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THE ROAD TO, AND THROUGH, *HEART OF ATLANTA* *MOTEL*

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During the early summer of 1963, the Senate Committee on Commerce (Committee) began hearings to discuss what its Chairman labeled as “the most important and sensitive bill that has been referred to this committee in many years.”¹ If any doubt existed about the importance of the bill, such uncertainty vanished upon the appearance of the first witness regarding “A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce” (Bill).² Testifying before the Committee, without mincing words, Attorney General Robert F. Kennedy remarked that “[w]hite people of whatever kind—prostitutes, narcotics pushers, Communists, or bank robbers—are welcome at establishments which will not admit certain of our Federal judges, ambassadors, and countless members of our Armed Forces” for no other reason than that latter group of individuals was black.³ To highlight the gravity and scope of the problem, the Attorney General not only submitted a list of segregation statutes from states around the nation, but also referred to recent racial conflicts in places like Birmingham, Alabama; Savannah, Georgia; and Cambridge, Maryland.⁴ Many states had failed to address the problem of racial discrimination by

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¹ *Civil Rights—Public Accommodations: A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1 (1963) [hereinafter *Commerce Committee Hearings*] (statement of Sen. Warren G. Magnuson).

² *See id.* at 2 (containing the text of the Bill).

³ *Id.* at 18 (statement of Robert F. Kennedy, Att’y Gen. of the United States).

⁴ *Id.* at 21-24.

legislation; therefore, there was “no hope . . . that State and local authorities [would] act to eliminate this kind of discrimination.”⁵ As a result, Congress possessed “no moral choice” but to enact a legislative remedy to secure “the very premise of American democracy—that equal rights and equal opportunity are inherent by birth in this land and not based on color, race or creed, or religion.”⁶

The substrate for congressional action to eliminate racial discrimination in public establishments had been coalescing for over a decade. Following *Brown v. Board of Education*,⁷ the Supreme Court issued a series of decisions that began to dismantle racial segregation at various publicly owned and operated facilities. Each of these cases employed a traditional definition of “state action,” since all involved state or local government-supported practices that discriminated on the basis of race.⁸ After these decisions, racially discriminatory practices at public facilities, such as municipally owned golf courses and state courtrooms, were legally barred.⁹ However, a wide swath of racially discriminatory practices remained unaffected by these Supreme Court decisions—racially discriminatory actions of private individuals. A private owner of a motel in Atlanta, Georgia, or a restaurant owner in Richmond, Virginia, could refuse to accommodate a guest on the basis of that guest’s skin color.¹⁰

Evidence illustrating the adverse effects of private racial discrimination could be readily culled from highly publicized activities in the South.¹¹ Other evidence, however, demonstrated that the problem of racial discrimination did not recognize Civil War boundaries. Indeed, Rhode Island’s Senator John O. Pastore asserted that “[t]his idea that there is any attitude of hostility or vindication or recrimination against the South is a fallacy. This is a national problem. This discrimination exists in every state in one form or another.”¹² As evidence of the extent of discrimination, Executive Secretary of the National Association for the Advancement of Colored People (NAACP), Roy Wilkins, testified that he was unable to get a cup of coffee in Salt Lake City, Utah, because he was black but that he was served breakfast in the “sinful State” of Nevada—an experience that caused him “to doubt . . . whether the evil people

⁵ *Id.* at 25.

⁶ *Id.*

⁷ 347 U.S. 483 (1954).

⁸ What is and is not “state action” has been a frequent source of confusion and debate; *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding state action in the judicial enforcement of racially restrictive covenants associated with private real estate transactions).

⁹ *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (prohibiting the city of Atlanta from allocating usage of a golf course by race); *Johnson v. Virginia*, 373 U.S. 61 (1963) (proscribing states from requiring racially segregated seating in courtrooms); *see also* *Mayor of Balt. City v. Dawson*, 350 U.S. 877 (1955) (banning racial segregation at beaches in state parks); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (barring racial discrimination at an airport restaurant).

¹⁰ At least insofar as the jurisdiction did not have an anti-discrimination statute.

¹¹ *See Commerce Committee Hearings, supra* note 1, at 21-24.

¹² *Id.* at 737 (statement of Sen. John O. Pastore).

were as evil as they had been pictured, or the holy people as holy as they had been pictured.”¹³ Further, the Undersecretary of Commerce, Franklin D. Roosevelt Jr., testified that “[e]ven in the North, Midwest, and Far West, where the denial of equal treatment is less obvious than in the South, all public accommodations are by no means fully available.”¹⁴ Given the breadth and variety of racial discrimination, the mid-twentieth century analog of today’s “Driving while Black” would be multifaceted¹⁵ — “Eating while Black,” “Sleeping while Black,” and “Traveling just about anywhere while Black.”

