SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 18 | Issue 3 Article 14

1967

An Appropriate Constitutional Provision for Dealing with Problems of Discrimination

Charles P. Rose

An Appropriate Constitutional Provision For Dealing With Problems of Discrimination

IN ATTEMPTING to solve the problem of racial discrimination, the courts and, more recently, Congress have relied upon the "Reconstruction Amendments"[1] and the commerce clause[2] as means of legally guaranteeing the rights of citizenship to Negroes. It is the purpose of this Note to trace the parallel development of antidiscrimination measures under the fourteenth amendment and the commerce clause and to determine which constitutional provision is best suited to accomplish the desired end, or whether perhaps a combination of the two might best eliminate discrimination. There is even a possibility that neither of these provisions offers the ultimate solution, for Congress may decide to assume a new role by enacting legislation under section five of the fourteenth amendment.[3] Although this Note will focus upon the area of racial discrimination, it is hoped that the following analysis will also serve to illuminate the problems of discrimination generally in the United States.

I. THE DEVELOPMENT OF THE FOURTEENTH AMENDMENT

A logical starting point for a discussion of constitutional guarantees in the field of civil rights is section one of the fourteenth amendment,[4] because it purportedly conferred citizenship upon the former slaves and established their civil liberties.[5] Included in this amendment are three well-known and often-used safeguards: (1) the privileges and immunities clause, (2) the due process clause, and (3) the equal protection clause. Because of the inconclusive nature of its legislative history and the continuing judicial interpretation of its provisions, the fourteenth amendment has pro-

[1] U.S. CONST. amends. XIII-XV.

[2] U.S. CONST. art. I, § 8.

[3] See note 42 *infra.*

[4] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

[5] See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 138-39 (1949).

vided limited assistance in the solution of contemporary problems as compared with its potential as part of a growing constitution.

A. Destruction of the Privileges and Immunities Clause

The idea of protecting the privileges and immunities of citizenship was incorporated in article IV, section 2, of the Constitution.[6] An analysis of this provision was provided by Judge Washington in *Corfield v. Coryell*,[7] wherein he concluded that the delegates were referring to privileges and immunities which are: "in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[8] The purpose of this article was to unite a loose confederation of states into a single nation.[9] The courts, however, have limited the interpretation of this clause to the protection of a citizen of one state against discriminatory treatment under the laws of another state where no substantial reason for the discrimination exists.[10] In short, article IV, section 2 affords protection against discrimination to citizens of one state while in another state, with respect to those privileges and immunities which are fundamental in a free society.

In 1868, the fourteenth amendment protection of privileges and immunities of United States citizens was added to the Constitution. The purpose of this clause was to make national citizenship the primary consideration in determining whether or not there was a violation of the privileges and immunities clause.[11] Under this measure,

[6] "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." U.S. CONST. art. IV, § 2.

[7] 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

[8] *Id.* at 551. Judge Washington proceeded to enumerate these fundamental privileges and immunities:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . . The right of a citizen of one state to pass through, or to reside in any other state, . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions . . . in the courts of the state; to take, hold, and dispose of property . . . and an exemption from higher taxes or impositions than are paid by the other citizens of the state. *Id.* at 551-52.

See also WEAVER, CONSTITUTIONAL LAW 130 (1946).

[9] Toomer v. Witsell, 334 U.S. 385 (1948).

[10] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873): "The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of." See Toomer v. Witsell, *supra* note 9, at 395-96.

[11] Edwards v. California, 314 U.S. 160, 182 (1941); Colgate v. Harvey, 296 U.S. 404, 427 (1953); 16 AM. JUR. 2D *Constitutional Law* § 469, at 823 (1964).

all citizens of the nation were protected against discriminatory treatment by any state government. The amendment extended the coverage of the original privileges and immunities clause to a greater number of citizens, but it apparently did not expand the nature of the privileges and immunities which required protection. The fourteenth amendment has been judicially limited to privileges and immunities of national citizenship[12] and, as was pointed out in *Colgate v. Harvey*,[13] since privileges and immunities under article IV, section 2 "are derived exclusively from the Constitution and laws enacted under it, the states were powerless to abridge them before the adoption of the Fourteenth Amendment as well as after."[14] Thus, although no new safeguards were created by the amendment, all the citizens of the nation were protected.

As a result of the manner in which the privileges and immunities clause has evolved, it has been of little use in combatting discrimination on the state level and in the private sector where no rights of national citizenship are involved. Rights derived from state citizenship continue to rely upon state constitutions and judiciaries for protection. In this situation, there is little the federal government can do to aid its citizens, especially where the state government itself is responsible for the unfair treatment.

B. Due Process of Law

The concept of due process of law, or "the law of the land," originated in England sometime prior to the signing of the Magna Carta.[15] In the United States, the guarantee has been afforded to all citizens through the fifth and fourteenth amendments.[16] Due

[12] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1873). See also Colgate v. Harvey, *supra* note 11, at 443 (dissenting opinion); MASON & BEANEY, THE SUPREME COURT IN A FREE SOCIETY 218 (1959). Mason and Beaney point out that "despite the unlimited potentiality latent in the fourteenth amendment for the enhancement of the Court's supervisory power, the Justices seemed . . . reluctant to exploit this new source of authority." The authors see the fourteenth amendment provision as an opportunity to break down the dichotomy between state and national citizenship.

