Southerners argued that the law would violate individual contract rights,<sup>14</sup> that legislation could not change racial attitudes,<sup>15</sup> and that Congress should not reward the civil rights demonstrators.<sup>16</sup>

Some Republicans agreed with the Southern opponents that requiring public accommodations to serve African Americans infringed the liberty of the owners<sup>17</sup> and that, in any event, regulation

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Belknap]. Religion later became a basis for attacking the constitutionality of the Act. The owner of a public accommodation argued that Title II infringed his freedom of religion, “since his religious beliefs compel him to oppose any integration of the races whatever. The court rejected this claim, because free exercise of religion “is subject to regulation when religious acts require accommodation to society.” *Newman v. Piggie Park Enterprises*, 256 F.Supp. 941, 943 (D.C. S.C. 1966), *rev’d on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d with modifications*, 390 U.S. 400 (1968).

<sup>13</sup> *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 2466 (1963) (statement of Dr. Albert Garner, President, Florida Baptist Institute and Seminary, Lakeland, Fla.).

<sup>14</sup> *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 2138 (1963) (statement of Douglas McKay, Jr. Attorney of Columbia, S.C., Regarding H.R. 7152 and Related Proposals Concerning Civil Rights Legislation).

<sup>15</sup> *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 2383 (1963) (statement of Jack Lowery, Esq., Attorney, Louisville, Ky.).

<sup>16</sup> *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 2274-75 (1963) (statement of Basil L. Whitener, Member of Congress from the 10th District of North Carolina).

<sup>17</sup> A Washington state supreme court justice had so argued in 1959, dissenting from a decision upholding the Washinton public accommodations law: “the right to exclusiveness... is essential to freedom.” *Browning v. Slenderella Sys.*, 54 Wash.2d 440, 455 (Wash. 1959) (Mallery, J., dissenting) (discussed in CHRISTOPHER W. SCHMIDT, *Defending the Right to Discriminate: The Libertarian*

of such places should be treated as a state law issue over which the federal government had no legitimate power. A representative of the National Apartment Owners Association echoed Southern arguments that the proposal would violate property rights and could not change the moral views of segregationists.<sup>18</sup> Barry Goldwater, who became the Republican nominee for President later that year, argued that the bill would lead to a police state and threaten “loss of our God-given liberties.”<sup>19</sup> There was a real chance that the Republican leader in the Senate, Everett Dirksen, would oppose the title and that this could kill the entire bill.<sup>20</sup> An intellectual leader of conservative Republicans, Robert Bork, argued both that the bill would “self-righteously” impose the morals of the majority upon a minority, thereby undermining freedom, and that it was impractical to impose a law “which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country.”<sup>21</sup> Similarly, New York Times columnist Arthur Krock argued that “the legislation proposes to

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*Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY, 417, 424 (Sally E. Hadden & Patricia Hagler Minter eds., 2013).

<sup>18</sup> *Civil Rights: Miscellaneous Proposals Regarding the Civil Right of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 2252-3 (1963) (statement of Oscar H. Brinkman of the National Apartment Owners Association).

<sup>19</sup> Quoted in RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS 16 (2001). The property rights rationale prevailed with California voters, who in November 1964 amended the California constitution to prohibit the state from restricting the right of homeowners to sell to whom they pleased. The Supreme Court upheld a California Supreme Court ruling that the amendment was unconstitutional, because intended to overturn laws forbidding race discrimination in the sale of property. *Reitman v. Mulkey*, 387 U.S. 369 (1967), discussed in Schmidt, *supra* note 16, at 437-438 n.83.

<sup>20</sup> Memorandum from Senator Mansfield, re meeting with Senator Dirksen (June 13, 1963), in Belknap, *supra* note 11 vol. 13, at 30; Mansfield-The President (June 18, 1963), in Belknap, *supra* note 11 vol. 13, at 30 at 33-34.

<sup>21</sup> Robert Bork, *Civil Rights – A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 23. Bork later acknowledged that his position had been wrong, because “there are no general principles to decide competing claims of association and non-association.” ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 80 (1990).



invest the Federal Government with vast, new and penal limitations of individual freedom of choice.”<sup>22</sup>

Racist groups such as the Ku Klux Klan not only opposed the bill, but intimidated business owners who wanted to desegregate. In Ohio, a Klan leader told a Klan rally that “if our President, our Congress, our Supreme Court, continues to suppress the white Caucasian race, it’s possible that there might have to be some revenge taken.”<sup>23</sup> Another objection, advanced by legal scholar Alfred Avins<sup>24</sup> and embraced by Senator Strom Thurmond, claimed that Title II would violate the Thirteenth Amendment’s ban on involuntary servitude.<sup>25</sup>

The Kennedy administration faced a legal policy issue. The Supreme Court had held the Civil Rights Act of 1875 unconstitutional, because neither the Thirteenth nor Fourteenth Amendment authorized Congress to ban private discrimination in public accommodations.<sup>26</sup> The Administration was faced with a question: “Should it ask the Court to overrule the *Civil Rights Cases* or should it instead draft legislation that relied on the Commerce Clause to confer authority on Congress to ban discrimination in

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<sup>22</sup> Arthur Krock, *In The Nation: Intolerance in the Pursuit of Tolerance*, THE NEW YORK TIMES, May 14, 1964.