Racial discrimination may not have been confined to one region of the country, but such discrimination had varying relationships to government. In some cities, local ordinances required racial segregation in minute detail. The City Code of Greenville, South Carolina, for example, prohibited serving “meals to white persons and colored persons in the same room, or at the same table, or at the same counter,” required “[s]eparate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme,” and mandated different spaces “for the cleaning of eating utensils and dishes furnished the two races.”¹⁶ In other places, segregation resulted from the decisions of private business owners who chose to provide race-based services. One owner of a restaurant in Richmond, Virginia, decided to serve white patrons only while another owner decided to integrate his restaurant.¹⁷ Interestingly, the two restaurants were next door to one another.¹⁸ The combination of geographic breadth, the absence of anti-discrimination legislation in some states, and the ability of private individuals to discriminate on the ground of race under Supreme Court precedent invited federal intervention.

To attack racial discrimination attributable to private actors throughout the nation, the Bill declared that “[a]ll persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment” of various public establishments.¹⁹ Next, the Bill defined the public establishments it covered in sweeping terms to include “any” location offering public services such as motels, hotels, restaurants, cafeterias, lunch rooms, theaters, gas stations, and the like.²⁰ Covering “any” establishment engaged in providing a service to the public stood at the core of the Bill because the Bill covered the actions of private owners, which had been left untouched by Supreme Court jurisprudence. While the Bill’s coverage was intentionally broad, the original bill excepted “bona fide private club[s]” and

¹³ *Id.* at 675 (statement of Roy Wilkins, Exec. Sec’y of the NAACP).

¹⁴ *Id.* at 690 (statement of Franklin D. Roosevelt, Jr., Under Sec’y of Commerce).

¹⁵ See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).

¹⁶ *Peterson v. City of Greenville*, 373 U.S. 244, 246-47 (1963).

¹⁷ See *Commerce Committee Hearings*, *supra* note 1, at 751 (exchange between Sen. Strom Thurmond and Franklin D. Roosevelt, Jr., Under Sec’y of Commerce).

¹⁸ *Id.*

¹⁹ Interstate Public Accommodations Act, S. 1732, 88th Cong. § 3 (1963) (codified as amended at 42 U.S.C. § 2000a (2012)).

²⁰ *Id.* §§ 3(a)(1)-(3).

“other establishment[s] not open to the public” from its umbrella coverage.²¹ To enforce the ban on racial discrimination, the Bill afforded the individual suffering discrimination with a private civil remedy or permitted the Attorney General of the United States to seek civil relief in some cases.²²

The six sections of the Bill attracted witnesses and comments from a broad spectrum of individuals and groups during the hearings. High profile individuals in the national spotlight all testified before the Committee, such as Secretary of State Dean Rusk, various governors and mayors from around the country (including Governors George Wallace of Alabama and George Romney of Michigan), and the Commissioners of the National Football League, the American Football League, and Major League Baseball.²³ In addition to evidence offered by a parade of governmental luminaries, the Committee also heard and received communication from private business owners far removed from the national stage, all of whom were interested nonetheless in the impact of the legislation on their livelihoods.²⁴ Finally, the Committee also received numerous letters from groups offering their proverbial two cents. Ten consecutive pages of the final report, for example, included communications from the Socialist Party of the United States; the General Board of Christian Social Concerns of the Methodist Church; a private attorney from Baltimore, Maryland; the Young Democratic Club of the District of Columbia; and the Women’s International League for Peace and Freedom.²⁵ Because of the widespread interest in the Bill, the hearings lasted for over five weeks, and the Committee’s final report ran beyond 1500 pages.²⁶

The reason that the Bill garnered such voluminous legislative attention is that it pitted two time-honored principles against one another: civil rights versus the right of private property. On the one hand, civil rights issues had seized the public’s attention after various events during the late 1950s and early 1960s, such as Governor George Wallace’s “stand in the schoolhouse door” or Orval Faubus’s usage of the National Guard to prevent black students from entering Little Rock High School.²⁷ Furthermore, lunch counter sit-ins, freedom riders,

²¹ *Id.* § 3(b).

²² *Id.* § 5.