[13] 296 U.S. 404, 443 (1935).

[14] *Ibid.* Some examples of rights to which the privileges and immunities clause extends protection are found in the following cases: Twining v. New Jersey, 211 U.S. 78, 96 (1908) (right to peaceably assemble); Blake v. McClung, 172 U.S. 239, 252 (1898) (taxed on the same basis as citizens of the forum state); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) (the right to pass from state to state).

[15] BRANDT, THE BILL OF RIGHTS 83 (1965); GRISWOLD, THE 5TH AMENDMENT TODAY 31 (1955); WEAVER, *op. cit. supra* note 8, at 409.

[16] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

process is not a term which fits into the confines of a concise and readily understandable definition, but rather is a concept which develops as history develops and yet provides stability to this process of growth. It is in this context that Dean Griswold characterized due process: "Perhaps it may be said that we are accustomed to decent treatment from our public officers, and that our hearts and minds recoil when this custom is broken. It is with this sort of thing that the idea of due process, of the 'law of the land' is concerned."[17] In practice, the terms "arbitrary" or "oppressive" are often associated with governmental acts which violate the standards of due process.[18] Thus, although each situation must be examined with respect to its own facts, it may be said that any deprivation of life, liberty, or property by arbitrary, capricious, or unjust action would violate due process.

Due process, as it is understood today, refers to substantive as well as procedural abuses. Procedural due process seeks to insure that any proceeding which may deprive one of his right to life, liberty, or property is conducted in a manner consistent with the traditional, albeit abstract, notions mentioned above.[19] Two of the primary values which procedural due process currently emphasizes are: (1) the reliability of the guilt determining process;[20] and (2) respect for human dignity.[21]

Substantive due process, on the other hand, seeks to protect individuals against arbitrary actions which work a deprivation of life, liberty, or property irrespective of how correct the procedure may be.[22] Again, there are two values which act as guides in an analysis of substantive due process: first, whether the measure under attack involves an end which the state may validly seek to accomplish; and, second, whether reasonable means have been used to accomplish

---

[17] GRISWOLD, *op. cit. supra* note 15, at 37-38.

[18] *Id.* at 37; WEAVER, *op. cit. supra* note 8, at 411: "Any purely arbitrary, oppressive, confiscatory, or capricious exercise of legislative power, amounting to a wrongful invasion of liberty or property rights is not due process of law and is invalid."

[19] *Id.* at 411:

> The following requirements are generally considered essential elements of due process: Notice, summons or other process; a hearing, and granting an opportunity to be heard and to defend in an orderly proceeding before a court or other tribunal having jurisdiction of the cause and which renders judgment only after trial.

[20] Gideon v. Wainwright, 372 U.S. 335 (1963); Palko v. Connecticut, 302 U.S. 319 (1937).

[21] Mapp v. Ohio, 367 U.S. 643 (1961).

[22] BRANDT, *op. cit. supra* note 15, at 76; 16 AM. JUR. 2D *Constitutional Law* § 550, at 946 (1964).

that end.[23] If the state seeks to accomplish a valid end through reasonable means, then the requirements of substantive due process are probably met. During much of its existence, the concept of due process has been restricted to the procedural aspect.[24] It was not until the economic regulation cases of the early part of this century that substantive due process evolved as a curb to arbitrary deprivations of life, liberty, and property by governmental action.[25] In the last decade, however, the emphasis has returned to procedural due process with little attention being given to substantive matters.[26]

With the strict limitations placed on the privileges and immunities clause and the development of substantive due process, the due process clause of the fourteenth amendment has evolved as a potent weapon in the solution of discrimination problems.[27] However, the potential of even this provision has been stifled by the concept of state action.[28] The citizen thus appears to be adequately protected against unjust deprivations of life, liberty, and property by a state, but protection against private discrimination is less certain.

C. *Equal Protection of the Laws*

The authorities seem to be in general agreement that the equal protection clause was added to the Constitution to insure that Negroes would have the same civil rights that were enjoyed by the white race.[29] One might note at this point that unlike privileges and immunities and due process of law, the equal protection guarantee is found only once in the Constitution — in the fourteenth amendment. There is no equivalent provision in the original Constitution applicable to the federal government. Although equal protection, like due process, is difficult to define in precise terms, it

---

[23] Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897); WEAVER, *op. cit. supra* note 8, at 410. "The courts have held that this amendment includes such substantive rights as religious freedom, freedom of speech, freedom of the press, the right of one accused of crime to have the benefit of counsl, as well as the taking of private property by the states for public use without just compensation." *Ibid.*

[24] Fairman, *supra* note 5, at 164.

[25] *Id.* at 165. See also Nebbia v. New York, 291 U.S. 502 (1934); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[26] Fairman, *supra* note 5, at 9.

