

2008

Civil Rights Act of 1964

Henry L. Chambers, Jr.

University of Richmond, hchamber@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Henry L. Chambers, Jr., *Civil Rights Act of 1964*, in *Encyclopedia of the Supreme Court of the United States*, (D. Tanenhaus ed., Macmillan 2008).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

*Encyclopedia of the Supreme Court
of the United States*

VOLUME I
A-C

David S. Tanenhaus
EDITOR IN CHIEF

MACMILLAN REFERENCE USA
A part of Gale, Cengage Learning



Detroit • New York • San Francisco • New Haven, Conn • Waterville, Maine • London

slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." The act then detailed the attributes of citizenship, stipulating that all Americans would enjoy the same "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens," including being "subject to like punishment, pains, and penalties, and to none other."

The rest of the act dealt with penalties, jurisdiction, and enforcement. Section 2 stated that anybody who deprived a person of "any right secured or protected by this act" could be fined up to one thousand dollars, imprisoned for as long as one year, or both. Subsequent parts of the statute were intended to prevent local officials and others from using inaction, evasion, or intimidation to foil the law. Section 3 gave federal courts exclusive jurisdiction over cases brought under the act. Section 4 granted authority to a broad range of federal officials to bring charges against those who violated the act. Sections 5 and 6 imposed fines and imprisonment upon anyone convicted of obstructing enforcement of the act. Sections 8 and 9 empowered the president to direct judges, marshals, district attorneys, soldiers, sailors, and militiamen to prevent violations of the act and ensure its enforcement.

In terms of law and governance, the primary significance of the Civil Rights Act was its use of federal authority to protect the rights of individuals. The act empowered federal officials to overrule state laws in order to guarantee equality, and in this it reflected the same radical Republican political commitments that had made possible the use of centralized authority to destroy slavery. This expansion of federal power at the expense of the states departed from earlier traditions of American governance, but the circumstances of Reconstruction—defiant southern whites attempting to render the freed-peoples' liberty virtually meaningless only months after the defeat of their rebellion at the cost of more than six hundred thousand lives—led members of Congress to see this approach as not just possible, but imperative.

The act did have its limitations. Its benefits were not extended to Native Americans, most of whom would not gain citizenship until decades later. Moreover, it made no mention of a right to vote, because any such provision would have enfranchised black men, and most whites strongly opposed black suffrage at that point. African Americans objected vigorously to being denied the ballot, but as the bill's author explained, the Civil Rights Act as it stood was "as far as the country will go at the present time." (quoted in Foner 1988, p. 245).

Supreme Court interpretation of the Civil Rights Act of 1866 was for many years quite limited because its basic stipulations were quickly constitutionalized as section one

of the Fourteenth Amendment. In circuit court rulings in 1866 and 1867, Chief Justice Salmon Chase and Justice Noah Swayne (1804–1884) both found the law a legitimate exercise of Congress's power to preserve freedom under the Thirteenth Amendment. A century later, however, the Supreme Court revived the law as a support for expansive action by Congress to protect Americans' civil rights because it seemed to allow federal authority to extend beyond what was considered permissible under the Fourteenth Amendment. In *Jones v. Mayer*, 392 U.S. 409 (1968), the Court ruled that the Civil Rights Act forbade racial discrimination by private citizens in the rental or sale of housing. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court found that the act could prevent private schools from using race as a reason to reject qualified applicants. And in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); and *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Court decided that the act also protected white people, religious minorities, and ethnic groups, respectively. These latter rulings have since been subject to challenge, indicating the ongoing relevance of the Civil Rights Act of 1866 to civil rights enforcement in the twenty-first century.

SEE ALSO *Amendments, Post-Civil War; Fourteenth Amendment; Reconstruction; Thirteenth Amendment*

BIBLIOGRAPHY

- Belz, Herman. 1976. *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861–1866*. Westport, CT: Greenwood Press.
- Foner, Eric. 1988. *Reconstruction: America's Unfinished Revolution, 1863–1877*. New York: Harper and Row.
- Kaczorowski, Robert J. 2005. "Congress' Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted." *Harvard Journal on Legislation* 42(1): 187–283.