²³ *Commerce Committee Hearings, supra* note 1, at 281 (statement of Dean Rusk, Sec’y of State); *id.* at 434 (statement of Gov. George Wallace); *id.* at 539 (statement of Ford Frick, Comm’r, Major League Baseball); *id.* at 554 (statement of Pete Rozelle, Comm’r, Nat’l Football League); *id.* at 557 (statement of Joe Foss, Comm’r, Am. Football League).

²⁴ *See id.* at 344 (statement of Sam H. Hicks); *id.* at 598 (statement of Edgar Kalb); *id.* at 1059 (statement of John G. Vonetes).

²⁵ *Id.* at 1267-77.

²⁶ *See id.* at 1136 (statement of Sen. Norris Cotton).

²⁷ *See generally* E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION’S LAST STAND AT THE UNIVERSITY OF ALABAMA* (1993) (discussing the expulsion of Autherine Lucy and the subsequent fall of segregation at the University of Alabama in narrative form); JOHN A. KIRK, *BEYOND LITTLE ROCK: THE ORIGINS AND LEGACIES OF THE CENTRAL HIGH CRISIS* (2007) (examining the struggle for racial equality in Arkansas in multiple compiled essays from the time period).

demonstrations involving Martin Luther King, Jr., and the violence that erupted at some protests made national headlines.²⁸ On the other hand, the right of private property was, and remains, at the heart of the American experience. Exalted thinkers from John Locke to Thomas Jefferson proclaimed the importance of private property rights in high-minded writings that form a core philosophy of the nation's government.²⁹ Moreover, fear of communism and its possible relationship to the civil unrest occurring in various parts of the country added another layer of complexity to the hearings.³⁰ Given the explosive cocktail of social and political interests at stake, the Committee Chairman's description of the Bill as "sensitive" was well-justified.³¹

Legally, the clash of socio-political interests during the hearings focused on congressional authority to enact the Bill. Because the Bill aimed to eliminate racial discrimination experienced at establishments that served the public, the Fourteenth Amendment appeared to be the natural locus of congressional power to legislate in that area.³² The Supreme Court's decision in the *Civil Rights Cases*,³³ however, seemingly precluded a Fourteenth Amendment foundation for the Bill. In the *Civil Rights Cases*, the Supreme Court held that the Fourteenth Amendment did not reach private actions; therefore, the Civil Rights Act of 1875 was unconstitutional.³⁴ For his part, Attorney General Kennedy believed that circumstances had sufficiently changed since the *Civil Rights Cases* to permit the Fourteenth Amendment to be the legal foundation for the Bill.³⁵ The holding in the *Civil Rights Cases* notwithstanding, other witnesses similarly maintained that the Fourteenth Amendment was the appropriate legal basis for the proposed legislation.³⁶

Despite support for the Fourteenth Amendment approach, sole reliance on the Fourteenth Amendment was risky; therefore, the Commerce Clause

²⁸ FREDERIC O. SARGENT, *THE CIVIL RIGHTS REVOLUTION: EVENTS AND LEADERS, 1955-1968* 38-77 (2004) (describing sit-ins, freedom riders, the "Battle of Birmingham," and Martin Luther King, Jr.).

²⁹ See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 85 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 *THE WORKS OF THOMAS JEFFERSON* 7 (Paul Leicester Ford ed., G. P. Putnam's Sons 1905) ("The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.").

³⁰ See *Commerce Committee Hearings*, *supra* note 1, at 282 (statement of Dean Rusk, Sec'y of State); *id.* at 359 (statement of Gov. Ross E. Barnett of Miss.); *id.* at 519 (statement of Bruce Bennett, Att'y Gen. of the State of Ark.).

³¹ *Id.* at 1.

³² See U.S. CONST. amend. XIV, § 1.

³³ *The Civil Rights Cases*, 109 U.S. 3 (1883).

³⁴ *Id.*

³⁵ See *Commerce Committee Hearings*, *supra* note 1, at 23; *id.* 132 (responding to a question from Sen. Winston L. Prouty).

³⁶ See *id.* at 192-95 (statement of Sen. John Sherman Cooper); *id.* at 772 (statement of Erwin N. Griswold, Comm'r, Civil Rights Comm'n and Dean of Harvard Univ. Law School).

provided an alternative legal basis upon which the Bill rested.³⁷ Unlike Fourteenth Amendment jurisprudence, Supreme Court decisions repeatedly confirmed that Congress possessed broad authority to regulate matters affecting interstate commerce.³⁸ Notably, reliance on the Commerce Clause as the legal source of the authority to legislate created a schism among Committee members. They agreed that the ultimate goal was to eliminate discrimination in public accommodations, but many could not justify doing so on the basis of regulating interstate commerce.³⁹ In the end, the findings in the introduction to the Bill and the language of its regulations seemingly placed primary emphasis upon the Commerce Clause rationale.⁴⁰ Nonetheless, some language, albeit scant, also suggested that Fourteenth Amendment principles informed the Bill.⁴¹ Thus, each side in the debate obtained some satisfaction while covering their jurisprudential bases.