[27] See text accompanying notes 6-26 *supra.*

[28] See text accompanying notes 39-41 *infra.*

[29] BRANDT, *op. cit. supra* note 15, at 325; MASON & BEANEY, *op. cit. supra* note 12, at 254; WEAVER, *op. cit. supra* note 8, at 395; Fairman, *supra* note 5, at 138-39.

has developed as a guarantee that people in similar situations will be given similar treatment.[30] At first blush this would seem to be inconsistent with the very nature of legislation which often involves the creation of rules proscribing the actions of certain groups or classes. As Tussman and tenBroek point out, however, this inconsistency presents no obstacle in light of the doctrine of reasonable classification.[31] Legislation directed at a specific class does not violate the equal protection clause if the classification is based on reason and is not arbitrary.[32]

As the other provisions of section one of the fourteenth amendment were diluted by early and restrictive judicial interpretations, so too did the phrase "equal protection of the laws" receive a severely limited interpretation. In 1896, the Supreme Court approved of segregation on railroad cars so long as equal facilities were made available to both races.[33] For the next fifty years, this "separate but equal" interpretation rendered the provision virtually useless in accomplishing the ends which the drafters of the equal protection clause had intended. But eventually the first visible signs of decay began to develop in this economically infeasible doctrine.[34] In *Sweatt v. Painter*,[35] the Supreme Court ruled that the separate Negro law school at a Texas university was inadequate and not equal to facilities for white students. Finally, in 1954, the Court overruled the "separate but equal" doctrine in *Brown v. Board of Educ.*[36] and rekindled the fight against discriminatory treatment — one which had begun in 1863 but which had been without success for almost one hundred years.

---

[30] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[31] In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. *Ibid.*

[32] *Ibid.*

[33] Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896); MASON & BEANEY, *op. cit. supra* note 12, at 256; WEAVER, *op. cit. supra* note 8, at 397.

[34] McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). See also MASON & BEANEY, *op. cit. supra* note 12, at 257.

[35] 339 U.S. 629, 633-34 (1950).

[36] 347 U.S. 483 (1954). The Court found that separate facilities were inherently unequal. See also Turner v. Memphis, 369 U.S. 350 (1962) (airport restaurant); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public golf course); Gayle v. Browder, 352 U.S. 903 (1956) (desegrated buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bath houses).

As has been pointed out,[37] there is no equal protection clause which binds the federal government. However, an interplay has developed between equal protection and due process. The two clauses have in essence been read together, and a violation of equal protection — namely, unreasonable or arbitrary classification — is itself violative of due process. This argument was relied upon in *Bolling v. Sharpe*,[38] where the holding of the *Brown* case was applied to the desegregation of public schools in the District of Columbia. Despite this recent revival in the vitality of the equal protection clause, there remains the requirement of state action which, just as with due process, renders it ineffective in combatting discrimination in the private sector.

D. The Requirement of State Action

In addition to the restrictive interpretations given to the various provisions of section one of the fourteenth amendment, the largest single limitation on the use of these safeguards has been the concept of state action. The words "no state shall" loom larger than any single guarantee in the contemporary understanding of the amendment. The significance of this limitation was first brought to the fore in the *Civil Rights Cases*.[39] Mr. Justice Bradley, speaking for the majority, said: "Individual invasion of individual rights is not the subject matter of this amendment."[40] Under this doctrine, the only violations of the guarantees discussed above which receive protection are violations by the states through their various facilities. Although the requirement of state action has been somewhat relaxed through interpretation, it still represents a substantial obstacle in fighting discrimination in the private sphere.[41]

E. The Enforcement Provision

Finally, some reference should be made to section five of the fourteenth amendment[42] which, unlike section one, has virtually no traceable history. After the decision in the *Civil Rights Cases*,[43]

---

[37] See text accompanying note 30 *supra.*

[38] 347 U.S. 497 (1954).

[39] 109 U.S. 3 (1883).

[40] *Id.* at 11.

[41] See text accompanying notes 108-15 *infra.*

[42] U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[43] 109 U.S. 3 (1883).

which invalidated civil rights legislation dealing with public accommodations based on the enforcement clause, section five was totally disregarded until the Voting Rights Act of 1965. It is the rebirth of section five in the area of discrimination — a direct result of the Voting Rights Bill — which this Note seeks to explore.[44]

II. THE COMMERCE CLAUSE

The commerce clause, found in article I, section 8, represents an attempt by the Constitution's framers to eliminate one of the major causes of disunity under the Articles of Confederation. They sought to promote commercial intercourse among the several states and to create a united national economy — a kind of eighteenth-century common market.[45] Although the Constitution gave Congress the power to regulate commerce, it provided no guides as to the scope of the power or the meaning of the term "commerce." Mr. Chief Justice Marshall propounded a broad definition for the term in *Gibbons v. Ogden*,[46] in which he said: "Commerce, undoubtedly, is traffic, but it is something more — it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches."[47] Marshall also discussed the scope of the commerce clause:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, orher [*sic*] than are prescribed in the constitution.[48]

In *Gibbons*, the Court held that an act of Congress regulating the licensing of steamboats prevailed over a similar state act.[49] In *Cooley v. Board of Wardens*,[50] the federal government received considerable leverage in the regulation of commerce through the Court's analysis of the commerce power:

> Subjects national in scope admit only of uniform regulations; these require congressional legislation, and in the absence of such legislation the states cannot act. As to subjects of a local character, not

---

[44] See text accompanying notes 120-24 *infra*.