<sup>23</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969). He made the speech a week after the Senate approved the House bill, with amendments. It became law a few days later. *Id.*

<sup>24</sup> “Thus, we now find, a century after Negroes were freed from the involuntary servitude of cutting the hair of whites, a demand from their descendants that whites be forced by law to cut their hair.” Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Anti-discrimination Legislation*, 49 CORNELL L.Q. 254 (1964).

<sup>25</sup> George Rutherglen, *The Thirteenth Amendment, The Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUMBIA L.REV. 122 (2012) (citing 110 Cong. Rec. 7917–22 (1964) (statement of Sen. Strom Thurmond) (quoting memorandum of Alfred Avins)). Representative Howard W. Smith, citing the Thirteenth Amendment, proposed to amend the bill by exempting persons from rendering labor or service without his consent. The proposed amendment was defeated. TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* 191 (2014).

<sup>26</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

public accommodations?” In a controversial move, the Attorney General decided to rely on the Commerce Clause and not the Thirteenth or Fourteenth Amendment; however, in Congress, even the proponents of the bill were reluctant to rest on the Commerce Clause. A highly respected constitutional law professor, Gerald Gunther, wrote to the Department of Justice that “the proposed end run by way of the commerce clause seems to me ill-advised in every respect.” He argued that “the aim of the proposed anti-discrimination legislation . . . is quite unrelated to any concern with national commerce. . . .”<sup>27</sup> Similarly, Senator Pastore from Rhode Island objected, “I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce.”<sup>28</sup> Believing that the Commerce Clause provided solid support to the ban on discrimination by public accommodations and that the Supreme Court was unlikely to overturn the *Civil Rights Cases*, the Kennedy administration relied on commerce rather than the Fourteenth Amendment, as does Title II as finally enacted.<sup>29</sup> The Supreme Court rejected claims that the Commerce Clause did not authorize the legislation and that the Thirteenth Amendment forbade it.<sup>30</sup>

The Kennedy administration also had to decide on the scope of the proposed law. Should the law be limited to large-scale and multi-state chain establishments or should it cover all? As finally adopted, Title II covered almost all hotels and motels, restaurants, gas stations, and entertainment venues, with exceptions for transient lodgings with less than six rooms and for bona fide private clubs. This virtually universal coverage facilitated compliance by removing the fear that, if a public accommodation desegregated, its customers

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<sup>27</sup> Letter from Gerald Gunther, Professor of Constitutional Law, Stanford Law School, to the Department of Justice (June 5, 1963) (quoted in GERALD GUNTHER & NOEL T. DOWLING, *CONSTITUTIONAL LAW* 336 (8th ed. 1970)).

<sup>28</sup> *Hearing on S. 1732, Before the S. Commerce Comm.*, 88th Cong. 252 (1963) (statement of Sen. John O. Pastore, Senator from Rhode Island).

<sup>29</sup> See REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 114-117 (2006) (providing an account of the arguments in Congress for and against Title II).

<sup>30</sup> *Heart of Atlanta Motel v. Katzenbach*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

could flee to one that remained segregated.<sup>31</sup> The exception for small transient lodgings was based upon an understanding that exclusion by a hotel or motel and exclusion by a small lodging place “carry different social meanings. While a tired black family might bitterly resent Mrs. Murphy’s decision, they would understand themselves as victims of her personal choice—and this is categorically different from the institutionalized humiliation imposed by a hotel clerk who rejects them. . . .”<sup>32</sup>

Burke Marshall deployed Civil Rights Division lawyers to survey southern public accommodations because he, the Attorney General, and the President harbored fears that violence would accompany black efforts to use public accommodations on a footing of equality. They had ample reasons for their concern. Jim Crow was engrained in the culture of the Deep South; the Supreme Court had blessed racial segregation in the *Civil Rights Cases* and *Plessy*. The *Civil Rights Cases* had invalidated the 1875 federal law banning race discrimination in public accommodations, holding that neither the Thirteenth nor Fourteenth amendment to the Constitution authorized the legislation. The Court had distinguished social rights from civil rights and also said that African-Americans could not lay a claim to be “special favorite[s] of the law.”<sup>33</sup> In *Plessy*, the Court had denied a right of “enforced commingling of the two races” and had said that the white race was superior to the Negro race.<sup>34</sup> In the Deep South, state law required restaurants, hotels, and other public accommodations to segregate the races. It had been only a few years since the federal courts had held these laws unconstitutional, and the custom that the law required remained ingrained.