A. K. Sandoval-Strausz

CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964 (42 U.S. C.A.) (the 1964 Act) likely has had the greatest transformative effect on American society of any single law. By prohibiting discrimination based on race, color, sex, religion, and national origin in places of public accommodation, in federally assisted programs, in employment, in schools, and with respect to voting rights, this massive law has had profound effects on almost every facet of American society. Though other civil rights acts and laws to



Signing of the Civil Rights Act of 1964 by President Lyndon B. Johnson, with Martin Luther King, Jr., observing. Considered by many scholars to be the most wide-reaching law ever passed in the United States, the Civil Rights Act of 1964 affected the lives of millions of Americans, expressly prohibiting discrimination on race, gender, religion, and ethnic background. Unlike previous attempts at civil rights legislation, the constitutionality of the 1964 act held up under examination by the Supreme Court and received widespread, though not unanimous, acceptance from the American public.
© CORBIS-BETTMANN

vindicate civil rights have been passed, no other law was as well received by the Supreme Court as the 1964 Act and it is possible that no other civil rights law has been as generally accepted by the public as the 1964 Act.

THE ACT'S PASSAGE

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law. The law's passage was the culmination of extended congressional and national debate regarding civil rights in general and the role of race in particular in society. The act had originally been sent to Congress by President John F. Kennedy on June 19, 1963. President Johnson called for the passage of the civil rights bill as a legacy to President Kennedy on November 27, 1963, in an address to Congress shortly after President Kennedy's assassination. Eventually, President Johnson

would use the power of the presidency and his personal influence derived from his years in Congress to help shepherd the bill into law.

The 1964 Act was not met with universal support in Congress. Various parliamentary maneuvers were necessary to push the bill past Congressman Howard W. Smith (1883–1976) of Virginia, the powerful chairman of the House Rules Committee. Similar obstacles had to be surmounted in the Senate. Indeed, once on the floor of the Senate, the act was subject to a filibuster that lasted eighty-two days and stands as the longest in the Senate's history. During debate in both the House and the Senate, a number of congressmen and senators, most of whom were from the South, argued that the act was an unconstitutional affront to states' rights that exceeded Congress's power under the Constitution. Though the debate was heated, the final

version of the act ultimately passed 73 to 27 in the Senate and 289 to 126 in the House.

The 1964 Act certainly was not the first act Congress ever passed to vindicate civil rights. Soon after the Civil War (1861–1865), Congress passed the Civil Rights Acts of 1866 and 1875 in attempts to effectuate the liberty that many in Congress believed was granted by the abolition of slavery in the Thirteenth Amendment and the call for citizenship and equality in the Fourteenth Amendment. However, the Supreme Court narrowed the scope of the Civil Rights Act of 1875 in *The Civil Rights Cases*, 109 U.S. 3 (1883). Indeed, that decision struck down the public accommodations clauses that were retooled and reborn in the 1964 Act. In the several years before the 1964 Act was enacted, Congress passed the Civil Rights Acts of 1957 and 1960. However, both were fairly mild measures focused largely on voting rights. Congress did not stop with the 1964 Act. The 1964 Act has been amended a number of times, including significant amendments in 1972 and 1991.

THE SUBSTANCE OF THE ACT

The 1964 Act prohibits discrimination in certain substantive areas and creates mechanisms to monitor the advance of, and enforce the protection of, equal rights for all. The self-styled purpose of the 1964 Act was

to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

The language of the 1964 Act speaks in terms of nondiscrimination. Though the Court has lapsed occasionally into speaking of “protected groups” under the 1964 Act, particularly with respect to Title VII of the act, the act itself merely requires equal treatment for all by limiting the bases on which persons can be treated differently. Guaranteeing that citizens of all races, and religions, for example, enjoy the same rights is consistent with the Fourteenth Amendment command of equal protection of the laws. However, as noted below, Congress’ power to enact the 1964 Act provisions affecting private actors was found to be explicitly justified based on its commerce clause power, rather than on power to enforce the Fourteenth Amendment.