[45] Cooke, *The Commerce Power*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 45-46 (1938); MASON & BEANEY, *op. cit. supra* note 12, at 103.

[46] 22 U.S. (9 Wheat.) 1 (1824).

[47] *Id.* at 83.

[48] *Id.* at 86.

[49] *Id.* at 239-40.

[50] 53 U.S. (12 How.) 318 (1851).

> requiring uniform legislation, the states may legislate until Congress, by acting on the same subject, displaces the state law.[51]

The next major development in the history of the commerce clause permitted regulation of activities which were purely intrastate in nature but which had a *direct* effect on interstate commerce.[52] The idea emerged from the case of *Houston, E. & W. Ry. v. United States*,[53] in which a railroad charged lower rates between intrastate points than the rates established by the Interstate Commerce Commission. However, this principle was held inapplicable in cases where intrastate activities had only an indirect effect on interstate commerce.[54] This development reached its logical end in *Wickard v. Filburn*,[55] the Court holding that although one man's individual contribution to interstate commerce may not be substantial, when considered together with the contributions of those similarly situated, it becomes substantial.[56] It was a refinement of this last interpretation which brought the commerce clause into the battle against private discrimination in the 1964 Civil Rights Act.[57]

In addition to the development of the commerce power's scope *vis à vis* intrastate and interstate activity, the nature of the activities regulated expanded into a kind of federal police power.[58] Congress began exercising its authority under the commerce clause to accomplish ends which were morally and socially desirable.[59] In *Champion v. Ames*,[60] the Court upheld federal legislation prohibiting the distribution of lottery tickets in interstate commerce. Mr. Justice Harlan pointed out that since this was an interstate problem, no single state could take effective action to eliminate the evil: "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be crushed by the only power competent to that end."[61] Under this interpre-

---

[51] MASON & BEANEY, *op. cit. supra* note 12, at 114.

[52] Houston, E. & W. Ry. v. United States, 234 U.S. 342 (1914).

[53] *Ibid.*

[54] Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935).

[55] 317 U.S. 111 (1942).

[56] *Id.* at 127-28.

[57] Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Both of these cases considered the effect on interstate commerce of discrimination practiced by interstate operations.

[58] Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289 (1919).

[59] MASON & BEANEY, *op. cit. supra* note 12, at 157.

[60] 188 U.S. 321 (1903).

[61] *Id.* at 357-58.

tation, Congress could regulate any item in interstate commerce which it considered tainted with some moral or social evil.[62] Thus, the clause has developed from the regulation of intercourse among the states to the regulation of any activity — social, economic, or moral — which may have a substantial effect on interstate commerce.

III. Antidiscrimination Legislation and the Commerce Clause

A. The Cases

(1) Edwards v. California.[63]—In *Edwards* the petitioner had been convicted of violating a state statute which made the intentional bringing of non-resident indigents into the state a misdemeanor. The Supreme Court held that this statute, discriminating against indigent persons and enacted under the state's police power, was "an unconstitutional barrier to interstate commerce."[64] The Court further held that the transportation of indigent persons across state lines is an activity to be controlled by a single national authority.[65] The most interesting aspect of the decision is the concurring opinions which question the relevancy of the commerce clause to factual situations involving discriminatory treatment of United States citizens. Mr. Justice Douglas wrote: "I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."[66] Douglas felt that the right to move from state to state was one of those privileges and immunities which is inherent in national citizenship and protected by the fourteenth amendment.

Mr. Justice Jackson, also concurring, suggested that a human being with nothing to sell and no money with which to buy was isolated from traditional notions of commerce.[67] Like Douglas,

---

[62] See, *e.g.*, United States v. Darby, 312 U.S. 100 (1941) (goods produced under substandard labor conditions); Brown v. United States, 267 U.S. 432 (1925) (stolen automobiles banned in interstate commerce); Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917) (transportation of alcohol into a dry state); Hoke v. United States, 227 U.S. 308 (1913) (transporting women in interstate commerce for immoral purposes); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (adulterated food).

[63] 314 U.S. 160 (1941).

[64] *Id.* at 173.

[65] *Id.* at 176.

[66] *Id.* at 177 (concurring opinion).

[67] *Id.* at 182 (concurring opinion).

Jackson relied on section one of the fourteenth amendment, pointing out that the right of travel among the states is not absolute, and where it is limited the restrictions must be reasonable and not irrelevant or based on "neutral" grounds such as indigence, race, creed, or color.[68] The logical approach of the concurring Justices, therefore, would rely upon the fourteenth amendment to protect human rights rather than extending the commerce clause into this area.

(2) Heart of Atlanta Motel, Inc. v. United States.[69]—In 1964, subsequent to race rioting in the South, a Negro march on Washington, and innumerable protest demonstrations, Congress passed the first substantial antidiscrimination legislation since the days of Reconstruction. Title II of the 1964 Civil Rights Act sought to eliminate discrimination in the area of public accommodations.[70] The *Heart of Atlanta Motel* case involved a small, downtown Atlanta motel which advertised outside the state and registered seventy-five percent of its customers from other states. The proprietor refused to rent rooms to Negroes, and a declaratory judgment action was filed to have the act declared unconstitutional. The Court indicated early in its opinion that Congress intended to base this legislation on section five and the equal protection clause of the fourteenth amendment as well as the commerce clause.[71] After a thorough discussion of the legislation and its history, the majority proceeded to uphold its constitutionality based on the commerce clause.[72] Mr. Justice Clark conceded that Title II was intended to deal with a moral wrong, but he ignored that fact because of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse."[73] The Court reasoned, based on the history of the commerce power, that

[68] *Id.* at 184-85 (concurring opinion).