While Marshall may not have shared the commonly held belief that the government could not legislate morality, he must have harbored some doubts about the ability of the law to displace the

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<sup>31</sup> See GAVIN WRIGHT, *SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH* 94-95 (2013).

<sup>32</sup> BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 142 (2014).

<sup>33</sup> *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

<sup>34</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551, 560 (1896).

deep-seated culture of Jim Crow. Widespread noncompliance could lead to an enforcement nightmare. The Civil Rights Division had found it necessary to sue one county after another to enjoin racial discrimination in voter registration. The delays resulting from piecemeal and interminable litigation led to the adoption of the Voting Rights Act the following year. If it was difficult to enforce laws against voter discrimination against, for example, the 67 Alabama county boards of registrars, how much more difficult would it have been if thousands of public accommodations chose not to comply with Title II? School desegregation provided another example; although the Court decided *Brown v. Board of Education* in 1954, most public schools in the Deep South remained segregated ten years later, and desegregation had often been accompanied by violence.

Marshall was well aware that when African Americans had asserted their rights under rulings that interstate busses must be integrated, they and their white companions had met extreme violence at the hands of Ku Klux Klan types — the burning of a Greyhound bus, the beatings and jailings of Freedom Riders.<sup>35</sup> He had been intimately involved with desegregation of the University of Mississippi pursuant to federal court order and the resulting white riot that required the U.S. military to intervene. He had sought peace in Birmingham, which was often called “Bombingham” because of the violent resistance there to African-American rights.<sup>36</sup> He knew that businesses had refused service to participants in lunch counter sit-ins, that angry whites had attacked participants, and that local law enforcement had then arrested those same participants.

Violent reactions to African-American use of publicly owned facilities even extended to the ocean shore. Violence against Martin Luther King and others for using the public beach at St. Augustine

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<sup>35</sup> TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* at ch. 11 (1989) (describing vividly the saga of the Freedom Riders).

<sup>36</sup> DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* 72 (2002).

continued up and past the date of passage of the Act,<sup>37</sup> even though (several years earlier) the Supreme Court had made clear that the government could not maintain segregated public facilities. These reactions were both an impetus for the Act and warning signals of what might await the nation if the Act became law and African-Americans asserted their rights under it. The month before the Act became law, three civil rights workers were murdered in Philadelphia, Mississippi, adding to concern that violence would accompany efforts of African-Americans to use public accommodations. Governor Paul Johnson of Mississippi predicted that the Act would “divide the people” and result in “civil strife and chaotic conditions.”<sup>38</sup>

President Johnson signed the Act on July 2, 1964, just before the July 4<sup>th</sup> weekend. His speech to the nation when he signed the Act implicitly addressed many of the nation’s concerns. He argued, as had President Kennedy, that the law represented fundamental morality, appealing as well to religion: “those who are equal before God shall now also be equal in the polling booths, in the classrooms, in the factories, and in hotels, restaurants, movie theaters, and other places that provide service to the public.”<sup>39</sup> He emphasized that the law was not based on rancor, but on “principles of our freedom,” so “We must not approach the observance and enforcement of this law in a vengeful spirit.”<sup>40</sup> Responding to critiques of the law, he argued that it gives no special treatment to any citizen and that it “does not

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<sup>37</sup> See TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65* at 33-40, 337-340 (1998). On June 28, 1964, the leader of an Ohio Ku Klux Klan chapter threatened to march on St. Augustine, reflecting that the concerns about the rights of white men were not limited to the Deep South. Brief of Petitioner-Appellant at 6, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (No. 492) 1969 WL 136813.

<sup>38</sup> CORTNER, *supra* note 18, at 29.

<sup>39</sup> Lyndon Baines Johnson, *Remarks upon Signing the Civil Rights Bill*, MILLER CENTER: U. OF VA (July 2, 1964), <http://millercenter.org/president/speeches/detail/3525>.

<sup>40</sup> *Id.*

restrict the freedom of any American, so long as he respects the rights of others.”<sup>41</sup>

The Civil Rights Act had created the Community Relations Service (CRS), based on Congress’ concern about potential conflict arising from the non-discrimination requirements. The Service was to assist communities in resolving disputes, disagreements, and difficulties relating to discrimination. Johnson highlighted the CRS in his speech, announcing his nomination of former Florida Governor, Leroy Collins, as its first head.<sup>42</sup> He said Collins would help “communities solve problems of human relations through reason and commonsense.”<sup>43</sup> He had earlier expressed concern that enforcement would meet with massive resistance, as well as hope that “we’ve got to have observance rather than enforcement.”<sup>44</sup> He closed with a mini-sermon: “Let us close the springs of racial poison. Let us pray for wise and understanding hearts. Let us lay aside irrelevant differences and make our Nation whole. Let us hasten that day when our unmeasured strength and our unbounded spirit will be free to do the great works ordained for this Nation by the just and wise God who is the Father of us all.”<sup>45</sup>

