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THE WARREN COURT AND CONGRESS: A CIVIL RIGHTS PARTNERSHIP

*Clarence Mitchell**

On December 9 and 10, 1952, long lines of men, women and some children stood patiently outside the United States Supreme Court. This was the beginning of the school desegregation arguments. Only a small fraction got in to hear the proceedings. But when the decision was handed down on May 17, 1954, it had a profound effect on the lives of most of those present. Millions who were not there were also destined to be caught up in mountainous waves of change caused by the words of the opinion read by a new Chief Justice. The Honorable Earl Warren, who had been confirmed by the United States Senate on March 1, 1954, speaking for a unanimous court, said that "in the field of public education the doctrine of 'separate but equal' has no place."¹

The significance of the words of the opinion is found in the fact that this was a complete reversal of an evil concept of law that had fastened itself on the country in the time of political uncertainties that followed the Civil War. During that period of the Nation's history, Congress passed measures that ultimately put the Negro in a position to make a legal claim for equal treatment by invoking the thirteenth, fourteenth and fifteenth amendments to the United States Constitution. However, the Supreme Court systematically struck down the clear legislative guidelines that the Congress enacted for implementing the promises of these amendments. Subsequently, the Congress also fell into the mire of scorning or evading constitutional safeguards.

In contrast, from May 17, 1954 to the present there has developed a meaningful partnership between the Supreme Court and Congress in the field of civil rights, with the Supreme Court setting the direction for the course of that partnership.

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¹ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). At the time of the opinion Chief Justice Warren had been serving on the Supreme Court since September 30, 1953, after receiving, first, a recess appointment from President Eisenhower to fill the vacancy caused by the death of Chief Justice Fred Vinson. The President sent the nomination to the Senate on January 11, 1954. As Governor of California, Mr. Warren had appointed Richard Nixon (by then Vice President), Senator William F. Knowland, the Republican leader known as a conservative, and Senator Thomas H. Kuchel, the Republican leader known as a liberal, to serve in the Senate before they began elected terms. All of them warmly praised the Warren appointment.

Before the decision, even liberal members of the House and Senate quailed when asked the question: "Do you believe in social equality?" Like the term "Black Power" used in the racial exchanges today, the words "social equality" could mean anything from being willing to be seen in the company of a Negro on a public street to "joyfully encouraging him to become a son-in-law." Generally, the social equality bomb was thrown at Senators or Congressmen who argued against discrimination based on race. Sometimes, with an ear turned in the direction of their home state or districts where some of the voters might think of the son-in-law version of social equality, the legislators would hasten to explain that they followed the "constitutional guarantee of separate but equal." Others simply avoided getting entangled in civil rights problems. The net result of all this was to leave the field to the vocal and highly abrasive segregation advocates. They gave Congress a low rating among most of the Negroes in the United States.

Seldom did people, other than the late Walter White, who was secretary of the National Association for the Advancement of Colored People (1923 to 1955), and his associates in the organization, think of Congress as a place to seek redress of wrongs. Mr. White, a man with dynamic faith in the legislative branch of American government, always looked forward to the day when Congress would pass effective civil rights legislation. He is credited by many as being responsible for the decline of lynching in the United States. He waged a skillful and continuous campaign for passage of an anti-lynching bill until he died in 1955. Year after year he worked for the introduction and passage of legislation in the Congress. The bill would pass the House and die from filibustering in the Senate. Nevertheless, the debates that accompanied its consideration had the helpful effect of generating strong public opinion against the crime.

In 1937 Mr. White and his associates succeeded in getting the bill, introduced by Representative Joseph Gavagan (D-N.Y.), through the House by a vote of 277 to 119, a breakthrough which was blocked by the Senate. The following is his account of what happened:

We found that the long struggle to arouse public opinion had penetrated areas and created support where a decade before we would never have dreamed of receiving such support. Southern newspapers like the Richmond Times-Dispatch, the Greensboro Daily News, the Danville Register, and other leading newspapers vigorously and unequivocally urged passage of the bill. Southern church, labor, and student bodies, particularly the women of the Methodist Episcopal Church South, were equally outspoken. But the stronger the Southern and national support became, the more vindictive were the filibustering tactics of senators like Connally of Texas, Smith of South Carolina, Bilbo of Mississippi, Russell

and George of Georgia, and McKellar of Tennessee, aided openly by Borah and less openly by some of the conservative Republican senators. A seven-week filibuster in 1938 was finally successful when an emergency relief appropriation bill to feed the unemployed was used to displace the anti-lynching bill in the Senate.²

Even before the 1954 decision, most Negroes who looked to Washington for aid had their eyes on the occupant of the White House or the Supreme Court. The names of Presidents Roosevelt and Truman and Justices Black, Clark, Frankfurter and Douglas were household words. It is a symbol of the fulfillment of America's promise that the man most responsible for the almost reverent attitude of Negroes toward the Court is now a justice himself, Associate Justice Thurgood Marshall. Very early in his career, colored citizens regarded Mr. Marshall, National NAACP Counsel for many years, as a kind of combination of Attorney General and Chief Justice. Even those white Americans who opposed his efforts to achieve civil rights through the courts, exaggerated his powers. There is further significance in the fact that he was appointed to the Court by a President who was a Senator from Texas when the 1954 decision became news of world wide importance. When Mr. Marshall, serving as chief counsel for the plaintiffs in the school desegregation cases, won, the lions of the Senate and the lesser noise generators in the House made the Capitol echo with their brimstone oratory against Chief Justice Warren and Mr. Marshall. On one occasion, while attacking Court decisions, Senator Richard B. Russell of Georgia suggested that Mr. Marshall seemed to have "mesmeric" powers over the Court.

On March 12, 1956, nineteen Senators and eighty-two Representatives from southern states issued a manifesto declaring that "The unwarranted decision of the Supreme Court in the public school cases is... a clear abuse of judicial power."³ Senator Price Daniel of Texas signed the manifesto, but Senator Lyndon Johnson did not. Eleven years later on August 30, 1967, President Johnson's nomination of Mr. Marshall was overwhelmingly approved by the Senate 69 to 11. It is noteworthy that one of the manifesto signers, Senator J. W. Fulbright (D-Ark.), was among those who voted to approve the Marshall nomination. Another Senator who supported the nomination was William B. Spong whose predecessor, A. Willis Robertson of Virginia, had signed the manifesto. Both of the Texas Senators, Republican John Tower and Democrat Ralph Yarborough, also supported the nominee.⁴

² W. WHITE, *A MAN CALLED WHITE, AN AUTOBIOGRAPHY OF WALTER WHITE* 173 (1948).

³ CONG. Q. ALMANAC 416-17 (1956).

⁴ 113 CONG. REC. 12718 (daily ed. Aug. 30, 1967).

An indication of Congressional respect for the Court's role in giving leadership comes from Representative Richard Bolling (D.-Mo.) who, as a key member of the House Rules Committee, has played an important part in getting civil rights legislation to the floor. In a recent book he says: "In the 1950's the most substantial impact in domestic affairs was the work of the Supreme Court. . . . It alone behaved in a superior fashion during the period of panic and legislative cowardice provoked by McCarthyism and internal strains brought on by the cold war."⁵

EDUCATION AND VOTING RIGHTS

In a sense the vote for the Marshall nomination was a reliable indication that, on the issue of civil rights for the American Negro, the Warren Court enjoyed the potent political approval of the people and their elected officials. Other examples of the Nation's sentiments began to appear as early as the 84th Congress. Although President Eisenhower was not an advocate of civil rights legislation, his Attorney General, Herbert Brownell, put together a civil rights package that became H.R. 627.⁶ In the 84th Congress some conservative Republicans insisted that they could not support the bill. Senator Hugh Scott of Pennsylvania initiated a move in the 1956 Republican Convention to make the bill a part of the party platform. This was done and it helped immeasurably in gaining GOP votes when the bill reached the Senate in 1957.⁷ One of the principle objectives of the legislation was to give the Attorney General power to institute civil action to protect the Negro's right to vote. The Department of Justice already had power to seek indictments and prosecute offenders in voting discrimination cases, but it was reluctant to use the powers. In his testimony, Attorney General Herbert Brownell stressed the importance of civil action in voting cases. At one point he said:

I cannot emphasize too much the importance of providing the Department with these civil-law powers and remedies in voting and also in other civil-rights cases. The civil remedies would be far simpler, more flexible, more reasonable, and more effective than the criminal sanctions could possibly be. Yet at the present time criminal sanctions are the only remedy specifically authorized by Congress.⁸

⁵ R. BOLLING, *POWER IN THE HOUSE* 193 (1968).

⁶ H.R. 627, 85th Cong., 1st Sess. (1956).

⁷ In his book, H. SCOTT, *COME TO THE PARTY* (1968), Senator Scott, who was a Republican member of the House Rules Committee in 1956-57, comments on his effort to have the Republican platform support the civil rights bill and the 1954 school desegregation decision. *Id.* at 148-49.

⁸ *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 591 (1957).

Some indication of how much the statute was needed can be gleaned from a statement by Assistant Attorney General Warren Olney, III. He said that the White Citizens Council, an organization formed to resist school desegregation, was operating in Ouachita Parish, La., for the principal purpose of preventing and discouraging Negroes from voting. This organization was said to have eliminated 3,300 Negro voters from the parish rolls "in violation of the laws of Louisiana, as well as those of the United States."⁹

Eighty-three Southern opponents of the bill had issued a second "manifesto" as soon as it was introduced. Just as they did in 1954, when attacking the Supreme Court, and as some of the rear-guard segregation advocates do now in denouncing civil rights laws passed by Congress, the signers of the second manifesto resorted to sulfuric terms in attacking the bill. The following is an excerpt from their statement:

WHEREAS, under the guise of pious language the civil rights bill, HR 627, proposes to establish a Commission on Civil Rights, and to provide for an additional Assistant Attorney General, and further purports to strengthen the Civil Rights statutes and protect the right to vote; and

WHEREAS, the truth is that these combined proposals if enacted into law would constitute a flagrant violation of States' rights; would result in further concentration of power in the Federal Government and vest unprecedented powers in the hands of the Attorney General, and would intrude the authority of the Federal Government into matters which under our Constitution are expressly reserved to the States and the people.

Now, therefore, be it resolved that we, the undersigned Members of the United States House of Representatives, conscious of the grave and far-reaching consequence involved in it, hereby pledge our unqualified opposition to this iniquitous legislation....

