

THE CIVIL RIGHTS ACT OF 1964 AND THE FULCRUM OF PROPERTY RIGHTS

*Alfred L. Brophy*¹

During the fiftieth anniversary of the Civil Rights Act of 1964, much of the discussion is about the origins of the Act in the ideas and actions of the African American community and of the future possibilities of the Act. This essay returns to the Act to look seriously at those who opposed it and at their critique of the Act's effect on property rights. That is, this looks at the property law context of the Act and the criticism that the Act would dramatically affect property rights. In contrast to those who favored the Act and, thus, wanted to make the Act look as modest as possible, this retrospective suggests that, in fact, the Act had an important effect on property rights in the United States. That is, it was part of democratizing property and rebalancing the rights of property owners and of non-owners in ways that are long-lasting and important.

The supporters of the Civil Rights Act of 1964's guarantee of equal treatment in public tried to make it look like a modest extension of principles that had existed from time out of mind.² Yet, the Act's requirement of equal access to public accommodations brought outcries, in particular from its opponents, that it would dramatically restrict the right to exclude from private property.³ Legal historians who have assessed the long history of the Civil

¹ Judge John J. Parker Distinguished Professor, University of North Carolina – Chapel Hill. Contact the author at abrophy@email.unc.edu or 919.962.4128. I would like to thank the *Alabama Civil Rights & Civil Liberties Law Review* for its invitation to participate in the discussion of the Act and also Anthony Cook, Richard Delgado, Bryan Fair, Mitu Gulati, Trina Jones, Utz McKnight, Donna Nixon, Gregory Parks, Gregg Polsky, Tiffany Ray, Dana Remus, Meredith Render, Jasmine Gonzales Rose, and Jean Stefancic for their comments and help.

² See, e.g., Paul A. Freund, *Constitutional Bases for the Public Accommodation Bill*, in S. REP. NO. 88-872, at 82, 85-86 (1963).

³ See, e.g., VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, CIVIL RIGHTS AND LEGAL WRONGS: A CRITICAL COMMENTARY ON THE PRESIDENT'S PENDING "CIVIL RIGHTS" BILL OF 1963 1 (1963); VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, CIVIL RIGHTS AND FEDERAL POWERS: A FURTHER CRITICAL COMMENTARY UPON THE PENDING OMNIBUS CIVIL RIGHTS BILL 9 (1963) ("Title II . . . is the section that would attempt through the force of federal law to desegregate every restaurant, soda fountain, lunch counter, and boarding house in the nation. . . . Our concern is the attempt to reach an essentially

Rights Movement have tended to agree that the Act was a fulcrum moment on the move towards civil rights—in fact, one of the most important assessments of the Civil Rights Movement makes the Act, not *Brown v. Board of Education*, the centerpiece of the movement.⁴ This essay returns to the conservative opponents of the Act’s public accommodations provision and takes their writing seriously.⁵ It considers the possibility that the Act was radical, as its critics contended, and that it marked a fulcrum in property rights as well as civil rights.⁶

social and political end through means that flagrantly violate the Constitution.”); REPORT OF THE COMMITTEE ON COMMERCE, UNITED STATES SENATE, S. Rep. No. 88-872, at 62-65 (views of Senator Strom Thurmond on “the right of private property and due process of law considerations”).

⁴ 347 U.S. 483 (1954); *see, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 367 (2004) (arguing that *Brown* worked in conjunction with other variables—such as the Civil Rights Act—to move support for integration into mainstream thought and law).

⁵ In taking conservative arguments seriously in Southern legal history, this essay draws methodology and inspiration from the literature that relocates conservative ideas to the center of study because they were so important and because they controlled the terms of the debate, if not the outcome, for so much of our nation’s (and region’s) history. *See, e.g.*, MICHAEL O’BRIEN, INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810-1860: AN ABRIDGED EDITION OF CONJECTURES OF ORDER (2010); Alfred L. Brophy, *The World Made by Laws and the Laws Made by the World of the Old South*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 219-39 (Sally E. Hadden & Patricia Hagler Minter eds., 2013); ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009).

⁶ Historians often discuss the concern over the Act’s implication for property rights. *See, e.g.*, CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 88 (2014) (discussing concern over the Bill’s implication for property rights); TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 190 (2014) (discussing conservative argument that the Bill would “usurp centuries of private property rights and commingle the races”); ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S 181, 187 (1984). *See also* ERIK BLEICH, THE FREEDOM TO BE RACIST?: HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM 113 (2011) (discussing the Civil Rights Act of 1964 as part of a movement against racism, but noting its limitations).

1. THE POSSIBILITIES OF FEDERAL REGULATION OF PRIVATE PROPERTY RIGHTS

Title 2 of the Civil Rights Act promised “all persons shall be entitled to the full and equal enjoyment of the goods, service, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin.”⁷ Supporters justified this as part of a longstanding common law tradition.⁸ This linking of common law doctrine with the prohibition on discrimination stretched back to the discussion over the 1875 Civil Rights Act.⁹ Justice Harlan, in dissent in the *Civil Rights Cases*, listed a number of situations in which inn keepers and railroads were not permitted to discriminate in the provision of services.¹⁰ The Senate Commerce Committee’s report pointed out that some states had legislation requiring equal treatment in public accommodations.¹¹ Oddly, as recently as 1954 Louisiana had repealed its statute that required the provision of public accommodations without regard to race and, in 1959, Alabama had repealed its similar statute.¹² In fact, over several pages, the Senate’s Commerce Committee Report discussed precedents dating back to the seventeenth century that prohibited innkeepers from discriminating against classes of guests because the availability of inns is a matter of public interest.¹³ And, in fact, when it turns to the Supreme Court’s decision in the *Civil Rights Cases*, which struck down federal legislation outlawing private

⁷ Title VI of the 1964 Civil Rights Act, Pub. L. No. 88-352, § 201(a)(b), 78 Stat. 241, 243-44 (1964) (defining “public accommodation” and providing a list of establishments covered by the Act). The original bill appears at 1 LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 PUBLIC LAW 88-352, at 1 (1964). The final Bill had an exemption for small innkeepers, which the original Bill did not have, but it also included people who were not themselves involved immediately in interstate travel. See S. REP. NO. 8- 872, at 2 (referring to changes between Bill as introduced and the final Bill).