The immediate response to the enactment of Title II was widespread compliance, mixed with some serious non-compliance, cases challenging the constitutionality of the Act, and some violence. Civil rights historian Taylor Branch recounts that in the months after the Act passed “visible public separations broke down across the South in countless pioneer dramas. . .”<sup>46</sup>

There were definite trouble spots.<sup>47</sup> As one might have expected, one was Selma, Alabama. As recounted by U.S. District Judge Daniel Thomas,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> CORTNER, *supra* note 18, at 27.

<sup>44</sup> *Id.*

<sup>45</sup> Johnson, *supra* note 34.

<sup>46</sup> BRANCH, *supra* note 32, at 388; see also ZIETLOW, *supra* note 26, at 122.

<sup>47</sup> WRIGHT, *supra* note 4, at 97-98 (showing that “In many localities, the first reaction of proprietors was often open defiance,” but “[w]ithin two or three years, the overwhelming majority of establishments were committed to compliance.”).

About 3:00 p.m., on July 4, 1964, four Negro college students (two male and two female), who were in Selma in connection with the literacy project, attempted to obtain service at the Thirsty Boy Drive-In. The owner called Sheriff Clark, although his normal practice was to call the city police. The sheriff and several deputies arrived. A form affidavit was handed to the proprietor to sign; the warrants charging trespass after warning were already partially completed. The four Negro students were arrested, . . .; one of the students had an additional charge of resisting arrest lodged against him when he responded to the electrical shocks; another had placed against her an additional charge of carrying a concealed weapon—a bicycle chain and padlock. All four of these Negro students were required to answer a two-page questionnaire about their civil rights activities. All were lodged in jail.

Later on July 4 between 4:00 and 5:00 p.m., ten to fifteen Negro teen-agers, after purchasing tickets and securing permission of the management, entered the formerly white section of Selma's Wilby Theatre; this was the first time an attempt had been made to desegregate the theatre. At the time of this occurrence, city police, deputy sheriffs and 'possemen' patrolled the theatre area; around 5:30 p.m., when additional Negroes attempted to enter the theatre, they were blocked by a group of white citizens; an altercation occurred, and when police were summoned by the management, the police, deputies, the sheriff and 'possemen' responded; both white and Negro groups on the outside of the theatre were dispersed. Several unknown white citizens entered the theatre to remove the Negroes; the manager advised the Negroes to leave—they did; at this time some of the sheriff's deputies were inside the theatre. The officers— police, sheriff and possemen— did nothing on this occasion to protect the Negroes in their use or attempted use of this place of public accommodation; instead, they chased them from the theatre entrance and stood by while the whites forced them from the inside. The theatre was closed for the day upon the order of Sheriff Clark.<sup>48</sup>

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<sup>48</sup> United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965).

At least six Selma restaurants refused to serve African-Americans.<sup>49</sup> The black patrons at the Thirsty Boy were not just arrested; the Sheriff's deputies used electric cattle prods in arresting them.<sup>50</sup> Similarly, in St. Augustine, Florida, restaurants denied service to African-Americans, who also were assaulted by whites, including members of the Ancient City Gun Club.<sup>51</sup>

However, many public accommodations peacefully desegregated. For example, African-American lawyer Solomon Seay tells the story of his family's outing to the Elite Café in Montgomery, Alabama around 5:30 on July 2, 1964.<sup>52</sup> The Seay family sat at a table, but the servers ignored the family. Mr. Seay asked the manager whether they would be served and was told that the President was expected to sign the Civil Rights Act at 6:20 pm. "We would be served at 6:20 P.M., and not one minute before, he added."<sup>53</sup> I was able to experience this shift myself when another white Civil Rights Division attorney and I took two African American secretaries to lunch at the Holiday Inn in Montgomery, Alabama. We got approving smiles from the doorman and bellmen and disapproving scowls from the waitresses, but we were served without incident, in contrast to the treatment of the African Americans at the Thirsty Boy (fifty miles away) in Selma.

Desegregation of public accommodations gained acceptance more readily in urban centers than in rural areas. In early 1965, African Americans in the small towns of Marion and Uniontown, Alabama met resistance when they tried to desegregate local restaurants. That summer, a group of African Americans set out to integrate the Gulf Café in Morton, Mississippi. The Chief of Police threatened them with his pistol and beat up two of them. The

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<sup>49</sup> *United States v. Warren Co.*, 10 RRLR 1293 (SD Ala. 1965) (three judge district court; citations to RRLR refer to the Race Relations Law Reporter).

<sup>50</sup> In preparing for the trial of the case, I gave myself a mild jolt with an electric cattle prod. Never again will I do that!