The Eleven Titles of the Act The 1964 Act has eleven titles, with some titles focusing on addressing

discrimination in specific areas of American life, others creating agencies to enforce specific parts of the act, and yet others establishing procedures for enforcing the act.

Title I has largely been superseded. Title I focused on procedural equality in voting rights. For example, rather than bar literacy tests, Title I limited the manner in which literacy tests could be given. Functionally, the voting rights provisions of the 1964 Act were superseded by the Voting Rights Act of 1965 and its later amendments, which strengthened the procedural and substantive prohibitions on voting rights discrimination pursuant to the Fifteenth Amendment.

Titles V, VIII, and X establish some of the agencies and procedures necessary to monitor the advance of equal rights. Title V provides procedures to follow, and redefines the role and duties of the Commission on Civil Rights that the Civil Rights Act of 1957 created. Title V requires that the commission investigate allegations of deprivations of the right to vote, evaluate legal developments and federal laws to make sure they do not constitute denials of the equal protection of the laws, and serve as a clearinghouse for information respecting violations of equal protection. Though the commission and its charge were altered somewhat and re-codified in 1983, its basic function has remained the same.

Title VIII requires that the secretary of commerce compile registration and voting statistics for use by the Commission on Civil Rights. Title X established the Community Relations Service as a part of the Department of Commerce to “provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.”

Titles IX and XI are procedural and descriptive. Title IX specifies procedural processes in civil rights cases where plaintiffs seek relief from a denial of equal protection under the Fourteenth Amendment. Title XI is a mass of miscellaneous provisions designed to increase the 1964 Act’s effectiveness and define its scope.

The 1964 Act’s substantive core consists of Titles II, III, IV, VI, and VII. These titles prohibit discrimination in various substantive areas. Title II focuses on public accommodations. It bars discrimination and segregation based on race, color, religion, or national origin with respect to hotels, restaurants, theaters, stadiums, and like facilities, if their “operations affect commerce, or if discrimination or segregation by it is supported by State action.” Under certain conditions, private clubs and nonpublic establishments are not covered by the title.

Title II spawned the first Supreme Court cases that addressed the constitutionality of the 1964 Act: *Heart of*

Atlanta Motel v. United States, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Both cases were filed just after the 1964 Act became law and were decided by the Supreme Court on an expedited basis. In *Heart of Atlanta*, plaintiff sought a declaratory judgment deeming the 1964 Act unconstitutional. Plaintiff argued, inter alia, that the act exceeded Congress' power under the commerce clause of the Constitution. After noting that the Heart of Atlanta Motel had substantial connection to interstate travel and commerce, the Court indicated that its ruling would be limited to determining whether Congress had appropriate power under the commerce clause to render the act constitutional. The Court explicitly noted that it was not deciding whether Congress' enforcement power under section five of the Fourteenth Amendment was a sufficient basis to validate the act. In doing so, the Court sidestepped the issue of precisely how the invalidation of the public accommodations provisions of the Civil Rights Act of 1875 by *The Civil Rights Cases* would affect the Court's decision. Nonetheless, the Court stated that *The Civil Rights Cases* would not resolve the issue as to the 1964 Act's public accommodations provisions because they were narrower and different than the like provisions of the Civil Rights Act of 1875. The Court concluded that the 1964 Act's public accommodations provisions were clearly within Congress' commerce clause power when, as in *Heart of Atlanta Motel*, they were applied to a motel that admittedly served interstate travelers. Though the Court expressed no opinion on the Fourteenth Amendment question, the concurrences by Justices William O. Douglas and Arthur J. Goldberg argued that the act was also constitutional pursuant to Congress' enforcement power under the Fourteenth Amendment.

