Senator Smith Decides: A Simulation
Public Accommodations and the Civil Rights Act of 1964

THE CIVIL RIGHTS ACT OF 1964

In June 1963, President John Kennedy asked Congress for a comprehensive civil rights bill, induced by massive resistance to desegregation and the murder of Medgar Evers. After Kennedy's assassination in November 1963, President Lyndon Johnson continued to press for the bill in Congress in 1964.

The proposed bill is comprehensive in scope. Congress plans to prohibit discrimination in the workplace, public accommodations, and federally funded programs. The bill also will strengthen the enforcement of voting rights and the desegregation of public schools.

This effort faces fierce resistance in states committed to segregation, and 1964 is a presidential election year. President Johnson is insistent that Congress pass a bill that he can sign.

Title II: Public Accommodations

A major sticking point of the proposed Act is Title II which deals with public accommodations. These are privately owned restaurants, motels, hotels, movie theaters, or other places serving customers. African Americans cannot not patronize these facilities in segregated states, but these businesses are not operated by the government.

The U.S. Supreme Court has declared “separate but equal” treatment is a denial of equal protection in public facilities, but it has not made a ruling regarding the constitutionality of private actors discriminating based on race.

Congress wants to remove the barrier of segregation from these institutions. The question is how. Making the right constitutional choice is essential for gaining enough votes to pass the Act and defending the Act against legal challenges in the federal courts.

What part of the Constitution gives Congress the power to prohibit discrimination in public accommodations? Senator Smith has been tasked by a Joint Committee with identifying the strengths and weaknesses of several constitutional options and making a recommendation. The Senator has convened a special group of congressional staffers to help with the review.

PUBLIC ACCOMMODATIONS: CONSTITUTIONAL OPTIONS

1) ***Article, I, Commerce Clause***
2) ***Article, I, Necessary and Proper Clause***
3) ***Fourteenth Amendment, Section 1***
4) ***Fourteenth Amendment, Section 5***
5) ***No Viable Grounds***

Option 1: Article, I, Commerce Clause

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Commerce Clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power.

Prior to 1900, most of the approximately 1,400 cases that reached the U.S. Supreme Court under the Commerce Clause prior to 1900 involved state legislation and dealt with curbing state power. Since the 1930s, it has been used by Congress as a source for federal power to enact regulations among the states and also within the states.

Advantages

This clause has been the basic fuel for Congressional action since the 1930s. The Commerce Clause has allowed Congress to pass laws regulating housing to shipping to manufacturing to labor practices. It is the workhorse of Congressional action on national issues.

Segregation clearly affects interstate commerce, even when it takes place within a single state. In *United States v. Darby* (1941), the U.S. Supreme Court held that the Commerce Clause permitted Congress to pass laws against unfair labor practices (including child labor). Surely the Commerce Clause can be used to bar segregation here.

While the Constitution may not forbid discrimination in public accommodations, neither does it stop Congress from banning it. States with Jim Crow laws are quite comfortable infringing on the property rights of white entrepreneurs when they forbid them to serve black customers. If government can compel private actors to discriminate, surely it can compel them not to discriminate?

Disadvantages

Using the Commerce Clause would change forever the balance between states and the federal government. The Tenth Amendment reserves the police power to the states. If Congress can regulate public accommodations, then the federal government can regulate every activity, by the state or by a person, anywhere.

Using the Commerce Clause to prohibit private discrimination would render the rest of the Constitution unnecessary. Congress would no longer need to find any other constitutional authority because the Commerce Clause allowed Congress to authorize anything it wanted to do.

Using the Commerce Clause threatens the system of private property. A store owner has a right to say who can come on their premises and how long they can stay. They can tell a customer to leave and, if necessary, call the police and get help to throw the customer out. If this right is destroyed by the federal government, the citizen has been deprived of one of his inalienable rights just as surely as if the federal government took his physical personal property. Since property right is essential to freedom, this legislation threatens freedom itself.

Option 2: Article I, Necessary and Proper Clause

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

This clause concludes the list of Congress's enumerated powers. It is a general statement that Congress's powers include not only those expressly listed, but also the authority to use all means necessary and proper for executing those express powers.