<sup>51</sup> *Williams v. Connell and Bolden v. Allen*, 9 RRLR 1427, and *Plummer v. Brock*, 9 RRLR 1399 (M.D. Fla. 1964).

<sup>52</sup> I knew the Elite [pronounced ee'-light] as the hangout for Alabama politicians, judges, and lawyers.

<sup>53</sup> SOLOMON SEAY, *JIM CROW AND ME* 22 (2008).



Department of Justice charged him with the crime of willfully depriving individuals of civil rights under color of law,<sup>54</sup> but he was ultimately acquitted.

## II. SUCCESS OF TITLE II

The Supreme Court upheld Title II's application to hotels and motels and restaurants on December 14, 1964, six months after the law took effect.<sup>55</sup> A year after the law went into effect, the Attorney General's annual report noted: "Voluntary compliance with Title II has been most gratifying. Places of public accommodation have been voluntarily desegregated . . . in [such cities as Birmingham, Jackson, New Orleans, Jacksonville, and Savannah]."<sup>56</sup> The report also noted that where there were complaints of non-compliance "in the majority of instances institution of an investigation by the FBI has led to compliance. Only a minority of cases have required litigation."<sup>57</sup>

The following year, the report noted "a high incidence of voluntary compliance . . . in cities and urban areas, but significant patterns of non-compliance . . . in rural areas in several Southern states."<sup>58</sup> One important case enjoined an association of 122 restaurant owners in the Shreveport, Louisiana market from refusing equal service to African-Americans based on the pretext that they were private clubs.<sup>59</sup> The website for the Civil Rights Division shows the Division bringing only 21 public accommodations cases

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<sup>54</sup> ATT'Y GEN. ANN. REP. at 203 (1966). The incident is described in detail in Frank Schwelb,

*Mississippi in the Sixties and Other Experiences: The Contemporary Memoir of a Justice Department Civil Rights Lawyer* (2012), available at <http://judgeschwelbcivilrightsmemoir.com/Index2.htm/Welcome.html>,

<sup>55</sup> *Heart of Atlanta Motel v. Katzenbach*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>56</sup> Annual Report of the Attorney General for 1965, 182.

<sup>57</sup> *Id.*

<sup>58</sup> Annual Report of the Attorney General for 1966, 207.

<sup>59</sup> *United States v. N.W. La. Rest. Club*, 256 F.Supp. 151 (W.D. La. 1966).

in the past thirteen years, while bringing 57 fair lending cases during the same period.<sup>60</sup>

Once compliance was generally established, second-generation issues arose. Most of these issues resulted from ambiguity in the law regarding implementation. For example: Were amusement parks covered? Were drive-ins covered if most of their wares were sold for consumption off premises? What about pizza delivery companies? What establishments qualified for exemption as bona fide private clubs? How were plaintiffs to prove their case? When night clubs select who may enter, what will be proof of discrimination? Must the plaintiff prove discriminatory intent, or does proof of disparate impact shift the burden to the defendant to justify the impact? At present, the courts have answered many, but not all, of these questions.

I do not want to leave the impression that there are no problems. Derrick Bell has shown that racial discrimination in public accommodations is not dead; Title II does not cover every public accommodation.<sup>61</sup> For example, Bell mentions taxi drivers who will not take African-American passengers — a violation of local regulation of cabs, but hard to prove and enforce, and not a violation of Title II. The bona fide private club exception in Title II allows an unknown number of establishments to discriminate based on race.<sup>62</sup> In addition, more subtle forms of discrimination undoubtedly exist and are more difficult to discover and to prove in court.

Today, hardly any public accommodation will say to a prospective customer, “we don’t serve blacks.” Bell mentions slow service, confining minorities to less desirable tables or motel rooms, discrimination in application of disco dress codes, and differential fees, as examples.<sup>63</sup> Some of the Department of Justice (DOJ) cases

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<sup>60</sup> The Civil Rights Division, Housing & Enforcement Cases, THE UNITED STATES DEPARTMENT OF JUSTICE (Jan. 21, 2015, 4:00 PM), <http://www.justice.gov/crt/about/hce/caselist.php#pa>.

<sup>61</sup> DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 579 (6th ed. 2008).

<sup>62</sup> “[T]housands of ‘bona fide’ clubs and organizations...continue policies and practices that deny the personal dignity of all blacks simply because they are not open to all whites.” *Id.*

<sup>63</sup> *Id.* at 570-73.

fall into this category, and a few of these cases become nationally publicized in news stories. For example, discriminatory service to black Secret Service agents by a Denny's Restaurant in Annapolis, Maryland became a *cause celebre*, and a DOJ investigation and several lawsuits led to Denny's agreeing to pay \$45 million to over 4,500 victims of discrimination.<sup>64</sup> Latent racial attitudes have not been eliminated, as current voting controversies remind us. It is always possible that the attitudes could resurface in public accommodations as well, though the recent recession did not bring new life to race discrimination in public accommodations.