⁸ See, e.g., 88 CONG. REC. 2, 387 (1963).

⁹ See Civil Rights Act of 1964, PUB. L. NO. 88-352 (1964).

¹⁰ See 109 U.S. 3, at 37-41. Justice Harlan referred, for instance, *id.* at 41, to *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. 344 (1848), which held that a common carrier is “in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned.” He also referred to Justice Joseph Story’s treatise on *Bailments* §§ 475-476. 109 U.S. at 43 (“If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor . . . [t]hey (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.”).

¹¹ S. REP. NO. 88-872, *supra* note 2, at 10.

¹² *Id.*

¹³ *Id.* at 9-11.

discrimination, it noted that the decision was made a decade before the southern states enacted their Jim Crow statues.¹⁴ This is a recognition of the argument of C. Vann Woodward's *The Strange Career of Jim Crow* that discriminatory statutes were enacted in the wake of Reconstruction.¹⁵ That is, the system of state-mandated segregation was created after the Civil War and in an attempt to re-establish and entrench white supremacy.¹⁶ This insight that Woodward popularized also appeared in the fictional literature of the 1950s, which recorded so well American attitudes towards race.¹⁷ For instance, Ralph Ellison's *Invisible Man* looked back to the era when the Invisible Man's grandfather gave up his gun during Reconstruction (or actually at the end of Reconstruction, which one might call the period of "Deconstruction"), which was then followed by Jim Crow.¹⁸ Similarly, William Faulkner's meditation on history *Requiem for a Nun* refers to an African American janitor who had served as a United States marshal during Reconstruction and then lost his job when Reconstruction came to a conclusion.¹⁹ The particular relevance of this man, known as Mulberry, was that he had once held a position of authority but had been reduced to a janitor, which provided a living connection to the days of Reconstruction.²⁰ He was a living reminder of how much things had changed—for the worse in this case—even as there were other changes afoot that ignored—"overcame" is not quite the right word—the past.²¹ Thus, supporters tried to link the Bill to previous generations of case law and to the secondary literature on how Jim

¹⁴ *Id.*

¹⁵ See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 23-25 (3rd rev. ed. 1974) (1956). See also 4 LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 PUBLIC LAW 88-352, at 6600 (1964) (citing Woodward's *Strange Career of Jim Crow*); 9 LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 PUBLIC LAW 88-352, at 15, 340 (1964) (reprinting article from *Philadelphia Inquirer* on Jim Crow's persistence in Mississippi).

¹⁶ See WOODWARD, *supra* note 15, at 22-29. See also *Civil Rights – A Reply*, NEW REPUBLIC 24, (August 31, 1963) (listing as the first justification for the Civil Rights Act that it gave national enforcement to the ancient common law restriction against discrimination in public accommodations).

¹⁷ See, e.g., RALPH ELLISON, *INVISIBLE MAN* 16 (2d Vintage International ed., 1995); WILLIAM FAULKNER, *REQUIEM FOR A NUN* 242 (1951).

¹⁸ ELLISON, *supra* note 17, at 16 ("Son, after I'm gone I want you to keep up the good fight. I never told you but our life is a war and I have been a traitor all my born days, a spy in the enemy's country ever since I give up my gun back in the Reconstruction.").

¹⁹ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 242 (1951).

²⁰ *Id.*

²¹ *Id.*

Crow had developed²² in ways that seem reminiscent of the seventeenth century lawyers' rediscovery of the Ancient Constitution, where certain obscure threads of history were pulled together to create an intellectual world that matched their aspirations for law, even if it did not quite match the reality of the law.²³ Sometimes in that sort of myth-making,²⁴ we do remake the world. The Civil Rights Act of 1964 may be yet another of those instances.

Fiction may be necessary to bridge one era to another; however, neither fiction nor a sense of inevitability or natural progression should obscure the reality that the Civil Rights Act was radical and rebalanced the line between public and community rights and private rights. Even though supporters turned to Lord Hale and Blackstone, there are a lot of cases where courts distinguished the public accommodations mandate.²⁵

Supporters of the Act, like Paul Freund at Harvard Law School, added that the Act was not just grounded in ancient precedents on the duties of common carriers and innkeepers to take all comers.²⁶ It also fit alongside more recent cases, such as labor cases that permitted occupation of private property.²⁷ There was other precedent that supporters could have pointed to as well to buttress the argument that the Act's public accommodations requirement was in keeping with well-established property rights

²² See S. REP. NO. 88-872, *supra* note 2, at 65-75.

²³ See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439 (2003).