[W]e invite and urge every member of like mind in the House of Representatives and in the Senate, where the rules of procedure are more flexible, to join with us in the employment of every available legal and parliamentary weapon to defeat this sinister and iniquitous proposal.¹⁰

Apparently there was not a "like minded" majority in the House. When the bill came to a vote on July 23, 1956, it passed 279 to 126.¹¹ Senate obstruction prevented passage of the law that year, but its chief sponsors, Representative Emanuel Celler (D-N.Y.) and Representative William McCulloch (R-Ohio) reintroduced it in the 85th

⁹ *Id.* at 1018.

¹⁰ CONG. Q. ALMANAC 462 (1956).

¹¹ 102 CONG. REC. 13894 (1956).

Congress as H. R. 6127.¹² It passed the House on June 18, 1957, by a vote of 286 to 126. Although the Senate struck out a very vital title known popularly as "Part III",¹³ the other parts of the bill specifically mentioned in the foregoing excerpt from the manifesto remained virtually unchanged. The Senate passed the bill 72 to 18 on August 7, 1957, and President Eisenhower signed it into law on September 9, 1957.¹⁴ The law was amended in 1960.¹⁵

One of the important developments connected with the passage of the 1957 Act was the fact that this was the first time Congress had been able to pass a civil rights bill in over eighty years. A number of clichés that had been used, even by civil rights supporters, were discredited when the bill became law. One standard saying was that civil rights legislation could pass the House but would never get through the Senate without a change in Rule XXII of that body which requires a two thirds vote of Senators "present and voting" to shut off a filibuster. Senator Strom Thurmond staged an all night filibuster but was not successful in preventing passage. Another widely held belief was that legislation which did not get Senate approval before April or May would not have a chance for passage, assuming that it could get around a filibuster, because from June to the end of the session Congress would be so busy with appropriation bills that it would not have time to consider civil rights matters. The 1957 bill, as previously noted, reached the Senate in June and was passed in August.

The Supreme Court took prompt action in overruling challenges to the new law.¹⁶ The Court's posture was a great source of encouragement to members of Congress who wanted to seek more and stronger legislation in this field.

¹² At the time the bill was introduced in 1956, the Republican support was led by Representative Kenneth B. Keating, who was then the ranking member of the House Judiciary Committee. Mr. Keating was elected to the Senate from New York in 1956. Mr. Culloch then became the ranking Member of the House Judiciary Committee.

¹³ The passage of the 1964, 1965, and 1968 Civil Rights Acts has cancelled out this loss.

¹⁴ The Civil Rights Act of 1957, 71 Stat. 634, 637 (1957).

¹⁵ The Civil Rights Act of 1960, 74 Stat. 86 (1960). The 1960 Act authorized federal judges to appoint referees to register Negroes who were denied that right by state officials. This was helpful but slow. Civil rights advocates had insisted that examiners appointed by the executive branch would be more effective and could reach a greater number of people. Congress approved the use of examiners in the 1965 Voting Rights Act. The 1960 law also provided criminal penalties for bombings and threats of bombings as well as penalties for mob action obstructing court orders.

¹⁶ *United States v. Raines*, 362 U.S. 17 (1960); *Hannah v. Larche*, 363 U.S. 420 (1960).

Moved by continuing evidence of flagrant denial of the right to vote in the 1964 Presidential elections and acts of violence, such as the killing of NAACP State Executive Medgar Evers in Mississippi, the violence against voting rights' marchers in Selma, and national indignation, President Johnson called for a new voting rights act in 1965. By that time resistance to such legislation in Congress was insignificant. The bill became law August 6, 1965.¹⁷ It provided for registration of Negroes by federal examiners appointed by the executive branch of government.

The State of South Carolina promptly sought to prevent enforcement of the new statute. Alabama, Louisiana and Mississippi refused to obey its provisions and the Department of Justice filed suit to require compliance. These issues reached the U.S. Supreme Court, and on March 7, 1966, Chief Justice Warren, speaking for the Court said:

After enduring nearly a century of widespread resistance to the 15th Amendment, Congress has marshalled an array of potent weapons against the evil, with the authority in the Attorney General to employ them effectively....As against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting.¹⁸

Complimenting the Johnson determination to move ahead with civil rights bills was the general assumption in Congress that, under the Warren leadership, the Court would not evade its responsibility to uphold legislation that met constitutional requirements. Clear evidence of this congressional belief is found in the hearings, debates and the language of the 1965 Voting Rights Section dealing with the poll tax as a requirement for voting in state elections. Faced with a disagreement about the provision, Congress said in effect, "Mr. Attorney General, you can get the power you need in a court decision." On final passage, the bill included the following: (a) a declaration that the requirement of a payment of a poll tax as a condition for voting was an abridgement of the right to vote, (b) directed the Attorney General to institute "forthwith" challenges to poll tax requirements in the federal courts, (c) stipulated the directive to the Attorney General was based on authority given to Congress by the fourteenth and fifteenth amendments to the U.S. Constitution, (d) stipulated that during the pendency of suits filed by the Attorney General against the poll tax no citizen in the affected political area could be denied the right to vote during the first year of his eligibility if he tendered payment of

¹⁷ Voting Rights Act of 1965, 79 Stat. 437 (1965).

¹⁸ South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

the tax for the current year to an examiner at least 45 days prior to an election, and (e) authorized federal examiners, serving in lieu of state registrars to issue receipts for payment of poll taxes and transmit payments to state officials. The Attorney General began his work as suggested by Congress, but the Supreme Court did not seem to need any advice on the matter when it decided the issue.¹⁹

In *Harper v. Virginia Bd. of Elections*, the Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."²⁰

The foregoing court decisions and laws dealing with public school desegregation and voting rights establish three important points that should be kept in mind when considering the voluminous and highly emotional arguments that have been devised to attack court decisions and legislation protecting rights of Negroes in the areas of public accommodations, equal employment and fair housing. These points are as follows:

1. Even though rules and laws regulating public schools and voting are clearly in the ambit of state action and, therefore, subject to requirements of the fourteenth amendment to the United States Constitution, opponents of federal protective action fight advances in these fields just as vigorously as they oppose federal protection against discrimination by what they describe as "purely private action with no state connection."
2. The Warren Court has continued to move the nation forward in the area of civil rights despite the increasing intensity of the attacks and the spurious charge that the Court has exceeded its powers.
3. Leadership given by Presidents Kennedy and Johnson, in the executive branch, challenged Congress to act in meeting vital civil rights problems. This, in turn, has given the Court the kind of backing in civil rights matters that encourages forthright decisions affirming the right of Negroes to be first class citizens.

¹⁹ *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex. 1966) (abolishing Poll Tax in Texas elections); *United States v. Alabama*, 254 F. Supp. 537 (S.D. Ala. 1966) (abolishing Poll Tax in Alabama elections).

²⁰ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966).

PUBLIC ACCOMMODATIONS AND THE
1964 CIVIL RIGHTS ACT

First it should be noted that while President Kennedy presented to Congress his Civil Rights Bill in June, 1963, the task of enacting what became the Civil Rights Act of 1964 fell on the desk of President Johnson. President Johnson was better equipped to accomplish results than any other chief executive in recent history. He knew all of the strengths and weaknesses of civil rights opponents in the Senate. These opponents have been the main roadblock to civil rights legislation since the turn of the Century. As majority leader in the Senate, he had been a hard driving leader, neither sparing himself nor his followers. He transferred that quality to his White House program and also did not hesitate to prod civil right forces when he thought it was necessary to do so.²¹

In 1964 and 1965 Congress did not have the advantage of reading the Chief Justice's expressions on the "Responsibilities and Duties of the Legal Profession". That speech was not made until April 23, 1966, at the dedication ceremonies of the new law building of the School of Law at the University of Maryland. If that speech had been available many senators and congressmen could have cited it as justification for assuming that the Court would uphold the constitutionality of bills then under consideration. These are the words of the Chief Justice:

In seeking to meet the problems of these turbulent times, law schools like yours face an exciting challenge. The programs which they offer should provide the opportunity for meeting the social problems which surround us. I am thinking not only of the so-called bread and butter course which may be available. The law is not just a craft. It is a profession. And it is a profession with

²¹ The writer of this article cites these two personal experiences.

(1) Shortly before passage of the 1964 Act, I shared a Capitol subway ride with a distinguished southern senator who has long been an opponent of civil rights, but who has usually fought fair. "We put up a tough fight", he said, "but we are going to lose because President Johnson is just putting too much pressure on us."

(2) After passage of the 1965 Voting Rights Act the President invited civil rights leaders to a meeting at the White House. He was in good humor. Noting that some advocates of civil rights seemed to be straying to other fields, he said: "In my part of the country it gets very cold on the range. The cattle get weary and lie down. If we do not make them stand on their feet they will freeze to death. So we go around and twist their tails until they stand up. That is known as tailing up," he said. Then pointing to an aide who was present, he said to the group, "I want him to be in charge of tailing up on civil rights." The President was smiling when he said it, but most of those present knew that if they felt a sharp sensation in the dorsal region of the conscience, when not attending to duty, the source of the pain might very well be the White House.

increasing responsibilities to serve society as a whole. Today's law schools have a significant responsibility, not just to train lawyers but to further the development of our democratic system. . . . For the law schools to perform their proper function today, they must participate in research in the law as it relates to social conduct. There is a compelling need for creative research projects which will afford an insight to the complexities of modern living. In this way, the law schools can facilitate the growth of the law, which must attune itself to the changes in our social and economic institutions.²²

In addressing a New York University Law School Convocation on October 4, 1968, the Chief Justice said:

All government agencies, local, state and national, must employ their total resources in seeking solutions to the problems of racial hatred and discontent. . . . By remaining a responsive forum of last resort for Negroes and other minority interests, the court can assure that the spirit of the 14th Amendment will become a tangible reality of American life.²³

The Chief Justice's message to law students in Maryland and New York is really a kind of reaffirmation of the spirit that moved just men to seek abolition of human slavery and an end to all of the badges of servitude that accompanied it in the 19th Century.