The most integrated institutions in the U.S. today are our public accommodations. One who goes to a café in a Southern town today would find blacks and whites (who attend or work at largely segregated schools, live in segregated residential areas, and attend different churches) sitting at adjacent tables or even the same table, seemingly without even noticing. The demonstrators who were treated as criminal trespassers when they engaged in sit-ins at lunch counters are now treated as heroes.

Why did Title II succeed, while school desegregation and fair housing, not to mention voting rights (which ordinary non-discriminatory laws had failed to protect,) continued to meet such resistance? One answer may be the nature of public accommodations. They are, as the name suggests, accommodations that are open to the public. In a sense, Title II restored the common law principles that, "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer."<sup>65</sup>

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<sup>64</sup> *Id.* at 572.

<sup>65</sup> Justice Kennedy, *in Romer v. Evans*, 517 U.S. 620, 627 (1995) (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571 (1995)). The Senate Report on the Civil Rights Act noted, "In the 17th century, Lord Chief Justice Hale expressed the authority that the public, through its Government, can exert over commercial enterprises dealing with the public: Property does become clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in the use, and must submit to be controlled

Moreover, public accommodations are businesses whose owners hope to turn a profit. Once all were forbidden to discriminate, they profited from an expanded customer base. Initial predictions that business would decrease proved wrong. Indeed, many in the Southern business community welcomed Title II for eliminating a barrier to non-Southern investment in the South.<sup>66</sup>

Voting and school segregation lay at the heart of the racial caste system and were the keys to continued inequality. Public accommodations lay at the periphery.<sup>67</sup> While attendance at school is compulsory, use of public accommodations tends to be voluntary. While schools place students into close socialization and mixing of social classes, socialization is not implicit in use of many public accommodations, such as hotels and restaurants. Moreover, public accommodations tend to appeal to various social classes, so upscale places get upscale customers and chains (such as Dennys) attract the masses. Where public accommodations do lead to more chance of socialization, such as swimming pools and night clubs, the desegregation process has confronted more problems. Especially at the beginning of school desegregation, whites feared having their children taught by black teachers; the relationship between customer and wait staff is much different than that between teacher and student. As is strikingly dramatized in Lorraine Hansberry's *A Raisin in the Sun*, whites feared that desegregated neighborhoods would decline in value and that fear often became a self-fulfilling

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by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. (1 Harg.LawTracts 78, cited with approval by Mr. Chief Justice Waite in *Munn v. Illinois*, 94 U.S. 113, 126 (1877)).

Civil Rights Act of 1964, S. Rep. No. 88-872, 1964 U.S.C.C.A.N. 2363-.

<sup>66</sup> See Clay Risen, *The Bill of the Century: The Epic Battle for the Civil Rights Act 247*, BLOOMSBURY PRESS (2014).

<sup>67</sup> A year after Title II was enacted Bayard Rustin observed, "in desegregating public accommodations, we affected institutions which are relatively peripheral both to the American socio-economic order and to the fundamental conditions of life of the Negro people." Bayard Rustin, *From Protest to Politics*, in *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* 444, 445 (August Meier, Elliott Rudwick, & Francis L. Broderick eds., 2nd ed. 1971).

prophecy. By contrast, the fear that desegregation would devalue public accommodations was quickly overcome by the facts.

Additionally, desegregation of public accommodations has not raised the same issues of remedy as other civil rights laws. “It has not stirred up questions about racial preferences and quotas as did affirmative action and busing. Nor has it prompted federal bureaucrats to construct formulas for providing racial balance in schools and employment.”<sup>68</sup> Similarly, “it’s a lot easier for individual blacks to identify discrimination in this sphere—either they are denied service entirely or they are shunted to the back of the movie theater.”<sup>69</sup>

Stripping away the rhetoric, opponents had made basically two arguments against the public accommodations law. The first was abstract—the law interfered with property rights—but many accepted laws already interfered with the right to use one’s property as one wished, such as zoning laws, the law of nuisance, and health laws. Moreover, the common law had imposed a duty on owners of public accommodations to serve all respectable customers. The second argument, which the lower court in the *Ollie’s Barbecue* case adopted, was that desegregation would cause economic loss to the public accommodations, as whites refused to use desegregated restaurants and hotels. This argument proved factually incorrect. Many owners of public accommodations welcomed the law, regarding desegregation as a means to economic gains by opening up the market. Even *Ollie’s Barbecue* saw increased, not decreased, business once it opened its doors to African-Americans.<sup>70</sup>

The Supreme Court unambiguously upheld Title II. Thus, all three branches of government supported the right to use public accommodations free from racial discrimination. The Supreme Court and Congress have been much less supportive of school desegregation. Title IV of the 1964 Act places restrictions on the

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<sup>68</sup> CIVIL RIGHTS IN AMERICA: RACIAL DESEGREGATION OF PUBLIC ACCOMMODATIONS, NATIONAL PARK SERVICE 82 (revised 2009), available at [http://www.crmvet.org/info/nps\\_public\\_accom.pdf](http://www.crmvet.org/info/nps_public_accom.pdf).