²⁴ Cf. ELLISON, *supra* note 17, at 439 (referring to the lies used by the keepers of power). Ellison was, of course, referring to a different set of myth-makers, those who were in power and wanted to maintain it. Woodward debunked the myth that Jim Crow had always been with us, which had served so long to support the idea that there had to be a strict line separating African American and white people. See Alfred L. Brophy, *Introducing Applied Legal History*, 31 LAW & HIST. REV. 233, 235-36 (2013). The nineteenth century was filled with a host of myths promulgated by historians about the inferiority of people of African descent and the impossibility of ending slavery. Those ideas often washed over to legal thought. See Alfred L. Brophy, *When History Mattered: Law's History: American Legal Thought and the Transatlantic Turn to History*, 91 TEX. L. REV. 601, 604-06 (2013) (discussing proslavery histories and their connection to post-war historical thought in context of review of David Rabban, *Law's History: American Legal Thought and the Turn to Transatlantic Legal History* (2014)). My suggestion here is that the origin myths may be used to serve a great many different purposes, which is one of the reasons the understanding of the past is so contentious and has been for so long.

²⁵ See S. REP. NO. 88-872, *supra* note 2, at 65-75.

²⁶ *Id.*

²⁷ *Id.* at 82-92.

jurisprudence.²⁸ Regulation of private property had been increasing throughout the twentieth century with such decisions as *City of Euclid v. Ambler Realty Company*.²⁹ That decision, written by the staunch supporter of property rights Justice Sutherland, had rejected a challenge to regulations that were alleged to be depriving landowners of as much as 75 percent of their value.³⁰ Lest anyone think that Justice Sutherland was soft on property rights, one need only recall that in his dissent in *Blaisdell* he argued that the Constitution was designed to protect the rights of property owners³¹ and, citing *Dred Scott*,³² that the original intent of the Constitution mattered. And then there were other traditions, even more hidden in some ways, that might have been drawn upon to suggest that courts and legislatures had rebalanced property rights between owners and non-owners at critical times in American history. For instance, during the Anti-Rent movement along New York's Hudson River Valley, the New York courts and legislature took action to require owners of feudal rights to sell those rights to their "tenants."³³

Despite those other precedents, when it came to constitutional background, supporters justified the Bill on two bases. First, and most fully, it was advanced as an exercise of the Commerce Clause.³⁴ Even its detractors acknowledged Congress' power.³⁵ Supporters also suggested that the Bill might be based on the Fourteenth Amendment.³⁶ The report expressed skepticism about the continuing validity of the *Civil Rights Cases*' requirement of state action. Either the Court, the report surmised, would overturn or distinguish the *Civil Rights Cases*.³⁷ There were sustained

²⁸ *Id.*

²⁹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³⁰ *Id.* at 384.

³¹ *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 458 n.3 (1934) (Sutherland, J., dissenting) (citing CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 31, 33 (1913)). I am grateful to Daniel Hulsebosch for pointing this out.

³² *Id.* at 450.

³³ See ALFRED L. BROPHY, ALBERTO LOPEZ, & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE 54-59 (2011).

³⁴ S. REP. NO. 88-872, *supra* note 2, at 12.

³⁵ *Id.* at 13 (questioning "how far Congress wants to go under the authority of the commerce provision of the Constitution," not whether it can act).

³⁶ *Id.* at 13.

³⁷ S. REP. NO. 88-872, *supra* note 2, at 12. This was, of course, strenuously contested by individual senators. See, e.g., SENATE REPORT, *supra* note 2, at 54, 67-69 (reporting views of individual senators on Congress' lack of power under the Fourteenth Amendment and the continuing validity of the state action doctrine). Herbert Wechsler, however, thought that state action doctrine could not be

challenges to state action doctrine as the Supreme Court interpreted more action as state rather than as private action.³⁸ In the post-World War II era there was a line of cases that shifted to the rights of individuals against private property owners.³⁹ In *Marsh v. Alabama*⁴⁰ the Supreme Court in essence turned private property into public property for the purposes of First Amendment protections of protesters. And in *Shelley v. Kraemer*⁴¹ in 1948 the Supreme Court took away the right of neighbors (the holders of the dominant estate in an equitable servitude) to prevent African Americans from occupying property that the African Americans owned. That is, *Shelley* limited the rights of holders of a dominant estate to use their right to exclude; the Supreme Court did this by converting the use of the courts to enforce the exclusion into state action, much as *Marsh* had turned the private company's exclusion of protesters into state action.⁴²

Some litigants still tried to use the Civil Rights Act of 1875,⁴³ which had been ruled unconstitutional in the nineteenth century.⁴⁴ They met with no success.⁴⁵ In order to find a prohibited discrimination there had to be some state action. They found it in 1961 when a municipally owned parking garage in Wilmington, Delaware, leased space to a coffee shop that discriminated.⁴⁶ And while Congress was considering the Civil Rights Act of 1964, there was a growing sense that enforcement of trespass statutes themselves might constitute state action.⁴⁷ Jerre Williams, then a University

stretched as the majority hoped. His testimony was used by a dissenting Senator. *See id.* at 48.

³⁸ *See generally* *Marsh v. Alabama*, 326 U.S. 501 (1946); *see also* *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁹ *See Marsh*, 326 U.S. 501, 502; *Shelley*, 334 U.S. at 1, 4.

⁴⁰ *Marsh*, 326 U.S. at 502.

⁴¹ *Shelley*, 334 U.S. at 4.

⁴² *See generally id.*

⁴³ 18 Stat. 335-337. It provided that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

⁴⁴ *See The Civil Rights Cases*, 109 U.S. 3, 19 (1883).

⁴⁵ *Williams v. Howard Johnson's Rest.*, 268 F.2d 845 (4th Cir., 1959); *Slack v. Atlantic White Tower System*, 284 F.2d 746 (4th Cir., 1960).