Congress passed a civil rights bill on March 14, 1866. Two weeks later it had to override a veto by President Andrew Johnson. Among other things, this bill gave colored citizens the right "to inherit, purchase, lease, sell, hold and convey real and personal property."²⁴ After the ratification of the fourteenth and fifteenth amendments, Congress, on May 31, 1870, reenacted the 1866 statute with certain additions on voting, personal protection, etc.²⁵ In response to pleas for further protection, Congress passed another Civil Rights Act on March 1, 1875. This law provided that:

[A]ll 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, theaters, and other places of public amusement; subject only to conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.²⁶

Although the Reconstruction Congress sought to protect the rights of Negroes, the Supreme Court at that time was a stronghold of post civil war opposition to making the freed man a citizen.

²² Warren, *Responsibilities of the Legal Profession*, 26 MD. L. REV. 103, 108 (1966).

²³ Washington Evening Star, Oct. 5, 1968.

²⁴ The Civil Rights Act of 1866, 14 Stat. 27, 27 (1866).

²⁵ The Civil Rights Act of 1870, 16 Stat. 140 (1870).

²⁶ The Civil Rights Act of 1875, 18 Stat. 335, 336 (1875).

J. Patrick White, writing on "The Role of the Judiciary in a Democratic Society",²⁷ points out that the Court held that the fourteenth amendment did not preclude the infringement of a citizen's rights by another individual acting privately.²⁸ The Court then struck down the Civil Rights Act of 1875 by insisting that the fourteenth amendment, on which the court concluded the statute was based, did not cover situations where there were invasions of rights by individuals as distinguished from state action.²⁹ Historians and legal scholars have rightly praised the eloquent dissent written by Mr. Justice Harlan in that case. However, within the very language of the majority opinion were words and reasoning that would once again help to open the door of equal treatment in public accommodations. Chief Justice Bradley, writing for the Court, conceded that use of the power of Congress to regulate the commerce would have presented a different problem.³⁰ In other decisions the Court set forth the reasoning that became the legal basis for the separate but equal doctrine.³¹

Acting on the separate but equal theory, the country set up an incredible network of rules and regulations that built physical and mental walls between American citizens. There were separate waiting rooms in railway stations, separate schools even in John Brown's Kansas, barriers against use of hotels and restaurants, and separate accommodations in some department stores.

In a 1947 publication, Milton R. Konvitz, in discussing the importance of state civil rights laws, said:

In the absence of such legislation in a state, places of public accommodation have the right to select their patrons and customers; they may exclude whomsoever they please, for any reason whatsoever. . . . For instance, in Baltimore, where the Negroes constitute 18 per cent of the population, only one large department store accepts Negro trade and allows Negro customers to try on apparel. In other stores two patterns are found: (1) as soon as a Negro enters the store, a floor-walker approaches and says that the store does not cater to Negro trade; and (2) Negroes are permitted to enter and buy articles across the counter, but are not allowed to try on hats, dresses, or gloves. Similar discrimination is practiced in Washington, D.C.³²

²⁷ White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 *Mb. L. Rev.* 181, 183 (1959).

²⁸ *United States v. Cruikshank*, 92 U.S. 542 (1875).

²⁹ *Civil Rights Cases*, 109 U.S. 3 (1883).

³⁰ *Id.*

³¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Cumming v. Bd. of Education*, 175 U.S. 528 (1899).

³² M. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 115 (1947).

In another exercise of imagination, numerous filling station operators refused to allow colored customers to use rest rooms available for white customers.³³

In 1954, tickets to a Navy football game at the Sugar Bowl in New Orleans carried this statement: "This ticket is issued for a person of the Caucasian Race and if used by any other is a violation of state law. Such person may be ejected without penalty or refund."³⁴ The Navy met the problem by selling them to all who wanted to purchase them. This provoked an angry editorial outburst in the South. One paper said:

Because of the agitation and the Navy's surrender to it, the seeds are sown for what could be an explosive situation at the Sugar Bowl. Probably there will be no serious unpleasantness—we certainly hope not—but by surrendering to NAACP pressure and attempting to flaunt long established customs of Louisiana the Navy has made a mistake.³⁵

Although it is not clear that the Navy's action had much practical value in assuring that colored spectators would not be ejected if they used the tickets, the occurrence prompted the Army to move its 1957 game with Tulane University to a location outside the state of Louisiana.³⁶ This, of course, triggered an uproar among Louisiana Congressmen, especially Representative Hébert, a powerful member of the House Armed Services Committee. A year later he said he had been assured that no "service academy team is automatically barred from a bowl game because of racial segregation issues."³⁷ This type of backtracking on the part of the federal government is one of the many reasons why most thoughtful civil rights advocates prefer a court decision or a law to an executive order or a statement of policy.

Seldom did one pick up a newspaper during the late 1950's without finding an item saying such things as "Negroes arrested for trying to use public golf course,"³⁸ or "clergymen arrested for riding in white section of Atlanta street car."³⁹ Many people assume that the refusal of Negroes to accept Jim Crow arrangements did not begin until the late 1960's. Actually, the *Henderson* case on segregation in dining cars,⁴⁰ the *Morgan* case on interstate travel,⁴¹ and

³³ Hearings on the 1964 Civil Rights Act.

³⁴ Chattanooga, Tenn. Times, Dec. 25, 1954.

³⁵ Chattanooga, Tenn. Free News, Dec. 24, 1954.

³⁶ Washington (D.C.) Post, Sept. 17, 1957.

³⁷ Washington (D.C.) Star, May 28, 1959.

³⁸ Carolina Times, Oct. 31, 1959.

³⁹ Baltimore Afro-American, Jan. 13, 1959.

⁴⁰ *Henderson v. United States*, 339 U.S. 816 (1950).

⁴¹ *Morgan v. Virginia*, 328 U.S. 373 (1946).

the Delaware bus terminal decision⁴² all show that Negroes consistently challenged this type of injustice as they encountered it in their regular pursuits. Also, their acts often escaped public attention because the television camera had not come into wide use by the news media.

After World War II and the emergence of new non-white nations, an international aspect of the separate but equal problem began to arise. Previously, most dark skinned people who came to the United States on official visits were carefully steered around embarrassing segregation by the colonial power representatives whose governments controlled the countries from which the visitors came. In the Washington area visitors from India, even after that country gained its freedom, would sometimes escape simply by wearing a turban or a sari. Pandit Nehru, who became a life member of the National Association for the Advancement of Colored People, and his sister, Ambassador Pandit, usually were indignant when they encountered segregation based on race. Inevitably, of course, some American Negroes began wearing robes and turbans to be accorded the better treatment given to the citizens of India. When the African nations began asserting their independence the picture changed. The Black Africans could not and would not pass for some other racial group. In addition, they quite properly demanded that they be given the kind of treatment accorded other foreign visitors. Their indignant protests against discriminatory practices became page one news.

The African problem was brought to the fore in a dramatic way when K. A. Gbedemah, Finance Minister of Ghana, was refused a glass of orange juice at a restaurant carrying the trade name of a nationally known company. He was enroute to Washington from New York on official business and stopped for breakfast in Delaware. Although news accounts contained an implication that President Eisenhower did not fully grasp the seriousness of this insult to a foreign visitor, it was clear that he felt something should be done to make amends. He invited Mr. Gbedemah to breakfast at the White House. The minister cancelled a trip to London in order to accept the invitation. Afterward, he told the press that President Eisenhower had said "little things" like this were happening "all over the place" and one never knew when one of them "was going to blow up".⁴³

The fundamental difference between the Eisenhower approach to this problem and the responses of his successors, Presidents Kennedy

⁴² *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁴³ N.Y. Times, Oct. 11, 1958.

and Johnson, is illustrated by the incident affecting Mr. Gbedemah. The invitation showed President Eisenhower's personal inclination to be fair and this is further supported by some of his appointments and invitations extended for Negro guests to dine at the White House. On the other hand, he often insisted that "you can't change the hearts and minds of men with a lot of laws". His characterization of the incident as one of the "little things" happening "all over the place" also suggests that such things as the Supreme Court's civil rights cases and broad federal civil rights legislation were not high on his list of national priorities.

When President Kennedy took office he sought at once to make his own position clear, but was reluctant to seek legislation that would meet the problem.

The enormous pressures being built among Negroes made action imperative. These pressures were simply an expansion of activities that had gone unnoticed by most of the white people of the country. The parents who demanded admission of their children to formerly all white schools in the South or the travelers who had the courage to take a seat in the so-called white section of a bus in Mississippi were the founders of what is often popularly called "direct action."

Sometimes a careful look at the cases involving young people, who were in court because they had personally challenged segregation, revealed that many of them were children or even grandchildren of persons who had been working against racial discrimination through the years.

In Maryland the Jackson children, whose names are listed in the case that accomplished desegregation of public beaches in that state,⁴⁴ raised the issue by going for a swim and outing with their aunt, State NAACP lawyer, Juanita Jackson Mitchell. Their grandmother, Dr. Lillie M. Jackson, state president of the NAACP holds a record for picketing. She was a leader of persons who won desegregation of a theater after picketing for seven years in the 1940's.

NAACP leaders in Oklahoma were among the first to win desegregation of state supported institutions of higher learning.⁴⁵ One of the leaders in that state is Mrs. Clara Luper, a school teacher and a mother. She became the NAACP's youth adviser in her state. Her children were among the most active in attacking segregation in places of public accommodation.

⁴⁴ *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954), *rev'd*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955).

⁴⁵ *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

The 1958 Report of the NAACP carried this statement: "The Oklahoma City youth council conducted a city-wide "sit down" protest against segregation in lunchrooms, soda fountains and department stores which resulted in 39 stores opening their full facilities on an integrated basis to thousands of Negro customers."⁴⁶ The 1960 Report states: "The Oklahoma City youth council was cited by Parents Magazine as the most outstanding youth group in the nation during 1959-60. The council received a special Parents Magazine gold medallion and a check for \$100 for its efforts in opening up more than 100 places of public accommodation to Negro citizens."⁴⁷

In 1960, the use of the Oklahoma City type of pressure for civil rights was used by students in North Carolina. This attracted nation-wide attention and is sometimes, although erroneously, thought to be the first time Negroes employed this technique. In 1961 caravans of "freedom riders" began to test segregation practices on buses and in bus stations while travelling south of Washington. Most of the riders were subjected to brutal physical attacks for sitting in so-called white sections of buses or going into white waiting rooms. John Seigenthaler, who was then an assistant to Attorney General Robert Kennedy, was knocked unconscious during one incident of mob action against the freedom riders.⁴⁸ Mass demonstrations of Negroes, led by Dr. Martin Luther King in April 1963, in Birmingham, Ala., were broken up with dogs and fire hoses. As stated earlier in this writing, Medgar Evers, the state Secretary for the NAACP in Mississippi, was shot and killed on June 12, 1963, as he entered his home. He was engaged in leading extensive civil rights campaigns, including stepped up efforts to increase voter registration. Two months before, a white Baltimore postman, William L. Moore, was found dead of bullet wounds on a road in Alabama on April 23. He was walking through the state to protest against segregation.