Because the Commerce Clause provided the safest justification for the Bill, the Committee received a wealth of evidence about the impact of racial discrimination on interstate commerce to confirm the Bill's Commerce Clause focus. Undersecretary Roosevelt submitted data that purported to illuminate the nexus between segregation and interstate commerce.⁴² The data, according to the Undersecretary, showed that racial discrimination negatively affected the business environment.⁴³ Conventions scheduled in segregated locales backed away from their commitments and segregated cities had difficulty attracting new businesses. In 1963, the American Legion scheduled its annual convention in New Orleans, Louisiana, but relocated to Florida when the Legion learned that integrated facilities were not available to support attendees.⁴⁴ The loss of business in New Orleans was an estimated \$4.5-\$5 million financial benefit to Florida.⁴⁵ Similarly, a Library of Congress report submitted to the Committee concluded that professional sports teams had not "invaded the South . . . because seats for the game[s] were being sold [o]n a segregated basis."⁴⁶ Some businesses either could not or would not operate in a location where a policy of segregation and its consequences prevailed. The bottom line, according to Undersecretary Roosevelt, was that "segregation impose[d] unnatural

³⁷ *Id.* at 23.

³⁸ *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

³⁹ *See Commerce Committee Hearings, supra* note 1, at 192-195 (statement of Sen. John Sherman Cooper); *id.* at 200 (statement of Sen. Kenneth B. Keating); *id.* at 252 (testimony of Burke Marshall, Assistant Att'y Gen., Civil Rights Div., Dept. of Justice).

⁴⁰ *See id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at 691-734.

⁴³ *Id.* at 691.

⁴⁴ *Id.* at 696.

⁴⁵ *See Commerce Committee Hearings, supra* note 1, at 696.

⁴⁶ *Id.* at 1386, 1383 (identifying the subject of the Library of Congress report as "[a]n episod[ic] account of [the] economic effects of segregation and resistance to segregation in the South").

limitations in the conduct of business which are injurious to the free flow of commerce.”⁴⁷

Undersecretary Roosevelt’s data not only explicated the impact of racial discrimination from a macro-perspective, but also revealed the deleterious effect of segregation on the micro-level. Evidence of the challenges faced by black families wanting nothing more than to take a trip from Washington, D.C., to Miami, Florida, or from Washington, D.C., to New Orleans, Louisiana, utilizing various roads through the South showed that racial discrimination was burdening individual decisions to engage in interstate travel.⁴⁸ The average distance between suitable accommodations on the Miami trip was 141 miles, while the distance between such lodgings on the New Orleans trip was 174 miles.⁴⁹ Making the journey even more difficult, the suitable accommodations available on these trips were typically establishments of less than fifteen units.⁵⁰ As a result, a possibility existed that the suitable accommodation would be sold out, which required even more travel in search of accommodations.⁵¹ Under those circumstances, black travelers faced “a bitter choice to make in deciding whether to go back or push on. Frequently the choice they make [would] be one which violates the National Safety Council’s admonition that the nonprofessional driver should stop after 6 to 8 hours driving and get a night’s sleep.”⁵²

Underscoring the challenges faced by black persons hoping to vacation by car, NAACP Executive Secretary Wilkins offered a more intimate view of the issue as compared to the naked statistics presented to the Committee. Responding to a question as to whether or not families simply avoided traveling due to the obstacles, he replied:

You have to pick a route; a route sometimes a little out of the way. I have known many colored people who drove from the East to California, but they always drove through Omaha, Cheyenne, and Salt Lake City and Reno. They didn’t take the southern route. And if they were going to Texas, they stayed north as long as they could. They didn’t go down the east coast and across the South. They went across the Middle West and down the South.

Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don’t stop where there is a vacancy sign out at a motel at 4 o’clock in the afternoon and rest yourself; you keep on driving until the next city or

⁴⁷ *Id.* at 691.

⁴⁸ *See id.* at 694 (calculating the travel information by reference to the *Go-Guide*, *infra* note 55).