[69] 379 U.S. 241 (1964).

[70] "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Civil Rights Act of 1964, § 201(a), 78 Stat. 243, 42 U.S.C. § 2000a(a) (1964).

[71] 379 U.S. at 249.

[72] *Id.* at 250. In his concurring opinion, Mr. Justice Goldberg cited the Senate Commerce report:

> "The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable . . . because of his race or color." *Id.* at 291-92.

[73] *Id.* at 257.

the movement of people across state lines is interstate commerce and that although the Heart of Atlanta Motel may be a local, intrastate operation, its discriminatory practices may have "a substantial and harmful effect upon that commerce," and Congress is therefore authorized to regulate it.[74] The legislative history of Title II indicated that discrimination in public accommodations made it difficult, if not impossible, for Negroes to find suitable lodging while away from home and thus discouraged them from traveling.[75]

The case of *Katzenbach v. McClung*[76] dealt with the constitutionality of the act as it applied to a Birmingham, Alabama, restaurant. Ollie's Barbecue, a small restaurant located some distance from any interstate highway, served primarily the local community. No Negroes were served in the restaurant, although the proprietor did provide a take-out service which was available to them. The most significant factor in this decision was that forty-six percent of the meat which Ollie's Barbecue bought locally had moved through the channels of interstate commerce.[77] The district court found that the state of Alabama was not involved in the discrimination practiced by Ollie's and that since no "state action" was involved, the fourteenth amendment was inapplicable.[78] The Supreme Court, in applying Title II to Ollie's Barbecue, again relied on the legislative history of the bill to supply the requirement of "reasonableness" to the means used to accomplish the desired end.[79] This examination indicated that because of discriminatory practices in facilities serving interstate goods, Negroes were discouraged from traveling and, therefore, fewer interstate goods would be sold than if discrimination did not exist.[80] As in *Heart of Atlanta Motel, Inc. v. United States*,[81] the Court used a quantitative approach to the commerce

---

[74] *Id.* at 258.

[75] *Id.* at 253. Mr. Justice Clark, writing for the majority, stated:
> This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. . . . [T]he voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel. *Ibid.*

[76] 379 U.S. 294 (1964).

[77] *Id.* at 296.

[78] *Id.* at 297.

[79] *Id.* at 299-301.

[80] *Id.* at 300.

[81] 379 U.S. 241 (1964).

clause for the purpose of guaranteeing human rights to Negroes.[82] Under this analysis, the civil rights of a Negro family living next door to Ollie's Barbecue are totally dependent upon how much food the restaurant buys through the channels of interstate commerce.

Twenty-three years after his opinion in *Edwards*,[83] Mr. Justice Douglas, joined by Mr. Justice Goldberg, again voiced dissatisfaction with a decision which relies upon the commerce clause to protect basic civil liberties. He contended that a holding based on section five of the fourteenth amendment would limit obstructionist litigation over the commercial definitions of inn, restaurant, and interstate traveler. Douglas wrote: "Under my construction, the Act would apply to *all* customers in *all* enumerated places of public accommodation."[84] In his brief concurring opinion, Mr. Justice Goldberg substantially enhanced the meaning of section five of the fourteenth amendment when he wrote:

> [Section] 1 of the Fourteenth Amendment guarantees to all Americans the constitutional right "to be treated as equal members of the community with respect to public accommodations," and . . . "Congress [has] authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause . . . to implement the rights protected by § 1 of the Fourteenth Amendment.[85]

The opinions of Douglas and Goldberg indicate dissatisfaction with the use of the commerce power in antidiscrimination legislation, apparently because of the tenuous connection between the protection of human rights and a constitutional provision intended to establish a unified national economy. Although there may be some small connection between discrimination at Ollie's Barbecue and the flow of interstate goods, the purpose of the act was the elimination of discriminatory practices. And what result will obtain in factual situations where commerce is clearly not involved? Are human rights to be ignored?

B. The Logical Result

If the Court should decide to expand its recent interpretation of the commerce clause into other areas, there exist innumerable sub-

---

[82] See note 75 *supra.*

[83] Edwards v. California, 314 U.S. 160 (1941).

[84] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 280 (1964) (concurring opinion). (Emphasis added.)