<sup>69</sup> ACKERMAN, *supra* note 29, at 172.

<sup>70</sup> CORTNER, *supra* note 18, at 188.

Attorney General's authority to sue to desegregate the schools, while Title II allows the Attorney General to sue whenever a public accommodation engages in a pattern or practice of racial discrimination. While the Equal Educational Opportunities Act of 1974 lifted the restrictions on the Attorney General's authority to sue for school desegregation, Congress made clear in that act that the neighborhood school was "the appropriate basis for determining public school assignments,"<sup>71</sup> even though residential segregation continues to separate the races.

### III. CONCLUSION

What significance can we draw from experience under Title II? There are at least two lessons one may draw from this experience. Surely one important lesson is that legislation can have a major impact on morality. The moral code of the Deep South and many other areas of the United States held that blacks and whites should not eat in the same restaurants, sleep in the same hotels, swim in the same pools, or play in the same amusement parks. While there is a fringe that continues to hold these beliefs, the vast majority of Americans now think it is immoral to exclude individuals from public accommodations based on race. Gavin Wright points out that desegregation was accompanied by marked economic progress in the South, and he suggests that this progress helps explain "the dramatic decline in Southern white support for strict segregation between 1961 and 1968. . . ."<sup>72</sup> Randall Kennedy has observed that "the ethos of the law has helped to change hearts and minds and conduct in a fashion beyond what many sit-in protesters would ever have initially imagined."<sup>73</sup> Although the main impetus for Title II stemmed from discrimination against African-Americans, Title II successfully outlawed discrimination based on national origin and religion as well, overcoming exclusion of Hispanics, Asians, Jews, Moslems.

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<sup>71</sup> 20 U.S.C. § 1701(a)(2) (1974).

<sup>72</sup> WRIGHT, *supra* note 4, at 103.

<sup>73</sup> Randall L. Kennedy, *Struggle for Racial Equality in Public Accommodations*, LEGACIES OF THE 1964 CIVIL RIGHTS ACT 161 (Bernard Grofman ed., 2000).

It is worth further study to inquire why this law was so successful in, first, changing behavior, and, second, changing the prevailing moral code. Sam Bagenstos argues that Title II also represents rejection of the Nineteenth Century distinction between civil rights and social rights, which had marked what Robert Post and Reva Siegel call “a sphere of associational freedom in which law would allow practices of race discrimination to flourish.”<sup>74</sup> Futher, Richard Epstein is troubled that Title II has served as a model for more sweeping legislation, especially at the state and local level, that both covers many businesses that are not covered by Title II and protects more groups from discrimination. He suggests that “the resurgence of Title II-type obligations under modern ‘human rights laws’ indicates a serious and regrettable reversal of fortune. . . .”<sup>75</sup> The battle over the legitimacy of coercing action based on one’s view of morality continues, but there is no dissent from the proposition that the Act did change the way Americans think about race segregation of public accommodations.<sup>76</sup>

Today, the public accommodations issue is arising in a new context. Some business owners object to laws that require them to provide their services to same-sex couples. They say that these laws impinge on their free exercise of religion or their right of non-association, replicating arguments that had been made against Title II. This argument was long ago rejected as a ground to invalidate

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<sup>74</sup> Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 6 STAN.L.REV. 66 (forthcoming 2014) (quoting Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislations After Morrison and Kimel*, 110 YALE L.J. 441, 490 (2000)).

<sup>75</sup> Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 6 STAN.L.REV.(forthcoming 2014).

<sup>76</sup> The morality enforced by Title II is partly grounded in the history of the racial caste system in the United States and partly grounded in the libertarian principle, articulated by John Stuart Mill. JOHN STUART MILL, ON LIBERTY (1859). Although Rand Paul has argued that the public accommodations law violates libertarian principles, Mill’s ideas allow government to regulate conduct that harms others.

Title II.<sup>77</sup> The case that has drawn particular attention is *Elane Photography v. Willock*,<sup>78</sup> where a wedding photographer was held liable under New Mexico's antidiscrimination law for refusing to photograph a same-sex commitment ceremony. In rejecting claims that the application of the law to *Elane* violated the photographer's rights of free speech and association and of free exercise of religion, the New Mexico Supreme Court relied in part on *Heart of Atlanta Motel, Inc. v. United States*,<sup>79</sup> which had rejected the argument that Title II imposes involuntary servitude on owners of public accommodation (in violation of the Thirteenth Amendment.) The court relied on a distinction between commercial and private activity. Justice Bosson, concurring, observed, "In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [proprietors] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different."<sup>80</sup> The court held that Title II does not cover wedding photographers and does not protect against discrimination based on sexual orientation. At the same time, however, the court did not answer the question of whether Title II stands as a precedent for upholding from broader statutes such as New Mexico's or whether the limited scope of Title II's coverage distinguishes it from these newer state laws.<sup>81</sup>

The implementation of Title II has also proven that law can be a force for economic improvement by enlarging markets.