⁴⁶ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁴⁷ S. REP. NO. 88-872, *supra* note 2, at 12 ("There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished.").

of Texas law professor and later a judge of the United States Court of Appeals for the Fifth Circuit, argued in an article with the illuminating title, “Twilight of State Action,” that the state action requirement was, indeed, declining.⁴⁸

Thus, as Congress was debating further action, protests in the streets were also moving along, as were cases in the courts. The sit-in cases were in front of the United States Supreme Court in 1964, presenting the question of whether the enforcement of a neutral trespass statute involved state action.⁴⁹ As supporters were trying to make this look normal, they also recognized the importance of the demonstrators to the movement.⁵⁰ Something was brewing that was remaking property rights.⁵¹ There were protests in the streets and, even among those who were not in the streets, there was a growing sense of the injustice of Jim Crow.⁵² In 1960 both Democrats and Republicans included in their platforms a call for elimination of racial discrimination.⁵³ In the words of the Senate report, “the Negro revolution of 1963” brought a realization of the need to “remove a daily insult from our fellow citizens.”⁵⁴ President Kennedy referred to such protests when he said in February 1963 that:

this is a daily insult which has no place in a country proud of its heritage—the heritage of the melting pot, of equal rights, of one nation and one people. No one had ever been barred on account of his race from fighting or dying

⁴⁸ Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1962-1963). Williams’ article was included as an appendix to the individual views of Vermont Senator Winston S. Prouty in the *Senate Report*, *supra* note 2. Though many strenuously opposed such a reading. *See, e.g.*, Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC 21, 22-23 (August 31, 1963).

⁴⁹ *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226 (1964). This case was decided June 22, 1964, just after the Civil Rights Act of 1964 was passed. It was remanded for further investigation of whether the convictions were justified because subsequent Maryland legislation outlawed discrimination in public accommodations.

⁵⁰ *See generally* TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

⁵¹ *Id.*

⁵² *See, e.g., id.*; H. Timothy Lovelace Jr., *Making the World in Atlanta’s Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative Committee of the United Nations Race Commission*, 32 LAW & HIST. REV. 385 (2014). And there was, of course, a growing opposition to those protests. *But, c.f.*, 7 LEG. HISTORY OF THE CIVIL RIGHTS ACT OF 1964, *supra* note 2, at 8663-64 (showing growing opposition to those protests through complaints about CORE’s confrontational street protests). *See also id.* at 8644 (1964) (discussing the growth of Jim Crow).

⁵³ *See* S. REP. NO. 88-872, *supra* note 2, at 8.

⁵⁴ *Id.*

for America— there are no “white” or “negro” signs on the foxholes or graveyards of battle. Surely in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.⁵⁵

Even as supporters were trying to make the Act look moderate, they recognized that there were more fundamental issues at stake over private property.⁵⁶ Here, they advanced the idea that has subsequently been so central to the progressive property movement,⁵⁷ that property rights “exis[t] for the purpose of enhancing the individual freedom and liberty of human beings.”⁵⁸ This was a theme that reverberated in the press. James Reston of the *New York Times*, for instance, wrote about the conflict between property and human rights in June 1963.⁵⁹

Such ideas had deep, though often obscured, roots in American thought about property. In the nineteenth century, during the Age of Jackson, there was talk of the conflict between people and property.⁶⁰ In the twentieth

⁵⁵ *Id.* at 8-9.

⁵⁶ S. REP. NO. 88-872, *supra* note 2, at 22 (discussing property rights).

⁵⁷ See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009); Joseph William Singer, *Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 209 (2006); Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. CIV. C.L. L. REV. 91 (2011).

⁵⁸ S. REP. NO. 88-872, *supra* note 2, at 22. It continued that property “assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and property, from his individual efforts.” *Id.*

⁵⁹ James Reston, *Washington; Property vs. Human Rights The Big Issue Principles and Politics*, N.Y. TIMES, June 21, 1963. This is a theme that Reston explored sometimes in later articles, too. See James Reston, *Aspen Colo.: Human Rights vs. Property Rights*, N.Y. TIMES, Aug. 30, 1970. It is a theme that had been heard on occasion in the pages of the *Times* during the Great Depression. Compare Robert S. Posmontier, Letter to the Editor, *Property vs. Human Rights Radicals Who Deny the Former Held to Be Really Reactionaries*, N.Y. TIMES, Sept. 21, 1936, with Henry A. Soffer, Letter to the Editor, *Human and Property Rights*, N.Y. TIMES, Sept. 19, 1934.

⁶⁰ See, e.g., GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD AND NEIGHBORING TOWNS, JULY 4, 1836 11 (1836)

century the talk of human rights versus property rights was popularized by Theodore Roosevelt⁶¹ and carried onward by Woodrow Wilson in the context of foreign relations,⁶² then down to Hubert Humphrey.⁶³ Sometimes that conflict appeared in the Supreme Court in the early twentieth century as well.⁶⁴ While what we hear most about in American property law are such concepts as the right to exclude,⁶⁵ there are some other common law fragments that help to rebalance the right to regulate, to force the transfer of rights to neighbors, and even in some cases to require landowners to allow others onto their property.⁶⁶ The Senate report recognized the dispute

(focusing on the differences between Whigs and Democrats in their approach towards property, democracy, and humanity).

⁶¹ See HAROLD HOWLAND, THEODORE ROOSEVELT AND HIS TIMES 114 (1921) (“Ordinarily, and in the great majority of cases, human rights and property rights are fundamentally and in the long run identical; but when it clearly appears that there is a real conflict between them, human rights must have the upper hand, for property belongs to man and not man to property.”). Often in the legal literature the idea of a distinction between human rights and property rights was criticized and property rights were robustly supported. See, e.g., J.W. Gleed, *Human Rights vs. Property Rights*, B. ASS’N OF KAN. PROC. 57-66 (1912) (referring to Theodore Roosevelt, but arguing against the distinction); Silas H. Strawn, *Human Rights vs. Property Rights*, 9 STATE BAR J. CALIF. 319-28 (1934).