⁴⁹ *Id.*

⁵⁰ *Id.* (noting that the distances are “extremely crude estimates”).

⁵¹ *Id.*

⁵² *Id.* at 694-95.

the next town where you know somebody or they know somebody who knows somebody who can take care of you.⁵³

NAACP Executive Secretary Wilkins rhetorically asked himself how a family figures out how to make a trip given such impediments and answered, “you don’t figure them out. You just live uncomfortably, from day to day.”⁵⁴

One option for families planning to make a trip was to utilize a travel guide specifically designed to convey information about where black individuals and families could stay, eat, or get gasoline while on the road. In fact, Undersecretary Roosevelt referred to one such guide, the *Go: Guide to Pleasant Motoring*, (*Go-Guide*) during his testimony.⁵⁵ For one dollar in 1959, a family could purchase a *Go-Guide* and have a list of places to stay for “All Travelers.”⁵⁶ Most of the lodgings were described as “first class in every respect,” while others, even if not first class, were deemed “acceptably operated.”⁵⁷ Individuals who used the *Go-Guide* were assured that the owners of its listed establishments “have agreed to accept as guests all well-behaved persons, regardless of their race, religion or nationality.”⁵⁸ Inside the *Go-Guide*, a reader could find information that one might find in a modern travel guide—listings of hotels, places of interest, maps, pictures, and so on. The entry for Georgia, for example, provided information about the State’s nickname, the population of black persons in the State, and then described places of interest, such as Savannah.⁵⁹ The Georgia entry also provided the names and addresses of suitable hotels, included telephone numbers and prices for rooms, and listed gasoline stations willing to serve all travelers.⁶⁰ The 1959 *Go-Guide* identified Brayboy’s Tourist Rest, located at 739 W. 52nd Street, U.S. 17, in Savannah, as being a lodging willing to accommodate black travelers.⁶¹ Given the roadblocks to black travelers, the *Go-Guide* provided vital information that could be consulted to ameliorate, but not eliminate, the hardships highlighted by NAACP Executive Secretary Wilkins.

Demonstrating that a commercial market existed for such travel information, the *Go-Guide* was not the only travel guide available to black travelers who sought to reduce the obstacles imposed by segregation in advance of travel. In 1936, Victor Green began publishing *The Negro Motorist Green Book* (*Green Book*) with the goal of providing a black traveler with “information that will keep him from running into difficulties, embarrassments and to make his trips more enjoyable.”⁶² To obtain information for listings in the *Green Book*, Green paid individual contributors for information gathered in their own

⁵³ *Id.* at 656-57.

⁵⁴ *Id.* at 657.

⁵⁵ *Id.* at 693 (citing MARION H. JACKSON, GO-GUIDE TO PLEASANT MOTORING (1959)).

⁵⁶ JACKSON, *supra* note 55, at 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 20.

⁶⁰ *Id.*

⁶¹ See JACKSON, *supra* note 56, at 20.

⁶² VICTOR H. GREEN, THE NEGRO MOTORIST GREEN BOOK 1 (1949).

travels.⁶³ The end result was an eighty-page guide that offered much more information for the prospective traveler than the *Go-Guide*. The 1949 *Green Book* entry for Little Rock, Arkansas, for example, included information for hotels, tourist homes, restaurants, beauty parlors, beauty culture schools, night clubs, barber shops, taverns, liquor stores, tailors, service stations, garages, and drug stores.⁶⁴ Whatever the contents and however the entries changed over time, the mere existence of travel guides—especially competing travel guides—specifically designed to aid black travelers is a testament to segregation’s impact on commerce.⁶⁵

Although the Committee received a wealth of information (such as the *Go-Guide*) that elucidated the link between racial discrimination and burdens on interstate commerce, this evidence did not go unchallenged. Conventions may have relocated and businesses may have avoided opening new facilities in segregated cities, but those decisions could have resulted from unrest associated with the demonstrations in those cities. During his testimony, for example, Undersecretary Roosevelt stated that several conventions scheduled to be held in Birmingham, Alabama, relocated because of the City’s segregation policy.⁶⁶ However, South Carolina Senator Strom Thurmond argued that segregation per se could not have been the reason for relocating conventions in Birmingham because those conventions had been scheduled with full knowledge that the City operated under a system of segregation.⁶⁷ Instead, Senator Thurmond suggested that the Birmingham relocation decisions stemmed from the risk of violence associated with the demonstrations in Birmingham at the time and not from the City’s segregation ordinances, which Undersecretary Roosevelt could not resoundingly refute.⁶⁸ Similarly, the Library of Congress report included evidence from a real estate agent in Missouri who worried that signed real estate contracts would not be fulfilled because of civil unrest in the area, showing potential business harm independent of segregation per se.⁶⁹ Thus, connecting racial discrimination and adverse impacts on interstate commerce was not entirely free from ambiguity in all cases.