“Under the Necessary and Proper Clause, congressional power encompasses all implied and incidental powers that are conducive to the beneficial exercise of an enumerated power. The Clause does not require that legislation be *absolutely* necessary to the exercise of federal power. Rather, so long as Congress's end is within the scope of federal power under the Constitution, the Necessary and Proper Clause authorizes Congress to employ any means that are appropriate and plainly adapted to the permitted end” (Congress.gov).

Advantages:

The Necessary and Proper Clause has a great history. It was invoked by Chief Justice Marshall for a unanimous Supreme Court in the case of *Maryland v. McCulloch* (1819). The Court held that Congress possesses powers not explicitly stated in the Constitution.

In *McCulloch* the Court also held that the Constitution and federal laws are supreme and cannot be controlled by the states. Such a power is particularly useful when addressing state-enforced segregation laws barring service to non-whites.

The Attorney General has suggested that the Necessary and Proper Clause allows Congress to “enact any measure suited to prevent or rectify unconstitutional State action even though it may have wider ramifications.”

The Necessary and Proper Clauses allows Congress to reach “private action” in ways that the Commerce Clause does not. It thus answers a likely path of constitutional challenge.

Disadvantages:

Since the 1930s the Supreme Court has relied primarily on the Commerce Clause for granting powers to Congress. The only modern cause relying on the Necessary and Proper Clause is *United States v. Darby* (1941), when the Court affirmed Congress’s acted with proper authority in outlawing substandard labor conditions in different states to their own advantage in interstate commerce. It was in addition to the Commerce Clause, not all by itself.

The Court held in *Darby* that the power of Congress "can neither be enlarged nor diminished by the exercise or non-exercise of state power." The power of this clause over private action is uncertain.

The Necessary and Proper Clause is a tantalizing but unproven remedy. It may be risky to use it as the foundation for such an important part of the Act.

Option 3: Fourteenth Amendment, Section 1.

> *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.*

The Civil Rights Act of 1964 addressed what many Americans considered a profoundly moral issue: racial segregation Under Jim crow laws as well as discrimination based on race and other factors. Racial discrimination in places of public accommodation is a violation of human dignity. It prevents African Americans from participating fully as citizens in American life. The Equal Protection Clause of the Fourteenth Amendment any State from denying "any person within its jurisdiction the equal protection of the laws." This clause lends moral force to the proposed legislation.

Advantages:

Using the Equal Protection Clause to prohibit discrimination in public accommodations is a powerful way to make the case for the Act as a whole. Equality is a powerful argument that is readily understandable by Americans regardless of age, education, or background. Nothing speaks to this idea better than the Fourteenth Amendment.

The Fourteenth Amendment offers a path to bipartisan support. Traditionally, Democrats are more comfortable turning to the Commerce Clause to expansions of federal power, while Republicans—the party of Abraham Lincoln and Reconstruction—turn to the Fourteenth Amendment. The Act will need every single vote, and the Equal Protection Clause might bring them.

Disadvantages:

The Fourteenth Amendment works well for public education and government entities, but it doesn't reach private action—at least according to Supreme Court precedents. The Court would have to overrule or set aside its decision in *The Civil Rights Cases* which held that Congress could only address "state action," not private discriminatory conduct, under the Fourteenth Amendment. There is a lot riding on that proposition.

The extension of the Fourteenth Amendment to reach public accommodations may also raise federalist concerns among certain legislators. Expanding federal power in this area of traditional state legislation is a concern for many members of Congress across the country, not just those in the South. Reluctant legislators may need a "bright line" test that clearly marks the limits of federal power before they agree to using the Equal Protection Clause.

Option 4: Fourteenth Amendment, Section 5.

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendments. Following its enactment, Congress passed several statutes to implement the amendment. The Civil Rights Act of 1875, for example, prohibited private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement.

The U.S. Supreme, however, declared unconstitutional or rendered ineffective practically all of these laws. In the *Civil Rights Cases* (1883), the Court held that this enactment to be beyond Congress's power. The Court observed that, because Section 1 prohibited only state action and did not reach private conduct, Congress's power under Section 5 also was similarly limited.