[85] *Id.* at 293 (concurring opinion of Mr. Justice Goldberg, quoting from his opinion in Bell v. Maryland, 378 U.S. 226, 317 (1964)). His reference to the commerce clause includes only the basis of the majority opinion which he does not feel is the best approach.

jects which could be regulated with slight if any relation to the common notions of commerce. The argument as established in the discrimination cases would take the following form. Congress has the power to regulate commerce among the states.[86] The *quantity* of goods flowing in interstate commerce is adversely affected by the practice of racial discrimination.[87] Therefore, Congress has the power to prohibit the practice of racial discrimination. If it should find that astronomical motel rates or the excessive prices charged by restaurants selling interstate goods impair the flow of goods (as well as people) in interstate commerce, then, applying the above argument, valid price control legislation could be enacted based on the commerce power. A more extreme, albeit a permissible, extension would allow Congress to control *aesthetics* under the *commerce power.* If one could show that citizens shy away from travel or purchase of interstate goods because of poorly designed buildings or highways obliterated with billboards, Congress could intervene and regulate these areas under the authority of the commerce clause. This appears to be the logical, though somewhat disturbing, result of a substantially quantitative approach to the commerce power. In an extreme situation perhaps this kind of justification may be necessary, but there exists some doubt as to its necessity in the area of racial discrimination.

IV. ANTIDISCRIMINATION LEGISLATION AND SECTION FIVE

A. The Cases

(1) United States v. Guest.[88]—Guest and his fellow defendants were charged with conspiring to deprive Negroes of the enjoyment of their constitutional rights under a federal statute.[89] Part II of Mr. Justice Stewart's opinion deals with that portion of the in-

[86] U.S. CONST. art. I, § 8.

[87] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964); Katzenbach v. McClung, 379 U.S. 294, 300 (1964).

[88] 383 U.S. 745 (1966).

[89] 18 U.S.C. § 241 (1964) provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

dictment which charged the defendant with conspiring to deprive Negroes of the right to use state-operated facilities in Athens, Georgia. The opinion points out that this was a private conspiracy and no one "acted in any way under the color of state law."[90] Stewart avoided section five by construing the statute involved as incorporating the equal protection clause and nothing more.[91]

According to the traditional interpretation of the fourteenth amendment, the equal protection clause is only effective against state action. Stewart felt that this requirement was met.[92] He reasoned that the filing of false criminal charges against Negroes by a private conspiracy which brings state law enforcement agencies into action constitutes sufficient affirmative state action to invoke the equal protection clause. Although Stewart wrote the majority opinion, he was in a definite minority in his argument supporting reversal of the dismissed indictment on this ground.

A majority of the Court was of the opinion that Congress, under section five may "enact laws punishing *all* conspiracies to interfere with the exercise of fourteenth amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy."[93] For the first time, a majority felt that section five was intended as more than a measure to authorize remedial congressional legislation only after the Court had found the actions of a particular state violative of the fourteenth amendment. Equally significant is the idea that this positive grant of power to Congress is not limited by the doctrine of state action. If a private conspiracy may be indicted for interfering with the rights of Negroes in their enjoyment of state facilities, why could not the

---

[90] United States v. Guest, 383 U.S. 745, 754 (1966).

[91] *Id.* at 754-55.

[92] *Id.* at 756.

[93] *Id.* at 782 (concurring opinion). Mr. Justice Brennan's opinion, in which Mr. Chief Justice Warren and Mr. Justice Douglas joined, continues:

> Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of *private* conspiracies interfering with the exercise of such right is necessary to its full protection. *Ibid.* (Emphasis added.)

Mr. Justice Clark, joined by Justices Black and Fortas, stated: "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies — with or without state action — that interfere with Fourteenth Amendment rights." *Id.* at 762 (concurring opinion).

same group be indicted for similar conspiracies in other areas of discrimination?[94]

(2) Katzenbach v. Morgan.[95]—In the summer of 1965, only one year after the enactment of the civil rights legislation involved in *Heart of Atlanta Motel*,[96] Congress enacted another significant civil rights measure designed to protect voting rights against discrimination.[97] Two New York residents brought an action attacking the constitutionality of section four of the act because it prohibited the use of literacy tests which were required by New York law. The lower court held the act unconstitutional on the ground that it was beyond the power granted to Congress and violated the tenth amendment.[98] The Supreme Court reversed, and the opinion written by Mr. Justice Brennan stated: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . ."[99] The Court held that sec-

---

[94] Mr. Justice Harlan disagreed with the policy behind this extension of the fourteenth amendment:

> If the State obstructs free intercourse of goods, people, or ideas, the bonds of union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority, or by appropriate federal legislation. *Id.* at 772.

[95] 384 U.S. 641 (1966).

[96] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[97] Voting Rights Act of 1965, § 4(e), 79 Stat. 438, 42 U.S.C. § 1973(a)-(8) (Supp. I. 1966):

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language. (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any state, or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

[98] Katzenbach v. Morgan, 384 U.S. 641, 646 (1966).

[99] *Id.* at 650. "The classic formulation of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, . . . : 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.'" *Ibid.*

tion five gave Congress a grant of power to insure the Puerto Rican minorities of New York City the right to vote and found a rational basis upon which Congress had made its judgment that the literacy test deprived those groups mentioned in section four of equal protection of the laws.[100]

Mr. Justice Harlan, joined by Mr. Justice Stewart, clung to the orthodox view that section five is applicable after the judiciary has decided whether a particular state act infringes upon the guarantees of the amendment.[101] This view is somewhat puzzling, for if the Court declares the state action invalid, there is nothing for Congress to do under section five. Apparently, Mr. Justice Harlan's primary concern with the majority opinion was that Congress may be able to dilute as well as expand the protections of the amendment through section five.[102] Mr. Justice Brennan responded to this possibility in a footnote: "We emphasize that Congress' power under § 5 is limited to adopting measures *to enforce the guarantees* of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[103] Thus, any legislation by the Congress under section five which tended to restrict the amendment's provisions would be found unreasonable by the Court and declared invalid. A fair reading of *Katzenbach v. Morgan*[104] supports the conclusion that Congress has an implied power to enact laws necessary to insure the express guarantees of the fourteenth amendment so long as the legislation is reasonable.