⁶² JAMES PECK, IDEAL ILLUSIONS: HOW THE U.S. GOVERNMENT CO-OPTED HUMAN RIGHTS 60-61 (2010).

⁶³ Hubert Humphrey, *A Plea for Civil Rights* (1948), available at: http://www.mnhs.org/library/tips/history_topics/42humphreyspeech/speech1.php.

⁶⁴ See, e.g., Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 444, 518-23 (1982) (discussing *Buchanan v. Warley*, 245 U.S. 60 (1917), as part of the civil rights v. property rights debate). See also Brent M. Ruben, *Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law*, 92 TEXAS L. REV. 477-520 (2013) (providing the most recent reassessment of *Buchanan*).

⁶⁵ Thomas W. Merrill and Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). Even those who roundly criticize the institution of property—or maybe especially those who do so—recognize its power in American thought. See, e.g., Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329 (2007); Cf. Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603 (2009).

⁶⁶ See, e.g., *Overbaugh v. Patrie*, 8 Barb. 28 (N.Y. Sup. Ct. 1852) (limiting the rights of a holder of equitable servitude over those bound by the servitude); *United States v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990) (permitting Zuni Tribe a prescriptive easement over property they have used for generations). See also Alfred L. Brophy, *Re-Integrating Spaces: The Possibilities of Common Law*

between human dignity and property rights.⁶⁷ “Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.”⁶⁸

Of course in Alabama we need to be particularly cognizant of the ways that direct protest affected the movement. As Rick Pildes has reminded us in relation to Alabama’s central place in the evolution of voting rights, one could write our nation’s history of civil rights largely out of Alabama’s history.⁶⁹ The racial conflicts in the Black Belt counties of Perry and Dallas that set off the famed Selma to Montgomery march and then the Voting Rights Act of 1965 were still nearly a year away when the Civil Rights Act of 1964 was being debated. But the Alabama civil rights movement was well underway.⁷⁰ The state was nearly a decade past the 1955 Montgomery Bus Boycott⁷¹ and, as noted in the title of Glenn Askew’s book *But for Birmingham*, the events there in 1963 helped catalyze public opinion in favor of a broader civil rights act.⁷² Bull Conner’s fabulously lousy political behavior reminds us once again that violence is often counter-productive.

2. THE PROPERTY RIGHTS AND LIBERTARIAN CHALLENGE TO THE CIVIL RIGHTS ACT

The supporters of the Bill added to their argument that it was moderate that it was also necessary and humane.⁷³ Witnesses explained how African Americans were routinely denied public accommodations.⁷⁴ The supporters were able to make the moral case for action. It was President Kennedy who explained in February 1963 the multiple reasons for the Act:

Race discrimination hampers our economic growth
by preventing the maximum development and utilization

Property, 2 SAVANNAH L. REV. 1, 17-20 (2015) (discussing anti-feudalism in contemporary American property law).

⁶⁷ S. Rep. No. 88-872, at 15.

⁶⁸ *Id.* at 22.

⁶⁹ Rick Pildes, *Book Review*, 27 LAW & HIST. REV. 228-30 (2009) (reviewing BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007)) (employing the apt phrase, “Alabama is to the right to vote as the Jehovah’s Witnesses are to the First Amendment.”).

⁷⁰ *See generally* GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997).

⁷¹ *Id.* at 20-21.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ S. Rep. No. 88-972, at 15-16 (1964).

of our manpower. It hampers our world leadership by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the costs of public welfare, crime, delinquency and disorder. Above all, it is wrong.

Therefore, let it be clear in our own hearts and minds that it is not merely because of the Cold War, and not merely because of the economic waste of discrimination, that we are committed to achieving true equality of opportunity. The basic reason is because it is right.⁷⁵

Yet despite the evidence that many states already protected civil rights, that there were common law origins of the right, and that discrimination was morally wrong, there was still a deep sense among opponents that the Act was radical.⁷⁶ In opposition to Senator Hubert Humphrey's argument that the Bill was in keeping with the common law,⁷⁷ there were claims that the Bill was socialist, if not communist.⁷⁸ Sometimes

⁷⁵ *Id.* at 14.

⁷⁶ *Id.*

⁷⁷ *Civil Rights Act of 1963*, CONGRESSIONAL RECORD 6307, 6318 (March 30, 1964), in 3 LEG. HIST., *supra* note 7, at 6307, 6318 (“[W]e are not proposing anything radical. Blackstone is not known as a radical. In fact he was quite a conservative man. ... [T]his provision of title II is not a machination of a radical, evil mind. Title II is in the tradition of Anglo-Saxon common law.”). *See also id.* at 6317 (maintaining that the Act is not a taking of property in violation of the Fifth Amendment violation, only a narrow regulation of property).

⁷⁸ For references to communism or socialism (or both), *see* 2 LEG. HIST., *supra* note 7, at 1848 (“It is first, foremost, and always most important to safeguard the individual's right to own and operate his personal property as he sees fit. This, of course, is government by men and interpretation by men, not government by law. This violates the Constitution, the principles of capitalism, and the basic common denominator of the United States of America. At the time when communism, socialism, and capitalism are locked in a life-or-death struggle, with the right to own property as the principal ingredient of that struggle, and we here abandon our constitutional right to own and operate property, we endanger our whole system of society. How tragic and how unnecessary, in the name of preserving civil rights. This section on public accommodations throws American civil rights right out the window.”); 3 LEG. HIST., *supra* note 7, at 5401; 3 LEG. HIST., *supra* note 7, at 4906; 3 LEG. HIST., *supra* note 7, at 6219 (Senator Thurmond, referring to title 6) (“This is pure socialism. It is Government control of the means of production and distribution and that is socialism.”); 6 LEG. HIST., *supra* note 7, at 10924; 9 LEG.