Katzenbach arguably was more difficult than *Heart of Atlanta Motel* because it involved a restaurant, Ollie's Barbecue in Birmingham, Alabama, that catered to local residents and did not appear to serve or seek to serve interstate travelers. Ollie's Barbecue was subject to Title II of the 1964 Act because that title regulated restaurants if a substantial portion of the food the restaurant served traveled in interstate commerce. That much of the meat Ollie's Barbecue served was purchased from a local supplier, who bought it from an out-of-state supplier, suggested that the restaurant was subject to the act. The Court determined, in limiting the act's coverage to restaurants that imported a substantial portion of the food they served from out-of-state, Congress acted within its Article I power to regulate interstate commerce.

Titles III and IV authorize the government to provide assistance to guarantee that the constitutional commands to desegregate public facilities and public schools were enforced. Title III authorizes the attorney general to become involved in cases in which people were

demanding the desegregation of public facilities if those people could not fully or adequately prosecute the case on their own. Title IV facilitates the continued desegregation of public education by requiring that the commissioner of education (now the secretary of education) survey and report on the equality of schools, and by allowing the commissioner to provide technical assistance regarding the desegregation of schools. In addition, as under Title III, Title IV authorizes the attorney general to intervene in cases in which potential meritorious litigants cannot adequately prosecute a case involving the desegregation of public schools. Much of the litigation to which Title III or Title IV would apply is brought under the Constitution's equal protection clause without reference to the 1964 Act. For example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), a school desegregation case, was considered an attempt to apply the strictures of *Brown v. Board of Education*, 347 U.S. 483 (1954). Title IV was implicated because the case involved school desegregation. However, the Court indicated that Title IV's purpose was to define how the federal government could facilitate the desegregation process, rather than to augment the substantive guarantees of the Fourteenth Amendment. Consequently, the Court ruled that the requirements of Title IV go only as far as the limits of the Fourteenth Amendment. Of course, the federal government was to have a role to play up to the limits of the Fourteenth Amendment. The Court noted that Title IV's relevance was only with respect to the appropriate procedures that were to be used to decide the case, rather than to determine the substance of the decision.

Title VI of the Act requires nondiscrimination in federally assisted programs, thus allowing the participation of all in programs subsidized by the federal government. The Court has made clear that, like Title IV, Title VI's reach is coextensive with the Fourteenth Amendment's reach. Consequently, Title VI only reaches intentional discrimination that violates the equal protection clause (see *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582 [1983]; *Grutter v. Bollinger*, 539 U.S. 306 [2003]). However, federal agencies that administer programs that provide federal financial assistance are required to issue regulations that effectuate the purposes of Title VI. Such regulations under Title VI may be as important in a practical sense as Title VI itself. Indeed, a recent Title VI case, *Alexander v. Sandoval*, 532 U.S. 275 (2001), arose in the context of a Department of Justice regulation that barred the use of rules in programs receiving federal assistance from the department that had the effect of discriminating based on race. The Court did not decide whether the regulation was valid under Title VI, but did rule that the regulation did not create a private cause of action that would have allowed a private plaintiff to recover if an entity was found to be using a prohibited

rule that harmed the plaintiff's ability to enjoy the benefits of the federally-assisted program at issue.

Title VII and Equal Employment Title VII, the longest section of the 1964 Act by far, requires equal employment opportunity. It broadly restricts employers, employment agencies, and labor organizations from discriminating with respect to employment or employment opportunities based on race, color, religion, sex, or national origin. In addition, covered entities may not retaliate against employees for informally challenging or participating in the official challenging of unlawful employment practices. Title VII also limits how covered entities can advertise jobs.