B. The New Approach

(1) A "Necessary and Proper" Clause in the Fourteenth Amendment.—Katzenbach v. Morgan[105] represents a breakthrough in eliminating the traditional restrictive notions of the fourteenth-amendment protections. The battle against discrimination should now shift from the Court to the legislature because Congress is not limited to prohibiting only those actions by the states which violate equal protection, due process, or privileges and immunities; but may now enact laws which are necessary to insure these guarantees to *all* citizens. This new concept is consistent with the argument

100 *Id.* at 656.
101 *Id.* at 666 (dissenting opinion).
102 *Id.* at 668 (dissenting opinion).
103 *Id.* at 651 n.10. (Emphasis added.)
104 384 U.S. 641 (1966).
105 *Ibid.*

made by Frantz: "[T]he theoretical approach is that the amendment creates affirmative rights in individuals, not merely restraints upon the states."[106]

(2) The Erosion of State Action.—Before looking at the effect of the new approach on the state action doctrine, it is necessary to examine the extent to which this doctrine has developed since its inception in the *Civil Rights Cases*.[107] Although the state action doctrine has been a hindrance in fighting discrimination, it has eroded to the point where it now exists only as a legal fiction.[108] Apparently, the slightest connection with state authority will support a finding of state action. The requirement has been satisfied where a state court enforced a racially restrictive covenant,[109] and where a private organization had undertaken the performance of a governmental function.[110] State action was also found where a state leased facilities in its parking garage to a private concern.[111]

One author suggests that the analysis in these cases should be directed to an "evaluation of the personal right to discriminate as against the public's concern for the elimination of discrimination."[112] Professor Thomas Lewis, on the other hand, warns that without state action "the concept of constitutional rights would potentially spill over into the whole domain of traditionally private affairs, and the courts could easily be forced into the position of drawing lines founded on artificial distinction."[113] Since state action is no longer anything but a fiction, and since some tenuous connection with the state must be invented to circumvent this fiction in enforcing four-

---

106 Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1375 (1964). See Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

107 109 U.S. 3 (1883).

108 MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 415 (1966).

109 Shelley v. Kraemer, 334 U.S. 1 (1948).

110 Marsh v. Alabama, 326 U.S. 501 (1946) (private corporation owns and governs a town); United States v. Classic, 313 U.S. 299 (1941) (a private political organization exercised control over the right to vote).

111 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (coffee shop renting space in a municipal garage). *But see* Garner v. Louisiana, 368 U.S. 157, 183-85 (1961) (concurring opinion), in which Mr. Justice Douglas expressed the view that a private person cannot discriminate if he depends on a state license authorizing him to do business.

112 Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 380 (1963).

113 Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1098 (1960). It is suggested that perhaps Professor Lewis would not be as concerned about the elimination of state action if the legislature, and not the courts, were fighting discrimination and drawing the distinctions.

teenth amendment guarantees there seems no good reason for retaining this restrictive device. *Katzenbach v. Morgan*[114] offers the courts and the Congress an opportunity to abandon the state action doctrine, as suggested in the *Guest* case.[115]

C. *The Logical Result*

Congress now has the affirmative power under section five of the fourteenth amendment to enact all laws necessary and proper to insure every citizen the guarantees of section one of the amendment. Congress may now weigh the factors of discrimination in housing and perhaps enact legislation guaranteeing equal treatment to Negroes in the selection of housing.[116] Again, the individual's right to discriminate must be balanced against a public interest in eliminating discrimination.[117] Congress might also attack discrimination in the South practiced through a system of private schools instead of the usual public schools. The Negro and indigent white youth in these states are being deprived of the opportunity to receive an education because of an unreasonable classification.[118] In addition to national fair housing legislation and the elimination of discrimination in private Southern schools, the doctrine of state action may be abandoned, as previously pointed out.[119] The legislative branch may act to prevent all types of discrimination in the area of criminal procedure and any other area where the rights of a United States citizen are violated.

V. THE APPROPRIATE PROVISION

The parallel treatment of the constitutional safeguards of basic civil liberties which have developed should afford some insight into their future application in dealing with contemporary problems. The historical development in the area of civil rights coupled with

---

[114] 384 U.S. 641 (1966).

[115] United States v. Guest, 383 U.S. 745 (1966).

[116] 18 W. RES. L. REV. 328, 338 (1966). The writer also suggests that national fair housing legislation could be based on the commerce power, since materials used in the building trade generally move in interstate commerce. *Id.* at 336.

[117] See text accompanying note 105 *supra.* The legislative branch is better able to balance the many factors and to judge the public interest in eliminating discrimination.