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<sup>77</sup> *Newman v. Piggie Park Enterprises*, 256 F.Supp. 941, 943 (D.C. S.C. 1966), *rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd with modifications*, 390 U.S. 400 (1968). While this district court ruling is often cited in briefs, the rejection of the free exercise of religion argument has not yet been cited by courts. *Id.*

<sup>78</sup> *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

<sup>79</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

<sup>80</sup> *Elane Photography*, 309 P.3d at 80 (Bosson J. concurring).

<sup>81</sup> See Bagenstos, *supra* note 60, and Epstein, *supra* note 61. The competing views are well summarized in Note, *Constitutional Law -- First Amendment -- New Mexico Supreme Court Holds That Application of Public Accommodations Law to Wedding Photography Company Does Not Violate First Amendment Speech Protections*. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), 127 Harv.L.Rev. 1485 (2014).



Segregation excluded over 25% of the potential market from public accommodations, and Title II expanded the potential market by adding African-Americans into the customer base. While this would seem to be an obvious application of classic economic theory, opponents of the Act had prophesied that desegregation would be economically destructive. The economist, Gavin Wright, finds that experience under Title II presents “a remarkable example of collective co-evolutionary learning towards a better economic outcome.”<sup>82</sup> In line with the theory of the Justice Department (embraced by the Supreme Court,) Title II removed “an artificial restriction on the market’ [that] interfered with the flow of merchandise.”<sup>83</sup>

Experience under the Act validates the controversial decision of the Kennedy Administration to rely on the Commerce Clause as the constitutional basis for Title II. This decision then became the basis for a federal law that not only bans discrimination in public accommodations against the disabled, but also requires that the public accommodations make reasonable accommodations to the needs of disabled customers.<sup>84</sup> The Supreme Court has narrowed the scope of Congress’ Commerce Clause powers in recent years by excluding from Congress’ power non-economic activity with a remote nexus to commerce and inactivity, even if it has a demonstrated nexus with commerce.<sup>85</sup> Experience under Title II, however, demonstrates that the Commerce Clause ground for social legislation retains vitality when applied to economic activity.

At present, as Gavin Wright notes, discrimination against gay, lesbian, bisexual, and transgender (GLBT) persons in the southern states deters high-technology business.<sup>86</sup> Title II, unlike

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<sup>82</sup> WRIGHT, *surpa* note 4, at 101.

<sup>83</sup> Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964).

<sup>84</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 301 (1990). Indeed, the 1964 Act “represents a paradigm for congressional action to protect the rights of the American people.” ZIETLOW, *supra* note 26, at 123.

<sup>85</sup> United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

<sup>86</sup> WRIGHT, *surpa* note 4, at 263 (citing James B. Stewart, *Intolerance May Carry a Price for States*, N. Y. TIMES, May 12 [should be 11], 2012).

other key portions of the 1964 Act, has never been amended. Should Title II be expanded to protect GLBT persons from discrimination in public accommodations? To answer that question would require further inquiry into the extent of discrimination by hotels, restaurants, gas stations and places of entertainment. Most likely the discrimination occurs more in employment opportunities and in non-recognition of marriages and in activities, such as photography, not covered by Title II.

Related to the first two lessons – impact of the law on morality and impact on economy - Derrick Bell links interest-convergence theory with the experience under Title II. Bell’s discussion of Title II focuses on its shortcomings, while acknowledging that “the public generally assumes that [exclusion of blacks from public accommodations] is no longer acceptable.”<sup>87</sup> Bell argues that throughout American history, significant advances for blacks came “from policies that were intended to, and had the effect of, serving the interests and convenience of whites rather than remedying racial injustices against blacks.”<sup>88</sup> Experience under Title II shows that whites do benefit from non-discrimination in public accommodations, so the convergence of white economic interests and black interests in equal treatment helps explain the general success of Title II. This also suggests another question, though. Is it not probable that complete eradication of race discrimination from American life would benefit both whites and people of color? Is it possible to convince whites that they would be better off without racial disparities in education, employment, and business?

One can expect the lessons of Title II to guide courts and policy makers alike as new conflicts arise between the demands of equality and other values and as Commerce Clause legislation is considered.

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<sup>87</sup> BELL, *supra* note 48, at 570.

<sup>88</sup> *Id.* at 25.