If the evidence failed to show an irrefutable link between racial segregation and interstate commerce under some circumstances, then the evidence presented by those opposed to the Bill suffered a similar infirmity. The opposition argued that implementing the Bill would cause existing businesses to close and offered anecdotal evidence to show that passing the legislation would financially harm segregated businesses already in operation.⁷⁰ One witness

⁶³ Cotten Seiler, “So That We as a Race Might Have Something Authentic to Travel By”: *African-American Automobility and Cold-War Liberalism*, 58 *AM. Q.* 1091 (2006).

⁶⁴ See GREEN, *supra* note 62, at 9.

⁶⁵ See *Commerce Committee Hearings*, *supra* note 1, at 693.

⁶⁶ *Id.* at 749.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1385 (noting evidence as part of a report prepared by the Library of Congress).

⁷⁰ *Id.* at 946 (testimony of I. Beverly Lake); *id.* at 1066 (testimony of John G. Vonetes).

testified that two government-owned beaches in Maryland experienced a downturn in business following an attempt at integration.⁷¹ Setting aside the unquestionable application of the Fourteenth Amendment to government-owned beaches, the same witness noted that neither beach had closed, but only that white people had abandoned the beaches.⁷² Such evidence, of course, did not show that integration was the sole cause of any economic harm. After all, another beach may have become more popular in the area because it offered new amenities, or some other change may have occurred, such as increased fees, to diminish usage at the state-owned beaches. Similarly, opponents pointed to a business closure in Mississippi as evidence of the harm initiated by integration.⁷³ However, the evidence merely showed that the Mississippi business shut down after the owners attempted to integrate for “about a week or two.”⁷⁴ Again, the closing of the business does not unambiguously prove that the attempt to integrate was the cause of the closure, particularly since the attempt only lasted “about a week or two.”

Contributing to a Newtonian counterfactual,⁷⁵ the Library of Congress report contained equal and opposite evidence showing that integration neither forced businesses to close nor inflicted economic losses in integrated locales.⁷⁶ The report cited a Wall Street Journal survey of Southern businessmen, most of whom suffered “no grave dislocations” from integration and asserted that the change had been “less painful than expected.”⁷⁷ In fact, integration represented an economic boon to Dallas, Texas, because it had scheduled \$8-\$10 million in business following the decision to integrate hotels and restaurants.⁷⁸ The City of Atlanta, Georgia, experienced a similar financial gain after owners of local hotels decided to integrate.⁷⁹ A few businesses reported “lasting economic consequences” attributable to integration, but a “sizable number” discovered that integration made “business better than ever.”⁸⁰ Although the evidence was taken from newspapers and periodicals rather than scholarly studies, the information in the report cast the dire warnings of financial ruin resulting from integration into considerable doubt.

Interestingly, both proponents and opponents of the Bill had ready-made laboratories that could have been used to illuminate the positive, negative, or neutral impact of integration on businesses. At the time of the hearings, thirty-two states had public accommodations laws similar to the one before Congress.⁸¹

⁷¹ *Id.* at 609.

⁷² *Id.*

⁷³ *Id.* at 362.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1387.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ The manager of the Atlanta Convention Bureau identified increased convention traffic as a source of increased revenues. *Id.*

⁸⁰ These “lasting economic consequences” were not detailed in the Library of Congress report. *See id.*

⁸¹ *Id.* at 1316.

The Road to, and Through, Heart of Atlanta Motel

Either side could have initiated a study of the economic effect of integration on businesses, particularly in those states where segregation had been the widespread norm. Opponents, for example, could have conducted a study to identify businesses that had closed or had been economically harmed, attempted to isolate the causes, and pinpointed integration as a, if not *the*, cause of the harm. For their part, proponents could have conducted the converse academic study in the hope of finding no adverse economic consequences stemming from integration. Of course, such studies are difficult to design, challenging to implement, and may take a long time to complete. In July 1963, however, time was of the essence, and each side had evidence to craft their desired narratives.