[118] It is suggested that this could be accomplished despite the state action requirement since these *private* schools are carrying on a traditionally public function — education. See United States v. Classic, 313 U.S. 299 (1941).

[119] See text accompanying notes 108-15 *supra.*

the *Morgan* case[120] indicates that it is time to unshackle the fourteenth amendment from outdated interpretations and utilize its provisions for the purposes intended.

Although there is a good deal of dispute over the amendment's legislative history,[121] it was apparently aimed at protecting human rights. On the other hand, the avowed purpose of the commerce clause was to insure the development of a unified national economy.[122]

If the approach of "purpose interpretation" as outlined in *Heydon's Case*[123] is followed, it is clear that the fourteenth amendment must prevail as the appropriate safeguard of individual civil liberties. The advantage of the amendment's provisions is even more obvious in the case of an unusual fact situation where the problem clearly involves discrimination but it is unique and thus devoid of precedent. Under the purpose-interpretation approach, the fourteenth amendment might be creatively expanded to solve numerous problems. Following the same reasoning, the promotion of interstate commerce is a purpose which is severely limited in its application to discrimination problems. Comparing the purposes behind these constitutional provisions, it seems clear that the fourteenth amendment, rather than the commerce clause, will lead to more creative and well-reasoned solutions to the problems of discrimination.

In addition, the use of the fourteenth amendment will enable responsible officials to give the public more credible, and thus more acceptable, explanations for the actions taken. A significant result of the recent decisions is a shifting of the forum from the Court to the Congress. The fine distinctions which must be drawn in this area are matters for the legislature, a body over which the people have some measure of control. No longer will it be necessary for nine individual Justices to solve the problems created by discriminatory practices. The Court can return to its neutral role of reviewing the measures adopted in light of the principles of equal protection, due process, and the like.[124] Congress, with its responsibility

---

120 Katzenbach v. Morgan, 384 U.S. 641 (1966).

121 FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949).

122 See text accompanying note 45 *supra*.

123 Heydon's Case, 3 Coke 7a, 76 Eng. Rep. 637, 638 (1584).

124 See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

to the American people, can use the fourteenth amendment to present well-reasoned and credible explanations for decisions and legislation in the area of civil rights.

Reliance upon the fourteenth amendment will make it unnecessary to give an involved and detailed presentation regarding the meaning of a quantitative approach to the commerce power. It will not be necessary to attempt to convince the proprietor of Ollie's Barbecue that where he buys his supplies determines whether or not he must serve Negroes. Although prejudice will continue to hamper ready acceptance of antidiscrimination measures, the use of the fourteenth amendment should give society an acceptable alternative to the beliefs of the past. No longer need it appear that those seeking advances in civil rights can only justify their position through absurd applications of constitutional provisions that bear little or no relation to the problem.

Legislation based on the fourteenth amendment could also have an important psychological impact on oppressed minorities. In our complex technological world, the notion of mass society, resulting in the obliteration of all individual rights, has developed. The force of the mass society is especially felt by the poor and the oppressed. In addition to being denied basic civil liberties, society has deprived them of dignity and self-respect. It must be this loss of dignity and the fear of mass society which led large numbers of poor Negroes to abandon the peaceful protest and take to the streets in rioting and violence. While it is true that advances were made through nonviolence, the advances did not come in the framework of the individual's rights. In guaranteeing civil rights, the Supreme Court has generally based its findings on a consideration of the Negro as an economic unit in a mass society, and the effect of those units on interstate commerce determined the availability of human rights. However, if the American Negro feels that he is being protected against oppression as an individual and not as the purchaser of so many hamburgers, the natural result will be a feeling of dignity as a human being. Such a person would not be easily drawn to violent and lawless activities. Obviously, this will not end the problem, but an emphasis on the individual in this area may point the way to a similar emphasis in other areas and dilute the dangers of the so-called mass society.

There are those who will immediately charge that the above analysis is a gross violation of states' rights and must lead to the downfall of the federal system. To this charge there are two an-

swers. First, the federal-state relations of 1960 are vastly different from what they were in 1790 or 1870, and although it is not suggested that the federal system be abandoned, it is suggested that the states today have a new and different relationship with the federal government and this new relationship needs fresh evaluation. In addition, under the above analysis, the federal government has not usurped state functions but has merely guaranteed the right of all citizens to participate in those functions. It seems that Congress has broad powers under section five, but they are not unrestricted powers and the test of reasonableness looms large as a protection for the states. Although section five, if used unwisely, may present a danger to the federal system, it is suggested that a continued denial of basic civil rights presents an even greater danger to that system.

VI. CONCLUSION

Traditionally, the commerce clause and section one of the fourteenth amendment have shared the task of combatting discrimination in this country. The fourteenth amendment has protected basic civil liberties against abridgment by state action, while the commerce power has governed all types of discrimination where interstate commerce was involved. Recent cases have added new vigor to section five of the fourteenth amendment, making it apparent that Congress can enact legislation to eliminate private acts of discrimination even where commerce is not involved. The close connection between human rights and the fourteenth amendment and the deficiencies inherent in measures enacted under the commerce clause suggest that future antidiscrimination legislation should be based on section five of the fourteenth amendment.

CHARLES P. ROSE, JR.