Numerous voluntary efforts were made to meet the demand for equal access to places of public accommodation. These succeeded at times, but many businessmen were unwilling to act without a law.

The feelings of some who were disposed to end segregation are set forth in a publication by the North Carolina Mayors' Cooperating Committee. The following are excerpts:

⁴⁶ NAACP, *THE ANNUAL REPORT OF THE NAACP* 32 (1958).

⁴⁷ NAACP, *THE ANNUAL REPORT OF THE NAACP* 32 (1960).

⁴⁸ A. SCHLESINGER, JR., *A THOUSAND DAYS* 936 (1965).

The president of the Chamber of Commerce, at the request of the Mayor, called a meeting of the executive committee of the Charlotte Chamber of Commerce to discuss what adjustments could be made in opening accommodations—hotels, motels, restaurants, and theaters—to the Negroes. This was in May, 1963.

No one seemed to know how, but all agreed that they would be willing. However, no one was willing to make adjustments alone. There was economic fear. The operators seemed afraid to act alone because they did not want to be criticized individually. Neither did they want to risk letting a competitor have any sort of advantage.

There was subsequently a meeting of 40 hotel and motel men. There was hesitancy on the part of some, but others were ready to go. Concern about the possible loss of white customers and concern about a possible incident seemed to be the delaying factors. Eight decided to desegregate. The others would wait. Within a week the others moved. Adjustment was made, completed and announced. The hotel men agreed to desegregate their dining rooms first. On three successive days the white directors of the Chamber of Commerce and several other leading business, civic, and government leaders went to lunch with Negroes as guests. In groups of two, four, and six, they went by appointment. There was no publicity. *On one occasion when an out-of-town newsman sought to take pictures for national television, the appointment was switched to another restaurant in order that the agreement not to take pictures would remain unbroken.*

Attention was turned, then, to drive in restaurants. Meetings and telephone calls brought an agreement for 18 drive-ins to begin accepting Negroes, two groups each night, for three nights beginning June 24. After that, it was hoped, general desegregation would be announced. *However, something that can never be predicted happened over an intervening week-end. There was a big social affair that involved several restaurant owners. Some of the dining room owners chided some of the drive-in owners about their plans to desegregate. By Monday several of them had changed their minds. When the Negro groups showed up Monday night they were turned away at 11 of the 18 places.*⁴⁹

On June 11, 1963, President Kennedy made a radio-television address to the Nation in which he said:

The old code of equity law under which we live demands for every wrong a remedy, but in too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens as there are no remedies at law. Unless the Congress acts, their only remedy is the street.

I am, therefore, asking the Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar establishments.

⁴⁹ NORTH CAROLINA MAYORS COOPERATING COMMITTEE, NORTH CAROLINA AND THE NEGRO 55-58 (1964) (emphasis added).

This seems to me to be an elementary right. Its denial is an arbitrary indignity that no American in 1963 should have to endure, but many do.

I have recently met with scores of business leaders urging them to take voluntary action to end this discrimination and I have been encouraged by their response, and in the last two weeks over 75 cities have seen progress made in desegregating these kinds of facilities. But many are unwilling to act alone, and for this reason, nationwide legislation is needed if we are to move this problem from the streets to the courts.⁵⁰

Agreeing on a legal basis for a public accommodations statute was a thorny problem. Many able lawyers in the Civil Rights field had given considerable attention to the possibility of getting a public accommodations law passed in Congress or establishing a legal basis for a successful court suit.

In 1949, William R. Ming, a well known civil rights lawyer, had suggested a possible court attack on segregation in places of public accommodation by applying the rationale of the Supreme Court in the restrictive covenant cases. Writing in the *University of Chicago Law Review*, where he also served as a law school faculty member, Mr. Ming said:

[J]udicial remedies appear available for the victims of racial segregation even in the absence of state statutes. For example, if a Negro presents himself for admission to a privately owned place of public accommodation, such as a hotel, and is denied admission solely on account of his color, it has generally been held by state courts that, in the absence of a statute to the contrary, he is without remedy. But the *Restrictive Covenant Cases* require such a decision to meet the test of the Fourteenth Amendment, and the Supreme Court's analysis of that amendment should compel reversal. The decision of the state court would be "state action" as now defined. Moreover, it is this "state action" which denies the plaintiff damages and the basis of the court's denial of damages is the race and color of the plaintiff. It thus follows that he has been denied equal protection of the laws in violation of the constitutional prohibition.⁵¹

Jack Greenberg, the director-counsel of the NAACP Legal Defense and Educational Fund, in his book *Race Relations and American Law*, discussed the possible form that such statutes should take. He also noted that there was respectable historical precedent in the English Common Law which bound innkeepers "to receive and lodge all travelers and to entertain them at reasonable prices without any specific or previous contract, in the absence of reasonable grounds for refusal." In considering the American position on

⁵⁰ CONG. Q. ALMANAC 967 (1963).

⁵¹ Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 234 (1949).

this phase of the common law, Mr. Greenberg mentioned several states which specifically rejected the common law in this area. Tennessee, the author pointed out, expressly abrogated the common law.⁵² Prompted by the Greenberg research, this writer checked two earlier cases that have a bearing on the duty of innkeepers under the common law. A 1913 Tennessee case which arose from a boarding house owner's objection to paying a tax imposed on hotel owners, gave a recital of the duty of an innkeeper to serve all.

After stating that the terms "innkeeper and hotel keeper", while synonymous, do not include a boarding house, the court said:

The innkeeper, said Coleridge, J. in *Rex v. Ivens*, 7 Car. & P. 213, "is not to select his guest. He has no right to say to one, 'you shall come into my inn,' and to another, 'you shall not', as everyone conducting himself in a proper manner has a right to be received; innkeeper being a kind of public servant, having the privilege of entertaining travelers and supplying them with what they want."⁵³

Further American thinking on this subject may be found in a Rhode Island decision as late as 1936. There the court said:

In *Cromwell v. Stephens*, 3 Abbott's Practice, (n.s.) 26, the court, at page 36 of that opinion, defines an inn as "a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment are received, if there is accommodation for them, and who, without any stipulated engagement as to duration of their stay, or as to rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodgings and such services and attention as are necessarily incident to the use of the house as a temporary home." This definition of an inn concisely set out the position of an innkeeper as stated in the early English cases of which *Newton v. Trigg*, 1 Salk 109 is an example.⁵⁴

While the cases cited did not involve the question of serving a Negro, their statement of the law shows that the argument of segregation advocates about public accommodation laws invading rights of privacy of the owners of establishments open to the public was not sanctioned in the early decisions of the British Courts when dealing with innkeepers. At the time of the decisions in Tennessee and Rhode Island, the courts' extensive description of an innkeeper's duties and obligations would indicate, in those states at least, the private right to be free from control by law in accommodating guests did not have acceptance. As Mr. Greenberg points out, Dela-

⁵² J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 97 (1959).

⁵³ *McClagherty v. Cline*, 128 Tenn. 605, 607, 163 S.W. 801, 801 (1913).

⁵⁴ *Ford v. Waldorf System, Inc.*, 57 R.I. 131, 133, 188 A. 633, 635 (1936). In this case, the plaintiff was suing for a breach of implied warranty after swallowing a piece of wood while eating beans in the defendant's restaurant.

ware, Mississippi, Florida and Tennessee found it prudent to reject the innkeeper laws by statute.⁵⁵ He concluded that the "innkeeper rule as now observed in some jurisdictions seems to contain exceptions which might be used against Negroes."⁵⁶ After listing various inadequacies of the innkeeper laws and other common law approaches, Mr. Greenberg concluded that the best way to get at private action would be through passage of a civil rights law.⁵⁷

To this writer the cases and the statutes passed by states to nullify the common law in this area show that supporters of segregation did not intend to take any chances on giving Negroes a legal right of entry to places of public accommodation by failure to close all loopholes in the statutory or common law. This kind of ingenuity would seem to indicate that results were obtained with sufficient state involvement to warrant an attack under the fourteenth amendment. Unfortunately, it is also my opinion that without the Warren Court that attack would not have succeeded.

Although he was citing the event as a warning to alert segregation advocates, Senator Russell advised the Nation, via the Congressional Record, that "Thurgood Marshall, head of the large legal staff of the national colored peoples association" was devising a new attack on segregation in places of public accommodation.

The Russell warning was based on a widely publicized meeting of sixty-two civil rights lawyers at Howard University in Washington, D.C. The group issued a statement on March 19, 1960, pledging to appeal "every fine" imposed on persons arrested because they sought service in restaurants from which they were barred because of race. The lawyers agreed that use of public force either in the form of arrest by the police or conviction by the courts "is in truth state enforcement of private discrimination and is in violation of the 14th Amendment."⁵⁸

Outside of Congress one of the most active persons seeking passage of the entire 1964 Civil Rights bill was Joseph L. Rauh, Jr. Mr. Rauh, who is engaged in the private practice of law in Washington, D.C., has given extensive volunteer service in drafting civil rights bills. At the outset of the discussions on the constitutional basis for the Public Accommodations title of the bill, he insisted that the title could be based on both the fourteenth amendment and the Commerce Clause. After numerous conferences, organizations comprising the Leadership Conference on Civil Rights accepted the Rauh

⁵⁵ J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 97 (1959).

⁵⁶ *Id.* at 98.

⁵⁷ *Id.* at 112.

⁵⁸ 106 CONG. REC. 6777 (1960).

formula in pushing for passage of the bill in Congress. They refused to take a position that public accommodations legislation had to be based on a single part of the Constitution.⁵⁹

In Congress there was a considerable amount of opinion favoring a public accommodations statute based on the fourteenth amendment. Senator John Sherman Cooper of Kentucky, highly respected by his colleagues for his views on constitutional law, was a leading proponent of the fourteenth amendment approach. The Kennedy Administration and many legal scholars thought that the statute had to rely upon the Commerce Clause to avoid a legal collision with the Supreme Court's earlier rejection of the fourteenth amendment base in the *Civil Rights Cases*.