Whatever evidentiary shortcomings may have existed, one aspect of the hearings is unambiguously clear in hindsight—the Committee hearings generated a blueprint for the legal challenge that would be made after the Bill became law. The primary architect of the legal arguments was Senator Thurmond, who repeatedly inquired whether the *Civil Rights Cases* barred the proposed legislation and if the Bill represented a taking of property in violation of the Fifth Amendment.⁸² In Senator Thurmond’s view, the Bill created a taking of property because private property owners lost the right to use their properties as they saw fit.⁸³ Furthermore, Senator Thurmond and others often asked about the scope of the Bill in terms of the businesses that might fall under the regulation given the vagaries of the Commerce Clause’s reach.⁸⁴ For example, Senator Thurmond asked Attorney General Kennedy about the definition of “substantial” and how “substantial” an impact had to be to permit legislation under the Commerce Clause’s “substantially affect interstate commerce” rationale.⁸⁵ Attorney General Kennedy succinctly replied that “substantial” meant “[m]ore than minimal.”⁸⁶ Similarly, Senators Frank Lausche and Mike Monroney each questioned witnesses about the scope of legislative authority under the Commerce Clause.⁸⁷ Senator Lausche even referred to Webster’s Dictionary for a definition of “substantial” in an effort to delineate the extent of legislative power under the Commerce Clause.⁸⁸

Predictably, a legal challenge soon followed passage of the Bill, which became Title II of the Civil Rights Act of 1964 (Title II).⁸⁹ The owner of a 216-room motel called the Heart of Atlanta Motel promoted his business through a national advertising campaign in print media, along with billboards placed along

⁸² *Id.* at 239-47 (exchange between Sen. Strom Thurmond and Burke Marshall); *id.* at 385 (exchange between Sen. Strom Thurmond and Gov. Ross E. Barnett); *id.* at 571 (exchange between Sen. Strom Thurmond and C. Maurice Wiedermeyer).

⁸³ *Id.*

⁸⁴ *Id.* at 107-13 (exchange between Sen. Strom Thurmond and Att’y Gen. Kennedy).

⁸⁵ *Id.* at 107.

⁸⁶ *Id.*

⁸⁷ *Id.* at 210-12 (exchange between Sen. Frank Lausche and Burke Marshall, Assistant Att’y Gen., Civil Rights Div., Dept. of Justice); *id.* at 1144-46 (exchange between Sen. Mike Monroney and Brice Bromley, Att’y, New York, N.Y.).

⁸⁸ *Id.* at 211.

⁸⁹ Codified as amended at 42 U.S.C. §§ 2000a-2000a-6 (1964).

interstates in Georgia.⁹⁰ The record revealed that the Heart of Atlanta Motel attracted conventions from outside of Georgia, and approximately seventy-five percent of its guests were from outside the State.⁹¹ However, none of those guests were black. The owner persistently refused to provide rooms for black patrons and demonstrated no intention to do so in the future—in contravention of the recently enacted Title II of the Civil Rights Act of 1964.⁹² As a result, the owner filed suit challenging Congress's authority to enact Title II under the Commerce Clause and asserted that Title II violated both the protection afforded to property owners under the Fifth Amendment as well as the Thirteenth Amendment's ban on involuntary servitude.⁹³

In *Heart of Atlanta Motel v. United States*, a unanimous Court upheld the constitutionality of Title II.⁹⁴ As an initial matter, the Court concluded that the statute at issue in the *Civil Rights Cases*, the Civil Rights Act of 1875, was not based upon the Commerce Clause.⁹⁵ Therefore, the holding in the *Civil Rights Cases* did not apply to Title II, because it was, in part, based upon the Commerce Clause.⁹⁶ The Court next detailed the broad power of Congress to regulate interstate commerce, which included “those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end.”⁹⁷ The question regarding congressional authority under the Commerce Clause amounted to nothing more than the Court's determination of whether Congress had a rational basis to conclude that racial discrimination by motels affected interstate commerce and, if so, whether the chosen means of regulation were “reasonable and appropriate.”⁹⁸ To that end, Congress had ample evidence that racial discrimination, even if practiced by intrastate businesses, inflicted a “substantial and harmful effect” on interstate commerce and that Congress possessed broad discretion in how to address the problem.⁹⁹ Interestingly, the Court brushed aside the Fifth Amendment and Thirteenth Amendment challenges in but a few sentences.¹⁰⁰ The Court stated that the Fifth Amendment challenge had no basis in precedent and that Title II's requirements were not “akin to African slavery” as comprehended by the

⁹⁰ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964). Interestingly, the owner of the motel served as his own attorney in the Supreme Court.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Brief of Appellant at 33-58, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (No. 515).