Like all other 1964 Act titles, Title VII merely eliminates discrimination on the basis of various characteristics. Nonetheless, much of the debate regarding the proposed Title VII focused on whether its strong anti-discrimination language effectively created a climate in which employers would be required to favor minority workers over white workers or risk violating the statute. The act's supporters argued that Title VII's nondiscrimination language required that workers be treated equally without regard to race and could not fairly be read to create a preference for any particular group of workers. The Court balanced the need for equality and the reality of historical discrimination when it allowed a voluntary affirmative action plan initiated under Title VII to stand in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Congress created the Equal Employment Opportunity Commission (EEOC) to enforce Title VII. The EEOC was given broad powers to investigate and resolve charges made by employees against employers, employment agencies, and labor organizations, but was not given the power to adjudicate claims. The charge process was designed to work in conjunction with state and local fair employment practices commissions whenever possible. When a charge is unable to be resolved informally, either the aggrieved employee or, in some cases, the EEOC may file suit.

Title VII is the only title under the 1964 Act that barred sex discrimination at its passage, though other titles have been amended since 1964 to ban sex discrimination. Congressman Howard Smith (1883-1976) of Virginia proposed amending the bill late in the legislative process to include sex discrimination under Title VII. Smith claimed that given the other parts of the act, adding sex discrimination to Title VII could not hurt the quality of the act. Conventional wisdom suggests that Smith added sex discrimination merely to poison the chances that the act would pass. Indeed, for that reason, some of the act's staunchest supporters opposed Smith's amendment. However, Congresswoman Martha Griffiths (1912-) of Michigan suggested that she would have proposed adding sex discrimination to Title VII had Congressman Smith failed to do so. Regardless of how sex entered the bill, it

did so late in the process and without nearly as much discussion as other provisions. The lack of legislative history surrounding sex discrimination has provided the Court a freer hand in interpreting sex discrimination than in interpreting other types of discrimination covered by Title VII.

Title VII has spawned a number of cases that have significantly altered the workplace. For example, *Duke Power Company v. Griggs*, 401 U.S. 424 (1971) sanctioned the disparate impact cause of action that does not require proof of intentional discrimination. Rather, disparate impact can be proven when an employer, lacking a business necessity for doing so, employs a facially neutral rule that has the effect of discriminating against a certain group of workers on the basis of their race, sex, or other characteristic. Eventually, this interpretation of Title VII was explicitly written into law in the Civil Rights Act of 1991.

As importantly, the Court has recognized and defined workplace sexual harassment through its interpretation of Title VII. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court recognized a cause of action for both quid pro quo and hostile work environment sexual harassment. Quid pro quo harassment occurs when actual job detriment results from the refusal to acquiesce to sexually harassing behavior. Hostile work environment harassment occurs whenever sexually harassing conduct alters the terms, conditions, or privileges of an employee's employment without causing tangible job detriment. In addition, the Court ruled in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) that same-sex sexual harassment may be actionable, though it noted that Title VII was not meant to be a "general civility code" for the workplace. In that vein, the Court in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) ruled that in some circumstances employees had to give the employer an opportunity to remedy the harassment before the harassment would support an award of damages.

The Court's interpretation of Title VII has not always been consistent with Congressional sentiment. For example, the Court's refusal to treat pregnancy discrimination as sex discrimination in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) led to the passage of the Pregnancy Discrimination Act of 1978, which defined sex discrimination under Title VII to include pregnancy discrimination. Similarly, dissatisfaction with *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) spurred Congress to pass significant amendments to Title VII in the Civil Rights Act of 1991. The 1991 act amendments clarified the standards for disparate impact liability, clarified the effect of the presentation of evidence that both lawful and unlawful motivations caused an employment decision, provided for jury trials for certain Title VII

cases, and allowed the recovery of punitive damages in some cases.

IMPACT OF THE CIVIL RIGHTS ACT OF 1964

The 1964 Act inaugurated a sea of change in the United States. It demands equality for all in many of the most important areas of American life. The Court's ready acceptance of the constitutionality of the 1964 Act helped make the act acceptable to the large majority of Americans. Of course, the Court continues to interpret the act. Though there may be disagreement regarding specific interpretations that the Court makes, the legitimacy of the act and its goals is not subject to debate.