It is another indication of the respect for the fairness and courage of the Warren Court that many congressmen and senators believed the Court could be relied upon to uphold a carefully drawn statute based on the fourteenth amendment. Their view was expressed by Senator Cooper when he said:

I believe that title II should be based on the 14th amendment, and that a constitutional right is involved where access to places open to the general public is in issue. I believe this right would be made explicit by the Supreme Court.⁶⁰

During the arguments about the constitutional basis for a public accommodations law, a collateral and wholly political problem was created by opponents of the bill. They insisted that basing the bill on the fourteenth amendment would make it broad enough to cover "even the elderly widow, living on Social Security and meager rents from her boarders, who might be compelled to take a guest in her home against her wishes." Eventually, this fictitious lady became known as "Mrs. Murphy." Supporters of the Commerce Clause approach got around this argument by exempting owner occupied units with five or fewer rooms for rent. Many supporters of the public accommodations measure immediately attacked this limitation as a plan to gut the bill. In the end, the "Mrs. Murphy" provision was kept in the bill.⁶¹

⁵⁹ *Civil Rights Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1870 and 2172 (1964).

⁶⁰ 110 CONG. REC. 13447 (1964).

⁶¹ A similar provision was included in the 1968 fair housing legislation. The Supreme Court's decision in *Jones v. Mayer*, 392 U.S. 409 (1968), makes it clear that the 1866 statute would not permit a Mrs. Murphy exemption to be valid under that law. Whether the decision also nullifies the Mrs. Murphy provision in the 1968 law has not been determined at this time.

Fortunately for all concerned, the long standing friendship between Chairman Emanuel Celler of the House Judiciary Committee and the ranking Republican, Representative William McCulloch, enabled the House to resolve the problem by basing the bill on both the fourteenth amendment and the Commerce Clause. A similar good fellowship between Assistant Majority Leader Hubert Humphrey and Assistant Minority Leader Thomas H. Kuchel obtained potent legal support in the Senate for the dual reliance on the Commerce Clause and the amendment.

Early in 1964, Senators Humphrey and Kuchel sent a joint letter to Harrison Tweed, Esq. and Bernard G. Segal, Esq. The letter invited the views of Messrs. Tweed and Segal as co-chairmen of the Lawyers' Committee for Civil Rights Under Law to submit the official views of the committee or give their opinion "in conjunction with other individual leaders of the bar who have had occasion seriously to consider questions of constitutionality." Senator Humphrey inserted the reply in the Congressional Record. He noted that it was signed by three former Attorney Generals of the United States, four former presidents of the American Bar Association, four law school deans (Harvard, Yale, Vanderbilt and Minnesota), and members of both major political parties. The total number, including Messrs. Tweed and Segal, was twenty-two. The letter reply contained a well documented legal memorandum supporting the view that:

With respect to Title II, the Congressional Authority for its enactment is expressly stated in the bill to rest on the commerce clause of the Constitution and the 14th Amendment. The reliance upon both of these powers to accomplish the stated purpose of Title II is sound. Discriminatory practices, though free from any State compulsion, support or encouragement, may so burden the channels of interstate commerce as to justify legally congressional regulation under the commerce clause. On the other hand, conduct having an insufficient bearing on interstate commerce to warrant action under the commerce clause may be regulated by Congress where the conduct is so attributable to the State as to come within the concept of State action under the 14th Amendment.⁶²

Unlike some who persist in trying to find justification for a separate society based on race, most of the members of Congress in the House and Senate were personally convinced that action in this field was urgent. The factual reports on experiences of colored citizens when they sought public accommodations had a profound effect on Senators and Representatives. The following is an example. It is an excerpt from a speech by Senator Bartlett of Alaska:

⁶² 110 CONG. REC. 7052 (1964).

I voted for cloture only when the time came when I believed everything which needed to be said about the bill had been said.... I am a member of the Commerce Committee. For several weeks the Commerce Committee held hearings upon a separate public accommodations bill.... At that time I became persuaded and was left with no doubt whatever that such a Federal act is not only justified but necessary.

I have one memory that abides with me out of many, one that impressed itself particularly upon me during the Commerce Committee hearings. That was when Mr. Roy Wilkins, a Negro—intelligent, well dressed, and known personally by many Senators—came before the committee and described the agonies and embarrassments his wife and he suffered while seeking to make a transcontinental automobile trip.

That sort of thing should not be permitted to happen to anyone in this country. I made up my mind then and there I should do my part to prevent its happening in the future.⁶³

In addition to staging a filibuster that lasted seventy-four days, from February 26 to June 17, the opponents of civil rights legislation filled the pages of the *Record* with legal arguments against the bill. One of the more imaginative of these writings dealt with the possibility that a civil rights statute which had the effect of requiring white people to serve colored people in places of public accommodation would be involuntary servitude forbidden by the thirteenth amendment.

Senator Sam Ervin presented "Freedom of Choice in Personal Service Occupations: 13th Amendment Limitations of Anti-Discrimination Legislation" which was published in the Winter, 1964, issue of the *Cornell Law Quarterly*. He also offered "Maybe It's Time to Look at the Anti-Slavery Amendment," an article published in the *U.S. News and World Report* on May 11, 1964. Both of these articles were written by Alfred Avins.⁶⁴ Although the legal reasoning included in the articles took up approximately ten printed pages of the *Congressional Record*, there is no indication that they were persuasive enough to cause Senators to vote against the public accommodation law to save white people from involuntary servitude in barber shops, hotels or restaurants serving colored patrons. Senator Ervin offered an amendment to "prevent anyone from having to tender any service to anyone he does not wish to under the public accommodations section, in line with the thirteenth amendment abolishing slavery." The amendment was beaten 68 to 21.⁶⁵

The views of the lawyers who supported the Public Accommodation Law were vindicated shortly after the Act's passage when

⁶³ 110 CONG. REC. 14325 (1964).

⁶⁴ 110 CONG. REC. 13474 (1964).

⁶⁵ 110 CONG. REC. 13489 (1964).

the Supreme Court struck down challenges to the Act. Justice Clark, speaking for the Court in one case observed that "there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power."⁶⁶ Justice Douglas, in concurring, asserted his belief that it is better to rely in public accommodation on "the legislative power contained in Section 5 of the Fourteenth Amendment which states: 'The Congress shall have power to enforce, by appropriate legislation, the provision of this article' . . . a power which the Court concedes was exercised at least in part in this Act." The Douglas opinion gave a strong judicial hint that Senator Cooper was right in looking to the Warren Court for a bold departure from strained constructions of the past. This is particularly true when one reads the Justice's view that:

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation on whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American History.⁶⁷

OTHER IMPORTANT TITLES OF THE 1964 ACT

To the credit of Congress it should be said that sometimes its potential is greatly underestimated. This was true when the effort to pass the 1964 Civil Rights Act began. Most of the disorder and embarrassing displays of brutal repression by local authorities that appeared on television screens centered on disputes about the use of public accommodations. For some this was such an overriding problem that they did not wish to risk defeat of the bill by adding an amendment setting up an equal employment opportunity agency to seek eradication of racial discrimination against minorities in the job field. Civil rights supporters, strongly backed by Speaker John McCormack, Chairman Celler, Representative McCulloch and other house civil rights minded congressmen, succeeded in getting the amendment included by the House Judiciary Committee and subsequently successfully fought off attempts to delete that amendment on the floor.

To the surprise of those who sought to kill Title VII's equal employment provisions by stirring up opposition among labor unions,⁶⁸

⁶⁶ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964).

⁶⁷ *Id.* at 280 (Douglas, J., concurring).

⁶⁸ 110 CONG. REC. 486 (1964).

the legislative forces of the AFL-CIO, led by Andrew J. Biemiller and Jack Conway, gave all out support. Without their efforts, Title VII might well have been lost.

Title VI, requiring non-discrimination in federally assisted programs, also came under heavy attack when southern Democrats, aided by some northern members of that party who were wary of "bussing" and "racial balance as a means of achieving desegregation in northern schools" sought to weaken or delete Title VI. When the bill passed with Titles VI and VII included there was some speculation by "expert observers" that these two titles would be used for "bargaining purposes" in the Senate and would be dropped at an appropriate time in order to get a strong public accommodations title. At the outset of the Senate consideration of the bill, Senators Humphrey and Kuchel made it clear that they intended to seek passage of the entire measure. By agreement, various senators served as captains to protect specific titles of the bill. Title VI was accepted by Senators Pastore of Rhode Island and Cotton of New Hampshire. Title VII was accepted by Senators Clark of Pennsylvania and Case of New Jersey.⁶⁹ Although they had other titles to defend, the regular civil rights stalwarts such as Democrats Hart, Morse and Douglas also made a vigorous fight to uphold these titles. Republicans Keating, Javits and Scott, whose entire service in Congress is a record of supporting civil rights and Supreme Court decisions in this area of the law, also accepted the task of defending these titles along with their other assignments on the bill. The full list of the captains and their assignments follows:

Senator Hart and Senator Keating on title I—voting rights; Senator Magnuson and Senator Hruska on title II—public accommodations; Senator Morse and Senator Javits on title III—public facilities and Attorney General's powers; Senator Douglas and Senator Cooper on title IV—school desegregation; Senator Long of Missouri and Senator Scott on title V—Civil Rights Commission; Senator Pastore and Senator Cotton on title VI—federally assisted programs; Senator Clark and Senator Case on title VII—equal employment opportunity; and Senator Dodd for the Democrats on titles VIII through XI—voting surveys, appeal of remands, community relations service, and miscellaneous items.⁷⁰

It should also be noted that members of the House and Senate, for the most part, assumed that there would be no constitutional problems on Title VII. Here they were fully justified in view of the Court's long record of supporting the employment objectives and congressional power to act in the field of labor relations.⁷¹

⁶⁹ 110 CONG. REC. 6528 (1964).