⁹⁴ See *Heart of Atlanta Motel*, 379 U.S. at 261-62.

⁹⁵ *Id.* at 251-52.

⁹⁶ *Id.* at 252.

⁹⁷ *Id.* at 258 (quoting *United States v. Darby*, 312 U.S. 100, 101 (1941)).

⁹⁸ *Id.* at 258-59 (“If [those chosen means of regulation] are [reasonable and appropriate], appellant has no ‘right’ to select its guests as it sees fit, free from governmental regulation.”).

⁹⁹ The decision does not expressly state that the mechanism of regulation was “reasonable and appropriate.” However, the Court must have considered Title II to meet that standard given that the Court upheld the law and noted that similar laws in other states stood unquestioned.

¹⁰⁰ *Heart of Atlanta Motel*, 379 U.S. at 261.

The Road to, and Through, Heart of Atlanta Motel

Thirteenth Amendment.¹⁰¹ Thus, the lengthy road that led to *Heart of Atlanta Motel* had ended by late 1964.

The Court's Commerce Clause analysis in *Heart of Atlanta Motel* readily aligned with precedent, but a question remained—what the decision might have been if the Bill had been grounded solely upon the Fourteenth Amendment as many supporters had desired. In fact, both Justices William O. Douglas and Arthur Goldberg maintained that Congress had Fourteenth Amendment authority to enact Title II in their concurring opinions in *Heart of Atlanta Motel*.¹⁰² None of the other Justices joined either concurrence, but an additional clue to the possible outcome lies in the primary obstacle to sole Fourteenth Amendment reliance—the *Civil Rights Cases*.¹⁰³ In a dissenting opinion in the *Civil Rights Cases*, Justice John Marshall Harlan wrote that

[i]n every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.¹⁰⁴

Given that the Court had already divined state action in judicial enforcement of private, racially restrictive covenants in *Shelley v. Kraemer*,¹⁰⁵ Justice Harlan's assertion cannot be considered to be beyond credulity if applied to the *Heart of Atlanta Motel* facts. And five years after *Heart of Atlanta Motel*, Justice Hugo Black dissented in a case applying Title II to a small business on the ground that the business could not be reached by Title II's Commerce Clause foundation.¹⁰⁶ However, Justice Black stated that he would have joined the majority in that case if Title II had been grounded upon the Fourteenth Amendment.¹⁰⁷ In short, precedent demonstrated that the state action requirement could be malleable when sufficiently weighty interests were at stake, and the *Heart of Atlanta Motel* concurrences, as well as Justice Black's aforementioned dissent, suggest that *Heart of Atlanta Motel* may have been, and probably was, such a case.

For the many black individuals and families who suffered the harmful effects of racial discrimination while traveling during the era, abstract legal discussions over whether Title II should have been based on the Fourteenth Amendment or the Commerce Clause were irrelevant. Obtaining legal protection from racial discrimination was path-independent. Black individuals and families simply wanted to be treated as equal to others on the road, in hotels, and in movie theaters. Once legal equality had been obtained, the legal route taken to attain such equality could be a topic for history books. Indeed, the fireworks during the

¹⁰¹ *Id.*

¹⁰² *See id.* at 279-80 (Douglas, J., concurring); *id.* at 293 (Goldberg, J., concurring).

¹⁰³ *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁰⁴ *See id.* at 58-59.

¹⁰⁵ 334 U.S. 1 (1948).

¹⁰⁶ *Daniel v. Paul*, 395 U.S. 298, 309-15 (1969) (Black, J., dissenting).

¹⁰⁷ *Id.* at 309.

congressional hearings held in conjunction with Title II, the *Go-Guide*, and the *Green Book* have largely been consigned to history. But if one looks, one can still find copies of those now-unnecessary travel guides, photos of locations listed in the guides, or newspaper articles that describe how the guides were used during the nation's period of segregation.¹⁰⁸ And, the legacy of *Heart of Atlanta Motel* is visible each time one enters a hotel, restaurant, or utilizes a gas station in cities around the country and sees patrons of multiple races.

¹⁰⁸ Alfred Brophy, *Jim Crow Accommodations*, THE FACULTY LOUNGE (June 28, 2014, 6:05 AM), <http://www.thefacultylounge.org/2014/06/jim-crow-accommodations.html>; Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. TIMES, Aug. 23, 2010, at C1; J. Freedom du Lac, *Guidebook That Aided Black Travelers During Segregation Reveals Vastly Different D.C.*, WASH. POST, Sept. 12, 2010.