SEE ALSO *Commerce Clause*; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Johnson, Lyndon B.*; *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Kennedy, Robert*; *Sex Discrimination*; *Warren Court*

BIBLIOGRAPHY

- Gillon, Steven M. 2000. *"That's Not What We Meant to Do": Reform and Its Unintended Consequences in Twentieth-Century America*. New York: Norton & Company.
- Grofman, Bernard, ed. 2000. *Legacies of the 1964 Civil Rights Act*. Charlottesville: University Press of Virginia.
- Halpern, Stephen C. 1995. *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act*. Baltimore, MD: Johns Hopkins University Press.
- Kotz, Nick. 2005. *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America*. Boston: Houghton Mifflin.
- Loevy, Robert D., ed. 1997. *The Civil Rights Acts of 1964: The Passage of the Law that Ended Racial Segregation*. Albany: State University of New York Press.
- Sokol, Jason. 2006. *There Goes My Everything: White Southerners in the Age of Civil Rights, 1945-1975*. New York: Knopf.
- Whalen, Charles, and Barbara Whalen. 1984. *The Longest Debate: A Legislative History of the 1964 Civil Rights Act*. Washington, DC: Seven Locks Press.
- Zietlow, Rebecca E. 2006. *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights*. New York: New York University Press.

Henry L. Chambers Jr.

CIVIL RIGHTS CASES, 109 U.S. 3 (1883)

In the *Civil Rights Cases*, 109 U.S. 3 (1883), a consolidation of five lower court cases involving the exclusion of blacks from inns, theaters, and ladies' railroad cars, the U.S. Supreme Court invalidated the public

accommodation provisions of the Civil Rights Act of 1875, which were passed under Section 5 of the Fourteenth Amendment and guaranteed to all persons the "full and equal" enjoyment of inns, public conveyances, and places of public amusement, regardless of race or color. In declaring these provisions unconstitutional, the Court established state action doctrine, the rule that the Fourteenth Amendment protects individuals against the government, but not against the "merely private" wrongs of individuals.

The *Civil Rights Cases* were argued on March 29, 1883, and decided on October 15, 1883, by a vote of eight-to-one, with Justice Joseph P. Bradley writing for the Court and Justice John Marshall Harlan in dissent. The decision is conventionally viewed as fashioning a narrow Fourteenth Amendment jurisprudence and as definitively abandoning blacks to southern home rule. Over the years, however, the Court's canonical articulation of state action doctrine has been subject to competing interpretations. At stake in this contestation are the limits of Congress's power under Section 5, as well as the historical understanding of the Court's settlement of Reconstruction.

The majority opinion of Justice Bradley rejected both Thirteenth and Fourteenth Amendment grounds for the public accommodation provisions. Regarding the Thirteenth Amendment, he agreed that it conferred freedom and prohibited the incidents of slavery. Public accommodation rights, however, were not among the fundamental rights that defined the "essential distinction between freedom and slavery." The Civil Rights Act of 1866, which protected black rights to property, contract, testifying in court, and physical security, marked out this essential line, and Bradley explicitly approved it. But Congress "did not assume under the authority given by the Thirteenth Amendment to adjust what may be called the social rights of men and races in the community." Thus invoking the conventional nineteenth-century distinction between "civil rights" and "social rights," Bradley declared that it would be "running the slavery argument into the ground" to count exclusions from public accommodations as badges of slavery.

Bradley also rejected the Fourteenth Amendment as a basis for the provisions. The conventional reading is that the provisions were invalid under Section 5 because they regulated private wrongs, and private wrongs are outside the scope of the Fourteenth Amendment. This reading is the basis for the view that state action doctrine left blacks exposed to Ku Klux Klan violence and private discrimination. There is disagreement, however, as to what state action doctrine may have meant to the Waite Court and whether a state's neglect of its duty to equally enforce the law counted as "state action" and was thus grounds for federal intervention. Accordingly, some suggest that the