⁷⁰ *Id.*

⁷¹ See *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938);

Title VI, of course, was generally regarded as an aid to speeding up compliance with school desegregation decisions. In addition, it had the support of some conservatives in Congress who adhere to the principle that federal standards of non-discrimination should apply when federal funds are spent.⁷²

Title IV of the 1964 Act, giving the U.S. Office of Education and the Attorney General duties to assist in school desegregation, is further evidence of an intention of the majority in both Houses to keep in step with Supreme Court decisions in civil rights matters. However, the unrelenting effort of some of the opponents of civil rights is evidenced by restrictive language written into this title. For example, the Title requires that the Attorney General must certify that aggrieved individuals are "unable to initiate and maintain legal proceedings" before he can act. Also, the Title asserts that it does not authorize courts or officials to issue orders to achieve racial balances in schools by transporting children from one school to another. Although this type of legal hair splitting reflects on the credibility of those who support it, there is much evidence to the effect that civil rights opponents regarded its passage as a severe setback for their cause. Senator Thurmond, for example, offered an amendment to delete the entire Title. His amendment was defeated by a resounding 74 to 15 vote on June 16, 1964.⁷³

OPEN HOUSING

President Johnson moved beyond the Court and President Kennedy when he sent his 1966 Civil Rights Message to Congress. After outlining the national effort to improve housing for the American people at all levels, he said:

The historic Housing Act of 1949 proclaimed a national goal for the first time: "a decent home and suitable living environment for every American family."

Railway Mail Assoc. v. Corsi, 326 U.S. 88 (1945); Steele v. Louisville and Nashville R. R. Co., 323 U.S. 192 (1944). For those who assume that picketing and other forms of public demonstrations by Negroes are new developments, it would be enlightening to read the Court's opinion in the New Negro Alliance case. During the 1930's, Negroes started so called "Buy where you can work movements" in a number of large cities. Usually, those engaged in the movements would picket stores or other businesses located in Negro neighborhoods but employing whites only. The defense of the owners was to get an injunction halting the picketing. In the New Negro Alliance case, the District Court enjoined the picketing, but the Supreme Court reversed with a holding that the matter was a labor dispute within the meaning of § 113 of the Norris-LaGuardia Act.

⁷² 110 CONG. REC. 13418 (1964).

⁷³ 110 CONG. REC. 13926 (1964).

The great boom in housing construction since the Second World War is, in large part, attributable to Congressional action to carry out this objective.

Yet not enough has been done to guarantee that all Americans shall benefit from the expanding housing market Congress has made possible.

Executive Order No. 11063, signed by President Kennedy on November 20, 1962, prohibited housing discrimination where Federal Housing Administration and Veterans Administration insurance programs are involved. That Executive Order clearly expressed the commitment of the executive branch to the battle against housing discrimination.

But that Order, and all the amendments that could validly be added to it, are inevitably restricted to those elements of the housing problem which are under direct executive authority.

Our responsibility is to deal with discrimination directly, at the point of sale or refusal, as well as indirectly through financing. Our need is to reach discrimination practiced by financial institutions operating outside the FHA and VA insurance programs, and not otherwise regulated by the government.

Our task is to end discrimination in all housing, old and new—not simply in the new housing covered by the Executive Order. I propose legislation that is constitutional in design, comprehensive in scope and firm in enforcement. It will cover the sale, rental and financing of all dwelling units. It will prohibit discrimination, on either racial or religious grounds, by owners, brokers and lending corporations in their housing commitments.⁷⁴

As usual, the opponents of civil rights rushed to musty pages of ancient law to defend the right of a man "to do as he pleases with his own property." While everyone would want to honor bona fide requests and stipulations of individual property owners to transfer property to friends, relatives or descendants, this is not the crux of the fair housing problem. The municipal ordinance passed to prevent Negroes from living in certain neighborhoods, the enforcement of restrictive covenants by requiring Negroes to sell property after they had made good faith purchases and the innumerable conspiracies to keep them out of neighborhoods by refusing to make loans or to provide necessary services all amount to restraints on the alienation of property. This is analogous to problems facing would-be purchasers of lands owned by the aristocracy or nobility of one kind or another in the thirteenth and sixteenth centuries in England.

The Statute De Donis, which gave birth to the fee tail estate, must have caused a great deal of mental anguish for the lawyers of that day before they perfected devices to convert the fee tail

⁷⁴ CONG. Q. ALMANAC 1254-55 (1966).

into the fee simple and, thereby, increase the chance of making valid transfers of title. The English Statute of Uses must have been as troublesome as our restrictive covenants until lawyers perfected the Rule Against Perpetuities.

Tiffany points out that after the Statute of Quia Emptores became the law of England it was well settled that complete limitation on the alienation of real property was "void as inconsistent with the fee." The United States Supreme Court in *Potter v. Couch*⁷⁵ invalidated a clause in a will which provided that "no creditors or assignees or purchasers shall be entitled to any part" of the devise. Speaking of this clause the Court said: "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void because repugnant to the estates devised."⁷⁶ In commenting on this decision, Tiffany says:

The real basis of the rule prohibiting a provision of the character mentioned which, by divesting, or giving power to divest the estate created in case of its voluntary transfer, operates to prevent such transfer, is to be found in considerations of public policy adverse to withdrawal of property from commerce, and the check upon its improvement and development which must result therefrom.⁷⁷

Apparently, it did not occur to some local law makers, real estate brokers and courts that refusal to sell property to Negroes, and even making them abandon it after taking up residence following bona fide purchase, was also a "withdrawal of property from commerce."

When property goes on the open market for sale to the public, in the opinion of this writer, the English objective of removal of restraints on alienation is on the side of those who say "let all buyers have equal opportunity to purchase without regard to race."

Even if one assumes for purpose of argument that the early English law is on the side of those who wish to retain segregation in housing, the degree of governmental involvement in creating segregation in the United States is so great that simple principles of equity would seem to dictate that what the state created to confound the would-be purchaser, the state had a duty to destroy.

In a series of cases it was necessary for the Supreme Court to strike down city ordinances which forbade Negro occupancy of property, except as servants, in many residential areas.⁷⁸

⁷⁵ 141 U.S. 296 (1891).

⁷⁶ *Id.* at 315.

⁷⁷ 5 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 1343 (3d ed. 1939).

⁷⁸ *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Richmond v. Deans*, 281 U.S. 704 (1930).

Being ever resourceful, however, the advocates of housing segregation quickly made use of another device known as the restrictive covenant. The use of this device became widespread when the Supreme Court dismissed a challenge to these private agreements barring Negroes from occupancy solely because of race. The Court said the dismissal was made for "want of a substantial question."⁷⁹

Although the covenants were designed to "protect white property owners," some of those "protected" found that they were really over protected when financial or other circumstances made it desirable for them to sell to Negro buyers. This state of affairs cried out for a legal remedy. There was the possibility that such a remedy might have been found in the Supreme Court's utterance that: "[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."⁸⁰ Unfortunately, neither the Court nor the general public seemed to classify Negroes as "fellows" who could be harmed by whites using their property right and contract rights to the detriment of their black brothers.

The harsh results of enforcing racial covenants is illustrated by a 1938 Maryland decision ousting a colored purchaser.⁸¹ The purchaser of the covered property was the Reverend E. D. Meade, a well known Negro leader and pastor of a Baptist Church. At the time that he moved into the new home with his wife and baby there was only one other property occupied by colored residents in the immediate area. The opinion of the court describes these as dressmakers who catered largely to white customers. Located in Baltimore City, the home purchased by the Reverend Meade was near an adjoining neighborhood where a large number of Negroes lived. Housing trends in the city at that time also showed that the sheer pressure of need and numbers would soon make it impractical to enforce the covenants in the block where the clergyman's house was situated. W. A. C. Hughes, Jr., a leading civil rights lawyer in Maryland at that time, included the following points in his defense of his client's right to occupy the dwelling: (1) the covenant did not run with the land in this case, (2) the covenant, as an agreement to restrict occupancy to whites only, was a restraint on alienation, (3) the clear indication that Negroes already occupied adjoining areas and soon would move into the covenanted area showed that the reason for executing the covenant in the first place no longer obtained, and (4) enforcement of the covenant would be a violation of the fourteenth amendment.

⁷⁹ *Corrigan v. Buckley*, 271 U.S. 323 (1926).

⁸⁰ *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (footnotes omitted).

⁸¹ *Meade v. Denistone*, 173 Md. 295, 196 A. 330 (1937).

In answering point one, the court said that the agreement barring Negroes had created an easement which could be used to protect white owners objecting to Negro owners and this made it unnecessary to depend on whether or not the covenant ran with the land. On point two the court said: "The rules against restraints on alienation were only intended to make conveyancing free and unrestrained, and had nothing to do with occupancy. It may be an anomalous situation when a colored man may own property which he cannot occupy, but if he buys on notice of such a restriction, the consequences are the same to him as to any other buyer with notice."⁸² Addressing itself to point three, the court noted that if the covenanted property became "untenanted and unmarketable" because of the racial restriction on occupancy "equity might relieve the parties of the burden of their agreement." Point four was disposed of by a holding that no state action was involved.

Perhaps the most ironic twist to this case was the court's disposition of point three. This said, in effect, that the racially restrictive covenant provided an impregnable fortress for housing discrimination against colored buyers, but, if the white owner suffered a financial loss because he could not sell or rent to a member of his race, equity might provide a kind of postern gate through which he could pass the fee or the right of occupancy to a Negro.

Some do not remember the cruel, the capricious and the tragicomic aspects of covenants prior to the Supreme Court's decisions halting their enforcement. In addition to the foregoing facts about the *Meade* case, it would be well to recall the following other illustrations of the unjust happenings surrounding the individuals who sought relief by going to the nation's highest court.

In *Shelley v. Kraemer*,⁸³ the Court pointed out that the covenant barring Negroes from the area was actually entered into at a time when members of that race were resident owners of dwellings located therein. Under the terms of the covenant the Supreme Court pointed out: "Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri Courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested."⁸⁴

Another illustration of absurdities based on legal principles is found in an Ohio case holding that a *minister of a church* could not occupy the parsonage because he was a Negro while, on the other

⁸² *Id.* at 307, 196 A. at 335.