opponents just referred to it as communist; at other times, there was an explanation as to how.⁷⁹ In some cases, for example, it was said that it would lead to other claims for rights.⁸⁰

We can conceive that there is a possibility that this great declaration of individual liberty might be distorted into support for the advocacy of extreme socialism, such as the right to food, housing, medicine, etc. If, however, the amendment should be used by either the legislative or judicial branches of our Government as the basis of such a public right, then it would be taken out of its natural meaning and setting. The individual Bill of Rights would be distorted into a public bill of rights.⁸¹

Or, as Senator Robertson phrased it, “What is communism but socialism raised to the nth power, the central government taking everything over, and a dictatorship administering the government?”⁸² This is how opponents characterized the bill.

The attacks on the Bill as communism reveal a wrinkle in the interpretation of *Brown* and the federal government’s support of the civil rights movement as a product of the Cold War.⁸³ While this is not the place for an extended discussion of the critical question of what causes fundamental legal change, the anti-communist statements made by Southern members of Congress invite some further explanation. Perhaps the references to the Cold

HIST., *supra* note 7, at 15359-60 (communism); 9 LEG. HIST., *supra* note 7, at 15, 355.

⁷⁹ 3 LEG. HIST., *supra* note 7, at 6219.

⁸⁰ 5 LEG. HIST., *supra* note 7, at 8472.

⁸¹ *Id.*

⁸² 88 CONG. REC. 5085 (1964).

⁸³ See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). It is worth noting in this context that nearly a decade before the United States entered World War II, the August 1933 lynchings of two African American men in Tuscaloosa led to an analogy of the United States’ treatment of our African American citizens to Nazi treatment of Jewish citizens. See Leon Ranson *et. al.*, *Memorandum Brief for the Attorney General of the United States in re: Prosecution of R.L. Shamblin, Sheriff of Tuscaloosa County, Alabama ...* 47 (1933) (“A Nation which can raise its hands in horror at the atrocities perpetrated against the Hebrew race under the Nazi government in Germany cannot, if it be honest and honorable, remain quiescent in the face of greater barbarities practiced daily within its own boundaries.”). See Alfred L. Brophy, “cold legal points into points of flame”: Karl Llewellyn Attacks Lynching (unpublished mss.), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619895.

War during the debates over school integration and the Civil Rights Act of 1964 are what one might think of as an excuse rationale. They are arguments used to justify what is being done on other grounds. In the case of the Civil Rights Act of 1964, the support may have had more to do with the moral case made by demonstrators and leaders of the Civil Rights movement than with the defeat of communism.⁸⁴ If it was about the defeat of communism, the opponents who claim the Act was inspired by communism and would result in a further slide to communism did not understand the role of the Act in winning the Cold War.

Sometimes the claim was not that the bill would lead to communism, but simply that it was an extreme interference with the property rights of businesses.⁸⁵ Sometimes they said it violated the Fifth Amendment's protection of taking of property without compensation.⁸⁶ Harper Lee's novel *Go Set a Watchman*, set in rural, southern Alabama in the 1950s, captured the sense of many white southerners that the civil rights revolution was an attack on property rights and the established order. Atticus Finch's brother told Jean Louise Finch (presumably the stand-in for Ms. Lee), that respect for property rights had declined:

The time-honored, common-law concept of property—a man's interest in and duties to that property—has become almost extinct. People's attitudes toward the duties of a government have changed. The have-nots have risen and have demanded and received their due—sometimes more than their due. The haves are restricted from getting more. You are protected from the winter winds of old age, not by yourself voluntarily, but by a government that says we do not trust you to provide for yourself, therefore we will make you save.⁸⁷

Atticus Finch, the hero of *To Kill a Mockingbird* in the 1930s, is by the 1950s a representative of a backward-looking constitutional law. He is representative of the deep opposition to civil rights among the white families in the fictional town of Maycomb. Atticus was against protection of African

⁸⁴ Cf. ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* (2009); WILLIAM P. JONES, *THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS* (2013); David Garrow, *The Obscure Heroes Behind Congress's Great Moment*, AM. PROSPECT (Apr. 3, 2014), <http://prospect.org/article/obscure-heroes-behind-congress%E2%80%99s-great-moment>.

⁸⁵ 88 CONG. REG. 5073-74(1964).

⁸⁶ *Id.*

⁸⁷ HARPER LEE, *GO SET A WATCHMAN: A NOVEL* chap. 14 (2015).

American voting rights and integrated schools. The robust protection of property rights was central to that vision. It is easy to imagine that Atticus Finch would have been a staunch opponent of the Civil Rights Act.

At other times the bill was just portrayed as a bad idea.⁸⁸ “The bill is one illustration of how unfortunate it would be if we permitted the Federal government to control this kind of private property under the specious claim that if a man from New York sits down at a hotdog stand in Virginia the hotdog stand is in interstate commerce,” said one Southern representative.⁸⁹ “That is the purest tommyrot.”⁹⁰

It was not just that the Act went well beyond the common law. The Act put into statute the protections of *Shelley v. Kraemer*.⁹¹ The Virginia Constitutional Commission, a commission established by the Virginia legislature in the 1950s to defend the proposition of states’ rights,⁹² published several pamphlets attacking the Act. One of them, *Civil Rights and Federal Powers*, attacked the Act’s extension of equal protection principles to private action:

The pending civil rights bill would uproot from our law these “firmly embedded” constructions of the Fourteenth Amendment. Under this bill, private acts of discrimination would be prohibited if they were (1) carried on under color of any custom or usage, or were (2) “required, fostered, or encouraged by action of a State or a political subdivision thereof.” The three verbs, coupled with the earlier reference to discrimination “supported” by State action, demand the closest scrutiny. ... But what exactly is meant by “fostered, encouraged, or supported”?