In order to hold that the Civil Rights Act's public accommodations section was constitutional, the Supreme Court would have to distinguish or overrule their decision in *The Civil Rights Cases*.

Advantages:

The Supreme Court might welcome the opportunity to overrule their decision in *The Civil Rights Cases.* In *Brown v. Board of Education* (1954), the Court set aside its decision in *Plessy v. Ferguson* (1896). Since that decision, the Court has been the primary federal actor for equality. There is good reason to believe that it would be open to overturning or setting aside its decision in *The Civil Rights Cases* and embrace the use of Section 5 to regulate private action in public accommodations and thereby finally end the evil of racial inequality .

Section 5 makes no reference to state action. It just says that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress's power to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional. In prohibiting prohibit state-supported discrimination, Section 5 allows Congress to address any additional area necessary in order to make that prohibition effective, including private discrimination.

Disadvantages:

Section 5 is a risky strategy for prohibiting discrimination in public accommodations. *The Civil Rights Cases* is still good law. The Supreme Court may not be very eager to be seen as willing to overrule itself so quickly after *Brown v Board of Education*.

Saying that private discrimination somehow is a product of state action does not make it so. Equating "State action" with "custom or usage" extends the Act to an area of private action beyond the scope of the 14th Amendment. Every Representative and Senator has constituents who don't want to be told who they can and cannot do business with. This may be a very hard argument for legislators to make their constituents across the country as well as in the South.

Option 5: No Viable Grounds

The Act is a wonderful piece of legislation, and most of it rights prohibits government discrimination. There is no constitutional basis, however, for a prohibition on private discrimination in public accommodations.

Advantages:

You cannot change the American birthright. Life, liberty, and the pursuit of happiness does not mean telling people who they serve in restaurants, laugh with in movie theaters, or sleep in their beds. We the people live in the United States of America, not the Soviet Union.

You cannot change the Constitution. Our federal government is a government of limited powers. Each and every person in the United States of America lives in a state with the police power. If that state so chooses to address public accommodations through legislation or enforcement of legislation, that is their sovereign right. But we as federal legislators cannot pretend that we have that power. It belongs uniquely to the states.

You cannot change human nature. People "discriminate" all the time! One woman likes a green dress, and another wants only blue. One man bleeds Cardinal red and the next man chooses the Yankees. People choose the food they eat, the place they live, the church they worship in, and the friends they keep. In America, they can make those choices because they are free, and if freedom means anything it includes the power to say "no."

Any legislator can claim that a clause in the Constitution will let them do whatever they want. Any lawyer can cite a Supreme Court decision that they claim supports their interpretation of the Constitution. But our constituents do not need degrees or titles to know that they are right and that the legislators and lawyers are wrong. They know that "the Devil can quote Scripture." Private action is just that—private—no matter the fancy words or degrees or citations used to convince them otherwise. This is beyond the law. We should follow their wisdom.

Disadvantages:

Not addressing public accommodations in the Act will result in a hollow victory. Just as segregationist states defied *Brown v Board of Education* by closing public schools and creating private academies, private discrimination will lead to the same problems all over again. Including public accommodations signals that Congress is serious about ending discrimination once and for all. The Supreme Court can decide if there if it is constitutional. That's their job.

There may be danger in just saying "no." People are tired of demonstrations and watching racial unrest on television. They are keen for progress. The election is later this year, and there may be value going along with things and not making waves.

SOURCES

This simulation was developed exclusively for educational purposes in secondary classrooms. Materials for this simulation have been drawn liberally from the sources listed below. In no way is this simulation presented as an original work, and it is neither designed nor protected by any copyright.

The Civil Rights Act of 1964: An Overview (Congressional Research Service R46534), September 21, 2020

https://crsreports.congress.gov

The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text (Congressional Research Service), August 1965

https://crsreports.congress.gov

The Constitution Annotated: Analysis and Interpretation of the U.S. Constitution

https://constitution.congress.gov/

Goldstein, Joel K., "Constitutional Dialogue and the Civil Rights Act of 1964." ***Saint Louis University Law Journal*****, Vol. 49, No.1095, 2005.**

https://scholarship.law.slu.edu/faculty/147/

Oyez

https://www.oyez.org/