⁸³ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁸⁴ *Id.* at 10.

hand, the congregation, which was all Negro, was free to use the church part of the property because the title of ownership was in a religious corporation "which has no race." The Supreme Court reversed the Ohio decision in *Trustees of Monroe Avenue Church v. Perkins*.⁸⁵

The extent of governmental involvement in establishing housing segregation is well documented in many reports and writings. In 1961, the Commission on Civil Rights published a report which said:

Federal policy in the field of housing reflected and even magnified the attitudes of private industry. The [FHA] Manual recommended the use of restrictive covenants to insure against "inharmomious" racial groups! When HOLC acquired homes in white neighborhoods and offered them for sale, Negroes could not buy them.⁸⁶

One description of the federal government's position is as follows. "It is hardly to the credit of the federal government that upon its entrance onto the housing scene in 1934, the spread of these (restrictive) covenants was accelerated. One commentator has characterized the Federal Housing Administration in its early years as 'a sort of typhoid Mary' for racial covenants."⁸⁷

Perhaps the most impressive demonstration of the skill of real estate interests bent on imposing restrictions is found in the program mentioned by the Civil Rights Commission in describing a Grosse Pointe, Michigan, plan. The Commission report said:

Organized brokers have, with few exceptions, followed the principle that only a "homogeneous" neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. Moreover, these views sometimes find elaborately systematic expression, as in the well-publicized program in Grosse Pointe, Mich. There, discrimination covered the full ambit of "race, color, religion, and national origin," and it was practiced with mathematical exactitude. Two groups, the Grosse Pointe Brokers Association and the Grosse Pointe Property Owners Association had established and maintained a screening system to winnow out would-be purchasers who were considered "undesirable." As Michigan Corp. and Security Commissioner Lawrence Gubow put it to the Commission:

⁸⁵ 334 U.S. 813 (1948). See also Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 204 & n. 5 (1949).

⁸⁶ UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT NO. 4, HOUSING 16-17 (1961).

⁸⁷ Semer and Sloane, *Equal Opportunity and Individual Property Rights*, 24 Fed. B.J. 51 (1964).

A passing grade was 50 points. However, those of Polish descent had to score 55 points; southern Europeans, including those of Italian, Greek, Spanish, or Lebanese origin had to score 65 points, and those of the Jewish faith had to score 85 points. Negroes and orientals were excluded entirely.

Similar exclusions are accomplished in other communities, though usually with less refinement than in Grosse Pointe.⁸⁸

Of course most of these policies were changed after the Supreme Court outlawed enforcement of restrictive covenants, but by that time the pattern of housing segregation was nation-wide and firmly entrenched.

The Commission also pointed out that:

Among the four federal agencies that supervise financial institutions, the Federal Home Loan Bank Board and the Board of Governors of the Federal Reserve System acknowledge—at least implicitly—that racial and religious discrimination in mortgage lending does occur among the institutions they supervise. The Comptroller of the Currency and the Federal Deposit Insurance Corporation disclaim any knowledge of such discrimination. . . . The Federal Home Loan Bank Board is the only one of these four agencies that had adopted a policy of opposing discrimination.⁸⁹

Representatives of the Civil Rights Commission presented this and other evidence during the hearings on the proposed fair housing statute.

When all else failed, the real estate interests and public officials joined forces in establishing firm working agreements which simply barred would be renters or purchasers solely because of race. During the long struggle for fairness in the sale and rental of property the value of one legal weapon remained a question mark.

In 1866, after the adoption of the thirteenth amendment, Congress sought to assure protection of the freedman's right to purchase, rent and hold real or personal property.

In the quiet detachment of law libraries and legal seminars scholars could read the debates that led to the approval of this law, they could consider the intention of Congress to remove the badges of slavery and, above all, they could see the plain meaning of English language in the statute. But, unfortunately, the courage that permits free expression in a drawing room is seldom found in legislative bodies and the courts. Both Congress and the pre-Warren Supreme Court adroitly ignored or downgraded this law.

⁸⁸ U.S. COMMISSION ON CIVIL RIGHTS, REPORT NO. 4, HOUSING 2-3 (1961).

⁸⁹ *Id.* at 79.

The battle for passage of the 1968 Housing provision began in 1966 when President Johnson called on civil rights leaders to inform them that he was about to "whip the teacher" and needed their help.⁹⁰

Some members of Congress favored a plan of action that would pass fair housing problems to the Supreme Court. They felt that the political risks in this area were too great. In effect, they were overruled when the President called for passage of a civil rights bill that would include a fair housing title.

Throughout the many discussions in which this writer participated, there seldom, if ever, arose doubt about the constitutionality of a fair housing statute nor of the Supreme Court's eventual approval of such a law.

In the 1966 hearings before the House Judiciary Committee perhaps the most prophetic testimony was presented by Professor Mark DeWolfe Howe of the Harvard Law School. He suggested, and was later vindicated by the Supreme Court in *Jones v. Mayer*,⁹¹ that Congress had the power to base a fair housing law on the thirteenth amendment.⁹² The redoubtable Joseph L. Rauh, Jr., testifying this time as counsel for the Leadership Conference on Civil Rights, gently reminded the committee that he had been right in advising that the 1964 Civil Rights bill could rest on the Commerce Clause and the fourteenth amendment. He asserted that a fair housing law could stand on the same legal foundation.⁹³

Attorney General Nicholas deB. Katzenbach, also fortified by Court decisions upholding his legal arguments presented to Congress in favor of the 1964 Civil Rights Act, suggested that he did not intend to seek a law prohibiting racial discrimination that would

⁹⁰ When the President used that expression the writer of this article was intrigued and asked about the background. The President then told this story. He said that as a boy in Texas he and some of his friends decided that they would give an unpopular but large and muscular male teacher a whipping. All of the would-be teacher whippers gathered at a bridge to make a joint and simultaneous attack on the target. The President said that he was the first to grab the teacher but he added: "When I looked over my shoulder I saw my buddies running over a hill and I was all alone." When the laughter among the listeners ended, the President circled the room with a steady gaze and said: "When we get into this fight, I don't want to look over my shoulder and find some of you fellows running over the hill." The writer regrets that some of those present did "run over the hill" but those of real conviction continued and battled until victory was won in Congress.

⁹¹ 392 U.S. 409 (1968).

⁹² *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 1560-81 (1966).

⁹³ *Id.* at 1543.

be based solely on the Commerce Clause because he thought it would be "equally justifiable as an implementation of Section V of the 14th Amendment."⁹⁴

Among those appearing against the fair housing legislation was W. B. Hicks, executive secretary of the Liberty Lobby. He was accompanied by Dr. Alfred Avins, who seemed undaunted by the short shrift Congress had given his anti-civil rights arguments in its consideration of the 1964 Civil Rights Bill.

Dr. Avins carried the main burden of the testimony which covered ten pages of the hearing record. One of the more intriguing sections of the Avins' argument, submitted for the record, is as follows:

[T]he small Negro minority which these laws benefit is precisely the group not in need of them to secure good housing. In short, this legislation is pro bono social climbers and nothing more. Invoking such laws for their benefit is like enforcing minimum wage legislation for Elizabeth Taylor.⁹⁵

Testimony at the 1967 Senate Hearing offers these sharp refutations of Dr. Avins' observations about "social climbers." Dr. Robert C. Weaver, Secretary of the Department of Housing and Urban Development, testified that 1960 figures showed that "Three times as large a proportion of non-white families, 28 per cent, lived in overcrowded homes, as did white...and this overcrowding was prevalent in all income classes."⁹⁶ Two Negro witnesses told of their individual problems. Lt. Carlos Campbell, a Navy flyer assigned to intelligence duty at the Pentagon, told the hearing group that most of the housing in the immediate area was for whites only. A poignant excerpt from his testimony is as follows:

I have had cause to reexamine my philosophy and recognize the fact that the status afforded me as a naval officer can abruptly fall once I leave the base. It seems incongruous that I could be entrusted with the responsibility of navigating a multi-million dollar airplane, which was the case in Patrol Squadrons 22 and 19...or with reviewing and approving millions of dollars worth of construction projects and master plans, as it is the case now with the Naval Air Systems Command.⁹⁷

Gerard A. Ferere, a former naval officer, but at that time teaching French and Spanish at St. Joseph's College in Philadelphia, Pennsylvania, told of his experiences in trying to buy a home. In

⁹⁴ *Id.* at 1178.

⁹⁵ *Id.* at 1618.

⁹⁶ *Hearing on the Fair Housing Act of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 36 (1967).

⁹⁷ *Id.* at 194.

one instance he estimated that, in avoiding selling a house to him, the white seller was evidently willing to take a loss of \$1,600 by transferring the property to a white person.⁹⁸

If one wished to rely merely on the very ancient and honorable doctrine that public policy is against withdrawal of property from commerce, some compelling evidence was offered by two businessmen on the need for legislation to support that policy.

William J. Levitt, President of Levitt and Sons, Inc., said his company had adopted an open occupancy policy in some areas of the country and it had resulted in a five fold increase in sales volume during a five year period. He gave the sales volume for the fiscal year of 1965-66 as seventy-five million dollars. He candidly admitted that he did not have an open occupancy housing policy in Maryland which did not have an open occupancy law at that time because: "[A]ny home builder who chooses to operate on an open occupancy basis, where it is not customary or required by law, runs the grave risk of losing business to his competitor who chooses to discriminate."⁹⁹

Mr. Levitt was followed later by James W. Rouse, President of the mortgage banking firm of James W. Rouse and Co., Inc. of Baltimore, Maryland. He said:

The public accommodations law may have been more important for the protection it gave those who wanted to open their facilities to all the market than for the pressures it imposed upon unwilling operators. Such is the case in housing. It is my honest belief that the preponderance of real estate developers and home builders would prefer to operate in a fully open market, but fear the results of going it alone.¹⁰⁰

Although real estate interests failed to stop the fair housing bill in the House in 1966, they did succeed in causing so much delay that the Senate, with some members busy campaigning for re-election, did not act.

Real estate interests and others who favor segregated housing then moved into the 1966 Congressional campaign for the purpose of defeating those who had supported the bill in the 89th Congress. By and large the anti-fair housing forces did not make many "heads roll" on the housing issue, but in fairness to House members, who had carried the major part of the burden in 1966, supporters of the bill made a tactical decision to seek passage first in the Senate and then in the House during the 90th Congress.

⁹⁸ *Id.* at 205.

⁹⁹ *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 1534 (1966).

¹⁰⁰ *Id.* at 1582.

Of course there were cautious persons who voiced reservations about wording and implementation, but the general feeling was optimism toward court approval, if the law could be passed, and pessimism toward the possibility of passage. The feeling of confidence in the constitutionality of the law was firmly expressed by the Attorney General during Senate hearings on the bill and its principle sponsors, Senators Walter F. Mondale of Minnesota and Edward M. Brooke of Massachusetts. By this time the opponents of civil rights had unsuccessfully used most of their best arguments against public accommodation legislation and they based most of their appeal on naked racial bigotry.¹⁰¹

Mr. Ramsey Clark had succeeded Mr. Katzenbach at the time the 1967 Senate hearings began. Mr. Clark again emphasized the encouragement given by the United States Supreme Court to Congress in this part of his testimony before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency:

Evidence presented before the subcommittees of both Houses last year clearly established the constitutional basis for this legislation.