The framers of this bill know full well what these rubbery words are intended to embrace. They envision a

⁸⁸ 88 CONG. REG. 5073-74(1964).

⁸⁹ *Civil Rights Act of 1964*, CONGRESSIONAL RECORD, at 4092, 4906, in 3 LEG. HIST., *supra* note 7, at 4092, 4906 (comments of Senator Robertson).

⁹⁰ *Id.*

⁹¹ See Civil Rights Act of 1964, PUB. L. NO. 88-352, 78 Stat. 241; *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁹² See RACE, REASON, AND MASSIVE RESISTANCE: THE DIARY OF DAVID J. MAYS, 1954–1959 (James R. Sweeney ed. 2008). See also MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (Clive Webb ed.) (2005) (discussing Constitutional Commission); THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA (Matthew D. Lassiter and Andrew B. Lewis eds., 1998).

situation in which the proprietor of a lunch counter or soda fountain refuses to serve potential customers by reason of their race. The unwanted customers refuse to leave. The proprietor summons police to arrest them for trespass. Under this bill, the action of the police and of the criminal courts in preventing and punishing trespass upon essentially private property is to be construed as State action “fostering, encouraging, or supporting” discrimination in an affected establishment.⁹³

Such an extension was, in the view of the Virginia Constitutional Commission, a radical attack on property rights:⁹⁴

In theory this approach has a certain pretty appeal. To embrace this concept, it is necessary only that one discard 10,000 years of property rights and 150 years of government under a written Constitution. One must prepare his mind for the obliteration of freedoms that have ranked among our most cherished rights. One must abandon the principle that governments are instituted among men to make men's rights secure, for no right is more ancient than man's right to hold, manage, and control the use of his property. If a citizen no longer may call upon the police and the courts to make that right secure, the whole concept of property rights is diminished. And we earnestly submit that no right is more important to every American citizen, regardless of race, than his right to property. None of the other familiar rights—the rights of free press, free speech, free religion, freedom to bear arms, the right of jury trial, the protection against excessive bail or cruel and unusual punishments—none of these cherished constitutional rights approaches, in terms of day-by-day living, the right to hold, manage, and control one's own property. The

⁹³ VA. COMM. ON CONSTITUTIONAL GOV'T, CIVIL RIGHTS AND FEDERAL POWER, *supra* note 2, at 14-15. *See also id.* at 24 (“Six members of the House Judiciary Committee, in their able minority report, termed the bill ‘revolutionary.’ In the very deepest meanings of the word, reaching to the changes this law would work in our federal system and in the immense accretions of power here contrived, it is a fair word for a very bad bill.”).

⁹⁴ Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY, *supra* note 5, at 417-46.

right is vital to poor man and rich man alike. It has surrounded the humblest citizen every hour of the day. There is no "human right" more precious. And this bill, in the name of a social objective for which many persons have sympathy, would fatefully undermine it.⁹⁵

In Congress, just as in the pamphlets distributed by the Virginia Constitutional Commission,⁹⁶ there were charges that the Bill would upend individuals' and businesses' rights of property.⁹⁷ One Congressman explained that:

Ours is a society of free enterprise based upon private ownership of property and exercising of individual liberties. The American system of business was founded on the principle of individual choice: One can buy from whom he wishes to buy and sell to people of his choosing. When one buys a home, he chooses a home in a neighborhood containing the environment which he desires. Some people like to live in a country club atmosphere; some in a city apartment house; some on a farm; some in neighborhoods of \$30,000 homes; and some in an area that is predominated by people of their own class, economic status, race, or religion. Hundreds of our fraternities and social organizations have been founded by people of a particular group whose endeavors many times have been the furthering of their own kind. In our society, we have always been able to make an individual choice.⁹⁸

The rhetoric was extreme; the bill was "vicious" and it had the "authority to destroy the character of American free enterprise."⁹⁹ It would, quite simply, "enslave our economic system."¹⁰⁰

⁹⁵ VA. COMM. ON CONSTITUTIONAL GOV'T, CIVIL RIGHTS AND FEDERAL POWER, *supra* note 2, at 14-15.

⁹⁶ The Virginia Commission Report was praised during the debates. *See* 3 LEG. HIST., *supra* note 7, at 5690.

⁹⁷ 3 LEG. HIST., *supra* note 7, at 5853-54.

⁹⁸ *Id.* at 5853.

⁹⁹ *Id.* at 5854.

¹⁰⁰ *Id.* For some reason the imagery of slavery was invoked with frequency by those who opposed anti-discrimination legislation. *See also* 5 Leg. Hist., *supra* note 7, at 8458-66 (reprinting Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination*

One should not expect deep analysis in Congressional debates, so there is no reason to expect a careful parsing of what the charges of communism and socialism meant. They were general allegations that the bill would restrict the rights of owners to exclude people from their property.¹⁰¹ Yet, at certain points opponents explained in more detail the philosophy behind the charges.¹⁰² For instance, they reprinted in the *Congressional Record* one lengthy critical analysis of Title 2.¹⁰³ That analysis, in turn, spent substantial space explaining the shift in property rights from the nineteenth century—a highpoint of individual rights, where owners presumably could exclude others at will and decide what they wanted to do with their property free from interference by the state—to the twentieth century’s increasing regulation of property.¹⁰⁴ That study rested in large part on *In Defense of Property*, a book of political theory published in 1963 by a Johns Hopkins University professor Gottfried Dietz.¹⁰⁵ The book was self-consciously a brief lamenting the “tragedy” of the decline of property rights.¹⁰⁶