It was shown that the housing business is substantially interstate and subject to the commerce clause. Millions of outstanding mortgages are held by lenders who reside in different States from the mortgaged housing. Hardly a home is built which does not contain materials produced in other States. The average family moves its place of residence once every 5 years, and 1 out of 6 moves is

¹⁰¹ In one letter to its members, the National Association of Real Estate Boards said: "We are devoting our budget now to production for the free leaflet, 'An Urgent Message to Every Homeowner,' which is being printed in the millions." Letter from NAREB to Board Presidents and Secretaries; Copy on file Washington, D.C. Bureau, NAACP.

In its March 11, 1968, publication "Realtors Headlines", the NAREB said that "the right of every homeowner is being bargained away under the guise of civil rights." 35 REALTORS HEADLINES No. 11, p. 1 (March 11, 1968).

The Louisiana Realtors put a full page ad in the Times-Picayune on March 15, 1968, which proclaimed "the House of Representatives in Washington, D.C., is debating a so-called open housing amendment to the pending civil rights bill. If enacted by the House and signed by President Johnson, this new law will forever destroy the basic American right of allowing property owners to rent or dispose of their property as they see fit. Send a Telegram to Hale Boggs or Eddie Hébert or whomever else is the U.S. Representative from your Congressional District supporting the fight against this dangerous and unconstitutional legislation." The Times-Picayune (New Orleans), March 15, 1968, § 2, at 16. See Appendix for example.

It is interesting to note that although Mr. Hébert followed the customary southern pattern of voting against fair housing, Mr. Boggs voted for the bill in spite of the deluge of propaganda in his state.

across a State line. Production and employment depend on the movement of workers and executives from one State to another. Advertising for new housing often crosses State lines.

The 14th amendment provides a firm constitutional base for legislation eliminating discrimination in housing. Government action of the past has contributed heavily to discriminatory housing practices. Until 1947 the Federal Government fostered discrimination in housing by encouraging and often requiring restrictive racial covenants in deeds where Federal mortgage insurance or guarantees were sought. Until 1948 courts enforced private restrictive racial covenants. Even today many State-licensed real estate agents refuse to show Negroes homes in all-white neighborhoods.

Last May in *Reitman v. Mulkey*, 35 U.S.L. Week 4473, U.S., May 20, 1967, the Supreme Court affirmed the finding of California's highest court that the amendment to the State constitution popularly known as Proposition 13 "involved the State in private racial discriminations to an unconstitutional degree." The right to discriminate, the Supreme Court found, had been "embodied in the State's basic charter."

This particular "State action" has been invalidated by the courts, but the case illustrates both the justification and the need for legislation to enforce the guarantees of the 14th amendment.

Last year the Supreme Court, in *Katzenbach v. Morgan*, 384 U.S. 641, demonstrated how firm a base the 14th amendment is for this bill.

Congress has the constitutional authority and duty to remove whatever it reasonably considers to be a barrier to equal protection of the law, even if the barrier is a product of individual action.

Mr. Justice Cardozo told us 30 years ago that, "property, like liberty, though immune under the Constitution from destruction, is not immune from regulations essential for the common good. What the regulations should be," he said, "every generation must work out for itself."

Our generation must give its answer to the pervasive problem of segregated housing now.

We believe that this bill is the answer, Mr. Chairman.¹⁰²

From the beginning of the fight in 1966, this writer believed that there were sufficient votes in Congress to pass a fair housing law and that such a statute would be upheld by the Supreme Court. This belief was based, in part at least, on faith in President Johnson's ability to "count votes" and his tenacity in working for legislative objectives. On my office wall there is a picture of a meeting with the President and a favorite pet at that time, a dog of uncertain ancestry named Yuki. So far as I was concerned there were two purposes for the meeting. The first was to thank the President for his appointment of Mr. Justice Marshall to the Supreme Court. The second was to exchange ideas on how we would get Senate passage of the fair housing law which had been

¹⁰² *Hearings on the Fair Housing Act of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 6-7 (1967).

passed in a restricted form in the House in 1966, but died in the Senate. The President responded to the first by saying nobody had asked him to appoint Mr. Justice Marshall. He said he had made his own decision to name the Justice because of his outstanding ability and the contribution he could make on the Court. I asked and was given permission to quote President Johnson on this. On the second matter of the Housing legislation, he struck his chair arm with his fist, looked me in the eye and said: "We have got to get that bill through and it must cover all housing." I left the White House with renewed belief that the Johnson skill would again prevail and that the Supreme Court would again affirm the constitutionality of a well drawn civil rights law. During the fight for the 1964 Civil Rights law, the chief problem in the Senate was how to win Senator Everett Dirksen over to a vote for cloture. In 1966 the Senator was important, but the addition of some new faces in the Senate also improved the outlook. These individuals worked and planned like the southern opposition in its most halcyon days.

The 1968 Civil Rights Bill, which includes the fair housing law, passed the Senate by a vote of 71 to 20 on March 11, 1968. Passage of the unchanged Senate bill was accomplished in the House on April 10 by a vote of 250 to 172. These heavy majorities in favor of the bill make it safe to predict that there will be good public acceptance of this legislation and it will accomplish its purpose when effectively enforced.

After passage of the bill there came the pleasant, but not wholly unexpected, announcement of the Supreme Court's decision applying the 1866 statute. Perhaps the most refreshing aspect of the Court's decision was its reliance on the thirteenth amendment. From that point on it would not be necessary to mention that amendment in a semi-apologetic manner when talking about vindicating civil rights.

The Court had read the plain words of the English language and concluded that when slavery was abolished in this country Congress meant to give the freedmen first class citizenship. A hundred years labor by those who really meant to build a united nation, blind to color, had proven not to be in vain.

In this writer's opinion the *Jones*¹⁰³ decision will open new doors for legislative advances in the field of civil rights. Particularly, it should be of great assistance in closing any loopholes in existing laws such as the 1964 Public Accommodations Act and the new housing statute.

¹⁰³ 392 U.S. 409 (1968).

CONCLUSION

Perhaps the best way to conclude an article of this kind is to quote the words of a man who is a living example of the spirit that motivates the Warren Court. He served the country as Secretary of Labor, was appointed to the Supreme Court and voluntarily stepped from the bench to fulfill a responsibility as the American Ambassador to the United Nations. Mr. Justice Goldberg, now speaking as a private citizen, said this to the 55th Annual Meeting of the American Judicature Society:

"It is imperative that we recognize that if the law is really to come to grips with the problems of racial discrimination and poverty, it must make itself felt not at the end of a policeman's nightstick, it must manifest itself in just and equitable provisions for righting of wrongs."¹⁰⁴

This is the spirit of the Warren Court and the Justices who have participated in the affirmation of the great principles contained in the recent civil rights decisions mentioned herein.

¹⁰⁴ 52 JUDICATURE 56 (1968).

AN UN-BIASED LOOK AT "OPEN-HOUSING"

Don't Let A Basic American Freedom Go Down the Drain

This urgent message is directed towards every citizen—white, colored, or Oriental—who owns or rents any kind of real property... a home which he occupies himself, a residence rented to others, an apartment house or duplex, a business place, even a vacant lot.

At this precise moment, the House of Representatives in Washington, D. C. is debating a so-called "open housing" amendment to the pending civil rights bill. An identical measure has already cleared the Senate.

If enacted by the House and signed by President Johnson, this new law will forever destroy the basic American right of allowing property owners to rent or dispose of their properties as they see fit. This means that the Federal Government could force you to rent or sell to a person not of your choice. If you insisted on not renting or selling, you could be brought before Federal enforcement agencies or the Federal courts.

Forgetting the race issue, suppose you own, but don't occupy, a neat little double cottage. The mortgage is paid and you and your wife have invested considerable money fixing it up prior to offering it for rent.

Along comes some family with a half-dozen undisciplined, highly destructive children. They have just been evicted by another landlord for making a shambles of his house and now they're primed and ready to use your sparkling clean place for their own private version of Vietnam. You advise them, as diplomatically as possible, that you do not want them for tenants.

In the meantime, they find out that you and they are of different religious beliefs, and they charge you with violating the open housing act by discriminating against them because of religion. However justifiable your reasons, you could be required to assert those reasons before a Federal Agency, *at your own expense.*

Far fetched?? Not at all.

You're in serious trouble and you got there simply because—either innocently or unconsciously—you tried to uphold what you thought was your traditional American freedom of choice.

We are in favor of everybody being able to obtain decent housing, but not at the expense of taking away from any American his basic right of freedom of choice. This is the essence of private property ownership.

As property owners ourselves, we are anxious to know how, in the name of a free country, can any legislation such as this be seriously considered.

We think this question is being asked by Americans everywhere and that it must be put squarely before the people we have elected to serve as our spokesmen in the Congress.

If you agree, then you should take immediate action to see that "forced housing" (which is what it really is) doesn't become the law.

Send a telegram to Hale Boggs or Eddie Hébert or whomever else is the U. S. Representative from your Congressional District, supporting the fight against this dangerous and unconstitutional legislation.

In addition to a wire, fill in the form printed at the bottom of this page, put it in a stamped envelope, address it to your Congressman, and send it to him without delay.

Chances are, he's waiting to hear from you.

Louisiana Representatives

District	Representative	Area
1	F. Edward Hébert	New Orleans
2	T. Hale Boggs	New Orleans
3	Edwin E. Willis	St. Martinville
4	Joe D. Waggoner, Jr.	Plain Dealing
5	Otto E. Passman	Monroe
6	John R. Rarick	Baton Rouge
7	Edwin W. Edwards	Crowley
8	Speedy O. Long	Jena

Hon. _____ M. C.
(Insert Representative's Name)

House Office Building
Washington, D. C.

I am strongly opposed to the "open housing" amendment to the proposed civil rights bill, and I urge you to work for its defeat.

(Your name)

(Your address)

LOUISIANA REALTORS ASSOCIATION
REAL ESTATE BOARD OF NEW ORLEANS, INC.
JEFFERSON BOARD OF REALTORS, INC.