The fullest and most famous exploration of these issues is Robert Bork’s op-ed in the *New Republic*, “Civil Rights – A Challenge.”¹⁰⁷ Bork challenged the Act as an infringement on personal freedom.¹⁰⁸ Harvard Law School professor Mark DeWolf Howe had written that the Act was a response to the South’s effort “to preserve the ugly customs of a stubborn people.”¹⁰⁹ Bork turned the reference to ugly customs into an attack on the bill, however.¹¹⁰ He thought that the “principle of such legislation is that if I find your behavior ugly by my standards ... and if you prove stubborn about adopting my views of the situation, I am justified in having the state coerce

Legislation, 49 CORNELL L. Q. 228-56 (1964)).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *A Critical Analysis of Title II of the H.R. 751 – The Public Accommodations Section of the Civil Rights Act*, in 8 LEG. HIST., *supra* note 7, at 12,882-907. See also ALFRED AVINS, OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: A SYMPOSIUM ON ANTI-DISCRIMINATION LEGISLATION, FREEDOM OF CHOICE, AND PROPERTY RIGHTS IN HOUSING (1963).

¹⁰⁴ *Id.*

¹⁰⁵ GOTTFRIED DIETZ, IN DEFENSE OF PROPERTY (1963).

¹⁰⁶ *Id.* at 7. See also *A Critical Analysis of Title II of the H.R. 751 – The Public Accommodations Section of the Civil Rights Act*, in 8 LEG. HIST., *supra* note 7, at 12903 (quoting Dietz, *supra* note 105, at 7).

¹⁰⁷ Bork, *Civil Rights—A Challenge*, *supra* note 48, reprinted in 6 LEG. HIST., *supra* note 7, at 10869-10871.

¹⁰⁸ *Id.* at 10870.

¹⁰⁹ *Id.* (quoting Howe in an unlocated source).

¹¹⁰ *Id.*

you into more righteous paths.”¹¹¹ That led to a conclusion that was probably Bork’s most famous line—and one that was the subject of intense focus during his United States Supreme Court confirmation hearing—“That is itself a principle of unsurpassed ugliness.”¹¹² Bork, likewise, attacked the distinction that some supporters drew between human rights and property,¹¹³ for he thought that “if A demands to deal with B and B insists for reasons sufficient to himself he wants nothing to do with A,” both are claiming “human rights.”¹¹⁴

Opponents used their belief that the bill was unconstitutional to warn of another “tragic era” that would follow the enactment. This was a reference to the Claude Bower’s history of Reconstruction—now thoroughly discredited as the distorted fantasy wrought by white supremacy¹¹⁵—that referred to the period as a tragic era that left Southerners without the protection of the Constitution.¹¹⁶ One member of Congress entered the chapter on Andrew Johnson from Claude Bower’s *Tragic Era* into the *Congressional Record*.¹¹⁷ Such sentiments reached Tuscaloosa, Alabama, where lawyer Charles Block addressed the Alabama bar in 1963 and labeled the constitutional and legislative changes of the Civil Rights Movement as “the second tragic era.”¹¹⁸

Amidst the many celebrations of the fiftieth anniversary of the Civil Rights Act of 1964 that took place in law schools around the country, much of the talk was about the future—the work left to be done and the possible new directions in legislation and litigation.¹¹⁹ Sometimes there were

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 88 CONG. REC. 11232 (1964).

¹¹⁴ *Id.* (referring to James Reston’s distinction between property rights and human rights, *supra* note 43). See also 88 CONG. REC. 13373 (1964) (“We are dealing today with property rights. The only question is: who shall have those property rights? Shall it be the man who has earned or the man who has coveted that which he has not earned? The only ‘human rights’ involved are the rights of some humans against the claims of other humans”).

¹¹⁵ See Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-versa*, 112 COLUM. L. REV. 1585, 1594 (2012).

¹¹⁶ 88 CONG. REC. 2791 (1964).

¹¹⁷ 88 CONG. REC. 5445 (1964).

¹¹⁸ See Charles J. Bloch, *A Second Tragic Era – The Role of the Lawyer in It*, 24 ALA. LAWYER 386-401 (1963).

¹¹⁹ See, e.g., Sam R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014); Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942 (2014).

retrospective glances as well.¹²⁰ This essay has looked backwards to the property rights debate before and during the debate over the Act to suggest that its focus on human rights and human dignity was grounded in debates and in legal decisions that had been going on for decades. But it also is worth taking the conservatives' views seriously and asking whether the Act was part of remaking of American property law and Americans' attitudes towards the right to private property. If those opponents were correct, we should be talking about the Act's contribution to human rights more generally. This may be yet another instance in which the African American freedom struggle contributed additional rights to the entire country, as it had with the Reconstruction-era amendments in the nineteenth century and in the equal protection revolution in the twentieth century.

It may very well be that the Act legitimized the discussion of the ways that "property rights serve human values," as Justice Maurice Pashman of the New Jersey Supreme Court wrote in the much-discussed 1972 case *State v. Shack*.¹²¹ Or maybe those changes, such as the implied warranty of habitability for residential tenants that has swept state legislatures since the 1960s, and Section 2 of the Civil Rights Act, draw on a common core of cultural values that support those who are not property owners. But whether the Act was an impetus for subsequent changes in property rights or merely a gauge of those changing values, the balance of the rights of property owners with those of the community changed during the 1960s.

¹²⁰ See, e.g., Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616 (2014); Randall L. Kennedy, *Ackerman's Brown*, 123 YALE L.J. 3064 (2014).

¹²¹ *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).